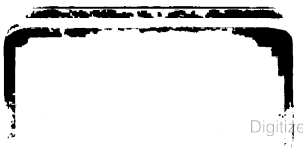

LAWRENCE'S WHEATON.

ELEMENTS

OF

INTERNATIONAL LAW.

BY

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ETC. ETC.

SECOND ANNOTATED EDITION.

BY

WILLIAM BEACH LAWRENCE,

AUTHOR OF "VISITATION AND SEARCH," ETC. ETC.

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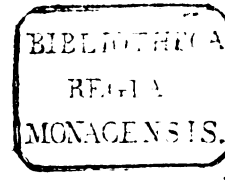

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TO THE SECOND ANNOTATED EDITION.

Mr. Wheaton's last additions to the "Elements" were made in 1847; they first appeared in the French edition of the ensuing year. In the one which was prepared in 1855, with annotations by the present Editor, as well as in this publication, the new matter of the Author, not to be found in the previous editions in English, is inserted in the appropriate place.

In the text, the principles are declared on which was based the recognition of Spanish American independence, now jeoparded by our fratricidal contest, inviting, as it does, the renewed subjection of America to European vassalage. Reference is made to the interference, avowedly in the interests of humanity, of three of the principal States of Europe, in the establishment of the principality, to which the classic name of Greece was applied; and we may see in the organization of that petty kingdom the germs of those defects, whose fruits were manifested by the recent revolution.

The separation of Holland and Belgium, differing as they do in language, religion, and the general characteristics of the populations, was an example in another form of the same principle, which is elsewhere leading to the consolidation of States of a common origin.

When the "Elements" received their latest emendations, none of the events, which have rendered memorable the last sixteen years, had transpired. The incipient acts had not occurred through which, despite of the treaties of Vienna, a member of the proscribed Bonaparte family, more distinguished by his ad-

minist ative talents and far-reaching political forecast than even the first Napoleon, restored the French Imperial dynasty. Mr. Wheaton's labors preceded the experiment of a new German Empire, which, though ephemeral in form, was the result of causes which are still impelling the public mind towards that national unity which is the manifest aspiration of the Teutonic populations; one of the evidences of which is the consistent duration, wholly disproportionate to its general political importance, of the Schleswig-Holstein controversy.

Panslavism had already been preparing the way for the political union of peoples of the same nationality of origin, then under the sway of diverse, and to a great extent, foreign organizations; but Mr. Wheaton does not consider the influence of ethnology in its bearing on the constitution of States, and the attempted independence of the Hungarian Magyars was subsequent to his exposition of the law of nations. Nor could the effect then have been foreseen of that complicated connection of Hungary with the other portions of the Austrian Empire, which presents so formidable a barrier to the establishment in common of those liberal institutions, which Francis Joseph would seem to be desirous, in good faith, to inaugurate.

The chivalric efforts of Charles Albert, the failure of which menaced, in 1849, even the integrity of his hereditary States, could not then have been anticipated. To refer to the glorious recognition of Italian autonomy, in the person of his son and successor, Victor Emanuel, falls within the province of the Editor. While yet admiring the serene and saint-like demeanor of the "Holy Father," and listening to the declaration, from his own lips, of his unalterable determination to adhere to what he deemed his sacred obligations, he had, in 1859, an opportunity to witness the enthusiasm with which, in the Roman States, as well as elsewhere, national unity was universally invoked. Not only local jealousies, but political theories were absorbed in the one idea of independence, for the exercise of which the Parliament of Turin had afforded admirable instruc-

tion. There a common Italian naturalization had, during ten years, aggregated celebrities from all parts of the peninsula. To attain the great end in view, Florence, and the other capitals of sovereign States, submitted to become provincial towns; and the most radical democracy was induced to acquiesce in a monarchy which, while it maintained the political equality of the people at large, might not offend the prejudices of the great European oligarchy.

The motives which induced the intervention of the Western powers to save the Ottoman Empire, as well from dismemberment by its too potent vassal, the Pacha of Egypt, as from the exclusive protectorate of Russia, are discussed. But, since Mr. Wheaton's labors closed, the Eastern question has been agitated anew. After sanguinary contests in the Crimea between Christian armies, another compact was entered into by the principal States of Europe to maintain Mussulman sway over their co-religionists. It continued in subjection to the direct government of the Porte portions of Turkey in Europe, where the followers of Mahomet constitute a minority of the population; while States wholly Christian are still compelled to contribute a revenue for the support of the harems of Constantinople. But in the manner in which the recent Greek revolution has been accepted by the great powers, especially England, may we not hope that the day is not distant, when intervention, repudiated in other cases, will cease to be applied to the retaining of Christian nations under Turkish dominion, and that Europe may yet see that her peace and happiness are to be secured not by perpetuating a barbarous rule, but by enabling the old Eastern Roman Empire to enter on the career so happily inaugurated in the Western by the emancipation of Italy? Why may not Greece and Italy yet reassume their ancient renown in becoming the guarantees of a new political equilibrium? Two such powers, with facilities for navigation surpassing those of England and France, would constitute a new epoch in the history of civilization.

While noticing in Italy, in Germany, in the coterminous provinces of the Ottoman and Austrian empires, what a common nationality is accomplishing, or at least attempting, for political autonomy, we love not to refer to the contrast which our own country presents. Here the principles of ethnology are, in more than one way, set at nought. An internecine contest, in many cases literally between children of the same family, is not only destroying our material resources and the best blood of the land, but threatens to dissolve that Union which philanthropists and publicists have regarded as the precursor of a confederation that, by combining, under federal institutions, all nations of the earth, would obviate every motive for future wars, and thus perpetuate universal peace.

However the Congress of Paris, of 1856, may have failed to reconcile Turkish *suzeraineté* over Christian populations, with security for the enjoyment of civil and religious freedom, it was not without important results in other respects. The declaration of maritime law, acceded to by all the powers of Europe, with one exception, though far from settling all debatable questions, has done much towards advancing the recognition of neutral rights.

The first war in which these regulations could have had any practical application, was the contest now going on between the North and the so-called Confederate States of America. In its progress, though the United States were in nowise parties to the "declaration," several points of maritime law to which its articles are applicable, have arisen. In reference to them, as to all topics growing out of the pending hostilities, the Editor is aware of the delicacy of his position as a citizen of a country involved in a gigantic civil war. He hopes, however, that it will be found that in the exposition of every subject which it has been his duty to discuss, he has maintained that impartiality towards all nations and all parties, without which his contributions to a treatise on international law would be wholly valueless.

The courtesy of Secretary Marcy, in opening to him the

archives of the State Department, for his previous edition, and the subsequent facilities accorded by Secretaries Cass and Black, enabled the Editor to peruse, without any restriction, all the communications between the United States and foreign powers, which he deemed applicable to his purpose, till the end of the last Administration. The printed correspondence of the present head of the Department, the British Parliamentary papers, and the documents that have emanated from the French and other foreign governments will, he trusts, afford adequate illustrations of such events of an international aspect as have since occurred. In this connection he would also refer to the advantages which he derived during a recent visit to Europe, from his intercourse with the eminent publicists whose names so frequently occur in these Notes. To Hautefeuille and Massé, Phillimore, Twiss, and Westlake, as well as to the Professors of International Law, at the great universities of Oxford and Cambridge, his acknowledgments are particularly due.

Much of what appeared as "Introductory Remarks" in the last edition, is now incorporated in the Notes or in the "Notice of the Author." Some extended notes are inserted in the form of an Appendix. The matters for annotation omitted in the body of the work, as well as events occurring while it was passing through the press, will be found in the Addenda to the Notes. Without disturbing the arrangement of Mr. Wheaton's text, the Editor's citations from books in foreign languages are rendered into English.

W. B. LAWRENCE.

OCHRE POINT, Newport, Rhode Island,
11th February, 1863.

PRÉFACE

A L'ÉDITION DE 1848. PARIS ET LEIPZIG.

La première édition de cet ouvrage a paru à Londres, en 1836, en anglais, et a passé par deux autres éditions dans la même langue, publiées à Philadelphie, et revues, corrigées, et considérablement augmentées par l'auteur. En écrivant cet ouvrage, il s'est proposé de réunir dans un livre élémentaire, destiné à l'usage des diplomates et des hommes d'état, l'ensemble des règles de conduite qui doivent être observées dans les rélations mutuelles des nations, en temps de paix et en temps de guerre. Le droit international, ou droit des gens positif, est fondé sur la morale internationale, qu'on a ordinairement appelée le droit des gens naturel. La plupart des règles dont se compose le droit international, sont tirées des exemples de ce qui, dans la pratique variable des nations civilisées, a été approuvé par le jugement impartial des publicistes et des tribunaux internationaux. Ces précédents se sont accrus en nombre et en importance durant la longue période qui s'est écoulée depuis la publication de l'ouvrage classique et justement estimé de Vattel, période abondante en discussions instructives entre les cabinets et dans les tribunaux et les assemblées législatives de diverses nations concernant leurs relations politiques et leurs devoirs mutuels. L'auteur a puisé à ces sources les principes généraux qu'on peut regarder comme ayant reçu l'assentiment de la portion la plus éclairée du genre humain, sinon comme règles de conduite invariables, du moins comme règles qu' aucun état ne peut violer sans encourir l'opprobre

général, et sans s'exposer au danger de provoquer les hostilités d'autres états indépendants dont les droits seraient lésés, ou dont la sécurité serait menacée par leur violation. L'expérience démontre que ces motifs fournissent une certaine garantie, même dans les temps les plus malheureux, pour l'observation des règles de justice internationale, s'ils n'accordent pas cette sanction parfaite que le législateur a annexée au droit interne de chaque état particulier. La connaissance du droit public externe a donc toujours été regardée comme étant de la plus grande utilité à tous ceux qui prennent part aux affaires publiques, et surtout à ceux qui sont destinés à la carrière diplomatique. L'auteur a été encouragé par la faveur accordée par le public aux éditions précédentes de son ouvrage à faire publier cette nouvelle édition en langue française.

H. WHEATON.

PARIS, *le* 15 *Avril*, 1847.

PREFACE TO THE THIRD EDITION.

Since the publication of the two former editions of the present Treatise, the Author has submitted to the public judgment another work connected with the same subject, and entitled "History of the Law of Nations in Europe and America, from the earliest Times to the Treaty of Washington, 1842." In the present edition of the "Elements of International Law," constant reference has been had to this historical deduction, in which the Author endeavored to trace the origin and progress of those rules of international justice so long acknowledged to exist, and which have been more or less perfectly observed by the Christian nations of modern Europe; which have been adopted by their descendants in the New World, from the first planting of European colonies on the American Continents; and have been more recently applied to regulate the relations of the European and American nations with the Mohammedan and Pagan races of the other quarters of the globe.

The law of nations acknowledged by the ancient Greeks and Romans was exclusively founded on religion. The laws of peace and war, the inviolability of heralds and ambassadors, the right of asylum, and the obligation of treaties, were all consecrated by religious principles and rites. Ambassadors, heralds, and fugitives who took refuge in the temples, or on the household hearth, were deemed inviolable, because they were invested with a sacred character and the symbols of religion. Treaties were sanctioned with solemn oaths, the violation of which it was believed must be followed by the vengeance of the gods.

War between nations of the same race and religion was declared with sacred rites and ceremonies. The heralds proclaimed its existence by devoting the enemy to the infernal deities. "Eternal war against the Barbarians," was the Shibboleth of the most civilized and enlightened people of antiquity. Among the Romans "stranger" and "enemy" were synonymous. *Adversus hostem æterna auctoritas esto* was the maxim of the Twelve Tables, and Justinian considered all nations as enemies unless they were the allies of Rome. More permanent relations could exist only between nations of the same origin, and professing the religious faith common to the entire race. Such were the Hellenic tribes represented in the great Amphictyonic council of Greece, which was rather a religious than a political institution. But even the purest moralists hardly admitted any other duties between the Greeks themselves than such as were founded on positive compact.

The introduction of Christianity tended to abolish the Pagan precept: "Thou shalt hate thine enemy," and to substitute for it the benevolent command: "Love your enemies," which could not be reconciled with perpetual hostility between the different races of men. But this milder dispensation long struggled in vain against the secular enmity of the different nations of the ancient world, and that spirit of blind intolerance which darkened the ages succeeding the fall of the Roman Empire. During the Middle Ages the Christian States of Europe began to unite, and to acknowledge the obligation of an international law common to all who professed the same religious faith. This law was founded mainly upon the following circumstances: —

First: The union of the Latin Church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns and between nations. Under the auspices of Pope Gregory IX., the canon law was reduced into a code, which served as the rule to guide the decisions of the Church in public as well as private controversies.

Second: The revival of the study of the Roman law, and

the adoption of this system of jurisprudence by nearly all the nations of Christendom, either as the basis of their municipal codes, or as subsidiary to the local legislation in each country.

The origin of the law of nations in modern Europe may thus be traced to these two principal sources,—the canon law and the Roman civil law. The proofs of this double origin may be distinctly discovered in the writings of the Spanish causists and the professors of the celebrated University of Bologna. Each general council of the Catholic Church was a European Congress, which not only deliberated on ecclesiastical affairs, but also decided the controversies between the different States of Christendom. The professors of the Roman law were the public jurists and diplomatic negotiators of the age. The writers on the law of nations before the time of Grotius, such as Francis de Victoria, Balthazar Ayala, Conrad Brunus, and Albericus Gentilis, fortified their reasonings by the authority of the Roman civilians and the canonists. The great religious revolution of the sixteenth century undermined one of the bases of this universal jurisprudence: but the public jurists of the Protestant school, whilst they renounced the authority of the Church of Rome and the canon law, still continued to appeal to the Roman civil law, as constituting the general code of civilized nations.

The establishment of the system of a balance of power among the European States also contributed to form the international law recognized by them. The idea of this system, though not wholly unknown to the statesmen of antiquity, had never been practically applied to secure the independence of nations against the ambition of the great military monarchies by which the civilized world was successively subdued. The modern system of the balance of power was first developed among the States of Italy during the latter part of the fifteenth century, and was applied, in the first instance, in order to maintain their mutual independence, and, subsequently, to unite them all against the invasions of the transalpine nations. Such was the policy of the

Republic of Florence under Cosmo and Lorenzo de Medici, and such was the object of Machiavelli in writing his celebrated treatise of the *Prince*. Unfortunately for his own fame, and for the permanent interests of mankind, this masterly writer, in his patriotic anxiety to secure his country against the dangers with which it was menaced from the *Barbarians*, did not hesitate to resort to those atrocious means already too familiar to the domestic tyrants of Italy. The violent remedies he sought to apply for her restoration to pristine greatness were poisons, and his book became the manual of despotism, in which Philip II., of Spain, and Catherine de Medici found their detestable maxims of policy. But policy can never be separated from justice with impunity. Sound policy can never authorize a resort to such measures as are prohibited by the law of nations, founded on the principles of eternal justice; and, on the other hand, the law of nations ought not to prohibit that which sound policy dictates as necessary to the security of any State. "Justice," says Burke, "is the great standing policy of civil society, and any eminent departure from it, under any circumstances, lies under the suspicion of being no policy at all."

Whatever may be thought of the long-disputed question as to the motives of Machiavelli in writing, his work certainly reflects the image of that dark and gloomy period of European society, presenting one mass of dissimulation, crime, and corruption, which called loudly for a great teacher and reformer to arise, who should stay the ravages of this moral pestilence, and speak the unambiguous language of truth and justice to princes and people. Such a teacher and reformer was Hugo Grotius, whose treatise on the *Laws of Peace and War*, produced a strong impression on the public mind of Christian Europe, and gradually wrought a most salutary change in the practical intercourse of nations in favor of humanity and justice. Whatever defects may be justly imputed to the works of Grotius, and the public jurists formed in his school, considered as scientific, expository treatises, it would be difficult to name any class of

writers which has contributed more to promote the progress of civilization than "these illustrious authors — these friends of human nature — these kind instructors of human errors and frailties — these benevolent spirits who held up the torch of science to a benighted world." [1] If the international intercourse of Europe, and the nations of European descent, has been since marked by superior humanity, justice, and liberality, in comparison with the usage of the other branches of the human family, this glorious superiority must be mainly attributed to these private teachers of justice, to whose moral authority sovereigns and States are often compelled to bow, and whom they acknowledge as the ultimate arbiters of their controversies in peace; whilst the same authority contributes to gives laws even to war itself, by limiting the range of its operations within the narrowest possible bounds consistent with its purposes and objects.

It has been observed by Sir James Mackintosh, that, without overrating the authority of this class of writers, or without considering authority in any case as a substitute for reason, the public jurists may justly be considered as entitled to great weight as impartial witnesses bearing testimony to the general sentiments and usages of civilized nations. Their testimony receives additional confirmation every time their authority is invoked by statesmen, and from the lapse of every successive year in which the current of this authority is uninterrupted by the avowal and practice of contrary principles and usages. Add to which, that their judgments are usually appealed to by the weak, and are seldom rejected except by those who are strong enough to disregard all the principles and rules of international morality. "The opinions of these eminent men," says Mr. Fox, "formed without prejudice upon subjects which they have carefully studied, under circumstances the most favorable to an impartial judgment, cannot but be considered as entitled to the highest respect. The maxims laid down by them are uninflu-

[1] Patrick Henry.

enced by national prejudices or particular interests; they reason upon great principles and with enlarged views of the welfare of nations; and by comparing the results of their own reflections with the lessons taught by the experience of preceding ages, they have established that system which they considered as of the greatest utility and of the most general application."[1]

The rules of international morality recognized by these writers are founded on the supposition, that the conduct which is observed by one nation towards another, in conformity with these rules, will be reciprocally observed by other nations towards it. The duties which are imposed by these rules are enforced by moral sanctions, by apprehension on the part of sovereigns and nations of incurring the hostility of other States, in case they should violate maxims generally received and respected by the civilized world. These maxims may, indeed, be violated by those who choose to suffer the consequences of that hostility; but they cannot be violated with impunity, nor without incurring general obloquy. The science which teaches the reciprocal duties of sovereign States is not, therefore, a vain and useless study, as some have pretended. If it were so, the same thing might be affirmed of the science of private morality, the duties inculcated by which are frequently destitute of the sanction of positive law, and are enforced merely by conscience and social opinion. As the very existence of social intercourse in private life depends upon the observance of these duties, so the existence of that mutual intercourse among nations, which is so essential to their happiness and prosperity, depends upon the rules which have generally been adopted by the great society of nations to regulate that intercourse.

In preparing for the press the present edition of the Elements of International Law, the work has been subjected to a careful revision, and has been considerably augmented. The Author

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[1] Mackintosh, Hansard's Parl. Deb. vol. xxx. p. 894; Fox, Parl. Hist. of England, vol. xxx. p. 1260.

has endeavored to avail himself of the most recent questions which have occurred in the intercourse of States, the discussion and decision of which have contributed to throw new light upon that system of rules by which all civilized nations profess to be bound in their mutual intercourse. He has especially sought for those sources of information in the diplomatic correspondence and judicial decisions of our own country, which form a rich collection of instructive examples, arising out of the peculiar position of the United States during the wars of the French *Revolution*, and during the war declared by them against Great Britain, in 1812. That international law, common to all civilized and Christian nations, which our ancestors brought with them from Europe, and which was obligatory upon us whilst we continued to form a part of the British Empire, did not cease to be so when we declared our independence of the parent country. Its obligation was acknowledged by the Continental Congress, in the ordinances published by that illustrious assembly for the regulation of maritime captures, and by the Court of Appeals, established for the adjudication of prize causes during the War of the Revolution. In the mean time, the United States had recognized, in their treaty of alliance with France, those principles respecting the rights of neutral commerce and navigation which subsequently became the basis of the armed neutrality of the northern powers of Europe. The American government has ever since constantly recognized and respected the same principles towards those maritime States by whom they are reciprocally recognized and respected. As to all others, it continues to observe the preëxisting rules of the ancient law of nations, whilst it has ever shown itself ready to adopt measures for mitigating the practices of war, and rendering them more conformable to the spirit of an enlightened age.

The Author has also endeavored to justify the confidence with which he has been so long honored by his country in the different diplomatic missions confided to him, by availing himself of

the peculiar opportunities, and the means of information thus afforded, for a closer examination of the different questions of public law which have occurred in the international intercourse of Europe and America, since the publication of the first edition of the present work. Among these questions are those relating to the exercise of the right of search for the suppression of the African slave-trade, and to the interference of the five great European powers in the internal affairs of the Ottoman Empire. The former of these questions had already been discussed by the Author, in a separate treatise, published in 1841, in which the immunity of the national flag from every species and purpose of search, by the armed vessels of another State, in time of peace, except in virtue of a special compact, was maintained by an appeal to the oracles of public law both of Great Britain and the United States, and has since been solemnly sanctioned by the treaty of Washington, 1842, and by the convention concluded, during the present year, between France and Great Britain, for the suppression of the mutual right of search conceded by former treaties. He indulges the hope that these additions to the work may be found to render it more useful to the reader, and make it more worthy of the favor with which the previous editions have been received.

BERLIN,
November, 1845.

ADVERTISEMENT TO THE FIRST EDITION.

The object of the Author in the following attempt to collect the rules and principles which govern, or are supposed to govern, the conduct of States, in their mutual intercourse in peace and in war, and which have therefore received the name of International Law, has been to compile an elementary work for the use of persons engaged in diplomatic and other forms of public life, rather than for mere technical lawyers, although he ventures to hope that it may not be found entirely useless even to the latter. The great body of the rules and principles which compose this law is commonly deduced from examples of what has occurred or been decided, in the practice and intercourse of nations. These examples have been greatly multiplied in number and interest during the long period which has elapsed since the publication of Vattel's highly appreciated work; a portion of human history abounding in fearful transgressions of that law of nations which is supposed to be founded on the higher sanction of the natural law, (more properly called the law of God,) and at the same time rich in instructive discussions in cabinets, courts of justice, and legislative assemblies, respecting the nature and extent of the obligations between independent societies of men called States. The principal aim of the Author has been to glean from these sources the general principles which may fairly be considered to have received the assent of most civilized and Christian nations, if not as invariable rules of conduct, at least as rules which they cannot disregard without general obloquy and the hazard of provoking the hostility of

other communities who may be injured by their violation. Experience shows that these motives, even in the worst times, do really afford a considerable security for the observance of justice between States, if they do not furnish that perfect sanction annexed by the lawgiver to the observance of the municipal code of any particular State. The knowledge of this science has, consequently, been justly regarded as of the highest importance to all who take an interest in political affairs. The Author cherishes the hope that the following attempt to illustrate it will be received with indulgence, if not with favor, by those who know the difficulties of the undertaking.

BERLIN,
January 1, 1836.

NOTICE OF THE AUTHOR

BY THE EDITOR.

The rank which is accorded to the "Elements of International Law," in the cabinets and universities of Christendom, where it has replaced the elegant treatise of Vattel, whose summary long formed a substitute for the more elaborate works of Grotius and Wolff, and the consideration which it enjoys, not only among diplomatists, but in legislative assemblies and in the tribunals administering the common jurisprudence of nations, seem to render proper a brief sketch of Mr. Wheaton's public career and preliminary studies. Those who are acquiring from his labors the fundamental principles of that science, of which he was not only a teacher, but which he successfully applied to the service of his country, may well desire a personal acquaintance with the author.

Henry Wheaton was born at Providence, in the State of Rhode Island, on the 27th of November, 1785. He was descended from a family identified with that Commonwealth from its earliest colonization. His father, Seth Wheaton, acquired, by commerce and navigation, a fortune sufficient to enable him to afford to his son those advantages of liberal culture and early foreign travel, that so eminently contributed to his success in the subsequent pursuits of life. The elder Mr. Wheaton maintained, during a long business career, a distinguished position among his fellow-citizens; and he held, at the time of his death, the Presidency of the Rhode Island Branch of the Bank of the United States, a station which, from the

controlling influence possessed by the parent institution over the currency of the country, till its fatal contest with the government of the Union, in President Jackson's administration, was regarded as the most honorable distinction that could be conferred on a retired merchant.

Mr. Wheaton's mother is represented to have been a woman of strong intellect and of rare delicacy and refinement. It was by the intercourse with her brother, Levi Wheaton, not only eminent as a physician, but distinguished for his literary culture, that our author's early taste for knowledge was stimulated and encouraged.

Mr. Wheaton, after receiving the ordinary preliminary instruction, graduated at the College of his native State, now Brown University, in 1802. During the ensuing three years, he prepared himself for admission to the bar. His studies were, from his earliest days, of a character appropriate to the education of a publicist. Besides his proficiency in the classical and mathematical departments, he was particularly distinguished, at school and college, for his fondness for general literature, and especially for historical research and the investigation of the political annals of nations.

In the spring of 1805, he went to Europe, and, at first, established himself at Poitiers, where there was a school of law. His object seems to have been to acquire a familiarity with the use of the French language, in which he had been early instructed; while he availed himself of the opportunity to frequent the tribunals and study the civil law. Indeed, in this branch of jurisprudence, he might almost be deemed a pioneer among his countrymen. At the time of Mr. Wheaton's residence in France, the legislation, substituting a uniform system for the somewhat diversified modifications of the civil law, existing before the Revolution in the several provinces, had only been a year in operation.[1] He was thus

[1] By the law of 21st March, 1804, the Roman law, the ordinances, the general and local customs, the statutes and *réglemens*, ceased to have the force of general

induced, at an early day, to study the codes which had not then been rendered into English, and of which he made a translation. A witness of the transition from the *droit coutumier*, and from a system composed of the Roman civil law and of royal ordinances and local regulations, to a uniform written law, he was preparing himself to exercise an enlightened judgment on codification, — a subject which, as a Commissioner of New York, under the first law passed by any State of the Union, for the liberal revision of its statutes, he had, twenty years afterwards, occasion to discuss, with a view to its practical application.

After visiting Paris, where General Armstrong, with whom he was in after life brought into intimate relations, represented the United States, he went to London. He was very kindly received there by our Minister, Mr. Monroe, subsequently President of the United States, and he passed six months in that metropolis. As he was in England during the change of Ministry, when Mr. Fox came into power, and during the proceedings against Lord Melville, in which the judicial authority of the House of Lords was exercised, on the presentation of the Commons, as the grand inquest of the nation, he had a favorable opportunity of studying the constitutional system of our mother country, the knowledge of which is so essential to the thorough understanding of our own. He was, also, enabled to compare the practical working of the common law, in the country to which we refer its origin, with the administration of the civil law, whose tribunals he had just quitted.

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or particular law upon the matters which form the subject of the civil code; but the code itself frequently refers to local customs or usages, which are founded on the ancient *coutumes* or laws. France had been divided into two great systems, that of the *pays coutumier* and that of the *pays de droit écrit*. Each of these systems was subdivided into an infinite number of branches. There were more than one hundred and eighty *coutumes générales*, which were modified by a great number of local customs. The *droit écrit*, also, varied in different places. The jurisprudence of the parliaments and the local usages had modified, in different ways, the Roman law, from which the *droit écrit* was drawn. There were, moreover, royal decrees and ordinances. The different countries, successively incorporated with France, had also their usages and laws. Pailliet, Droit Français, Introduction, p. 4, note.

But it was not merely by the study of the constitutional and municipal jurisprudence of what were then the two greatest nations of Europe, that his foreign residence was beneficial to the future diplomatist. Paris was the centre of all that was attractive, — of all that was interesting on the Continent of Europe. The Italian campaigns had already embellished her palaces and her museums with the *chefs d'œuvre* of art, which centuries had accumulated in the capital of the ancient world, and in the most favored cities of the Republics of the Middle Ages. The territorial arrangements, which the treaty of Utrecht was supposed to have settled on a firm basis, were, despite the successive coalitions to uphold the obsolete fabric of European organization, at an end. Even England had recognized, in 1802, by the short-lived peace of Amiens, concluded with the First Consul, the new order of things, to which every other power had previously given its adhesion. The French Revolution itself had been, it was supposed, brought to a close by the assumption, on 18th of May, 1804, with the almost unanimous approbation of the people, of the sceptre by Napoleon, and by his coronation, under circumstances of peculiar solemnity, on the 2d of December following, as Emperor of the French.

It was while the American student was still at Poitiers, that, by the battle of Austerlitz, the undisputed sway of the Continent, and which was scarcely affected by the untoward movements of Prussia, terminating in the treaty of Presburg and the affiliation of the French and Russian Emperors, became the property of Napoleon. On the other hand, by the battle of Trafalgar, contemporaneous with the capitulation of Ulm, the dominion of the sea was secured to England.

A state of war is emphatically the period for the practical application of the law of nations. The relations of his country towards the great European powers, which divided the supremacy of the world, were well calculated to lead an inquisitive mind to the investigations on which Mr. Wheaton's lasting

fame reposes. The accession of Mr. Fox, who was understood not to coincide, as to many points affecting neutral rights, with the administration which had preceded him, inspired at Washington new confidence of a settlement of all pending difficulties. This expectation was, also, strengthened by the prospect of a general European pacification, as the members of the new government, when out of office, had been opposed to the policy that had prevailed in reference to the French Revolution. These hopes, however, were destined to an early disappointment.

On Mr. Wheaton's return to America, he entered on the practice of his profession in his native town. There was, however, in the condition of the world ample scope for the talents of a young American; and the seven years which comprise the period that intervened before his final removal from the State of his birth were precisely those during which the neutral powers were exposed to the alternate aggressions of the two great belligerents; "the conduct of both of whom," in the language of Mr. Madison, when Secretary of State, "displayed their mutual efforts to draw the United States into a war with their adversary;" and among maritime States, America, as a neutral, after the gross violation of the law of nations by England towards Denmark, in 1807, stood alone.

Mr. Wheaton, whose nearest relatives were of the school of Jefferson, and whose political sentiments were unavoidably strengthened by his European residence, was, during these years of comparative leisure, an efficient supporter, by his contributions to the periodical press, of the administrations of Jefferson and Madison.

The letters addressed to Mr. Wheaton, at this time, from distinguished citizens in different sections of the Union, show, that his reputation was already being established beyond the limited bounds of his native State, and it would seem that his appointment as Secretary of Legation, either to Paris or London, was then contemplated. Among his correspondence of 1811 there is a letter from one of the Heads of Department,

enclosing a communication, which he fully endorses, from the editors of the National Intelligencer, not only the ablest journal at the seat of government, but then, as it was understood; the exponent of the views of the Administration, thanking him in strong terms for a political article which he had furnished, and inviting further contributions.

While yet resident at Providence, he delivered, on the 4th of July, 1810, an oration before his townsmen, in acknowledging the receipt of which Mr. Jefferson says: "He rejoices over every publication wherein such sentiments are expressed. While these prevail all is safe."

In 1811, Mr. Wheaton married his cousin Catharine, the daughter of Dr. Wheaton. He appears, at this period, to have sought a wider field for his talents, and to have intended to exercise his profession in the State of New York. This, however, was prevented by the old system of apprenticeship or clerkship, only fully abrogated by the Constitution of 1846, which required a novitiate of at least three years, and which would not then be dispensed with, even in the case of a practitioner from another State, or in consequence of attainments however extensive.

Towards the close of 1812, and some months after the declaration of the war with England, Mr. Wheaton was induced to take charge of a paper in New York, established under the title of the National Advocate, as the organ of the Administration party in that city. The establishment of this journal constitutes a new epoch in the history of the newspaper press of the country. In the Advocate were discussed, with the pen of a gentleman and a scholar, the great questions of violated neutral rights, which had given rise to the belligerent position of the country. The new duties which war had created on our part towards other nations, and the rights which it gave us, as well as the obligations of the several State governments to the Federal government, and the paramount allegiance of the citizens of the different States to the United

States, were elucidated with the learning of an accomplished publicist.

The period was one well calculated to arouse the patriotism of every American. War had been declared, when there had been a refusal to make an adjustment on the subject of impressment, and after it had been officially announced to the American government that the obnoxious Orders in Council would not be repealed, without a repeal of internal measures of France, which, not violating any neutral rights, we had no pretence to call on her to abrogate, and with regard to which England, therefore, had no excuse for asking us to interpose, even if one belligerent could make it a ground of offence towards a friendly power that it had neglected to exact from the other all that its neutral rights would authorize. Great Britain, after first requiring us to obtain the repeal of the Berlin and Milan decrees, to induce an abandonment of the Orders in Council, was not satisfied with their abrogation, as regarded the United States, but demanded that their repeal should be general, and should extend to the removal of the prohibition of English produce and manufactures from the Continent of Europe, where they operated as internal and municipal regulations not contravening any rights of neutrality.

The diplomatic papers of the American government, indeed, show that there was ground enough for a resort to extreme measures against both the great European belligerents, especially after the case of The Horizon, in 1807,[1] when the English manufactures found on board of an American vessel, shipwrecked on the coast of France, were confiscated, in conformity with the Berlin decree of 21st November, 1806. The effect of such an anomalous condition of things would scarcely have changed the actual position of the parties, inasmuch as the navy of Great Britain, by driving from the ocean not only the military, but mercantile, marine of France, had left her unassailable by us, in a maritime war, — the only species

[1] Wait's American State Papers, vol. vi. p. 463.

of hostilities that we could carry on against a strictly European power. Moreover, the avowed withdrawal of her hostile decrees, by France, in 1810,[1] though the indemnity for past spoliations was deferred, had already induced a distinction in her favor as to our retaliatory interdicts on commercial intercourse. And the conviction, which circumstances subsequently confirmed, that the savages had been, while peace with the mother country still continued, excited by her provincial authorities to carry the horrors of barbarous warfare into our frontier settlements, and that a secret agency had been instituted to separate the New England States from the Union, was deemed to justify a difference of conduct towards the two nations. War was consequently declared, on the 18th of June, 1812, against England alone.

At this day, looking not only to the causes of the war — the utter disregard of our flag in the impressment of our seamen, aggravated, even so early as June, 1807, by the act of a British admiral, scarcely disavowed and most inadequately atoned for, in wresting, after the loss of several lives, four of the crew from a ship of war of the United States;[2] and the condemnation of our vessels, in pursuance of Orders in Council, which even the British courts of admiralty did not venture to assert were consistent with the law of nations, — but to the manner in which it was conducted — subjecting to conflagration edifices consecrated to legislation; setting at naught the ties of a common origin and introducing the tomahawk of the Indian among the weapons of British warfare, — it is scarcely possible to believe that those, to whom the Constitution confided the conduct of our foreign affairs, did not receive the unanimous support of the American people and of the State authorities.

Not only were the energies of the government shackled by local legislatures denying, in the very midst of hostilities, the sufficiency of the causes of the war, and justifying the acts of

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[1] Wait's American State Papers, vol. vii. p. 441.

[2] See case of The Chesapeake. Wait's American State Papers, vol. v. p. 480.

Great Britain as being retaliatory of those of France, while even the victories achieved by our own infant navy were availed of to repudiate their glorious exploits, as unbecoming the approbation of a moral and religious people; but the Federal authorities were, in 1813, brought into direct collision with those of Massachusetts, Rhode Island, and Connecticut. The Governors of those States assumed the right of determining for themselves the exigencies which authorized the calling out of the militia, even in time of war, and refused to allow them to be placed in any case under the orders of the officer of the United States commanding the regular troops within the military department. The unconstitutionality of these pretensions, which it was obvious would have defeated the main object for which the Federal government was formed, and which, as pronounced by the Supreme Court of the United States, it was one of his last acts, when connected with that tribunal, to report,[1] was, at the time, ably exposed by Mr. Wheaton in the columns of his journal. It was, also, his duty to point out the highly objectionable nature of the convention of delegates from some of the New England States, held at Hartford, in 1814, on the invitation of Massachusetts,[2] for the purpose of considering their sectional interests; but which the news of peace, arriving almost simultaneously with their adjournment, rendered wholly innocuous.

Questions of maritime law were frequently discussed in the Advocate, and in its columns first appeared Judge Story's opinion, deciding the illegality of enemy's licenses — a subject which, from the extent to which they were then used in order to supply with provisions the British armies in the Spanish Peninsula, attracted great attention. Enjoying, as Mr. Wheaton did, the confidence of the members of the Cabinet, his journal was frequently selected as a medium through which to acquaint

[1] Wheaton's Reports, vol. xii. p. 29, Martin v. Mott. See also Ib. vol. v. p. 1, Houston v. Moore. Kent's Com. vol. i. p. 265.

[2] Annual Register, 1814, p. 193.

the people with the views of the Administration. He received, after the conclusion of peace, through the Attorney-General, Mr. Pinkney, an expression of the obligations of all his colleagues for the able support which he had rendered to the government, with a special commendation of the papers published by him on the treaty, and which that eminent jurist declared to be "as well as could be wished."

It was not merely to American affairs that the discussions of the Advocate were confined. His knowledge of Europe, with his intercourse with those most familiar with passing events, including the French Minister, Mr. Serurier, of whom he was a correspondent, enabled its editor to present the different aspects of the great pending contest, which was destined to change the whole fabric of European organization. His sagacity anticipated the permanent predominance, which Alexander was already achieving for Russia in the affairs of Europe; while the Emperor's accordance with us in maritime questions is shown to have been the reason why, though united with him in an alliance for continental matters, on which the destinies of both seemed to depend, Great Britain refused his proffered mediation in the war with the United States.

While engaged in his editorial avocations, Mr. Wheaton received the commission of Division Judge-Advocate of the army. The unanimous confirmation of the appointment, on the 26th of October, 1814, was announced to him not only by letters from two distinguished Senators, but the venerable Vice-President Gerry made it the subject of a congratulatory communication, in which he says: — "Your appointment was not only unanimous, but the voice of the Senate was expressed with cordiality."

In May, 1815, Mr. Wheaton left the National Advocate, on being appointed one of the Justices of the Marine Court in the city of New York, — a tribunal of limited jurisdiction. Whilst occupying a seat in this court, which he continued to fill till July, 1819, he had occasion to vindicate the paramount

treaty-making power of the Federal government. The case arose in 1816, under the commercial convention with Great Britain of the preceding year, and the question was, whether the reciprocity provision extended to the exemption of British vessels from the discriminating charges imposed by a local law of the State on foreign vessels.

In 1815, under the modest title of a "Digest of the Law of Maritime Captures or Prizes," Mr. Wheaton published his first systematic treatise, in which may be traced many of the principles of maritime law more fully developed in the present treatise.

In reference to this work, Judge Story wrote to the author, on the 13th of December, 1815: — "You have honorably discharged that duty which every man owes to his profession, and I am persuaded that your labors will ultimately obtain the rewards which learning and talents cannot fail to secure."

Thirty years after its publication, an English writer, a high authority on international law, declared the work on captures to be, "in point of learning and methodical arrangement, very superior to any treatise on this department of the law which had previously appeared in the English language."[1]

In 1816, Mr. Wheaton became Reporter of the Supreme Court of the United States, in which capacity he continued till 1827. Twelve volumes of Reports, containing, as it is well termed in a German notice of our author, "the golden book of American law," permanently connect his name with the jurisprudence of the Union. Already familiar with the languages and literature of Europe, and with her legal systems, he was called on to record the application of every branch of public and municipal law to the diversified objects of international and federal relations, as well as of private rights. It was his fortune to be associated with that high tribunal during the period when the Prize Code, which he had already traced, as far as it was

[1] Reddie's Researches, Historical and Critical, in Maritime International Law.

then established, was completed by the subsequent adjudications of the cases growing out of the recent war. In his time, also, the power intrusted to the court, and which is peculiar to institutions like ours, of bringing to the test of the Constitution the validity of all the proceedings of Congress and of the State legislatures, was exercised to such an extent, as to leave little room for the further interpretation of our organic law.

The character which Mr. Wheaton acquired as a reporter was unrivalled. He did not confine himself to a mere summary of the able arguments by which the cases were elucidated; but there is scarcely a proposition on any of the diversified subjects to which the jurisdiction of the court extends, that might give rise to serious doubts in the profession, that is not explained not merely by a citation of the authorities adduced by counsel, but copious rules present the views which the publicists and civilians have taken of the question.

Mr. Duponceau, the jurist, as well as philologist, and whose annotations of Bynkershoek, in common with the original treatise, are cited in the "Elements," among the authorities on which international law is based, names the notes of Mr. Wheaton, giving comparative views of the laws of different countries on the various subjects treated of in the body of the reports, among the most valuable contributions made to the science of law; while he alludes to the treatise on captures, in connection with Judge Story's and Chancellor Kent's works, as being "the fruits of the cultivation of the branches of jurisprudence not accessible to ordinary lawyers."[1]

It was not only as the medium of communication with the public that Mr. Wheaton was connected with the Supreme Court. Associated with the jurists of historical fame, in the argument of causes, the decisions of which he reported, we find his contributions to the common stock of legal learning, combined with theirs, in every volume to which his name is

[1] Duponceau on Jurisdiction, Preface, p. 20.

attached. The law of real property, the principles regulating commercial contracts, as well as those relating to that department of jurisprudence, prize law, with which he had shown a peculiar acquaintance, were discussed by him in the character of counsel.

Nor did he omit to take an efficient part in those questions on which the interpretation of our organic law is based. In the great case which settled the limits of the State and Federal legislation, in reference to bankruptcy and insolvency, and which, first argued in 1824, was held under advisement and not finally disposed of till after a second argument, in 1827, he was throughout the sole associate of Daniel Webster. Indeed, such was the position which Mr. Wheaton's industry and learning had acquired for him, that, on the death of Judge Livingston, in 1823, he was already prominently brought forward to fill the vacancy on the bench of the Supreme Court, an appointment which, it is understood, that he would have received, had it not been conferred by President Monroe on a member of his cabinet.

In 1821, Mr. Wheaton was elected a delegate from the city of New York to the convention for forming a new Constitution for the State.

The members were selected from among the most eminent citizens, and in some degree, without reference to party designation or local residence, and included, as well the then Vice-President of the United States, and the two Senators in Congress, Rufus King, and Mr., afterwards President, Van Buren, as Chancellor Kent and the Chief Justice, Spencer.

In this assembly Mr. Wheaton bore a conspicuous part. In the canvass for the Presidential term, to commence on the 4th of March, 1825, though following the second election of Mr. Monroe, which had been made with entire unanimity, there seemed to be no concurrence of opinion. Mr. Crawford, the Secretary of the Treasury, who had been designated by the caucus, as the meeting of the members of Congress for that purpose was denominated, according to the system which had

prevailed at several previous elections, was opposed by all the other aspirants for the station, however much they might differ among themselves. These candidates were John Quincy Adams, Secretary of State; Mr. Calhoun, Secretary of War; Mr. Clay, Speaker of the House of Representatives; and Andrew Jackson, whose administration of the government during two subsequent terms forms so memorable a portion of our history. To advance the pretensions of the South Carolina statesman, whose confidential correspondent he was during the canvass, to the highest office, was Mr. Wheaton's motive in permitting himself to be elected a member of the New York State Assembly, in November, 1823; and it is not a little remarkable, when we look to the views which Mr. Calhoun subsequently took of our system of government, that our author's original preference for him was induced by a concurrence of sentiment on the subject of the Federal Judiciary. To preserve to the Supreme Court the exposition of the Constitution, in the last resort, was then deemed by Mr. Calhoun, as his letters of that period show, an object of primary importance.

At the conclusion of the session, Mr. Adams, who became President by the choice of the House of Representatives, in consequence of the failure of an election by the Presidential Electors, wrote: "Your share in the legislative labors of the year has been great and conspicuous. I trust it has been introductory for you to movements on a yet wider field; and observe with pleasure your name among those of the candidates for a seat in the United States Senate."[1]

Mr. Wheaton was, in 1825, associated with Mr. Benjamin F. Butler, afterwards Attorney-General of the United States, and Mr. John Duer, subsequently an eminent member of the New York Judiciary, in a commission for revising the Statute Law of New York.

These labors were of a character particularly agreeable to the taste of Mr. Wheaton. Not merely for the improvement of the

[1] Mr. Adams to Mr. Wheaton, November, 1824.

existing statutes, but for the preparation of a code of a more comprehensive character, had one been contemplated, he possessed peculiar qualifications, through his varied knowledge of jurisprudence, which included, as has been shown, a familiarity, almost from their origin, with the French codes become, with slight alterations, the law of many of the countries of continental Europe, as well as of the State of our own Confederacy, which includes the great commercial capital of the South.

Applying himself to his new duties, while continuing his professional business and his functions as Reporter of the Supreme Court of the United States, he united with his colleagues in a report to the legislature, at the session of 1826, and he zealously engaged in carrying the plan, which the legislature sanctioned, into execution. A portion of the revision, as completed, was presented for adoption at the session of 1827; but other duties soon after called him away from the country.

Mr. Wheaton, at all times, combined the general cultivation of letters with the pursuits more especially connected with his chosen profession; and his right to be enrolled among the *litterateurs* of the country was recognized by his Alma Mater, as early as 1819, by conferring on him the degree of Doctor of Laws, in which she was followed, some years afterwards, by Hamilton College, and Harvard University at Cambridge. Of the literary associations that existed in New York during his residence there, he was, of course, an honored member. Among other occasional discourses, the Anniversary Address before the Historical Society, in 1820, was pronounced by him. He selected as his subject, "The Science of Public or International Law." This essay, which contains the germ of his great works on the law of nations, received, at the time, the sanction of those of his countrymen most capable of appreciating its merits, including the elder President Adams, President Jefferson, and Chief Justice Marshall.

Chancellor Kent, who, on occasion of the decision of a case in which Mr. Wheaton was counsel, and which rested on the

French Law of Marriage,[1] had acknowledged in the strongest terms his obligations for the elucidation of the nuptial community of goods which his argument afforded, and which he, alone of the bar, was capable of furnishing, wrote, on the receipt of this pamphlet:—"There is no person (unless it be our mutual friend and great master of jurisprudence, Judge Story) who could have handled the subject with so much erudition and enlightened judgment. It is a subject very much to my taste, and awakens the deepest interest. Be assured that I feel with full force the great obligations we are all under to you, for your professional efforts and illustrious attainments."

It will be recollected, in this connection, that the Law of Nations forms a branch of those "Commentaries on American Law," which now occupy with every student of the science the place formerly allotted to Blackstone; while the name of Kent is associated with that of Wheaton, both at home and abroad, as an authority on International Law.

To the periodical literature, and which then, owing to the extensive attainments and personal reputation of the conductors of the Reviews established at Boston and Philadelphia, commanded no small degree of public consideration, he was a large contributor. Accomplished scholars, such as Edward Everett, Jared Sparks, and Robert Walsh, were able to command the assistance, as *collaborateurs*, of many of the most eminent men of the Union; and the Quarterlies of the United States, at one period, would have favorably compared with the first periodicals of Europe.

Mr. Wheaton's numerous essays in other journals cannot be accurately traced; but in almost every volume of the North American, commencing with the first number, in May, 1815, may be found papers emanating from his pen, or his name is introduced in connection with notices of his works.

Among the reviews furnished by him, while yet at New

[1] De Couche *v.* Savetier, Johns. Ch. Rep. vol. iii. p. 211, cited in Part II. ch. 2, § 6, p. 138.

York, is the exposition of the early Prize Code of the United States, noticed in the Appendix, and he availed himself of the publication of Mr. Cushing's translation of Pothier on Maritime Contracts, to aid in making his countrymen acquainted with the merits of that most learned lawyer, by whose introduction to the English bar Sir William Jones deemed that he had, in some measure, paid the debt that every man owes to his profession. But he was not, as a jurist, exclusively absorbed in the civil and international law. His learning in the old Common Law appeared not only in his own Reports, but in the notice which he gave of Mr. Metcalf's edition of Yelverton, and by the numerous authorities cited in his edition of Selwyn's Nisi Prius; while in making his readers acquainted with what he terms, in a letter to his friend Mr. Butler, "Verplanck's beautiful speculation on the theory of the Law of Contracts, as to price," he had an opportunity of considering how far the doctrines of law and equity, as expounded by the courts, accorded with the rules of natural justice.

The review of a trial for manslaughter, which, arising from the killing of a counsellor-at-law, in an affray growing out of the occurrences at a trial, excited intense interest at the time, contains a learned disquisition on the distinctions between the criminal law of the Continent and that of England, especially in reference to the regard which the former pays, in certain offences, to the intent rather than to the event, as constituting the criminality.

On the other hand, not only had Mr. Wheaton Daniel Webster as the reviewer to whom the "Reports" were assigned, but Edward Everett was himself the author of the learned notice which the Historical Address received, as he was, after the lapse of thirty five years, of the posthumous edition of the "Elements."

The last labor in which Mr. Wheaton engaged, while still in the United States, out of the regular performance of his professional duties, and disconnected with the offices which he

held as reporter and revisor, was the preparation of the Life of William Pinkney.

The late President Monroe, the colleague of Mr. Pinkney in the negotiations at London, in 1806, and his associate in the Cabinet of Madison, placed at Mr. Wheaton's disposition the correspondence which had passed between them at the eventful period of their political connection.

If this enterprise had had no other effect than to elicit from President Madison two letters, explanatory of the events connected with the adoption of our restrictive system, and of the immediate circumstances that caused the declaration of war, in 1812, it would have been the means of adding valuable materials to history. We refer to them here as cognate to the subject of the principal treatise. In his letter of the 18th of July, 1824, Mr. Madison says that the President was unofficially possessed of the Order in Council of November 11, 1807, when the message to Congress, of December 11, 1807, recommending an embargo, was sent; and this fact is corroborated by a note to him from Mr. Jefferson, confirming his recollections. He also vindicates the efficiency of the restrictive measures, by referring to the fact, that the repeal of the obnoxious British orders, which took place on the 23d June, 1812, was induced by the influence of the manufacturers, before it was known in Europe that war had been actually declared by us. The letter of 26th February, 1827, says that the declaration of war was recommended, in consequence of the peremptory statement of Lord Castlereagh, made officially through the Minister at Washington, that the British orders would not be repealed, without a repeal of internal measures of France which did not violate our neutral rights. "The cause of the war lay, therefore, entirely on the British side. Had the repeal of the orders been substituted for the declaration that they would not be repealed, or had they been repealed but a few weeks sooner, our declaration of war, as proceeding from that cause, would have been stayed; and negotiations on the subject of impressment, the

other great cause, would have been pursued with fresh vigor and hopes, under the auspices of success in the case of the Orders in Council."

It was not till two years after the commencement of Mr. J. Q. Adams's administration that Mr. Wheaton received, in the spring of 1827, without any previous intimation to him or his friends, an evidence of the confidence of the Federal government, in his appointment as Chargé d'Affaires to Denmark. That title was the one by which, at that time, all our diplomatic agents in Europe were designated, except in the few cases, limited to the principal courts, at which Envoys Extraordinary and Ministers Plenipotentiary were employed.

In going abroad, the new diplomatist was not entering on a world with whose habits and usages he was unacquainted. Besides his early European experience, the advantage which he possessed over most of his fellow-citizens, however distinguished in other respects, in having a knowledge of the languages and literature, as well as an acquaintance with the legal and political institutions of other countries, had caused his society, at all times, to be sought by enlightened foreigners. With many of those whom the downfall of Napoleon compelled to leave France, General Lallemand, Réal, St. Jean d'Angelly, General Bernard, all historical personages, he was on terms of intimacy. With the last named his acquaintance was, to the advantage of his country, renewed in Paris, where General Bernard, after many years' service in the United States, terminated his career under Louis Philippe, as Minister of War.

Mr. Wheaton sailed for England, with his family, in July, 1827. To Jeremy Bentham, whose acquaintance he made during this visit to London, and whose works, despite the peculiarities of the language, contain an exhaustless mine of intellectual lore, and whose denomination of "International Law," as applicable to the subject of the accompanying treatise, our author adopted, he was particularly attracted; and in a discourse, on the Progress of the Law, seven years afterwards, he awards

to him the title of the greatest legal reformer of modern times.

Mr. Wheaton arrived at Copenhagen on 19th September, 1827, as the first regular diplomatic agent from the United States to Denmark. The only minister who had preceded him was Mr. George W. Erving, who, in 1811, was appointed on a special mission, in reference to those seizures and condemnations of American vessels and their cargoes, which constituted the particular matters now confided to him.

Count Schimmelmann, a venerable statesman, who had been for more than fifty years in the public service, was Minister of Foreign Affairs. He presented him to the king and royal family, by whom he was, at all times during his eight years' residence, treated with a consideration, which attached rather to his distinguished attainments and personal character, than to the diplomatic rank with which he was invested, and which scarcely indicated his true representative character. This was the more flattering, in consequence of the nature of the reclamations which he was making, and which, as it will appear, were not all of a description to preclude discussion.

In a letter, soon after his arrival, to the writer of these remarks, who was then in London, he says: — "I have made the acquaintance of several literary men, and have seen Professor Schlegel, among others, who, you will recollect, wrote in 1799 against Sir W. Scott's celebrated judgment in the case of the Swedish convoy. He appears to be a man of extensive learning in his profession. He is a judge (or rather assessor) in the High Court, and, at the same time, a professor in the University, and the head of the Law Faculty. He has written in Danish on the history of legislation. There are here some men who are unknown, if not in the rest of Europe, at least with us, that deserve to be known; and, in general, the attainments of their *savans* are much more profound in what they pretend to a knowledge of, than with us; and I suspect generally, even in England, they do not go to work so doggedly and so perseveringly."

Among his associates will be found not only the names familiar to the literary and scientific world, — Rask, Oersted, and the poet Öhlenscälger, who made him the subject of some complimentary verses, — but others whose fame, less extended elsewhere, is equally eminent in their own country. The friendly communications of this period, besides those of the individuals already named, which accident has preserved, embrace letters from Münter, Bishop of Zealand, and his sister, Madame Frederika Brun, whose country-seat of Fredericksdal was the resort of all the distinguished of Denmark, — of Müller, the successor of Münter, Rafn, and Magnusen.

A letter from Schlegel, dated March 15, 1830, states his election as a member of the Scandinavian Society to have been on his nomination, and at an extraordinary meeting held for the purpose.

The election to the Icelandic Society is communicated in a note from Rask, of the 22d of November of the same year; and it is even then placed on the ground of "his knowledge of the Northern History, his proficiency in the language, and his zeal in promoting the literature of Scandinavia."

Immediately on his arrival, he resumed those literary pursuits, which with him were always more or less connected with the study of his favorite science, now become a professional avocation. He imparted to his countrymen, through the pages of the North American Review, the first results of his investigations in the history, mythology, and jurisprudence of the Scandinavian nations. The article on the Public Law of Denmark, purporting to be a notice of the work of Schlegel, written in Danish, and which appeared in America, when he had only been resident at Copenhagen for a twelvemonth, is no slight evidence of his having omitted no opportunity to prepare himself, by a knowledge of the language and institutions of the country to which he was accredited, for an efficient performance of his diplomatic functions.

In this paper not only are the institutions of Denmark — the

lex regia, which regulated the succession to the throne, and conferred on the king the whole executive and legislative power, as well as the circumstances which then went to limit the theoretical despotism of the monarchy, through the *Höieste Rett*, explained, but the political connection with the kingdom of the duchies of Schleswig, Holstein, and Lauenburg, a subject which has been for years menacing the peace of Europe, is pointed out. Into the philology of the Danish language he had so far entered at an early day, as to present, among his contributions, a notice of Professor Rask's Grammar.

The Public Law of Denmark was soon followed by an Essay on the Scandinavian Mythology, Poetry, and History, in which the sources of the materials for the early history of the Gothic or Teutonic kingdoms of Norway, Sweden, and Denmark, are indicated. These articles, with the subsequent ones, in reference to the ancient laws of Iceland and the Anglo-Saxon language and literature, with a glance at the antiquities of a widely different region and people, disclosed to the world in the unravelling of the Egyptian hieroglyphics, through the discoveries of Champollion, and on which his friend, Professor Rask, had aided in throwing light, formed the suitable preludes to the classic work which, under the title of the "History of the Northmen, from the Earliest Times to the Conquest of England by William of Normandy," appeared in London and Philadelphia, in 1831. It was, on its publication, noticed with the highest commendation in the principal periodicals of Europe and America. The review of it in the North American is from the pen of Washington Irving.

This book at once took a place among the standard works of the language, and after being enriched by the further investigations of Mr. Wheaton, for which the publication in Denmark of the Icelandic Sagas and the labors of Magnusen afforded new materials, it was introduced, in 1844, through the translation of M. Guillot, to continental readers. This edition, which received the particular notice of the French Academy, and

which, as enlarged, Mr. Wheaton, at the time of his death, was preparing for publication in English, was rendered specially interesting to the scholars of the United States, by the new light which it sheds on the Scandinavian discoveries in America, the authenticity of which it maintains. To M. Guillot, the translator, the King of Prussia, on the application of Baron de Humboldt, granted "la grande médaille d'or," destined for meritorious works in the sciences and arts.

Further fruits of his historical studies at Copenhagen also appeared after he had quitted Denmark. The History of Scandinavia was published in 1838, in connection with Dr. Crichton. It contains what was intended by him as a sequel to the History of the Northmen, bringing down the history of Denmark and Norway from the extinction of the Anglo-Danish dynasty, in 1402, to the Revolution of 1660, including the the affairs of Sweden, under the union of Colmar. It is proper to add that, for the other portions of the work, Mr. Wheaton, whose contributions are pointed out in the Preface, is in nowise responsible. And so late as 1844, there was an essay from his pen in the Review of French and Foreign Law, at Paris, of which he was a regular contributor, on the ancient legislation of Iceland.

Nor was it to these subjects, in addition to the preparation of the works more strictly connected with his public pursuits, and which were not completed till his transfer to another mission, that the leisure which the intervals of business afforded was exclusively applied.

Mr. Wheaton had scarcely been established at Copenhagen, before he directed his attention to a revision of the Life of Pinkney, a new edition of which was published in Sparks's American Biography. The American Quarterly, at Philadelphia, to which he sent, in October, 1828, an Essay on Scandinavian Literature,[1] and a review of Depping's History of the

[1] American Quarterly Review, vol. iii. p. 481.

Normans,[1] as well as the European journals, participated with the North American in his contributions to the periodical press. Among other papers, an "Essay on the Danish Constitution" was, in 1833, inserted in the Foreign Quarterly Review.[2]

The special subject confided to Mr. Wheaton was the obtaining of an indemnity for the alleged spoliations on our commerce by Denmark, during the latter years of the European war. The character of these reclamations, as well as the opinions of publicists respecting the extraordinary success attending his efforts, will appear in the appropriate place in the "Elements." See Part IV. ch. 3, § 32.

The Treaty of Indemnity was signed on the 28th of March, 1830. By it, including what was paid in 1827–8, on account of the seizure, in 1810, of certain vessels at Kiel, (on the cargoes of which, though they were liberated, a duty in kind of fifty per cent. was imposed during the pendency of the proceedings,) and the renunciation of claims against the United States, about three quarters of a million of dollars were secured for our merchants. This was one fifth more than the American Minister was instructed to insist on. But what was infinitely more important, Mr. Wheaton's treaty was the pioneer of the conventions with France and Naples. From those treaties millions were obtained for our citizens, and our right to redress was established for violations of neutral commerce, whose sole palliation was the illegal acts of the opposing belligerents. And, in these last cases, it was also shown that, as long as a nation maintains the forms of external sovereignty, neither a change in the reigning dynasty, nor the plea of the preponderating influence of a powerful ally, can relieve it from its accountability to foreign States.

Besides calling the attention of his government, at an early period of his residence, to the duties imposed by Denmark on

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[1] American Quarterly Review, vol. iv. p. 350.

[2] Foreign Quarterly Review, vol. xi. p. 128.

the vessels of all countries, in passing the Sound and Belts, Mr. Wheaton was, in other respects, able to make his remote mission beneficial to American commerce. He was successful in obtaining modifications of the quarantine regulations on vessels from America, as to which the decision of Denmark was particularly important, in consequence of her acting as the sanitary police for the several Baltic States.

In 1830, the Governor-General of the Danish Islands, Von Scholten, was deputed on a special mission to Washington, with a view to the arrangement of a treaty, as respected the trade between those colonies and the United States, to be based on a mutual reduction of duties. In order to the adjustment of such propositions as were likely to be acceptable, many preliminary conferences were, by the invitation of the Danish Minister of Foreign Affairs, held with him by Mr. Wheaton.

Of the matters in Europe interesting to the United States, whether connected or not with his own legation, he was an attentive observer; and his suggestions, as well to his colleagues as to his government, were, at all times, valuable. The subject of our trade with the West Indies, received, on his entering on his duties, his particular attention. It was then a leading topic of discussion between us and Great Britain. By the recognition of the most liberal principles by that power in relation to her colonies, it has ceased to have the interest of a pending controversy. But it is, even at this day, worthy of notice that the Danish government, though urged by the British to accept the terms of the Act of Parliament of 1825, the non-compliance with which led to the temporary interruption of our intercourse with the West India Islands, declined to do so. The conditions proposed to powers having colonial possessions were much more favorable than those offered to the United States. It was only required of them, in order to participate in that trade, that they should grant to British ships the like privileges of trading with their colonies, as were granted to their ships of trading with the British possessions abroad; whereas it was made a condition

that we, having no colonies, should place the commerce and navigation of Great Britain and of her possessions abroad, upon the footing of the most favored nation.

The common sentiment of Europe, we are informed by Mr. Wheaton, approved of the decision of President Jackson, in treating as null the recommendation of the King of the Netherlands, which he had substituted for an award, in reference to our North-eastern boundary line. The despatch of the Danish Minister at that court, which announced the royal decision, and which is stated to have surprised every one there, was sent to him for perusal by Count Schimmelmann.

It will be seen in the course of our annotations that efforts had been previously made by the United States to obtain the appointment of the King of Denmark, as the arbiter, and that it was only on account of our inability to procure the assent of England to Russia or Denmark that the Netherlands was agreed to.

In May, 1830, Mr. Wheaton visited Paris with his family, passing through the Hague, where he attended the deliberations of the States-General, and was presented by the Minister of Foreign Affairs, the Baron Verstolk, to the old King William I. This was a short time before the movement, which severed the two portions of the kingdom of the Netherlands, which, he remarks during his stay there, were then far from being consolidated. He was still absent from his post at the time of the French revolution of 1830.

It was during the memorable occurrences of that period, that Mr. Wheaton was presented by Lafayette to Louis Philippe, and saw him take the oath to the charter. The king, during the remainder of Mr. Wheaton's residence in Europe, on repeated occasions, though he was never accredited to his court, conferred freely with him on matters of state and government. With Guizot, Thiers, and the other distinguished men of the Orleans dynasty, who added the official rank of ministers to the highest eminence in the literary world, he was, by congeniality of pur-

suits, brought into association. With the Duke de Broglie he was on terms of the most friendly intercourse, as he was, also, with the historian Mignet, the Perpetual Secretary of the Institute for the Class of Moral and Political Sciences, and with most of the other celebrities, whose society contributes so much to the intellectual attractions of the French metropolis.

In 1831, Mr. Wheaton visited London by direction of his government, in reference to matters connected with the Danish indemnity. While in England, he not only availed himself of the opportunity of making the personal acquaintance of the Ministers of State and other public men, as well as of the diplomatic corps, to many of whom he was already known; but he was, at once, recognized as a member of their own fraternity by the most eminent in literature and law.

Among the statesmen by whom he was particularly distinguished on this and the other occasions of his visiting the British capital, were Lord Aberdeen, Lord John Russell, Sir Robert Peel, and Lord Palmerston, and especially the Marquis of Lansdowne. With Sir James Mackintosh, whose judicial independence, when presiding in the Vice-Admiralty Court of a distant possession, contrasted so favorably with the ministerial subserviency of Sir William Scott, he was frequently brought in contact.

Senior, who, by an able paper in the Edinburgh Review, afterwards contributed to place his merits, as a publicist, properly before the world, was one with whom he was on terms of intimate association, as he was also with Palgrave, Hallam, Hayward, Mr. and Mrs. Austin, and others of like fame. It was at this period that the History of the Northmen was published, and the consideration which its author enjoyed in the literary circles of the metropolis, is the best test of its appreciation. He was, likewise, as a learned jurisconsult, requested to furnish answers to the queries of the common-law commission then in session, and who were occupied with the same investigations to which his own attention, as a commissioner at New York, had been directed.

In the autumn of 1833, Mr. Wheaton returned to the United States on leave of absence. At New-York, he was invited, by a committee of the most influential citizens, at the head of which was the Mayor of the city, as "a mark of their respect for his successful efforts, as a scholar and diplomatist, to sustain the reputation and interests of the country abroad," to partake of a public dinner.

He was also requested by The New York Law Institute, an association composed of his old professional brethren and of those who had, during his absence, been called to the bar, to pronounce a discourse at their anniversary, in May, 1834. The subject selected, as furnishing some of the fruits of his studies abroad, was "The progress of the science of law in Europe, since the independence of the United States." After tracing what had been previously done on the continent, he gave a rapid analysis of the great quarrel in Germany, between the historical and philosophical schools, on occasion of the introduction, into the conquered countries, of the French codes.

Mr. Wheaton returned, in August, 1834, to Copenhagen. Though he was not at a capital where the earliest intelligence could be commanded, his correspondence during this period, pointing out, as it does, the causes of events which are yet, in many cases, cabinet secrets, would afford historical annals inferior in interest to no contemporaneous memoirs. A large portion of it for the first part of his Danish mission was addressed, in the form of private or confidential communications, to the President and Secretary of State. So early as December, 1827, he appreciated the true position of Turkey, when, after the battle of Navarino, he writes, "I think we have only, as yet, the opening scene of a great drama, which is to be enacted in the Eastern world; and how the *dénouement* is to be brought about without a partition of the Ottoman Empire, I am at a loss to conjecture."

In a private letter to President J. Q. Adams, soon afterwards, (January 5, 1828,) he says: "Mr. Middleton has doubtless sent you a copy of the Russian circular, written after the

battle of Navarino, in which the views of that court as to the affairs of the East are developed. That paper certainly looks to the probability of His Imperial Majesty being compelled (however reluctantly) to occupy the principalities of Moldavia and Wallachia, if not to advance farther on the road to 'Byzantium.' But the evident interest of the other European States to oppose the territorial aggrandizement of Russia, and to support the tottering fabric of the Turkish power, induces a strong belief that some means will yet be found to induce the Porte to listen to the remonstrance of its 'friends.' If the Christian powers had acknowledged the independence of the Greeks three years ago, and labored in good faith to consolidate a real Grecian State to take the place of the Ottoman Empire in the balance of power, they would have adopted a much more sensible course than this their tardy interference, which will probably redound to the advantage of Russia only. But such a course would not have suited the views of Prince Metternich or of Mr. Canning, the latter dreading the creation of a new maritime power, which might rival that of England in the Mediterranean, as much as the former feared the example of successful resistance to oppression and the approximation of the Russian Colossus."

The circumstances, also, which were leading to a change in the internal constitution of Denmark, in accordance with the promises made at the period of the Congress of Vienna, but which only began to be redeemed in Mr. Wheaton's time, as well as the commencement of the difficulties in the Duchies, which are still menacing such fatal consequences to the integrity of the Danish States, are fully appreciated and explained.

During the whole period of his mission to Denmark, the United States were not represented in Austria, Prussia, or any other part of Germany. As a resident at the court of a sovereign who, on account of Holstein, was a member of the Germanic Confederation, his attention was necessarily drawn to that important portion of Europe. His despatches not only speak of the political concerns of the Confederation and of the

action of the Diet, but he gives us the origin of that commercial league, with which his subsequent career was, for so many years, connected.

Before leaving Denmark, on his visit to the United States, he had received from his Prussian colleague at that court, Count Raczynski, (to whom, as the historian of the Arts in Germany, we shall, in the sequel, have occasion to refer,) a communication, which his government had directed him to deliver to the American Chargé d'Affaires, with a view to its transmission to Washington. It expressed a desire for the restoration of diplomatic intercourse between the United States and Prussia, as well as intimated a wish that Mr. Wheaton, whose reputation was already established there, should be sent to Berlin. This appointment was, however, not made till the spring of 1835, when he was commissioned as Chargé d'Affaires to Prussia by President Jackson.

There had been no American Minister at Berlin since John Quincy Adams, whose nomination was made in 1797. An appointment was now proper, not only as a matter of reciprocal courtesy, but the increased political importance of Prussia, and more especially the controlling influence which she exercised over the commercial interests of a great part of Germany through the Zollverein, required that the United States should omit no suitable opportunity of cultivating with her relations of mutual interest.

Mr. Wheaton arrived in Berlin, in June, 1835. The Minister of Foreign Affairs, Mr. Ancillon, at their first interview, requested him to suggest by what means our commercial connections with Prussia might be extended. The articles of the Germanic Confederation, as established by the Congress of Vienna, in 1815, contemplated the regulation, by the Diet, of commercial intercourse among the States, as well as the free navigation of the great rivers; but nothing was ever done towards effecting the former object. The custom-house barriers had, however, been broken down between the individual States, by means of

Customs' Unions, of which there existed at the time of Mr. Wheaton's arrival two. Prussia was at the head of the Zollverein, which embraced most of the States of Germany, except the Austrian dominions, the Hanseatic Towns, the duchies of Holstein and Lauenburg, (belonging to the King of Denmark,) Mecklenburg, Oldenburg, the kingdom of Hanover, and the duchy of Brunswick. The two last formed, in 1834, a separate commercial league, called the Steuerverein, with which, soon after, Oldenburg was united. As the principles, on which these associations were established, were a uniform tariff, the duties from which were to be collected by the frontier States, and divided among the different members according to their population, it was with the leagues rather than their individual members that negotiations were to be conducted. They were represented, so far as respected diplomatic discussions with foreign nations, by Prussia and Hanover respectively; and Mr. Ancillon early intimated his desire to the American Minister, that he should not attempt to approach the Zollverein with any overtures for commercial negotiations, except through Prussia, its founder and natural head. Mr. Wheaton to the Secretary of State, November 25, 1835.

By his original instructions from the Secretary of State, Mr. Forsyth, his attention was specially directed to an establishment of commercial relations with Germany, founded on the new order of things, and also to the removal — for which the connection of many of the States with Prussia, through the Zollverein, would afford facilities — of the obstructions imposed on emigration by the existence of the droit d'aubaine and droit de détraction. Mr. Forsyth to Mr. Wheaton, April 20, 1835.

Soon after Mr. Wheaton's arrival, he availed himself of the suspension of diplomatic business to make, in July and August, a tour through a portion of Germany. Proceeding by the way of Lubeck, Hamburg, and Hanover, to the Prussian provinces of Westphalia and of the Rhine, he collected much useful information respecting the commercial and other resources of those

provinces, and of the intermediate States, as well as of Nassau, Hesse-Darmstadt, and Baden. He was furnished by Mr. Ancillon with introductions to the local authorities. On his return to Berlin, Mr. Wheaton suggested to the American government separate negotiations with Prussia and her league, and with Hanover and her associated States; and he was in consequence instructed to inquire whether Prussia, and the other German States united with her in the Zollverein, were disposed to open a negotiation with the United States upon their mutual commercial relations, with a view to an arrangement consistent with the great leading principles upon which our intercourse with foreign nations had been uniformly regulated, with such modifications and additional stipulations as the peculiar nature of the "commercial union" might render necessary.

Before any serious step was taken in the course of these negotiations, Mr. Wheaton was, as is elsewhere stated, under circumstances highly honorable to the appointing power, promoted, by President Van Buren, to the rank of Envoy Extraordinary and Minister Plenipotentiary. He received his letters of credence, and his commission in his new capacity, in March, 1837; though owing to the vacancy in the department of Foreign Affairs, intervening between the death of Mr. Ancillon and the appointment of Baron de Werther, and the annual visit of His Majesty to the baths of Toeplitz, where he was accompanied by the new minister, he did not deliver his letter to the king till September. He thought that he could not better employ the interval than by making another journey through the Prussian provinces, with a view to complete his former examination of their commercial resources, especially with respect to the question of the tobacco duties, to which his attention had been particularly directed, and the natural and artificial communications, by which the States of Germany associated in the Commercial Union are connected with the North Sea, and the channels opened for our commerce, in common with that of other nations, through the ports of Belgium and Holland, into the interior of the continent. Leaving

his Secretary of Legation in charge of the current affairs of the mission, he proceeded through the province of Brandenburg, which he had not before explored, to Cassel, the capital of Electoral Hesse; and he not only visited the States of Western Germany, but extended his tour through Belgium, where he had occasion to remark the improvements which had occurred under the new government since he first passed through it, in 1830, as well as to notice the intimate connection between the commercial interests of the United States and those of the Rhenish provinces, whose manufactures, in their diminished exports, were experiencing the effects of the monetary crisis, then prevailing in England and America.

Soon after his commission was sent to him in June, 1837, Mr. Wheaton received a full power, with instructions from Mr. Forsyth, though the Secretary preferred a relaxation of the duties by legislative or internal regulation, to conclude, if necessary, a treaty with the Zollverein, — an object which he ever zealously pursued for the ensuing six years.

Mr. Wheaton attended, under the instructions of his government, the Congress of the Zollverein at Dresden, in July, 1838. He presented to them a memoir, embodying all the statistical data and economical reasonings, which could tend to induce the introduction of a liberal policy. The importance to the Germanic Confederacy of the trade with the United States is fully explained, by a reference to facts as well as to general principles.

Though he was not immediately successful in obtaining all that was proposed, the only foreign relations considered at the Congress were those of the United States, arising out of Mr. Wheaton's memoir; and the favor which was accorded to his representations may be ascribed to the personal consideration which he commanded, and to the opportunities which his familiarity with the language of the members, as well as his thorough knowledge of the matters which he discussed, afforded him. By the ministers of state, as well as by their sovereigns, he

was everywhere received as the honored representative of a great and powerful nation.

At the extra session of the Congress of the United States, in May, 1841, a report from the Secretary of State, Mr. Webster, respecting our commercial relations with the Zollverein, was laid before the two houses with the President's message. The materials from which it was compiled were furnished by the despatches of Mr. Wheaton, as were also those used on the subject of the Sound duties, which was embraced in the same report, and the information concerning which had been communicated by him from Copenhagen and Berlin. In this document the suggestion is distinctly made, of entering into commercial treaties with the States united in the commercial league, as well with a view to the extension of our trade with them, as of abrogating the taxes in the character of droit d'aubaine and droit de détraction, which existed in many of them.

In 1842, Mr. Wheaton again attended a meeting of the Congress of the Zollverein, which was held at Stutgard, where he was presented, on the 15th of July, to the king, William I., an enlightened sovereign, who was duly sensible of the importance of cultivating commercial relations with the United States, and with whom he had a very interesting interview on that subject. On that occasion, he also visited Munich, and had several conferences with Baron de Gise, the Minister of Foreign Affairs of His Bavarian Majesty, in relation to the commercial interests of Germany, and of its intercourse with the United States. In the discussions at Stutgard, he found, as had been the case on the former occasion, that the Deputies were unwilling to make any changes in the tariff, unless accompanied by corresponding reductions in the United States, on the productions and manufactures of Germany. They all expected to receive from us some advantages for their manufactures, in exchange for the facilities they accorded to us; and it had been early objected, that our treaty of 1831, as regarded French wines in the United States, interfered with the consumption of those of Germany.

The Congress of the Commercial Union held a session at Berlin, in September, 1843, and during it Mr. Wheaton was given to understand that a convention could be made for the reduction of the duties on tobacco, based upon equivalent reductions in the American tariff on German products and manufactures, and which might be selected from those articles which did not come in competition with the manufactures of the United States. These views were embodied in official notes between him and Baron Bulow, of the 9th and 10th of October.

The assent of the Secretary of State, Mr. Upshur, was immediately given to the proposed course, and Mr. Wheaton was directed to proceed with the preliminary arrangements, "bearing always in mind, that the sanction of Congress, as well as of the Executive, will be indispensably required, before we accomplish the object in contemplation."

President Tyler had, in his annual message to Congress, at the session of 1843–4, referred, with satisfaction, to these negotiations with the Zollverein, then embracing more than twenty German States, and 27,000,000 of people, and especially to the reduction of the duty on rice, and to the strong disposition evinced to reduce the duty on tobacco. "This," he says, "being the first intimation of a concession on this interesting subject, ever made by any European power, I cannot but regard it as well calculated to remove the only impediment, which has so far existed to the most liberal commercial intercourse between us and them. In this view our Minister at Berlin, who has heretofore industriously pursued the subject, has been instructed to enter on the negotiation of a commercial treaty, which, while it will open new advantages to the agricultural interests of the United States, and a freer and more expanded field for commercial operations, will affect injuriously no existing interests of the Union." Accompanying the message was a report of the Secretary of State, to which were annexed the notes of Mr. Wheaton and Baron Bulow, giving the outline of the proposed arrangement, and in which Mr. Upshur states that the basis of a treaty

had been agreed upon, and submitted for the consideration and action of our government, which would effect the long-cherished object of procuring the reduction of the present duty on our tobacco, secure the continued admission of our cotton free of all duty, and prevent the imposition of any higher duty on rice. For these vast advantages, the conditional arrangement proposes that the United States shall give the Customs' Union proper equivalents, by reducing the heavy duties of the present tariff upon certain enumerated articles, which are not of the growth or manufacture of the United States.

The treaty was signed on the 25th of March, 1844. Mr. Wheaton was at once congratulated by Mr. Everett at London, and his other colleagues at the European courts, on the brilliant results of his labors; and he received the highest commendation from the President, and Mr. Calhoun, who had become Secretary of State. It was, however, defeated in the Senate, as the latter informed him, from strictly party motives, the reasons assigned by the committee on foreign relations being altogether inconclusive and such, as the Secretary felt confident, that the Senate would never sanction.

The failure of a measure on which, from the great benefit that he believed would result to his country, he had founded the expectations of a permanent fame, and which had engrossed so large a portion of his diplomatic career, occasioned feelings of mortification and disappointment which seriously affected the happiness of his few remaining years.

Going as Minister to Prussia, where we had not been represented for thirty years, it was Mr. Wheaton's duty to prepare the measures required by that increased intercourse, which during that period not only commerce had established between the United States and the Germanic Confederation, but which had been rendered much more intimate by a vast emigration to our country. The importance, on this account, as well of the abolition of the *droit d'aubaine* and *droit de détraction*, as of the establishment of a system for the mutual surrender of fugi-

tives from justice, is sufficiently apparent. The conventions which he made, and the part which Mr. Wheaton had in inaugurating the arrangements in other cases, which were only completed after the termination of his mission, are noticed under their respective heads in the body of the annotations.

He had, also, occasion to consider the effect of the return of a naturalized American citizen to the country of his original allegiance, a subject which would seem to have been treated by some of his successors more with reference to popular sentiment at home than to the rules of international law. He refused his interposition to a person thus situated, on the ground that, so long as he remained in the country of his birth, his native domicile and national character reverted, and that he was bound, in all respects, to obey the laws, as if he had never emigrated. That the acquired rights of a naturalized citizen are liable to be affected by his leaving the country of his adoption would seem to be recognized in the act of Congress of March 27, 1804, (Statutes at Large, vol. ii. p. 296,) which denationalizes any American vessel, the owner of which, in whole or in part, if a naturalized citizen, shall reside more than a year in the country in which he originated, or more than two years in any foreign country. The subject of the Sound duties at Elsinore, the examination of which was commenced at Copenhagen, was continued at Berlin. And it was undoubtedly owing to Mr. Wheaton's investigations that the American government was enabled to assume such ground in reference to exactions not maintainable on the principles of international law, as to lead to conventional arrangements by all the States of Christendom, not only for the abolition by Denmark of the Sound dues, but for the abandonment, also, by Hanover, of those imposed on vessels ascending the Elbe.

Several papers on matters relating to pending questions, in which his country was interested, though not falling within the scope of his official labors, are referred to in connection with the discussion of the subjects to which they relate. Such are

the cases of the arrest of McLeod for the destruction of The Caroline in the American waters; of the refusal of the British government to surrender the revolted slaves of The Creole, who had murdered their master and carried the vessel into a port of Nassau, and for whom compensation was afterwards made under the convention of 1853; of the prizes taken by Paul Jones's squadron, and delivered by the Danes to the British during the war of the American Revolution.

But of the extra-official acts of Mr. Wheaton, no one had been supposed to give him a stronger title to the gratitude of his country than the publication in 1841 of his "Inquiry into the validity of the British claim to the right of visitation and search of American vessels suspected to be engaged in the African slave-trade." At that time it was the policy of the United States to prevent the *surveillance* of the ocean, in time of peace, being assumed by Great Britain, and which it seemed likely would be effected by the quintuple treaty which had been negotiated by that power with France, Austria, Prussia, and Russia. To defeat its ratification by France was deemed an all-important object by the government and people of America. Mr. Wheaton obtained from Baron Bulow, the Prussian Minister of Foreign Affairs, the declaration that it was never intended by the other contracting powers, whatever might have been the views of England, that it should be executed in any other manner than by searching each other's vessels. The Minister of Foreign Affairs moreover expressed his conviction of the difficulty, if not impossibility, of the American government adhering to the principle which formed the basis of the treaty between the five powers. This matter, which is discussed in another place, is here alluded to in connection with the personal narrative of Mr. Wheaton. His work not only at the time received the official approbation of his government, through the Secretary of State, Mr. Legaré, but its authority was emphatically sanctioned in the debates in Parliament in 1858, when the claim of Great Britain, (voluntarily revived by us in the

late slave-trade treaty of April, 1862,) was formally abandoned by her. Lord Lyndhurst, in a speech in the House of Lords, on the 26th of July, 1858, adopts and makes his own the language of Mr. Wheaton, (whom he terms "the eminent American authority on international law,") declaring "it impossible to show a single passage of any institutional writer on public law, or a judgment of any court by which that law is administered, which will justify the exercise of such a right on the high seas in time of peace, independent of a special compact." He adds, — "For myself I have never been able to discover any principle of law or reason upon which such a right could rest."

The anomalous position of a government, where religion is an affair of State, but where the sovereign and the people belong to different creeds, is presented in the case of the difficulties which arose between the King of Prussia and the ecclesiastical authorities of the Rhenish provinces, where the Catholic religion predominates. The dispute with the Archbishop of Cologne, in 1837-8, for refusing to submit to the king's views as to mixed marriages, and other questions regarded as matters exclusively of ecclesiastical cognizance, and which became almost a subject of European discussion, made the Prussian Cabinet anxious to oppose to the ultra-montane or Jesuit party of Germany the united force of the Protestant community. A very favorite measure of the king to bring about this object was the blending of the Lutheran and Reformed Churches in one communion, to which effect, indeed, a decree was issued so far back as 1817. We have a notice in the despatches of a conference of ecclesiastical and lay deputies, representing the different Protestant governments of Germany, assembled at Berlin, at the beginning of 1846, for the purpose of promoting unity of faith, discipline, and worship. The disappointment, however, which began to be felt at the evasions of the long deferred promise, made by Frederick William III., of a constitutional charter, did not aid the ecclesiastical projects of his successor.

Mr. Wheaton's mission terminated, even before the promul-

gation of the edict of February, 1847, for convoking the Prussian Diet, and by which it was attempted, most imperfectly, to fulfil the promises made under the edict of the 26th of October, 1810, and the declaration of the 25th of May, 1815, of a constitution founded on popular representation. Consequently the revolutionary movements of the succeeding year are not within the particular scope of this notice.

Nor was the attention of the Minister at Berlin limited to matters which affected the interests of the United States in Prussia, or even in Germany. He lost no opportunity of creating a sound public opinion in Europe, respecting the political course of his country. He thus alludes to a conversation which he had with the king, Frederick William III., at one of the royal entertainments:—"His Majesty expressed the warmest wishes for the prosperity of our Republic, and his satisfaction at the measures taken by the President to preserve our neutrality, in respect to the troubles of Canada, which in their consequences might affect our interests. I ventured to assure His Majesty that in no possible event would the United States swerve from their fixed principles of non-interference in the internal affairs of their neighbors, so long as their own national rights and interests were not injuriously affected." Mr. Wheaton to the Secretary of State, January 31 1838.

Mr. Wheaton had also been enabled, through the confidence reposed in him by the Baron de Werther, the Minister of Foreign Affairs, who read to him a despatch from the Prussian Minister in London, to communicate to his government the real sentiments entertained in England, and expressed to the Ministers of other powers, as to our good faith with respect to Canadian affairs. Same to Same, March 23, 1838.

One of Mr. Wheaton's last official acts was to communicate to the government of Prussia the circumstances which led to the declaration of war against Mexico and the blockade instituted in consequence thereof. "He stated that the blockade

intended to be established would not give any just ground of complaint to neutral powers, since it would not be what is called 'a paper blockade,' but would be carried into effect by an actual investment of the ports in question by adequate naval forces. That we professed the same principles, in respect to neutral rights, which had been professed and maintained by Prussia, ever since the reign of Frederick the Great, and should be anxious to preserve our consistency in that respect, by meting out to others the same measure of international justice as belligerents, which we claimed from them when neutrals." Annexed to the despatch, which reported his proceedings in this matter, were extracts from Reddie's "Researches on Maritime International Law," and from the "Régles Internationales et Diplomatie de la Mer," by Ortolan,—works to which repeated reference has been made in these remarks and in our notes, and which were then the latest English and French authorities on these points of maritime law. Mr. Wheaton to the Secretary of State, May 27, 1846.

In a notice of this nature it is impossible to present even an analysis of the despatches from Berlin, on the general questions of European politics. When his mission there began, the agitation consequent on the French Revolution of 1830 had not yet ceased; while in the premature insurrection of Poland, in the movements in Prussia and the other States of Germany, and in the attempts of the sovereigns to satisfy by the smallest concessions possible the popular demands, we have the germ of those demonstrations throughout Europe, to which subsequent events gave vitality. The severance of the Kingdom of the Netherlands,—the creation of the Congress of Vienna, with the separation of Belgium from Holland,—the result of the Revolution of Brussels, the miniature edition of that of Paris, obstinately resisted by the King of Holland, and the controversy respecting it, including the questions connected with the dismemberment of Luxemburg, in which the Diet of the Germanic Confederation claimed the right to intervene, were not fully ter-

minated till 1839. During the intermediate period, there were continued conferences of the Ministers of the five great powers, who, referring to the Protocol of Aix-la-Chapelle, of 1818, as an authority for the perpetual existence of the alliance, undertook, as early as 1831, to make a treaty for Holland and Belgium.

The nationality of Poland was one of the measures supposed to be secured, even when its territory was parcelled out at Vienna. The assurances, however, on that subject, which were without any effective guarantee, were destined to be illusory. In 1832, the Kingdom of Poland had become politically merged in the Russian Empire. The ultimate fate of Cracow, by which the existence of the Republic was annihilated, was not finally settled till after the date of Mr. Wheaton's last despatches; but we learn from them that, in 1836, the Minister of Foreign Affairs of Prussia would scarcely permit to be read to him the protests of England and France against the continued occupation of that free city. Mr. Wheaton to the Secretary of State, June 2, 1836. And to the application of the Provincial Diet of the Grand Duchy of Posen, embracing that part of Poland occupied on the final partition by Prussia, for the political institutions stipulated for in the treaties of annexation, the king stated that the promise, contained in the declaration of 22d May, 1815, was not obligatory on him, inasmuch as his late royal father, who had substituted for it the edict of the 12th of June, 1823, had declared that its fulfilment was not binding on him, as not consistent with the welfare of his people. And in one of his last despatches Mr. Wheaton remarked, that Prussia was gradually blending the Grand Duchy of Posen with the German provinces of her dominions. Mr. Wheaton to the Secretary of State, April 22, 1846.

The affairs of the Peninsula, including the operations of the Quadruple Alliance, concluded in 1834, between England and France, and Spain and Portugal, for the termination of

the civil wars in the two latter countries, are within the scope of these papers, as well as the mediation of France between Naples and Great Britain, in 1840, the importance of which consisted in the settlement of the dispute without the intervention of Austria.

To the Emperor Nicholas, Mr. Wheaton was presented on occasion of his visit to Berlin, in 1838, and he again met him, the same year, at the Baths of Toeplitz. We have referred to the views which he conceived, at the commencement of his mission at Copenhagen, with regard to the ultimate fate of Turkey. And writing, soon after his arrival at Berlin, he says, what commanded new interest from subsequent occurrences: "If I am not wholly misinformed, the Emperor of Russia is not disposed much longer to postpone the execution of those designs upon Turkey, which he has inherited from the traditionary policy of his predecessors — a policy, in the actual nature of things, requiring the possession of Constantinople and the Dardanelles, in order to give complete development to the natural resources of Russia, and to enable her to advance in the career of civilization, in which she is now impeded for want of the complete command of this channel of communication with the Mediterranean, and its rich coasts and islands. It is therefore believed that the Emperor Nicholas has reserved the conquest of Constantinople as the crowning glory of his active reign, and that circumstances alone will determine the choice of the moment for executing this project." On the same occasion he alludes to an opportunity that he had had of inspecting the documents found in the cabinet of the Grand Duke Constantine, at the breaking out of the Polish Insurrection in 1830, and from which it appeared that preparations had been made to threaten Austria with an insurrection of the Slavonic population of Hungary and Galicia, had she attempted, in the campaign of the preceding year, which was terminated by the treaty of Adrianople, to disturb the Russian army in their march towards Constantinople. He also refers to propositions made by Russia to Austria, in 1835,

and rejected by her, for an ample share in the partition of Turkey as well as to negotiations, arising out of their failure, with Prussia, by which the latter power was urged to hold herself in readiness to attack Austria in the rear on the Bohemian frontier, and to hold France in check by a military demonstration on the Rhine, while Russia moved on Constantinople by land and by sea. Mr. Wheaton, in the despatch from which we have already quoted, further remarked, that "so long as the treaty of Unkiar Skelessi remains in force, — so long as Russia keeps what the Emperor Alexander called the *keys of his house*, — it is plain that France and England alone, with the utmost exertion of their power and resources, could not prevent the occupation of Constantinople and the Bosphorus by a Russian fleet and army; and it is perhaps even doubtful whether, with the aid of Austria, they could prevent the accomplishment of this design, whenever the favorable moment arrives for its consummation." Mr. Wheaton to the Secretary of State, December 9, 1835. MS.

The various negotiations, from those of 1827, for the pacification of Greece, to the treaty of 1841, recognizing the closing to foreign ships of war, in time of peace, of the waters connecting the Mediterranean and the Black Sea, and which, while it shuts other nations out of the latter sea, also excluded the Russian navy from the former,[1] will be found cited in the "Elements." They will illustrate the international relations between Christian Europe and its Mohammedan State, anterior to the Crimean war.

In 1836, the "Elements of International Law" were published at London. The same year an edition appeared in Philadelphia, and a third one, in English, at the same place in 1844. An edition prepared by the Author, with his latest emendations, was published, in French, by Brockhaus, at Leipzig and Paris,

[1] By the treaty between Russia and Persia, signed at Seiwa, (1813,) and confirmed at Teflis, under the mediation of Great Britain, Persia recognized the exclusive right of Russia to have ships of war in the Caspian Sea. Phillimore on International Law, vol. i. p. 49.

in 1848, and several other editions have been issued from the same press. The first edition, annotated by the present Editor, is of the date of 1855.

The "Elements" were, at once, by the periodical press of England, France, and Germany, recognized as a standard treatise. The able French journal, edited by Fœlix, and devoted to juridical science, recommended the work to the young French diplomacy, and urged its immediate translation. It does justice to the frankness with which Mr. Wheaton met the discussion of new and interesting matters, on which his predecessors had maintained silence, particularly on that delicate question, — the right of intervention by one power in the affairs of another, — which our author has, elsewhere, declared to be an "undefined and undefinable exception to the mutual independence of nations." Rev. Etr. et Fr. tom. iv. p. 161.

The first edition of a Prize Essay, prepared for the Institute of France, under the title of "Histoire des progrès du droit des gens en Europe, depuis la paix de Westphalie jusqu' au Congrès de Vienne," was published at Leipzig, in 1841; and another edition, much enlarged, appeared there and at Paris, in 1846. A third one was also published by Brockhaus, in 1853–4, and several more from the same house have since appeared. This work, whose object is to trace the progress which the law of nations has made since the treaty of Westphalia, occupies a place never before filled in the literature of the English language, or in that of any other. All students of jurisprudence, all students of history, who, not content with descriptions of wars and battles, rise to the grand principles, which are the sources of events, will regard this book as not less important than the "Elements." An English translation appeared at New York, in 1845, under the title of the "History of the Law of Nations, in Europe and America, from the earliest times to the treaty of Washington, in 1842." Among the suggested ameliorations in the law of nations, which Mr. Wheaton discusses, was that of the establishment of perpetual peace, by the settlement of national

disputes without resort to hostilities. Schemes have been, at different times, devised by philanthropists for the purpose of putting an end to all war; and he gives us in detail the plans of St. Pierre and Rousseau, of Bentham and Kant, for effecting this object. In some form or other they are all referable to the principle of a general council of nations, which may serve as a great tribunal, whose jurisdiction all States are to acknowledge.

The melancholy events, now going on in the United States, are but too well calculated to destroy the illusions of those philanthropists who had fondly hoped that in the settlement, through judicial forms, by the Supreme Court, of all questions between the Federal and State governments affecting constitutional questions, the great problem, how to terminate national disputes by pacific means, had been solved.

The *Compte rendu* of the last work, for the *Revue étrangère*, was prepared by Pinheiro Ferreira, formerly the Minister of Foreign Affairs of Portugal, and to whom, as the editor of Martens, we have frequent occasion to refer. It declares that "it bears evidence of the vast erudition of the author, showing that nothing which had been done or written that was remarkable was unknown to him." And in a subsequent volume, in which the American edition is announced, it is declared to have supplied all preceding omissions, and to have rendered the work a necessary compliment to the "Elements."

A paper in the "Edinburgh Review," from the pen of the jurist and political economist, Senior, under the head of the historical treatise, as it originally appeared in the French language, while it presents the difficulty of reducing to any general rules the practice of nations, and contests the author's views on the right of visit in time of peace, does justice to his preëminent fitness for his task. "Few men," it remarks, "are better qualified to write a history of the law of nations than Mr. Wheaton. A lawyer, a historian, and a statesman, he unites practical and theoretical knowledge, and he is the author of one of the best treatises on the actual state of that law, of which in the essay, the subject of this article, he is the historian."

The German periodicals were not less decided in their commendation of Mr. Wheaton's treatises than those of England and France; though, as was remarked in the "Leipziger Blätter für literarischen Unterhaltung," the public attention had, in Germany, been long exclusively drawn to those questions of internal public law which regard the constitutional liberties of States; so that the study of that branch of public law, which is supposed to regulate their international relations, had been somewhat neglected. M. Ludewig closes his notice, by declaring that "every student of this important science is bound to acknowledge his deep gratitude to the learned author, who, uniting the accomplishments of a public jurist and of a practical diplomat of the school of Franklin and Jefferson, to those of the scholar, already known by his other literary works, has furnished the best commentary on his 'Elements of International Law.'"

Mittermaier, Professor of International Law at Gottingen, was in the habit, we are told, when he gave the names of the books which he desired his pupils to study, to say: "And first of all, young gentlemen, I give you the name of the great American writer, Mr. Wheaton, the best authority in any language on the subject of International Law."

To multiply citations from the press, or to refer to the opinions of publicists as to the merits of this treatise, would be to question the universality of that fame, which has made the "Elements of International Law" the highest authority in every cabinet and every deliberative assembly of Christendom; while it has the sanction of the great universities of England, and is, in many countries, prescribed as the text-book for all aspirants to diplomacy. Not merely did those English writers who immediately followed in his tracks, Manning and Reddie, anticipate the public judgment, but no book is referred to with more respect than his works, by those living oracles of International Law, Phillimore and Twiss.

Hautefeuille, Massé, Ortolan, and Heffter, whose books are justly esteemed the best exponents of the continental theories on

maritime jurisprudence, abound in quotations from the treatises of Mr. Wheaton, to whom they unite in assigning the highest rank in the science; while the occasional criticisms in which they indulge show that their approbation is not devoid of discrimination.

Mr. Wheaton's old colleague at Copenhagen, Count Raczynski, was not only possessed of one of the best galleries at Berlin, but was the author of a magnificent work, giving an account of the brilliant and rapid progress of the Fine Arts in Germany, since the continental peace of 1815. This book was the subject of successive notices in the "Foreign Quarterly Review" on the appearance of each of the three volumes, presenting in themselves a sketch of the great artists of the different States of Germany, as well as of their productions, and with which Mr. Wheaton's long residence in the country, and his frequent journeys, had made him personally acquainted.

Nor were the fruits of these studies confined to the publication of a European periodical. In 1842, a society was established at Washington, under the title of "The National Institute," which it was hoped might, from its location at the seat of government, combine in a literary and scientific association those Americans, who were engaged in the cultivation of liberal pursuits, and hereafter take a rank with similar societies in the capitals of the Old World. To this association Mr. Wheaton conceived it his duty to communicate whatever information he had collected, that might be useful to his country, and with respect to which he did not correspond with the Department of State. His letters to the Society present a most instructive account of the state of modern art, as well of architecture as of painting and statuary. In one of them, indeed, we have a description of that recent monument of German nationality, of which Raczynski speaks at length, the Walhalla, near the ancient imperial city of Ratisbon, where it was intended to unite all these three arts, and in which are brought together the Teutonic celebrities, going back to Alfred and Egbert, of the Anglo-

Saxon race, and Charlemagne, of the Franks. Nor, in commemorating the foundation of the schools of Munich, Dusseldorf, and Berlin, and in familiarizing his countrymen with the names of Cornelius, Schadow, Wach, as well as with those of the architect Schinkel, and of the sculptor Rauch, and other contemporaries in fame, had he forgotten Thorvalsden, the Dane, the glory of that country, where so many years of our Author's life were passed. His death, after his return to the land of his nativity, during the progress of these papers, presented a further occasion for referring to the great works in which he was engaged at Copenhagen, and with which his career terminated.

Recondite historical researches, for which his position afforded peculiar facilities, also occupy many columns of the Washington journal, in which the papers of the society appeared. The physical geography of Humboldt, the writings of Diderot, the geography of Affghanistan, with the war then (1842) raging in Central Asia, were among the other topics of these communications. The original object of that war, on the part of the British, is described to have been to obtain a predominant control in that region, so as to guard against the contingent danger of Russian agents acquiring such influence among the Affghans as to be hereafter able to wield them, in conjunction with the Persians, as instruments of attack against the British dominions.

Ancillon, Werther, and Canitz, successively Ministers of Foreign Affairs, were his personal friends, as was also the Chevalier Bunsen, even better known in the republic of letters than as the distinguished representative of Prussia in London. In introducing to him one of the Professors of the University, then engaged in writing a manual on the law of nations, Bunsen says: "He fully appreciates the importance for him and his science to have access to one of the greatest European authorities, on many of the most interesting points of international law." Mr. Wheaton had in the Minister of England, Lord William Russell, the brother of the Minister of State, in the

Baron Meyendorf, the Envoy of Russia, and M. de Bresson, long the representative of France, intimate associates, whose letters, still extant, show that his intercourse with his colleagues of the diplomatic corps was such as exists among enlightened gentlemen, on an equal footing, as regards both attainments and social position. He was also a correspondent of that veteran diplomatist, Sir Robert Adair, whose entrance on the public service was coëval with the American Revolution. In transmitting to Mr. Wheaton a copy of the account of his mission to Vienna, in 1806, Sir Robert takes occasion to mention a fact, communicated to him by Mr. Fox himself. He told him that he had only consented to enter the Ministry, which succeeded Lord North's, on the pledge of the immediate unconditional recognition of the independence of the United States; and that his subsequent resignation was induced by the circumstance, that Lord Shelburne, who became Premier on the death of the Marquis of Rockingham, had previously deputed Mr. Oswald to Paris, where Mr. Fox also sent Mr. Grenville. This was done on the ground that America was in his department, which, as Home Secretary, then embraced the colonies. See, on this subject, Sparks's Diplomatic Correspondence, vol. iii. p. 378 *et seq.*

Mr. Wheaton's despatches contain accounts of interesting interviews with Metternich, whose name was so long synonymous with Austrian diplomacy. In one of the 19th of July, 1838, which is here introduced as corroborating the many proofs that no opportunity was lost by him of using, for the advantage of his country, the facilities which either his official rank or personal consideration commanded, he says: "I had yesterday a conversation of some length with the Archduke Francis, (who is a member of the council called the *Conference*, by which the government of the Austrian empire is administered,) and with Prince Metternich, (the real sovereign of that empire,) both of whom appeared to me to attach great importance to the extension of the commercial intercourse between the United States

and Austria. I did not fail to seize the occasion for intimating that the main obstacle, which had hitherto restricted that intercourse to a much less amount of exchanges than might have been expected from the great value and variety of the productions of the two countries adapted for exportation to each other, was to be found in the great inequality between their respective tariffs, and especially the discouragements created by the monopolies, lengthened quarantines, and other pernicious restraints on trade existing in the Austrian dominions. I insisted principally on the government monopoly of the trade and manufacture of tobacco, as being almost equivalent to a prohibition of our tobacco, only a small quantity of which is annually purchased by the Austrian *régie* at Bremen, to mix in with the Hungarian and other native tobaccoes."

But his associates were not confined to his professional brethren. Alone of the diplomatic corps, he was elected a foreign member, the number of which is limited to fifteen, of the Royal Academy of Sciences, where he had, as resident confrères, not only Alexander Von Humboldt, whose unrivalled attainments in physical science were universally recognized, but Ritter, distinguished in geography, Buch and Lichtenstein in natural history, Encke in astronomy, Rose and Mitscherlich in chemistry, Savigny and Eichorn in jurisprudence, Raumer and Ranke in history, Schelling and Steffens in philosophy, Boeckh in philology, and Bopp in the Sanscrit language and literature.

During the twenty years that Mr. Wheaton had been in diplomacy, he had received the most flattering assurances of the ability with which his duties were discharged, from all the Presidents under whom he had served, including Mr. J. Q. Adams, General Jackson, Mr. Van Buren, (who had also as Secretary of State been his chief, and as Minister in London his colleague,) General Harrison, and Mr. Tyler. His course had been equally approved by all those who had had the charge of the Department of State, being, besides Mr. Van Buren, Mr. Clay, Mr. Livingston, (with whom he was connected by kindred pursuits as a

scholar and a jurist,) Mr. McLane, Mr. Forsyth, Mr. Webster, Mr. Legaré, Mr. Nelson, Mr. Upshur, and Mr. Calhoun.

It was at the height of his celebrity, and when he might justly have looked for a transfer to one of the great courts of Paris or London, where his experience and peculiar acquirements might have been more useful to his country, that he received an intimation from Mr. Buchanan, the Secretary of State, of President Polk's intention to terminate his mission at Berlin, with a view to the appointment of a successor. The only favor proposed to be accorded to him was that of anticipating his removal by the tender of his resignation.

It had been hoped that, however general the rule of regarding our foreign missions as transient appointments, the importance of providing against unexpected exigencies would have led to the retaining abroad of at least one experienced diplomatist, through whom the government at Washington might have been advised of what was going on in the cabinets of Europe. Such would seem to have been the policy which, in Mr. Wheaton's case, had governed preceding administrations. Abroad, where our system of rotation in office is not understood, and from which, after what occurred in the present case, it cannot be supposed that any services however eminent, any fitness however unquestioned, can create an exception, the recall of Mr. Wheaton seemed scarcely susceptible of explanation. There was not a public journal in Germany that did not express surprise at the course of the American government, while his recall was the subject of an elaborate article in the "Augsburg Gazette." The only reasons assigned for his removal were such as might well have been regarded as his highest recommendations for continued employment — his great experience and the services that he had already rendered.

The King of Prussia not only regretted Mr. Wheaton's departure, but could not conceive it possible that any government could make such a mistake, as voluntarily to deprive itself of such a minister. This we learn not merely from a formal dis-

course, where it might be regarded as a complimentary phrase, but from the private note of the confidential friend of Frederick William IV., Alexander Humboldt. Baron Humboldt, it will be seen, on his part, could not regard Mr. Wheaton's recall otherwise than as the prelude to promotion. In a note dated Potsdam, the 18th June, 1846, he says: "The king often laments your departure. He knows how useful you were to us, and he does not comprehend how a government can make so great a mistake as to deprive itself of such support. I cannot yet persuade myself that you are not intended for some great place in Europe. Your name and that of Mr. Gallatin stand in a most elevated position, and you have the advantage over him in your excellent historical works. That is a great and beautiful conception which has opened the route of the United States of the North, by Trieste to the Levant and to India. The world is indebted to you for it. Accept, I pray you, my dear and respected confrére, the homage of my unalterable devotion."

The reference of Baron Humboldt is to the plan of communication from America across Europe, to unite with that by the Isthmus of Suez, which is traced in one of Mr. Wheaton's despatches.[1]

That the opinion expressed by Humboldt was no evanescent sentiment, we learn from an account of a visit to him, in Prussia, by our countryman Stephens, who will long be remembered for his graphic description of the monuments of Central America, and by the efforts, to which he sacrificed his life, to carry into

[1] A note from Baron Humboldt dated on the same day that Mr. Wheaton took leave of the king and queen, states that he had been consulted by their Majesties as to souvenirs from the queen to Mrs. Wheaton, saying that the forms of government cannot alter social affections, and that women are not subject to the Draconic laws. He adds "The king is aware that I address these lines to you, and he charges me to express to you anew, in his name, how much on all occasions he has had reason to be gratified with the sentiments of conciliation and moderation which you have constantly manifested, in order to cement the ties which unite Prussia to your noble country." In a postscript he adds: "I cannot yet believe that you will be allowed to quit Europe, that your country will deprive itself of a statesman such as you are."

effect those interoceanic communications to which the mind of Humboldt had been for so many years directed. "Baron Humboldt inquired about Mr. Wheaton, our late Minister to that country, and what was to be his future career. He said that it was understood at Berlin, that he was to be appointed Minister to France, and expressed his surprise that the United States should be willing to lose the public services of one so long trained in the school of diplomacy, and so well acquainted with the political institutions of Europe."

A despatch of the 20th of July, 1846, thus announces the delivery of his letters of recall, on the 18th, at the palace of Charlottenburg: "I was introduced into the king's cabinet, and after delivering to His Majesty my letter of recall, I stated the President's desire to cultivate those amicable relations which had ever existed between the two countries, and which it had been my object to cherish during my long residence at this court. His Majesty was pleased to express his approbation of my zealous efforts to extend the commercial intercourse between the United States and the German States associated in the Zollverein, accompanied with many expressions of regard towards me too flattering to be repeated.

"I had afterwards the honor of dining with the king and queen, and finally took leave, with the repetition, on the part of both their Majesties, of the kindest sentiments towards me.

"My venerable friend, Baron Von Humboldt, had informed me that a copy of the magnificent edition of the works of Frederick the Great, now publishing here, at the king's expense, would have been offered to me, had it not been that I was not at liberty to accept of any present from His Majesty. I took this occasion, to request, that a copy might be delivered to me for the use of the Library of Congress, at Washington. I accordingly this day received from Mr. Olfers, Superintendent General of the Royal Museum, the three first volumes of the work, to be transmitted to the President."

On Mr. Wheaton's quitting Berlin, he did not immediately

return to the United States, but remained in Paris till the ensuing year. In that great capital he was no stranger. He had for some years (deeming it the best means of qualifying himself for the discharge of his diplomatic functions to compare the views of the statesmen of different countries,) passed such time there, as his immediate duties in Prussia permitted. His sojourn in Paris was in no wise without direct profit to his country. His European reputation gave him a position with the public men of France, who were there, more than elsewhere, the men of letters and science, which no official rank could command. A letter of this period, from a gentleman long in our diplomatic service abroad, ascribes to Mr. Wheaton's communications to Washington, written from Paris, the conciliatory tone of President Jackson's Message of 1835, and which led to a satisfactory settlement of the difficulty, in reference to the non-fulfilment of the Indemnity Treaty of 1831 — a difficulty which had gone so far as to induce the proffer of the mediation of Great Britain. General Bernard was then a member of the King's Cabinet, and we have likewise the evidence of his efforts, in the intercourse between him and Mr. Wheaton founded on ancient associations, to terminate all dissensions between his own country and the one to whose hospitality he had been so long indebted. This affords another proof, of which the acquisition of Louisiana, half a century ago — adjusted, as the French Plenipotentiary tells us, in friendly intercourse between him and the American Ministers, Mr. Livingston and Mr. Monroe — is a striking illustration, of how much may be effected towards preserving the peace of the world by an accomplished minister, whose habits and acquirements place him on a footing of social communication with the members of the foreign government.

On several other occasions Mr. Wheaton rendered essential service, in conferring, respecting our policy, with distinguished men, in and out of office — such as Thiers, Molé, De Broglie — with whom his intercourse was based on other than official considerations. This was the case not only in 1841–2, when the

right of search was a subject of engrossing interest, but in 1844–5, when it was important that our course, as to Texas and Mexico, should be understood. In reference to these subjects, Mr. Calhoun, Secretary of State, says to him, in a private letter, dated December 26, 1844, "You need no apology or explanation for your prolonged stay at Paris. I have no doubt that your time was efficiently and well employed at that great centre of diplomatic relations of the civilized world. To give correct impressions there is all important, in the present state of our relations with England, in reference to Texas, Mexico, and this continent generally. They are, indeed, much needed there. The policy of France is, at present, far from being deep or wise, in reference to the affairs of this continent. It ought to be, on all points, antagonist to that of Great Britain. Should I remain where I am, you may be assured I shall not be indifferent as to what relates to yourself."

In the case of our Oregon difficulties, having a thorough acquaintance with the whole subject, not only were his lucid expositions of importance, in the familiar intercourse which he had with Sir Robert Peel and Lord Aberdeen, but in putting our other representatives abroad in a position in which to vindicate and sustain our country's rights.

In April, 1842, Mr. Wheaton had been elected a corresponding member of the French Institute. Mr. Lackanal, through whom the appointment was communicated, states, that during the forty-seven years that he had been a member, he had never been present at so flattering an election, which was made on the report of M. Bérenger, a peer of France, seconded by M. Rossi, likewise a peer of France, and who will be remembered by his untimely fate during the revolution at Rome, and by M. de Tocqueville. He adds, that he will undoubtedly be chosen one of the five free academicians, on the occurrence of the first vacancy. At the time of his admission the question was suggested, by the late Baron Degerando, whether he should be received in the section of History or of Jurisprudence. It was to the latter that he was attached.

During his stay in Paris he prepared and read before the Institute his Essay on the Succession to the Crown of Denmark, in which he elucidated from the facts, which his long residence at Copenhagen had made familiar to him, a question which soon thereafter became one of European importance. It was in quoting, after his death, his opinion on this subject, that the "London Times" says:—"We cannot mention the name of Henry Wheaton without a passing tribute to the character, the learning, and the virtues of a man, who, as a great international lawyer, leaves not his like behind."

Mr. Wheaton finally returned to his country in the spring of 1847. At New York, which had long been his residence, a public dinner was tendered to him for the 10th of June, the invitation to which was headed by the names of James Kent and Albert Gallatin, respectively the most eminent citizens in America, in the departments — Law and Diplomacy — with which his own fame was identified. The festival was presided over by the venerable Gallatin, and was attended, without regard to party, by all of the American metropolis who were distinguished in the various professions, or by their political station or social position. And when the Vice-President presented their guest, "Henry Wheaton — we bid him welcome to his home and our hearts," the sentiment was responded to with enthusiasm. John Quincy Adams and Daniel Webster expressed their regret at their inability to participate, in person, in the public testimony of respect and gratitude to a citizen who had long contributed to the honor of our national character, both at home and abroad.

That his involuntary resignation might cause no stain to his untarnished escutcheon, the Secretary of State, Mr. Buchanan, afterwards President of the United States, declared: "Mr. Wheaton richly merits this token of regard. He has done honor to his country abroad, and deserves to be honored by his countrymen at home. I offer you the following sentiment for the occasion — 'The Author of the Elements of International Law.' While we hail with enthusiasm the victorious general

engaged in fighting the battles of his country, our gratitude is due to the learned civilian, who, by clearly expounding the rights and duties of nations, contributes to preserve the peace of the world."

A similar compliment was proffered to him by the most distinguished citizens of Philadelphia, including Mr. Dallas, then Vice-President of the United States. The City Council of Providence, by a formal vote, bade him welcome to the city of his nativity, and he was invited by his old townsmen to sit for his portrait, to be placed in the Common Council Chamber.

At the anniversary of his Alma Mater, on the 1st of September, 1847, his last literary discourse was pronounced.[1] It was an Essay on the Progress and Prospects of Germany, and was delivered before the Phi Beta Kappa Society of Brown Uni-

[1] On the recurrence of this festival, four years afterwards, the following allusion was made to Mr. Wheaton, by the writer of this notice, then administering the government of the Commonwealth, in response to the toast proposed by the President of the University, in compliment to the State.

"I have referred to the lustre which your distinguished graduates have cast on Brown University; and I cannot allow the occasion to pass by, without a special allusion to the memory of the most eminent of them, one of whom his native State, as well as this Seminary, may be justly proud; one whose friendship it was my happiness to possess during more than a quarter of a century, and with whom I was connected, not only by the ties of kindred pursuits, but for a brief period as a colleague in the public service of the United States. I shall not here pronounce the eulogy of Henry Wheaton. Early instructed, after attaining the honors of this institution, in the languages and literature of Europe; after having received various marks of confidence from the State to which he had transferred his residence, and been for several years connected with that more than Amphictyonic council, the Supreme Court of the United States; having already attained a distinguished rank in American literature, Mr. Wheaton entered the diplomatic service of his country; and during a career of twenty years, possessed of every accomplishment requisite to command the consideration of his associates, sustained preëminently the reputation of the American name as one of her representatives abroad. But he did not confine himself to his mere official duties. His antiquarian researches and historical productions enrolled him among the literati of Europe, while his celebrated treatises on public law laid the foundation of his permanent fame. His works are now authorities in the principal cabinets of Europe, and while he was living, I have often heard Albert Gallatin, then the Patriarch of American diplomatists, and whose last public appearance was as President of the festival to greet Mr. Wheaton's return to America, declare that he deemed your illustrious alumnus the highest existing authority on international law. I will trespass no further but give you, — 'The memory of Henry Wheaton, the American expounder of International Law.'"

versity. The "Preussische allgemeine Zeitung," published at Berlin, thus closes a notice of this discourse, and bears renewed testimony to the position which Mr. Wheaton held in the estimation of Prussia: — "That there exists in America a sincere wish to spread the knowledge of German life and culture, we find proof in the above-mentioned oration, delivered before a learned assembly in his native town, by one who, during a long residence in this place, had won our affection and respect by his simplicity of character, by his high moral sense, and his extensive knowledge. We refer to Henry Wheaton, well known in the learned and political world by his 'Elements of International Law,' a sketch of the 'Law of Nations from the Peace of Westphalia,' a pamphlet on the 'Right of Search,' and a 'History of the Northmen.' All these works show the profound inquirer, the accomplished statesman, the acute jurist, and, above all, the philosopher, who is capable of taking an enlarged view of things, and discovering the connecting link between cause and effect."

Mr. Wheaton's unassuming deportment and purity of life should not be omitted in the recital of the characteristics of the accomplished diplomatist: — "From youth to age," to use the words with which Charles Sumner closed his obituary notice, "his career was marked by integrity, temperance, frugality, modesty and industry. His quiet, unostentatious manners were the fit companions of his virtues. His countenance, which is admirably preserved in the portrait of Healy, wore the expression of thoughtfulness and repose. Nor station nor fame made him proud. He stood with serene simplicity in the presence of kings. In the social circle, when he spoke, all drew near to him, sure that what he said would be wise, tolerant, and kind." — *L.*

ELEMENTS OF INTERNATIONAL LAW.

ERRATA.

Page 53, line 30 from bottom, for "the Porte," read *the contracting parties.*

" 100, line 20 from bottom, for "North American," read *North America;* line 21, supply apostrophes (') at the end of the sentence; line 22 from bottom, for "wherever," read *whenever.*

" 105, line 20 from bottom, for "Confederated States of America," read *Confederate States of America.*

" 110, line 35 from bottom, for "Constitution," read *Confederation.*

" 159, line 16 from bottom, for "Calderon," read *Calderon-Collantes.*

" 173, line 9 from top, supply Author's note 1, Term Rep. vol. viii. p. 31, Bos. & Pull. Rep. vol. i. p. 430, Wilson *v.* Marryatt.

" 177, line 7 from top, supply Author's note 1, Kent's Commentaries, vol. ii. p. 182, 186, note, 5th ed.; line 14 from top, supply Author's note 2, Huberus, l. 1, tit. 3, de Conf. Leg. § 9; line 20 from top, supply Author's note 3, Fœlix, § 99; line 22 from top, supply Author's note 4, Johnson's Ch. Rep. vol. iii. p. 211, De Couche *v.* Savetier.

" 389, line 41 from bottom, for "Lord Grenville," read *Lord Granville.*

" 396, line 7 from bottom, for "Stratford de Radcliffe," read *Stratford de Redcliffe.*

" 425, line 15 from bottom, for "Consul-General," read *Captain-General.*

" 535, line 15 from bottom, for "July 17, 1861," read *July* 13, 1861.

" 975, line 31 from top, for "Dartmouth College *v.* Woodworth," read *Dartmouth College* v. *Woodward.*

" 977, line 1 from top, for "Note [6, p. 8," read *Note* [6, p. 22.

" 1091, line 15 from top, insert —

Tuscarora and Nashville, 716.

Twiss's International Law, 3; Law of Nations, 49, 61, 71, 323, 398, 404, 416, 424, 462, 918; his opinion furnished to the Sardinian government in the Cagliari case, 268.

Tyndal, Essay concerning the Law of Nations and Rights of Sovereigns, 252.

" 1094, line 3 from bottom, insert —

Wenckius, 28.

Westlake, Private International Law, 21, 24, 165, 180, 183, 189, 200, 286, 288, 290, 293, 397, 648, 893, 909, 910, 912; on commercial blockades, 820, 825.

Westphalia, settlement of Europe by treaty of, 119, 134, 373.

Wharton's State trials, 919.

PART FIRST.

DEFINITION, SOURCES, AND SUBJECTS OF INTERNATIONAL LAW.

CHAPTER I.

DEFINITION AND SOURCES OF INTERNATIONAL LAW.

§ 1. Origin of International Law.

THERE is no legislative or judicial authority, recognized by all nations, which determines the law that regulates the reciprocal relations of States. 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 organized 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.

§ 2. Natural Law defined.

The leading object of Grotius, and of his immediate disciples and successors, in the science of which he was

the founder, seems to have been, *First*, 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 rights of war and peace, (*de jure belli ac pacis*,) 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 labors 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 social 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."[1]

§ 3. 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

[1] "Jus naturale est dictatum rectæ rationis, indicans actui alicui, ex ejus convenientiâ aut disconvenientiâ cum ipsâ naturâ rationali, inesse moralem turpitudinem, aut necessitatem moralem, ac consequenter ab auctore naturæ, Deo, talem actum aut vetari aut præcipi.

"Actus de quibus tale extat dictatum, debiti sunt aut illiciti per se, atque ideo à Deo necessario præcepti aut vetiti intelliguntur." Grotius, de Jur. Bel. ac Pac. lib. I. cap. 1, § x. 1, 2.

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.

Natural Law applied to the intercourse of States.

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.* [1

§ 4. Law of Nations distinguished from Natural Law, by Grotius.

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 favor 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

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[1 "Though it was the duty of the Collegium Fetialium to act as Ambassadors as well as Heralds, and to advise the State in negotiations of peace or alliance, and to regulate the general intercourse of Rome with foreign nations, rules of international conduct based upon reciprocity had been lost sight of by the Roman people long before the Republic had established its supremacy throughout the Italian peninsula. The *jus gentium* of the Romans was not a body of rules regulating the mutual intercourse of nations, but was that portion of natural law to which all mankind does homage, and which has accordingly been incorporated into the domestic code of every nation." Twiss on International Law, pp. 2, 3. The *jus gentium*, moreover, was that portion of the *jus privatum*, founded on the principles of natural law which was first applied to the *peregrini* in their relations with one another, or with Roman citizens, and in this respect it was distinguished from the *jus civile*, which was the appropriate positive law of the Romans. Much, however, of the *jus gentium* being of universal application, became incorporated into the *jus civile*. Marezoll, Lehrbuch der Institutionen des römischen Rechtes, § 15.] — *L.*

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." 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." [1]

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

[1] "Usus sum etiam ad juris hujus probationem testimoniis philosophorum, historicorum, poëtarum, postremò et oratorum; non quod illis indiscretè credendum sit; solent enim sectæ, argumento, causæ servire: sed quòd ubi multi diversis temporibus at locis idem pro certo affirmant, id ad causam universalem referri debeat; quæ in nostris quæstionibus alia esse non potest quàm aut recta illatio ex naturæ principiis procedens, aut communis aliquis consensus. Illa jus naturæ indicat, hic jus gentium: quorum discrimen non quidem ex ipsis testimoniis, (passim enim scriptores voce *juris naturæ*, et *gentium* permiscent,) sed ex materiæ qualitate intelligendum est. Quod enim ex certis principiis certâ argumentatione deduci non potest, et tamen ubique observatum apparet, sequitur ut ex voluntate liberâ ortum habeat." . . . . . "Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes aut plerasque ex consensu jura quædam nasci potuerunt; et nata apparent, quæ utilitatem respicerent non cœtuum singulorum sed magnæ illius universitatis. Et hoc jus est quod gentium dicitur, quoties id nomen à jure naturali distinguimus." Grotius, de Jur. Bel. ac Pac. Prolegom. 40, 17.

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 endeavored 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 fecit* of the Roman jurisconsults. This consent can only be established by the disposition, more or less uniform, of nations to observe among themselves the rules of international justice, recognized 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,[1] but clearly expressed and adopted by Cumberland,[2] and admitted by almost all subsequent writers, as the test of international morality.[3] 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 inquiry are observation and meditation; the

[1] Et jus quidem merum sive strictum nascitur ex principio servandæ pacis; æquitas sive caritas ad majus aliquid contendit, ut dum quisque alteri prodest quantum potest felicitatem suam augeat in aliena; et ut verbo dicam, jus strictum miseriam vitat, jus superius ad felicitatem tendit, sed qualis in hanc mortalitatem cadit. Leibnitz de Usu Actorum Publicorum, § 13.

[2] Lex naturæ est propositio naturaliter cognita, actiones indicans effectrices communis boni. Cumberland, de Legibus Naturæ, cap. v. § 1.

[3] Bentham's Principles of International Law. Works, Part VIII. p. 537. Edit. Bowring.

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.[1]

§ 5. Law of Nature and Law of Nations asserted to be identical, by Hobbes and Puffendorf.

Neither Hobbes nor Puffendorf 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."[2] To this opinion *Puffendorf* 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."[3]

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, Puffendorf 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

[1] Senior, Edinburgh Review, No. 156, pp. 310, 321.

[2] Præcepta utriusque eadem sunt; sed quia civitates semel institutæ inducunt proprietates hominum personales, lex quam, loquentes de hominum singulorum officio, naturalem dicimus, applicata totis civitatibus, nationibus sive gentibus, vocatur jus gentium. Hobbes, De Cive, cap. xiv. § 4.

[3] Cui sententiæ et nos plane subscribimus. Nec præterea aliud jus gentium, voluntarium seu positivum dari arbitramus, quod quidem legis propriæ dictæ vim habeat, quæ gentes tamquam à superiore profecta stringat. Puffendorf, De Jure Naturæ et Gentium, lib. ii. cap. 3, § 23.

nations, and of putting itself in general hostility with the civilized world. As a celebrated English civilian and magistrate (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 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."[1]

The same remark may be made as to what Puffendorf says respecting the privileges of ambassadors, which Grotius supposes to depend upon the voluntary law of nations; whilst Puffendorf 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

[1] Robinson's Admiralty Rep. vol. i. p. 140.

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.[1]

§ 6. Law of Nations derived from reason and usage.

Bynkershoek, (who wrote after Puffendorf, 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 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."[2]

In treating of the question as to the competent judicature in cases affecting ambassadors, he says, "The ancient jurisconsults 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 dic-

[1] Wheaton's History of the Law of Nations, p. 96.

[2] "Jus Gentium commune in hanc rem non aliunde licet dicere, quàm ex ratione et usu. Ratio jubet ut duobus, invicem hostibus, sed mihi amicis, æque amicus sim; et inde efficitur, ne in causâ belli alterum præferam. Usus intelligitur ex perpetuâ quodammodo paciscendi edicendique consuetudine; pactis enim Principes sæpe id egerunt in casu belli, sæpe etiam edictis contra quoscunque, flagrante jam bello. Dixi, *ex perpetuâ quodammodo consuetudine*, quia unum fortè alterumve pactum, quod a consuetudine recedit, Jus Gentium non mutat." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

tates 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 neither conceive of war, nor peace, nor alliances, nor embassies, nor commerce." [1] 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." [2] 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 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." [3]

§ 7. System of Wolf.

The public jurists of the school of Puffendorf had considered the science of international law as a branch

[1] De Foro Legatorum, cap. iii. § 10.
[2] Ibid. cap. vii. § 8.
[3] Ibid. cap. xix. § 6.

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, "That 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."[1]

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."[2]

This presumed consent of nations (*consentium gentium præsumptum*) to the voluntary law of nations he derives from the fiction of a great commonwealth of nations (*civitate 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

[1] Wolfius, Jus Gentium, Pref. § 3.
[2] Wolfius, Proleg. § 25.

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.

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

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.

§ 9. System of Vattel.

It is from the work of Wolf that Vattel 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 deduce from it the rules of a universal law of nations, necessarily admitted among sovereign States. I do not recognize 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.[1]

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 be-

[1] Vattel, Droit des Gens, Préface.

cause 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.[1]

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.[2]

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 be-

[1] Droit des Gens, Préliminaires, §§ vi. vii. viii. ix.

[2] Droit des Gens, Préliminaires, § ix.

tween 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, 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." [1]

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.[2]

§ 10. System of Hefftter.

According to *Heffter*, one of the most recent and distinguished public jurists of Germany, "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 recognize 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

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[1] Droit des Gens, Préliminaires, § xxvii.; Wolf, Proleg. xxv.

[2] Vattel, Droit des Gens, edit. de Pinheiro Ferreira, tom. iii. p. 22.

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, 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*."

Heffter does not admit the term international law (*droit international*) lately introduced and generally adopted by the most recent writers. According to him this term does not sufficiently express the idea of the *jus gentium* of the Roman jurisconsults. 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.[2]

"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 recognizes a law common to all nations by which its international relations are to be regulated. It cannot

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[2] Heffter intimates that he has not been clearly understood by our author. In his late editions he refers for his views to those sections of his work, which, while recognizing, as applicable to nations as well as individuals, the primordial principle, *ubi societas ibi jus est*, declare that, "States admit as obligatory on them only those laws which result from reciprocal consent; though this consent to be valid does not require the formal sanction of treaties nor the express confirmation or homologation of what is established by usage." Das europäische Völkerrecht, §§ 2, 3. The title which M. Bergson has given to his French translation of Heffter, published under the auspices of the author, in Berlin and Paris, in 1857, is "Le Droit International Public de l'Europe."] — *L.*

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 founded upon reciprocity of will. It has neither lawgiver 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." [1]

There is no universal law of nations.

Is there a uniform law of nations? [3] There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions,

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[1] Heffter, Das europäische Völkerrecht, § 2.

The learned Jesuit Saurez has anticipated this view of the moral obligation of the *jus gentium*. "Ratio hujus juris est, quia humanum genus, quamvis in varios populos et regna divisum, semper habeat aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale præceptum mutui amoris et misericordiæ, quod ad omnes extenditur, etiam extraneos et cujuscunque nationis. Quapropter, licet unaquaque civitas perfecta, respublica, aut regnum, sit in se communitas perfecta et suis membris constans, nihilominus quælibet illarum etiam membrum aliquo modo hujus universi prout genus humanum spectat. Nunquam enim illæ communitates adeo sunt sibi sufficientes sigillatim, quin indigeant aliquo mutuo juvamine, et societate, ac communicatione, interdum ad melius esse majoremque utilitatem, interdum vero et ob moralem necessitatem. Hâc ergo ratione indigent aliquo jure, quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magnâ ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediatè quoad omnia: ideoque potuerunt usu earumdem gentium introduci." Saurez, de Legibus et Deo Lægislatore, lib. ii. cap. xix. n. g.

[3] The latest English historian of jurisprudence says, in reference to the law of nations: "The complete recognition of this branch of jurisprudence will not take place until some international code be adopted by the principal civilized nations, promulgated by their authority, expounded by their international tribunals, and enforced by their combined strength in the last resort. Such a system (he says, writing in 1860) partially exists in North America, where the States federally united submit to the Supreme Court of justice those quarrels which, in ancient times, or even now in the greater part of Europe, could not be so peaceably arranged." Heron, History of Philosophy, p. 135.

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."[1] 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.*"[2] *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."[3] *Montesquieu*, in his *Esprit des Lois*, says, that "every nation has a law of nations — even the Iroquois, who eat their prisoners, have one. They send and receive ambassadors; they know the laws of war and peace; the

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Kant proposed, as a means of, at least, approximating his ideal object, *perpetual peace*, a permanent congress of States, by which he meant "a species of voluntary union of the several States, which should be at all times revocable and not, like that of the States of America, a union founded on a public constitution and consequently indissoluble. It is in this way only that the idea can be realized of a public law of nations, which may terminate the differences between peoples by a civil process, like the judicial proceedings among individuals, and not according to the barbarous manner of savages, that is to say, by war." Kant, Doctrine du Droit, Rechtslehre,) traduit par Barni, § lxi. p. 228. Leibnitz had long before suggested a means of producing, what he deemed, the desired result. He regretted that there did not exist in Europe one Christian State, of which the head in spiritual matters should be the Pope, in temporal matters the Emperor. Dissertatio 1ª, Primæ Codicis Gentium Diplomati Parti præfixa, § 15.] — *L.*

[1] De Jur. Bel. ac Pac. lib. i. cap. 1, § xiv. 4.

[2] Bynkershoek, De Foro Legatorum. Vid. supra.

[3] Leibnitz, Cod. Jur. Gent. diplom. Préf.

evil is, that their law of nations is not founded upon true principles."[1]

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 recognized in theory or in practice, have professed to obey, or have in fact obeyed.

An eminent French writer on the science of which we propose to treat, 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 nations."[2]

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.[3]

That very distinguished legal reformer, Jeremy Bentham, had

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[1] Esprit des Lois, liv. i. ch. 3.

[2] Rayneval, Institutions du droit de la nature et des gens, Note 10 du 1r liv. p. viii.

[3] Droit des gens, *Fr.* Diritto delle genti, *Ital.* Derecho de gentes, *Span.* Direito das Gentes, *Portug.* Völkerrecht, *Germ.* Volkenregt, *Dutch.* Folkeret, *Dan.* Folkrätt, *Swed.*

previously expressed the same doubt how far the rules of conduct which obtain between nations can with strict propriety be called *laws*.[1] And one of his disciples has justly observed, that "*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 honor 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."[2] [4]

This law 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 Dr. Zouch, an English civilian and writer on the science, distinguished in the celebrated controversy between the civil and

[1] Bentham, Morals and Legislation, vol. ii. p. 256. Ed. 1823.

[2] Austin, Province of Jurisprudence determined, pp. 147, 207.

[4] "International law is only a rule of moral obligation for nations or states in their political existence. But so far as this international law affects the action of individuals, and is enforced by the authority of some State, it becomes a law in the strict sense and at the same time becomes identified with municipal law, in becoming a part of the law enforced by a State within its own domain or national jurisdiction." Hurd, Topics of Jurisprudence, p. 10.] — *L.*

common lawyers during the reign of Charles II., as to the extent of the Admiralty jurisdiction. He introduced this term as more appropriate to express the real scope and object of this law.[1] An equivalent term in the French language was subsequently proposed by Chancellor D'Aguesseau, as better adapted to express the idea properly annexed to that system of jurisprudence commonly called *le droit des gens*, but which, according to him, ought properly to be termed *le droit entre les gens*.[2] The term *international* law has been since proposed by Mr. 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."[3] 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, and we cannot agree with Heffter in proscribing them. [5

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[1] Zouch, Juris et judicii fecialis, sive *juris inter gentes*. Lond. 1650.

[2] Œuvres de D'Aguesseau, tom. ii. p. 337. Ed. 1773.

[3] Bentham, Morals and Legislation, vol. ii. p. 256.

[5] Bentham invented the term *international law* about 1790, but Zouch was the first to distinguish between *jus gentium* and *jus inter gentes*. Heron says, "The law of nations teaches the rule which ought to be observed. International law is the rule observed." History of Jurisprudence, p. 146. Fœlix in his treatise, as originally published, condemned Mr. Wheaton's application of the term "international law," to the principles which govern the reciprocal relations of States, established by usage or treaties, and which, he contended, are only properly designated as the "law of nations," *droit des gens*. He appropriated *international law*, to indicate the branch of jurisprudence which constitutes the subject of Judge Story's *Conflict of Laws*, and of his own Treatise. "We call international law the collection of the rules recognized as the principle of decision (*raison de décider*) of the conflicts between the laws of different nations, in regard to individual or private rights (*le droit privé des diverses nations*); in other words, international law is composed of the rules relative to the application of the civil or criminal laws of a State in the territory of a foreign State." Fœlix, Du conflit des lois de différentes nations ou du droit international, chap. 1, § 1, note 1. Rev. Etr. et Franç, tom. vii. p. 81. But, in the later editions, the term is recognized, as well for the *jus gentium publicum* as for the *jus gentium privatum*. Droit International privé. tit. prél. ch. 1, § 1, tom. 1, p. 1, 8me ed. Polson objects to the title *International Law*, as used in this treatise, as an unnecessary change from the former nomenclature. Polson, Principles of the Law of Nations, p. 1. On the other hand, Mr. Manning says, that "the phrase *international law* is now in common currency, a definite and expressive term, of which Mr. Bentham claims the fatherhood, and which is almost the only term of his new political nomenclature that has passed into general circulation." Manning's Com-

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." [1] Opinion of Savigny.

It may be remarked, in confirmation of this view, that the more recent intercourse between the Christian nations in 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 recognized by, and reciprocally extended to, Turkey, Persia, Egypt, and the States of Barbary. The independence and integrity of the Ottoman Empire have been long regarded as forming essential ele-

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mentaries on the Law of Nations, p. 2. The term, besides being applied by M. Bergson to his translation of Heffter, from the German, is now generally adopted by continental publicists, including Hautefeuille, the author of the ablest treatises on the science that have appeared in France. He thus defines it: "International law (*droit international*) is that law which regulates and governs the relations of nations with one another." Hautefeuille, Droits des nations neutres, tom. 1, p. 3. The Spanish writer, Riquelme, uses the term in the title to his treatise, "Elementos de Derecho publico *Internacional*," and the South American publicist, Bello, calls his work 'Principios de Derecho *Internacional*." *International law* is, also, used as a generic term by those writers, who distinguish between *international law public* and *international law private*. Hurd's Law of Freedom and Bondage, vol. i. p. 22. Kent's Commentaries, vol. i. p. 2, note (*a*). Westlake, Private International Law, p. 1. Phillimore on International Law, vol. i. p. 2.] — *L.*

[1] Savigny, System des heutigen römischen Rechts, 1 B'd, 1 Buch, Kap. ii. § 11.

ments in the European balance of power, and, as such, have recently become the objects of conventional stipulations between the Christian States of Europe and that Empire, which may be considered as bringing it within the pale of the public law of the former.[1] [6

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[1] Wheaton's Hist. Law of Nations, p. 583.

[6] It was formerly held that in the intercourse between Christian and Mohammedan nations, the latter were entitled to a very relaxed application of the principles established by the States of Christendom to regulate their mutual relations. All recent negotiations, however, between the Sultan and Christian States have been conducted with reference to that law of nations, which is recognized by the civilized powers of Europe and America, and since 1826, when the Janizaries were suppressed, (Annual Reg. 1826, p. 354],) reforms have been made in the internal government of Turkey, which have been supposed to afford to foreign nations a guaranty for her conventional engagements. Though the Turkish Empire was not represented at the Congress of Vienna, nor at any subsequent congress convened for the purpose of considering the general interests of Europe till that of Paris of 1856, the Christian Powers have, for upwards of two centuries, had treaties of commerce with the Porte, and since 1791 they have repeatedly interposed to effect peace between Turkey and one of their number, especially Russia. In 1827, France, Great Britain, and Russia joined in a treaty to compel the Sublime Porte to recognize the independence of Greece, while in 1840 the Western Powers interfered as well to save the Ottoman Empire from being dismembered by the aggressions of the Pacha of Egypt, as from surrendering its independence to the exclusive protectorate of Russia. In 1854, England and France, with the avowed acquiescence of Austria and Prussia, united in a war to which Sardinia, in January, 1855, became a party, professedly, for the purpose of maintaining Turkey as an independent State, essential, as they alleged, to the political equilibrium of Europe, against the Emperor of Russia. He had not only asserted a claim, sanctioned by all the then recent treaties, to a protectorate in Moldavia, Wallachia, and Servia, which provinces enjoy special privileges, but had contended for the right of intervention, as based on repeated conventions, going back to the treaty of Kutschouc-Kaynardgi, of 1774, (Martens Recueil des Traités, tom. ii. p. 297,) in behalf of his co-religionists of the Greek Church generally, constituting three fourths of the European subjects of the Porte.

Though the Ottoman Empire is constitutionally a single State, the whole of which is divided into "Eyalets," of which there are fifteen in Europe, twenty-one in Asia, and three in Africa, (Almanach de Gotha, 1861, p. 863,) there is a practical distinction as to internal matters between the portions of it, both Christian, as the Danubian provinces and Servia and Montenegro, and Mahommedan, as Egypt and Tunis, all of which are only indirectly subject to the authority of the Porte, and those which are directly governed from Constantinople. In 1839, as a means of conciliating the great Powers, while the Porte was engaged in a contest with the Pacha of Egypt, the hatti-scherif of Gulhané, which, at the time, almost assumed the importance of a constitutional charter, was proclaimed to all races and religions. It declared that the imposition and receipt of taxes should no longer be arbitrary, that every one should be taxed equally according to his fortune, that there should be no more inequality in the military service, no more secret trials, and that there should be no more confiscation against innocent heirs on account of the crimes of their fathers. Lesur,

The same remark may be applied to the recent diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America, in which the former has been

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Annuaire, 1839, p. 342. Malte-Brun, tom. v. p. 624. But this decree, like those which preceded it, was without effect.

By the treaty of peace of Paris, of 30th of March, 1856, Great Britain, Austria, France, Russia, Prussia, and Sardinia declare the Sublime Porte admitted to participate in the advantages of the public law and system (*concert*) of Europe. They engage to respect the independence and territorial integrity of the Ottoman Empire, guarantee in common the strict observance of that engagement, and declare that they will consider any act tending to its violation a question of general interest. The treaty further states that the firman of the sovereign which, by ameliorating the condition of his subjects, without distinction of religion or race, perpetuates his generous intentions towards the Christian populations of the Empire, has been communicated to the other contracting Powers, that they recognize the high value of the communication, and that it cannot, in any case, give to those Powers the right to interfere, either collectively or separately, with the relations of the sovereign with his subjects or in the internal administration of the Empire. Martens par Samwer, Nouveau Recueil de Traités, tom. xv. p. 774. For the firman, see Ib. p. 508.

By the treaty of 15th of April, 1856, and in which only Austria, France, and Great Britain united, the contracting parties guarantee, jointly and severally, the integrity of the Ottoman Empire, as solemnly recognized by the treaty of 30th of March, 1856. They declare that every infraction of its stipulations will be considered by the signers of this treaty as a *casus belli*, and that they will communicate with the Porte as to the measures that may be rendered necessary, and agree without delay as to the employment of their naval and military forces. Ib. p. 790.

Notwithstanding the firman and despite the treaty, which was to remove the necessity for foreign intervention, the active interposition of the great Powers was required by considerations of humanity on account of the inability of the Porte to prevent the massacre of the Maronites by the Druses in Syria. This province had been, in 1840, taken from the jurisdiction of the Pacha of Egypt, through the influence of Great Britain, against the remonstrance of France, and restored to the direct government of the Porte. Guizot, Mémoires, tom. iv. p. 354. The Convention of 5th of September, 1860, to which all the signers of the Treaty of Paris, except Sardinia, were parties, declared that the Sultan had accepted the active coöperation of his allies. It provided that a body of European troops, one half of which were to be immediately furnished by France, should be sent to Syria to contribute towards the reëstablishment of tranquility in concert with the Porte, and the Powers were to maintain for the same purpose sufficient naval forces on the coast. Martens par Samwer, Nouveau Recueil de Traités, tom. xvi. p^te 2. p. 638. The occupation, originally fixed at six months, was extended to June 5, 1861, and then only terminated at the earnest demand of England. Annuaire des deux mondes, 1860, p. 541. On the withdrawal of the army, by a protocol signed by the representatives of the great Powers and by the minister of foreign affairs of the Porte, a new constitutional act was established for Libanus, which was to be placed under a single governor, chosen from among the Christian subjects of the Porte, order was to be maintained in "the mountain" by a militia recruited in the country, and Turkish troops were only to enter there on the requisition of the governor. *Moniteur Universel*, 12 Juin, 1861. Revue des deux mondes, tom. 3^me, p. 468.

compelled to abandon its inveterate anti-commercial and anti-social principles, and to acknowledge the independence and

The influence that Austria, France, and England, as well as Russia, have at different times exercised, as respects even the strictly internal relations of the Sultan to his subjects, in matters of municipal administration, and the peculiar provisions, by which jurisdiction is still recognized in the ministers and consuls of all the Christian Powers over their citizens and subjects in the countries of the East, including the protection accorded by them to Franks, though not of their own nationality, render it difficult to apply to the questions, which arise between Turkey and other Powers, the rules derived from the international relations of those States, which reject all interference from abroad in affairs of domestic cognizance.

It is in the immunity from the local jurisdiction of foreigners in Turkey, as in the intervention on account of the Christian subjects of the Porte, that the administration of justice is distinguished from that of Christendom. "Not only did the Turks never think of displacing the private jurisprudence of the Greek Empire in its application to the conquered people, but they have never claimed to subject the private affairs of Christian foreigners within their States to laws so little applicable to them as those of the Koran, leaving them rather to the operation of those laws which, as expressing the common sentiments of the parties, are naturally of force in their mutual dealings." Westlake, Private International Law, § 151.

In the Congress of Paris of 1856, the exceptional condition of foreigners, residing in Turkey, was discussed. The plenipotentiary of the Sultan declared that the privileges acquired by the capitulations with European powers injure their own security and the development of their transactions, by restricting the intervention of the local administration, that the jurisdiction which foreign agents claim over their countrymen constitutes a multiplicity of governments in a government and consequently an insurmountable obstacle to all ameliorations. It was, on the other hand, maintained that although the capitulations had reference to a state of things, to which the treaty of peace would necessarily put an end, and though the privileges for which they stipulate, circumscribe the authority of the Porte to an undesirable extent, it was not less important to proportion the changes to the reforms, which Turkey introduced into her administration, so as to combine the necessary guarantees to foreigners, with those which should arise from the measures which the Porte should adopt. The result of these discussions was the insertion in the protocol of the desire of the plenipotentiaries that negotiations might be opened at Constantinople, after the conclusion of the peace, between the Porte and the contracting Powers, in order to reconcile the legitimate interests of all parties. Martens par Samwer, Nouveau Recueil de Traités, tom. xv. p. 774.

So far, however, from any change having been made in the relations of the Franks to the Turkish authorities, the first article of the treaty of commerce and navigation, concluded at Constantinople, February 25, 1862, provides that "All rights, privileges, and immunities, which have been conferred on the citizens or vessels of the United States of America by the treaty already existing between the United States of America and the Ottoman Empire, (treaty of May 7, 1830,) are confirmed, now and forever, with the exception of those clauses of the said treaty which it is the object of the present treaty to modify; and it is, moreover, expressly stipulated that all rights, privileges, or immunities, which the Sublime Porte now grants, or may hereafter grant to, or suffer to be enjoyed by the subjects, ships, commerce, or navigation of any other foreign power, shall be equally granted to and exercised and enjoyed by the citizens, vessels, commerce, and navigation of the United States of America."

equality of other nations in the mutual intercourse of war and peace. [*

The exemptions from local jurisdiction are thus further impliedly recognized in the 21st article: "It is always understood that the government of the United States of America does not pretend, by any article in the present treaty, to stipulate for more than the plain and fair construction of the terms employed, nor to preclude in any manner the Ottoman government from the exercise of its rights of internal administration when the exercise of these rights does not evidently infringe upon the privileges accorded by ancient treaties or by the present treaty to citizens of the United States or their merchandise."

The operation of the provision of the old treaty that American merchants "shall pay the same duties and other imposts, that are paid by merchants of the most favored friendly powers," in having given us the benefit of the British treaty, appears from the 28th article. "The present treaty, when ratified, shall be substituted for the commercial convention of the 16th of August, 1838, between the Sublime Porte and Great Britain, on the footing of which the commerce of the United States of America has been heretofore placed." 37th Congress, 2d Session, Executive, No. 337.] — *L.*

[* The first American treaty with China was made by Mr. Cushing, in 1844. United States Statutes at Large, vol. viii. p. 592. And agreeably to its provisions new negotiations were entered into by Mr. Reed, which resulted in the treaty of June 18, 1858. This last treaty provides that the minister or highest diplomatic representative of the United States in China shall, at all times, have the right to correspond on terms of perfect equality with the officers of the Privy Council at the capital, and with the governors of certain provinces, and, whenever he has business, to visit and sojourn at the capital and there confer with a member of the Privy Council or another officer of equal rank deputed for that purpose. Provision is made for facilitating his journey and providing him a residence at the capital, at his own expense, and for permitting his permanent residence there, if the same privilege is given to the representative of any other nation. There is, also, an article for the toleration of Christians, as well Chinese converts as citizens of the United States. Treaties of the United States, 1860, pp. 72, 77.

By the treaty between Russia and China, June 1, 1858, the previous right of Russia which had existed for her alone) of sending ambassadors to Pekin is confirmed, and the relations between the chiefs of the Russian and Chinese Empires are not hereafter to be maintained, as previously, by the intervention of the Senate on the one side, and on the other, of the *li-san-iouan*, but by that of the Minister of Foreign Affairs of Russia, and of the President of the Supreme Council of the Empire (*tsziounmunsu*) or of the first minister, on a footing of perfect equality. There is a clause similar to the one in the American treaty, respecting the Christian religion; and provision is made for the admission of missionaries with passports from the Russian consuls or provincial authorities. Annuaire des deux mondes, 1858–9, pp. 1018–20.

Similar treaties were made in 1858, by China with England and France, but their execution having been prevented by hostilities, on occasion of the attempt of the ministers to go to Pekin to exchange their ratifications, they were confirmed by conventions concluded at Pekin, on the 24th and 25th of October 1860. By the second article of the British treaty, it is provided that Her Majesty's representative shall hereafter reside permanently or occasionally at Pekin, as her Majesty may decide. Annual Register, 1860, p. 270]. Annuaire des deux mondes, 1860, p. 726. Appendix, p. 788

The first treaty of the United States with China had been preceded by treaties

§ 11. Definition of international law.

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.[1] [8

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with Siam and Muscat, in 1833, and was followed by one with Borneo in 1850. The mission intrusted to Commodore Perry, who was also the commander of the United States naval forces in the East India Seas, resulted in the conclusion of a treaty with Japan, on the 31st of March, 1854, establishing commercial relations with that empire. The provisions of this treaty received further extension in 1857 and in 1858. In 1856 a treaty was made with Persia. The peculiar stipulations of all the preceding conventions as well as of those with the Barbary Powers will be referred to under their appropriate heads in the subsequent annotations.] —*L.*

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

[8 "All the older writers," Austin says, "on the so-called law of nations, incessantly blend and confound international law as it *is* with international law as it *ought* to be: with that indeterminate something which they supposed it *would* be, if it conformed to the indeterminate something which they style the law of nature.

"Of all the more celebrated writers on the so-called law of nations, Von Martens, of Göttingen, was the first to perceive steadily the palpable difference in question. He was the first to sever distinctly *actual* international morality from the morality, whatever it be, which *ought* to obtain between nations. From the customary conduct of nations in their various relations to one another, he endeavored to collect the morality, which nations habitually observe. And to this actual morality, collected by this induction, he gave the distinct name of '*positive* international law,' or '*practical* international law,' '*positives* oder *practisches* Völkerrecht.'" Province of Jurisprudence defined, p. 235, note, 2d edition.

As frequent reference will be made in the course of these annotations, to the views of M. Hautefeuille, a brief explanation of his system is deemed requisite.

In his admirable work, "*Des droits et des devoirs des nations neutres en temps de guerre maritime,*" Hautefeuille subjects the different matters of which he treats to the double test of what he terms the primitive law (*droit primitif*) and the secondary law (*droit secondaire*). From the primitive law, that is, from the natural law, flows the entire international law. Its principles are not only to be found in Grotius and in Hobbes, but they are in the hearts of all men. The natural law executed with exactitude would secure to all nations the tranquil exercise of all their rights, that is to say, peace and happiness. Oftentimes, however, rulers of nations lose sight of the best established truths and endeavor to torture the innate notions of justice and injustice in order to turn them to their advantage, and they even openly violate them, invoking the convenient, but most unjust, maxim *salus populi suprema lex.*

To prevent this fatal and too often voluntary blindness, and to remedy it where it already exists, nations have found it necessary to recall, in an express manner, the principles of the primitive law, to consign them to writing, and to make them the objects of special conventions. Treaties may contain two kinds of stipulations, those relative to the immutable principles of primitive international law, and those which

§ 12. Sources of international law.

The various sources 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.

2. Treaties of peace, alliance, and commerce declaring, modifying, or defining the preëxisting 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

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only concern the secondary and particular interests of the contracting parties, the decision of which consequently is entirely optional on their part and which they may arrange according to their own pleasure. "I have only," says the author, "to occupy myself with the first kind, which alone really touch international law."

The jurisprudence, the species of law resulting from human conventions, constitutes what the publicists call the conventional, positive, or secondary law. Hautefeuille adopts the last denomination. Certain usages have been established among civilized nations, without ever having been written in any treaty, or been the object of a special and express convention. These usages, not numerous, conformable to the primitive law, of which they serve to regulate the application, form a part of the international law which might be called the customary law (*droit coutumier*). He deems it preferable to consider them as part of the secondary law.

Every nation is in the habit, in order to regulate its conduct towards other nations, to publish laws and ordinances, either permanent or adapted to circumstances, or to make known, by diplomatic notifications, the line of conduct which it proposes to follow. Whatever the matter treated of in those laws, ordinances, or notifications, or the position of the nation which promulgates them, whether belligerent or pacific, powerful or weak, they can never be invoked as rules of international law. Their application is naturally and necessarily limited to the subjects of the prince or the citizens of the country which has issued them. "The law destined to regulate all the relations of nation to nation, the international law, is composed of only two parts the primitive law and the secondary law; the first containing the principles, the absolute basis of this law; the second recalling these principles and securing their execution by taking the necessary measures to accomplish it."—Tom. 1, p. 6–13, (2ème. ed.) Discours Préliminaire.]—*L.*

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.[1]

"Treaties," says Mr. 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."[2] [9]

3. Ordinances of particular States, prescribing rules for the conduct of their commissioned cruisers and prize tribunals.

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

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[1] Bynkershoek, Quest. Jur. Pub. lib. i. cap. 10.

[2] Madison, Examination of the British Doctrine, &c., p. 39.

[9] The collections of Dumont and Rousset, of Wenckius (Wenck) and of Martens, with the continuations of the last work, furnish a series of treaties from the year 800 to the present time. The "*Corps Diplomatique du Droit des Gens*" of Dumont and Rousset contains the treaties from the time of Charlemagne to that of its publication in 1731, which are included in eight volumes. There are seven volumes "*Supplément au Corps Diplomatique*," but two only of them are devoted to treaties, bringing them down to 1738. Two more volumes are the "*Histoire des Traités de Paix, du 17me siècle*," and four volumes entitled "*Négotiations secrètes touchant la Paix de Munster et d'Osnabrück*" complete the collection, making twenty-one volumes folio. The "*Codex Juris Gentium*" of Wenckius contains, in three volumes, the European treaties between 1735 and 1772, and the "*Recueil de traités*" of G. Fr. de Martens, beginning, in 1761, with the continuations by Charles de Martens, Saalfeld, Fr. Murhard, Ch. Murhard, Pinhas, and Samwer, had extended in 1860 to forty-nine volumes.] — *L.*

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 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 an eminent English civilian of our own times. "When," says Sir William Grant, "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." [1]

[1] Marshall on Insurance, vol. i. 425. The commentary of Valin upon the marine

4. The adjudications of international tribunals, such as boards of arbitration and courts of prize.

As between these two sources of international law, 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. [10

5. Another depository of international law is to be found in the written opinions of official jurists, 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, 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.[1] [11

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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.

[10 Mr. Wheaton published in his "Life of William Pinkney," who was a member of the joint British and American commission, under the treaty of 1794, the opinions delivered by Mr. Pinkney on the questions of international law involved in the various reclamations before that tribunal. See Wheaton's Life of Pinkney, pp. 193–372. Some cases decided by the joint British and American Commission, under the Convention of 1853, are cited in our notes from the Reports of that Commission printed by Congress in 1856.] — *L.*

[1] Senior, Edinburgh Review, No. 156, art. 1, p. 311.

The written opinions delivered by Sir Leoline Jenkins, Judge of the High Court

[11 The publicity which attends all transactions in the United States has led to the printing of a large portion of the diplomatic papers, which have been occasioned

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.

CHAPTER II.

NATIONS AND SOVEREIGN STATES.

§ 1. Subjects of international law.

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

§ 2. Definition of a State.

Cicero, and, after him, the modern public jurists, define a State to be a body political, or society of men,

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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 published as an Appendix to Wynne's Life of that eminent civilian. (2 vols. fol. London, 1724.) 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 honor to their author as they were addressed to a monarch who gave but little encouragement to these virtues, and as Jenkins himself was too much of a courtier to practice them, except in his judicial capacity. Madison, Examination of the British Doctrine, &c., p. 113. Lond. edit. 1806.

by their negotiations with foreign powers from the commencement of the Revolution to the present time. The diplomatic correspondence of the Revolution, edited by Jared Sparks, is comprised in twelve volumes, and the correspondence from its termination, till the Federal Constitution went into operation, 1783–1789, in seven volumes. Besides their publication in the congressional documents, a selection was made, several years since, of twelve volumes of "State Papers," including negotiations from 1789 to 1818; and the whole of the documents in reference to foreign affairs are in the course of being reprinted at the expense of the government. The opinions of the Attorneys-General, given on the application of the President, or of one of the Heads of Department, from 1789 to 1857, and which embrace numerous cases arising under the law of nations, have likewise been published. They comprise eight vols. 8vo. Washington, 1852–8. Those of Attorney-General Cushing, contained in the three last volumes, constitute in themselves a valuable body of international law.

The voluminous parliamentary papers, laid from time to time before the two Houses, afford means of access to the negotiations with which Great Britain has

united together for the purpose of promoting their mutual safety and advantage by their combined strength.[1]

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 incorporated, first, by the crown, and afterwards by Parliament, for the purpose of carrying on trade to 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

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been concerned, and which consequently embrace discussions on all the important diplomatic questions of modern times.

In the *exposé* of the situation of the French Empire presented to the Senate and *Corps législatif*, at the present (1862) session, not only is there a chapter giving a full *resumé* of the foreign relations of the country, but it is accompanied by *pièces justificatives*, extending to the whole correspondence of the past year. Nor is the publication of diplomatic papers confined even to constitutional governments, but all appeal to the public sentiment of mankind through the press. Some attempts have been made to preserve these State papers in a form more permanent than the daily newspapers, and at the same time more accessible than legislative documents. Besides special collections or those relating to particular negotiations, this has been effected to a limited extent by the (English) Annual Register, commenced in 1758, and of which the volume for 1860 has been published. A fuller compilation was made for several years, commencing in 1820–1, by the Librarian of the Foreign-Office, under the title of "British and Foreign State Papers." The American Annual Register, which was ably edited from 1825–6 to 1832–3, will be found to contain many valuable documents of the period.

The French *Annuaires* are much more complete, especially with reference to foreign countries, than the English Annual Registers, and in the course of the preparation for this work, the editor has had frequent occasion to consult for documents the *Annuaire* of Lesur, which began in 1818 and terminated in 1855, and the *Annuaire des deux mondes* from 1850 to 1860 inclusive, published as an accompaniment of the *Revue des deux mondes*, as well as the *Continuations* to the *Grand Recueil* of Martens, the more recent volumes of which, far from being confined to the mere text of treaties, give the negotiations by which they have been preceded, and many other diplomatic notes, connected with international discussions. For the latest foreign documents *Le Nord Journal International*, published at Brussels, has in general been followed.] — *L.*

[1] "Respublica est cœtus multitudinis, juris consensu et utilitatis communione societas." Cic. de Rep. l. i. § 25.

"Potestas civilis est, qui civitati præest. Est autem civitas cœtus perfectus liberorum hominum, juris fruendi et communis utilitatis causâ sociatus." Grotius, de Jur. Bel. ac. Pac. lib. i. cap. i. § xiv. No. 2. Vattel, Prélim. § 1, et liv. 1, ch. 1, § 1. Burlamaqui, Droit naturel, tom. ii. part 1, ch. 4.

control of the crown, and still less can it be so considered since it has been subjected to that control. Those powers are exercised by the East India Company in subordination to the supreme power of the British empire, the external sovereignty of which is represented by the company towards the native princes and people, whilst the British government itself represents the company towards other foreign sovereigns and states. [12

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.[1]

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.

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 Austrian, Prussian, 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, Prussia, and Russia, respectively. [13

[12 Since 1858 the political power of the East India Company has ceased, and India is now governed directly by the crown, through a responsible minister, the "Secretary of State for India." Annual Register, 1858, p. 130].] —*L.*

[1] . . . "nec cœtus piratarum aut latronum civitas est, etiam si fortè æqualitatem quandam inter se servent, sine quâ nullus cœtus posset consistere." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. iii. § ii. No. 1.

[13 Unity of race, confirmed by the popular sentiment, as indicated by universal suffrage, is the basis of the new "kingdom of Italy." Unsuccessful in 1848–9, this principle was the plea for the incorporation in 1860–1, with Sardinia (already augmented through the conquest of Lombardy from Austria and its cession by France), of Tuscany, Parma, Modena, the greater part of the Pontifical States, and also of the extensive Kingdom of the Two Sicilies. "The change," said Cavour, "which has just been accomplished in Italy, has not only been inspired by the principle of liberty, like the English revolution of 1688; it has been founded on the right of nationality which gives it additional force." Parlement Italien séance du 9 Avril, 1861.

The cession, by the treaty of 24th March, 1860, of Savoy and Nice, by Sardinia, to France, has also been defended on the same ground of national autonomy. The king, in his proclamation to the inhabitants, said: "I could not forget that the great

§ 3. Sovereign princes the subjects of international law.

Sovereign princes may become the subjects of international law, in respect to their personal right, 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. [14

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affinities of race, language, and customs, render your relations with France more intimate and natural." Martens par Samwer, Nouveau receuil, tom. xvi. p^ie 2. p. 541.

Though no more fortunate than the Italians in 1848–9, a government based on a common nationality has never ceased to occupy the popular mind of Germany. The *Nationalverein* responds to a general aspiration, which most of the *unitaires* look to Prussian hegemony, as the Italians did to that of Piedmont, to accomplish. Though the king of Prussia has regarded, as an infringement on his prerogative, the recent expression of the wishes of his people, through their representatives, for the acknowledgment of Victor Emanuel, as king of Italy, his Minister of Foreign Affairs, even while remonstrating, in his note of October 13th, 1860, against the course of Piedmont, with regard to the other Italian States, recognized "the high value of the sentiment of nationality as the essential and distinctly avowed moving principle of the Prussian policy, which in Germany will always have for its object the development and union, by a more complete and powerful organization, of the national strength." Baron Schleinitz to the Comte Brassier de Saint-Simon. Annuaire des deux mondes, 1860, p. 786. And the late Chamber of Deputies, before its dissolution, declared that a more intimate alliance of the German States, than is afforded by the international bond of the confederation, can alone respond to the moral, political, and economical interests of the German people, and that it cannot be longer deferred, in presence of the uncertain political situation of Europe, without putting in danger, by the extraordinary exertions required of Prussia, the independence and existence as well of all Germany as of Prussia. Le Nord, 3 Mars, 1862.

Diversity of origin has been deemed an obstacle to bringing into one Christian empire, capable of maintaining its independence as well against Russia as against Western Europe, the Greeks and the Roumanic populations of Wallachia and Moldavia, with Servia and other provinces of Slavonic origin, now under the *suzeraineté* of the Porte or subject to its direct government. At the same time, the principle of nationality is being invoked for uniting the conterminous peoples of common race in Turkey and Austria.

It is also adduced, without assailing the existing dynastic institutions, to prevent the consolidation of the Austrian Empire by the legislative union of Hungary with the Slavo-Germanic provinces. On the other hand, the *Slave* populations of the triune kingdom of Dalmatia, Croatia, and Sclavonia, which is deemed necessary to complete the appendages of the crown of St. Stephen, showed themselves in 1848 more opposed to the Hungarian Magyars than to Austria, and though a reincorporation with Hungary may be deemed by the Diet of Agram a matter of temporary expediency, really sympathize with the peoples of their own race in Herzegovine and Turkish Croatia, while the *Roumains*, who form two thirds of the population of Transylvania, desire to unite themselves with those of their nationality in Wallachia and Moldavia. Le Nord, 1861–2.] — *L.*

[14 "A sovereign unites in his person both a public or international character and

§ 4. Individuals, or corporations, the subjects of international law.

Private individuals, or public and private corporations may, in like manner, incidentally, become the subjects 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. 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'Etat 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.

§ 5. Sovereignty defined.

Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally.

Internal sovereignty.

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.

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that of an individual. The latter, however, can never be permitted to prejudice the former. Thus nothing prevents the sovereign of a State from acquiring and exercising the civil rights in a foreign country or consenting to a restriction of those possessed by him there. In the quality of an individual he may become the vassal or subject of a foreign prince, may enter into the civil or military service of a foreign power and may enjoy political or parliamentary rights. Thus the Duke of York, though sovereign Bishop of Osnabrück, sat, in 1787, as a peer of England in the House of Lords. The Duke of Cumberland, the late King of Hanover, furnishes a more recent example. (The present King retains his father's place in the British peerage.) These different functions are only incompatible, when their exercise violates the constitutional law of one of the States, or is of a nature to compromise the honor and dignity of the sovereign. The sovereign must then renounce the foreign functions, or at least suspend their exercise." Heffter, Das europäische Volkerrecht, § 52.] — *L.*

External 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.

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.

§ 6. Sovereignty, how acquired.

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.[1]

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, sovereign, and independent States," on the 4th of July, 1776. It was upon this principle that the Supreme Court determined,

[1] Kluber, Droit des Gens moderne de l'Europe, § 23.

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 recognized prior to the 4th of July, 1776, and which law had been enacted prior to that period, would not have been equally obligatory.[1] [15

[1] Cranch's Rep. vol. iv. p. 212. — M'Ilvaine *v.* Coxe's Lessee.

[15] Whether the Treaty of 1783 was the origin of the territorial sovereignty of the States of the American Union, was discussed during the long pending controversy in relation to the North-Eastern Boundary of Maine. The British Secretary of State for Foreign Affairs, Lord Aberdeen, having assumed, in his note of August 14 1828, as the ground for claiming exclusive possession till the award of the arbiter was rendered, that the American title to the territory in dispute was to be deduced solely from the treaty of peace, it was replied: —

'Before the independence of the United States, not only the territory in dispute, but the whole of the adjoining Province and State, was the property of a common sovereign. . . .

"To use the words of a celebrated authority, 'When a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother-country, naturally becomes a part of the State equally with its ancient possessions.'

"From the principle here established, that the political condition of the people of the mother-country and of the colonies during their union, is the same, the inference is unavoidable that, when a division of the empire takes place, the previous rights of the common sovereign, on matters equally affecting both of the States, accrue as well to the one as to the other of them.

"From the possession of the disputed territory by his Britannic Majesty, anterior to 1776, a title by prescription or first occupancy might, therefore, with the same propriety, be asserted for Massachusetts, of which the present State of Maine was then a component part, as for Nova Scotia, through which latter province the pretensions of New Brunswick are deduced.

"He cannot admit 'that the United States rest their claim to the possession of the territory upon the Treaty of 1783,' in any other sense than that in which his Britannic Majesty founds, on the same treaty, his claims to New Brunswick. By the instrument in question, which, besides being a treaty of peace, was one of partition and

The external sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect

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boundaries, the title of the United States was strengthened and confirmed, but it was not created. It had existed from the settlement of the country. Where this treaty is applicable, it, equally with all other conventional agreements between nations, is of paramount authority, and many of its provisions are, from their nature, of a permanent character; but its conclusion, though it created new claims to territory, did not destroy any prior right of the people of the United States that was not expressly renounced by it.

"The title to the district in controversy, as well as to all the territory embraced in the original States, is founded, independently of treaty, on the rights which belonged to that portion of his Britannic Majesty's subjects who settled in his ancient colonies, now embraced in the American Union, and upon the sovereignty maintained by the United States, in their national character, since the 4th of July, 1776.

"To the general rights of colonists under the law of nations, allusion has already been made. To the particular situation of the inhabitants of the country, now comprised in the United States, it is therefore not necessary further to refer, than to recall to the recollection of Lord Aberdeen that they were not a conquered people, but subjects of the King of Great Britain, enjoying the same rights with Englishmen; and, although they acknowledged the authority of a common sovereign, the right of the Parliament of the mother-country, in which they were unrepresented, to interfere in their internal concerns, was never acquiesced in.

"From the Declaration of Independence, in 1776, the claims of the United States, in their national character, to all the territory within the limits of the former thirteen colonies, are dated. Of the fact of their being in possession of sovereignty, comprising, of course, the rights of territorial jurisdiction, no further proof can be required than that they exercised all its highest prerogatives. Nor were these confined to the limits of their own country. Treaties of amity and commerce, and of alliance, were made with France, as early as 1778; and similar arrangements were entered into by the United States with other foreign powers, before any settlement of boundary was attempted to be defined by convention, between the American States and the adjacent provinces.

"The terms, as well of the provisional articles of 1782, as of the definitive treaty of the succeeding year, may be cited in confirmation of the view here taken. By the first article of both these instruments, his Britannic Majesty acknowledges the said United States; namely, New Hampshire, Massachusetts Bay, &c., &c., 'to be free, sovereign, and independent States; that he treats with them as such; and, for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same, and every part thereof.'

"This language is sufficiently different from that employed when it is intended to convey territory by a grant in a treaty, to forbid the application of the rules in the cases of cession to the renunciation of his claims made by his Britannic Majesty.

"If, by tracing the limits in the treaty by which the boundaries of the United States were attempted to be defined, England ceded to them the territory on the one side of the line, the possessions of Great Britain on the other side must be considered as held under a cession from the United States. On these provinces, indeed, the independent States of America had more or less pretensions, at different times during the war; and they were also entitled to prefer claims to a portion of them, founded

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 recognize 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 recognized.

§ 7. Identity of a State.

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.[1]

How affected by internal revolution.

If this change be an internal revolution, merely altering the municipal constitution and form of government, the State remains the same; it neither loses

on their being an acquisition from France at the time they formed an integral part of the empire.

"There is, however, nothing in a treaty of partition or boundaries, that conflicts with the idea of a perfect equality between the contracting parties. For the purpose of preventing all future disputes, the avowed object of the second article of the Treaty of 1783, such conventions are frequently entered into between two nations of the same antiquity. And it is believed that the exposition which has been given, is sufficient to show that the character of the right which the United States are entitled to advance, under the Treaty of 1783, does not imply any 'admission of the previous title of Great Britain to the territory in question,' considered distinct from that of Massachusetts." Mr. W. B. Lawrence, Chargé d'Affaires, to the Earl of Aberdeen, August 22, 1828. Cong. Doc. H. R. 20 Cong. 2d Sess. No. 90, p. 76. Amer. Annual Register, 1827-8-9, Part II. p. 86. British and Foreign State Papers, 1827-8, p. 584.] — *L.*

[1] Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. 9, § 8. Rutherforth's Inst. b. ii. c. 10, §§ 12, 13. Heffter, Das europäische Völkerrecht, § 24.

any of its rights, nor is discharged from any of its obligations.[1]

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.[2]

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.[3] 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.[4] [16

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[1] Grotius, lib. ii. cap. 9, § 8. Rutherforth, b. ii. c. 10, § 14. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1–3.

[2] Vattel, Droit des Gens, liv. ii. ch. 4, § 56. Martens, Précis du Droit des Gens, liv. iii. ch. 2, §§ 79–82.

[3] Wheaton's Rep. vol. iii. p. 610, United States v. Palmer; — Ib. vol. iv. p. 63, The Divina Pastora; — Ib. p. 502, The Nuestra Signora de la Caridad.

[4] See Part IV. ch. 3, § 3. Rights of War as to Neutrals.

[16] The recognition of belligerent rights in a colony or portion of a State, in revolt from, or in opposition to the metropolis, is not to be confounded with the ac-

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

§ 8. Identity of a State, how affected by external violence.

knowledgment of the absolute independence of such province or colony. Thus, even before their own formal declaration of independence, France and Spain opened their ports to the North American colonists, and treated them as an independent people. Annual Register, 1776, p. 182.* Their private, as well as public cruisers were not only admitted into the ports of the above mentioned States, but the same friendly disposition was manifested by all the other European powers, except Portugal, restrained through the influence of England. Ib. p. 183.* In 1779, the States-General, in reply to a demand of the British Ambassador to deliver up prizes brought by Paul Jones into the Texel, declared that they would in no respect take upon themselves to judge of the legality or illegality of those who, on the open sea, take any vessels, which do not belong to their country. Annual Register, 1779, p. 249.* Martens, Nouvelles Causes Célèbres du droit des gens, tom. 1, p. 118. This case is referred to in a note of Baron Van Zuylen to Mr. Pike, Minister of the United States, at the Hague, Sept. 17, 1861. The Netherlands Minister of Foreign Affairs remarks that: "the United States, whose belligerent rights were not recognized by England, enjoyed at that time the same treatment in the ports of the United Provinces, as the Netherlands authorities now accord to the Confederate States." Papers relating to foreign affairs, accompanying the President's Message, December 1861, p. 355.

An illustration of the claim of belligerent rights, on the part of a colony, engaged in vindicating its independence of the mother-country, is to be found in the reclamations persistently maintained by the United States against Denmark from 1779, almost to the present time, on account of three prizes captured during the war of the American Revolution by the squadron under Paul Jones, and carried into a port of Norway then under the government of Denmark, by whom they were delivered up to England. The first demand was made by Dr. Franklin, and was met by Count Bernstoff without denying the belligerent rights of the United States, by the situation of Denmark as to England, and subsequently through the Danish Minister in Paris, by a reference to the obligations of a treaty never produced. In the course of the negotiation a sum was offered as an indemnity, but rejected as inadequate. Sparks's Diplomatic Corr. vol. iii. p. 121; Sparks's Life of Franklin, vol. viii. pp. 407, 425, 433, 462.

The claim was again brought forward by Mr. Jefferson, under the instructions of the old Congress, in 1788. Dipl. Corr. 1783, vol. vii. p. 365. In 1805, Mr. Madison, Secretary of State, declared it would be superfluous to add any remarks to evince the illegality of the interposition in the war between the United States and Great Britain; for were it admissible that it should be considered, in the view of Denmark, as merely a civil war, the restoration of the prizes to the other party in the war would still be unauthorized, and the right of the United States to compensation consequently valid. State Papers, vol. iii. p. 4.

In 1806, Congress passed an act making an appropriation to the commander of one of the frigates, "on account of his claim for prize money," "to be deducted from his proportion of the money, which may be obtained from the Danish government." U. S. Statutes at Large, vol. vi. p. 61.

It was presented anew by Secretary Monroe to the Danish Minister in 1812, who was requested to bring it to the notice of his government. It received in 1820, the

conquered and ceded country may be a portion only, or the whole of the vanquished State. If the former, the original State

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sanction of the Committee of Foreign Affairs of the Senate, and of that of the House of Representatives, on a report of the Secretary of State, in 1837. Report, H. Rep. 2 Sess. 23 Congress, vol. ii. p. 389. Ib. 2 Sess. 24 Congress, vol. ii. p. 297.

The subject is fully discussed in its bearing on the belligerent rights of a State, before the acknowledgment of its independence, in a despatch from Mr. Wheaton to Mr. Upshur, Secretary of State, Nov. 10, 1843, and which was adopted as the basis of instructions to the American representative at Copenhagen. Testing the case by the principles laid down in the text, Mr. Wheaton concludes that, in the absence of any treaty with England to exclude the prizes of her enemy, and of any previous prohibition to the United States, by either of which means their prizes might have been refused admission without any violation of neutrality, they had a right to presume the assent of Denmark to send them into her ports; the more especially had they such a right, when based as in the actual case, on necessity from stress of weather. When once arrived in the port, the neutral government of Denmark was bound to respect the military right of possession, lawfully acquired through war, by capture on the high seas, and continued in the port to which the prize was brought. He added that there was no ground for the application of the *jus postliminii*, which could only take place between subjects of the same State or allies in the war, a neutral State having only a right to interfere to deprive the captor of his possession, when the capture has been made in violation of neutral sovereignty, within the limits of the neutral State or by a vessel equipped there.

Mr. Calhoun, Secretary of State, reports May 20, 1844, that the subsequent treaties were no bar to the claim; and Mr. Legaré, in his instructions to the Chargé d'Affaires at Copenhagen, May 31, 1843, expresses "the confident hope entertained by the President, that there will be no further delay in the settlement of claims which, notwithstanding the extreme degree of patience hitherto manifested in regard to them, this government can never consent to relinquish." Ex. Doc. H. R. 1 Sess. 28 Congress, vol. vi. No. 264.

In 1846, on the ground that the act of the old Congress had vested in the captors the stipulated share in the property taken by them, and that the nonfeasance of the government in not presenting the claim against Denmark made them liable to the captors, a bill was reported in the House of Representatives to pay to the representatives of Paul Jones, with the same provision as that contained in the act of 1806, as to the indemnity claimed from Denmark, the proportion of the prizes to which they would be entitled, with interest, according to the valuation of Dr. Franklin. In 1847, the same proposition was made by a committee of the Senate. Senate Rep. 29 Cong. 2 Sess. No. 63. In 1848, the act to pay the representatives of Paul Jones, and others, entitled to the proportion of prize money, as above ascertained, was passed. U. S. Statutes at Large, vol. ix. p. 214. This subject was incidentally brought to the notice of Congress in the special Session of July 1861, by a resolution as to the distribution of the fund. Cong. Globe, 37th Cong. 1 Sess. p. 312. See further, as to this case, "Introductory Remarks" to the last edition of this work, p. cxxxiv. Edinburgh Review, October 1861, No. cxxxii. Art. II. p. 299, Am. ed.

During the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed by them belligerent nations, and entitled to all the sovereign rights of war against their enemy. See *inter al.* Wheaton's Rep. vol. iii. p.

still continues; if the latter, it ceases to exist. In either case, the conquered territory may be incorporated into the conquer-

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610, United States *v.* Palmer; — Ib. vol. iv. p. 52, The Divina Pastora; — Ib. vol. vii. p. 337, The Santissima Trinidad. And when Texas declared herself independent of Mexico, in March 1836, to a remonstrance that the Texan flag was admitted to the port of New York, it was answered that in the previous civil wars between Spain and her colonies, "it had never been held necessary as a preliminary to the extension of the rights of hospitality to either party, that the chances of war should be balanced, and the probability of eventual success determined. For this purpose it had been deemed sufficient that the party had actually declared its independence, and at the time was actually maintaining it." Mr. Forsyth, Secretary of State to the Mexican Minister, September 20, 1836. President's Message, &c., December, 1836, p. 79. To the same effect was the opinion of Mr. Butler, May 17, 1836. Opinions of Attorney-General, vol. iii. p. 120.

During the Greek Revolution the same course was pursued by the British government. To a complaint of the Porte against allowing the Greeks belligerent rights, in which it was observed that "to subjects in rebellion no national character could belong," Mr. Secretary Canning replied through the Minister at Constantinople, that "the character of belligerency was not so much a principle as a fact; that a certain degree of force and consistency acquired by a mass of population engaged in war, entitled that population to be treated as a belligerent, and even if their title was questionable, rendered it the interest well understood of all civilized nations so to treat them. Their cruisers must either be acknowledged as belligerents or dealt with as pirates. When the British government acknowledged the rights of either belligerent to visit, and detain British merchant vessels having enemy's property on board, and to confiscate such property, it was necessarily implied, as a condition of such acknowledgment, that the detention was for the purpose of bringing the vessel detained before an established court of prize, and that confiscation did not take place, until after condemnation by such competent tribunal." Lord J. Russell's Speech, House of Commons, May 6, 1861.

But it is to be remembered that in the question of belligerent rights, as of a more formal acknowledgment of independence, the decision is with the government and not with the courts, and it was accordingly held by the Supreme Court of the United States in 1821, in a case as to the validity of a condemnation by a Court of Admiralty at Galveston, that, as the United States had not hitherto acknowledged the existence of any Mexican Republic or State at war with Spain, so that Court could not consider legal any acts done under the authority or flag and commission of such Republic or State. Wheaton's Reports, vol. vi. p. 193, Nueva Anna and Liebre.

In the pending hostilities between the United States and the so-called Confederate States of America, it was early agreed by France and England that they would adopt one and the same course of proceeding as to the seceded States. This communication was made to Mr. Sanford by M. de Thouvenel, and by Lord John Russell to Mr. Dallas, in April 1861. The reasons for coming to this decision were set forth in a despatch, which the Ministers of France and England were respectively charged to read to the Secretary of State, but which Mr. Seward, after being apprised of its contents, refused to hear. In addressing Mr. Dayton, at Paris, under the date of June 17th, 1861, he says, "That paper does not expressly deny the sovereignty of the United States of America, but it does assume, inconsistently with that sovereignty, that the United States are not altogether and for all purposes one sovereign power, but this nation consists of two parties of which this government is one.

ing State as a province, or it may be united to it as a coördinate State with equal sovereign rights.

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

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

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France proposes to take cognizance of both parties as belligerents, and for some purposes to hold communion with each. The instruction would advise us, indeed, that we must not be surprised if France shall address herself to a government which she says is to be installed at Montgomery, for certain explanations. This intimation is conclusive in determining this government not to allow the instruction to be read to it." Papers relating to Foreign Affairs, *ut supra*, p. 209.

The other Powers of Europe have also adopted the principle of neutrality in the pending contest. The greater or less extent to which, in consequence, belligerent rights or privileges of commerce have accrued to the so-called Confederate States, will more fully appear when we reach the section, Part IV. c. 3, § 3, which treats of neutrality.

Nor is it always to the advantage of the old government that belligerent rights should be withheld from the revolutionary government by foreign powers; for as long as the proceedings are deemed an insurrection in the body of the State, it might remain liable for the acts of the revolutionists to third parties, as well as be deprived, as respects them, of the belligerent rights of blockade, &c. Mr. Canning to Mr. Del Rios, March 25, 1825.

To the same effect Mr. Adams, Minister in London, in adverting, June 14, 1861, to the concession of belligerent rights to the Confederates, remarks: "At any rate there was one compensation; the act had released the government of the United States from responsibility for any misdeeds of the rebels towards Great Britain. If any of their people should capture or maltreat a British vessel on the ocean, the reclamation must be made only on those who had authorized the wrong. The United States would not be liable." Papers relating to Foreign Affairs, &c. p. 89.

On the secession of South Carolina from the American Union, inquiries were addressed by several foreign Ministers at Washington, as to the exaction of penalties from foreign consuls and masters for violations of the regulations or revenue laws of the United States, occasioned thereby, and the effect of payment of duties to the *de facto* collector of customs, on his requirement, in the absence of a collector of customs of the United States, and also as to the responsibility of the United States for goods, then stored or thereafter deposited in the United States' bonded warehouses, and for the losses occasioned to foreign ships by the removal of lights, beacons and buoys, by the *de facto* authorities. It was answered that, while the President regretted that any injury should happen from the anomalous state of things existing at Charleston, to the commerce of foreign and friendly nations, he declined giving any assurances in regard to the supposed cases, but said that the reliance which the Minister could not but feel on the justice of the American government would, no doubt, quiet all apprehension of ultimate wrong to British subjects, if such wrong could possibly be avoided. Mr. Black, Secretary of State, to Lord Lyons, January 10, 1861. Cong. Doc., Senate, 36 Cong. 2d Sess. See as to the parties to a civil war, Part IV. ch. 1, § 7, editor's note.] — *L.*

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 coördinate State, were conquered by France, and annexed to the French republic by the treaties of Campo Formio and Luneville. 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.[1]

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-Cobourg having been subsequently elected king of the Belgians by the national Congress, the terms and condition 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.[2] [17

[1] Wheaton's Hist. Law of Nations, p. 492.

[2] Wheaton's Hist. Law of Nations, pp. 538–555.

[17] It in nowise belongs to foreign Powers, not interested in the subject of dispute, to decide whether the admission of a new State constitutes an offence to anterior rights. In respect to them this creation is an event, an historical occurrence as to the allowance or prevention of which they are to be guided by policy and morality. On the other hand, it constitutes a legal question with regard to nations till then united under a common sceptre, a question which must be decided according to the rules of the internal public law and the solution of which besides requires the con-

§ 10. Province or colony asserting its independence, how considered by other foreign States.

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

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currence of the Powers, which have stipulated the integrity of the political union previously established or which have a legitimate and direct interest, and not merely that of an accessory guarantee. In every case the new State must fulfil the engagements, which date from the preceding union. Heffter, Das europäische Völkerrecht, § 23.

"Supposing," says the most recent Italian writer on public law, "the union and incorporation of several independent provinces to have been accomplished by the mutual will of their populations and that there are many and solemn proofs and attestations of a complete and spontaneous adhesion, or that it has become such, through the influence of time and habit, with the entire satisfaction of their legitimate interests; it is certainly not allowable for any of these provinces afterwards to disavow and dissolve the union under the pretext that it would be more advantageous for it to separate and remain alone or become aggregated to another State with which, it may be admitted, it would obtain more protection or would avoid the evils arising from intestine discord and general corruption. We repeat that even in such a case secession would transcend the limits of every legitimate right." Mamiani, Nuovo Diritto Europeo, cap. 3, § 2.] — *L.*

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.[1] 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 shown its ability to maintain its independence, the recognition of its sovereignty by other foreign States is a question of policy and prudence only. [18

Recognition of its independence by other foreign States.

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.[2] [19

[1] Wheaton's Hist. Law of Nations, Part III. § 12, pp. 220–294. Ch. de Martens, Nouvelles Causes célèbres du Droit des Gens, tom. i. pp. 370–498.

[18] Mr. Canning said, if he piqued himself upon anything in the South American negotiations it was upon the subject of *time*. As to the propriety of admitting States, which had successfully shaken off their dependence on the mother-country, to the rights of nations, there could be no dispute. There were two ways of proceeding were the case more questionable — recklessly and with a hurried course to the object which might be soon reached or almost as soon lost, or by another course so strictly guarded that no principle was violated and no offence given to other powers. H. of Com. Feb. 4, 1825. Hansard's Parl. Deb., 2d Series, vol. xii. p. 78.] — *L.*

[2] Vesey's Ch. Rep. vol. ix. p. 347, The City of Berne *v.* The Bank of Eng-

[19] It belongs exclusively to the political department of the government to recog-

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

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: —

I. As to its treaties of alliance and commerce.

II. Its public debts.

III. Its public domain and private rights of property.

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land; — Edwards's Adm. Rep. vol. i. p. 1, The Manilla, Appendix IV. Note D.; — Wheaton's Rep. vol. iii. p. 824, Hoyt *v.* Gelston; — Ib. p. 634, The United States *v.* Palmer.

nize or to refuse to recognize a government in a foreign country, claiming to have displaced the old and established a new one. Howard's Rep. vol. xiv. p. 38, Kennett *v.* Chambers. The same principle is applied to a State of the Union. So far as the United States are concerned, in the case of conflicting claims to the government of a State, it belongs to the political and not to the judicial power of the Federal government to decide them. Howard's Rep. vol. vii. p. 1, Luther *v.* Borden.

"Recognition," said Sir James Mackintosh, "is a term used in two senses, having nothing very important in common. The true and legitimate sense of the word *recognition* as a technical term of international law, is that in which it denotes the explicit acknowledgment of the independence of a country by a State which formerly exercised sovereignty over it." Speaking of the proposed acknowledgment of the independence of the Spanish-American Colonies, he remarks: "What we have to do is not *recognition* in its first and most strictly proper sense. It is not by formal stipulations or solemn declarations that we are to recognize the American States, but by measures of practical policy, the most conspicuous part of which is the act of sending or receiving diplomatic agents. It implies no guaranty, no alliance, no aid, no approbation of the successful revolt, no intimation of an opinion concerning the justice or injustice of the means by which it has been accomplished. The tacit recognition of a new State not being a judgment for the new government or against the old, is not a deviation from a perfect neutrality or a just cause of offence to the dispossessed ruler." Speech, 15th June, 1824. Mackintosh's Works, p. 749.

There is no proposition of law upon which there exists a more universal agreement of all jurists than that the virtual and *de facto* recognition of a new State (recognizing the commercial flag and sanctioning the appointment of consuls to its ports,) gives no just cause of offence to the old State, inasmuch as it decides nothing concerning the asserted rights of the latter. Before a formal recognition by sending ambassadors and entering into treaties with the new State by foreign Powers, there should be a practical cessation of hostilities on the part of the old State, which may long precede the theoretical renunciation of her rights, and there should be a consolidation of the new State, so far as to be in a condition of maintaining international relations with other countries, an absolute *bonâ fide* possession of independence as a separate kingdom, not the enjoyment of perfect and undisturbed internal tranquillity, — a test too severe for many of the oldest kingdoms, — but there should be the existence of a government acknowledged by the people over whom it is set, and ready to prove its responsibility for their conduct when they come in contact with foreign nations. But the refusal or the withholding of the consent of the old State, after the semblance of a present contest has ceased, upon the bare chance that she may one day or other recover her authority, is no legitimate bar to the complete and

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

formal recognition of the new State by the other communities of the world. Phillimore on International Law, vol. ii. pp. 17–22.

Recognition of a dependency separating itself from the community of which it was a member, may take place explicitly under the express provisions of a treaty of friendship or alliance, in which the independence of the new State is guaranteed by its ally; thus, France recognized and guaranteed the independence of the United States of America by the treaty of Paris, Feb. 6, 1778, and Prussia in a similar manner recognized and guaranteed the Confederation of the Rhine by the treaty of Tilsit, July 7, 1807, or by implication upon the mutual interchange of accredited envoys, whereby either State acknowledges *de facto* the competency of the other to negotiate and contract engagements under the law of nations. Twiss, Law of Nations, vol. i. p. 20.

President Jackson, in his special message of 21st December, 1836, in relation to the recognition of Texas, thus refers to the principles on which the United States have proceeded in the acknowledgment of the independence of new States: —

"All questions relative to the government of foreign nations, whether of the old or of the new world, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them, until the clearest evidence was in their possession, to enable them not only to decide correctly, but to shield their decision from every unworthy imputation. In all the contests that have arisen out of the revolutions of France, out of the disputes relating to the crowns of Portugal and Spain, out of the revolutionary movements in those kingdoms, out of the separation of the American possessions of both from the European governments, and out of the numerous and constantly occurring struggles for dominion in Spanish America, so wisely consistent with our just principles, has been the action of our government, that we have, under the most critical circumstances, avoided all censure, and encountered no other evil than that produced by a transient estrangement of good will in those against whom we have been, by force of evidence, compelled to decide."

More than ordinary caution was recommended in the case of Texas, as well on account of a large portion of the civilized inhabitants being emigrants from the United States, as from the people of that country having openly resolved, on the acknowledgment of their independence, to seek for admission into the Union as one of the Federal States. Congressional Globe, 1836–7, p. 44.

The course of the United States in the recognition of Texas, and which is placed on the same footing with that of Mexico herself, is explained and sustained in the instructions of Mr. Webster, Secretary of State, to Mr. Thompson, Minister to Mexico, April 15, 1842. Webster's Works, vol. vi. p. 434. And Mr. Everett says, of its subsequent annexation, "as a question of public law, there never was an extension of territory more naturally or justifiably made." Mr. Everett, Secretary of State, to the Comte de Sartiges, Dec. 1, 1852. Cong. Doc. 32 Cong. 2 Sess. Senate, Ex. Doc. No. 13, p. 20.

In 1848, a provisional government was formed in Hungary, which was followed, in 1849, by an attempt to dissolve the connection between that kingdom and the empire of Austria, (with which, though having distinct fundamental laws and other political institutions, it was united under one sceptre,) and to make the Hungarian nation an independent European State. This effort would, probably, have been successful, if the parties immediately concerned had been left to themselves. The intervention of Russia, however, at the request of Austria, but which was placed by

Treaties. I. Treaties are divided by the text-writers into *personal* and *real*. The former relate exclusively to the persons of the con-

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the Czar on the ground that his own safety was endangered by what was doing and preparing in Hungary, rendered useless all efforts on the part of the revolutionary government. The United States did not interfere in this contest, but they exposed themselves to the complaint of Austria by the measures which they took to be the first to welcome Hungary into the family of nations, by investing an agent in Europe, (Mr. A. Dudley Mann,) with power to declare their willingness to recognize the new State, in the event of its ability to sustain itself. This subject having not only been referred to in the annual message of President Taylor, in December, 1849, but the instructions of Mr. Mann having been communicated to the Senate, by whom they were ordered to be printed, in March, 1850, the Austrian Chargé d'Affaires, (Mr. Hülsemann,) addressed, (September 30, 1850,) in conformity to the instructions of his government, a note to the Secretary of State, (Mr. Webster,) protesting as well against certain expressions in the instructions of the agent as against the steps taken by the United States to ascertain the progress and probable result of the revolutionary movements in Hungary. He furthermore remarked, that "those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy;" and he reminded the Secretary, that "even if the government of the United States were to think it proper to take an indirect part in the political movements of Europe, American policy would be exposed to acts of retaliation and to certain inconveniences, which could not fail to affect the commerce and industry of the two hemispheres."

Mr. Webster in his answer, (December 21, 1850,) shows the consistency of the course pursued by President Taylor with the neutral policy which has invariably guided the government of the United States in its foreign relations, as well as with the established and well-settled principles of international intercourse and the doctrines of public law.

Questions of prudence, he said, arise in reference to new States brought by successful revolutions into the family of nations, but it is not required of neutral powers to await the recognition of the parent States. Within the last thirty years eight or ten new States have established independent governments, within the colonial dominions of Spain, and the same thing has been done by Belgium and Greece. All these governments were recognized by some of the leading powers of Europe, as well as by the United States, before they were acknowledged by the States from which they had separated themselves. If the United States had formally acknowledged the independence of Hungary, though no benefit would have resulted from it to either party, it would not have been an act against the law of nations, provided they took no part in her contest with Austria. But the United States did no such thing. Mr. Webster repudiates the idea of Mr. Mann being a spy, whom he defines to be "a person sent by one belligerent to gain secret information of the forces and defences of the other, to be used for hostile purposes." He considers the imputation as distinctly offensive to the American government; and he says, that had the government of Austria subjected Mr. Mann to the treatment of a spy, it would have placed itself out of the pale of civilized nations; and that if it had carried, or attempted to carry into effect any such lawless purpose, the spirit of the people of this country would have demanded immediate hostilities to be waged by the utmost exertion of the power of the Republic. He reasserts that the steps taken by President Taylor, now protested against by the Austrian government, were warranted by the law of nations,

tracting 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

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and were agreeable to the usages of civilized States. He defends the language of the instructions, as being a document addressed to its agent, and in reference to which the government of the United States cannot admit the slightest responsibility to the government of His Imperial Majesty. "In respect to the honorary epithet bestowed in Mr. Mann's instructions on the late chief of the revolutionary government of Hungary, Mr. Hülsemann will bear in mind that the government of the United States cannot justly be expected in a confidential communication to its own agent, to withhold from an individual an epithet of distinction, of which a great part of the world thinks him worthy, merely on the ground that his own government regards him as a rebel. As to the hypothetical retaliation, which Mr. Hülsemann threatened, the United States are quite willing to take their chances and abide their destiny. While performing with strict fidelity all their neutral duties, nothing will deter either the government or the people of the United States from exercising, at their own discretion, the rights belonging to them as an independent nation, and of forming and expressing their own opinions, freely and at all times, upon the great political events which may transpire among the civilized nations of the earth. The note concluded by expressing the President's satisfaction that, in the new Constitution of the Austrian Empire, many of the great principles of civil liberty, on which the American institutions stand, are recognized and applied.

Mr. Hülsemann replied, March 11, 1851, stating that the arguments in Mr. Webster's note had not had the effect of changing the views of the Imperial Government as to Mr. Mann's mission, or the tenor or terms of his instructions, but he declined all ulterior discussion of that annoying incident as leading to no practical result, and concluded in these words: "President Fillmore declared in his message of the 2d of December last, that he was determined to act towards other nations as the United States desired that other nations should act towards them; and that he had adopted as a rule for his policy, good-will towards foreign powers, and the abstaining from interference in their internal affairs. Austria has not demanded, and will never demand, anything but the putting into practice of those principles; and the Imperial Government is sincerely disposed to remain in friendly relations with the government of the United States, so long as the United States shall not deviate from those principles."

Mr. Webster, in acknowledging, on 15th March, 1851, the receipt of Mr. Hülsemann's note, also expressed the President's regret that his former note was not satisfactory to the Imperial Government as well as his gratification to learn that that government desired the continuance of the friendly relations between the two governments, and that the sentiments, respecting the international relations between the United States and foreign powers, contained in his last annual message, and in accordance with which he intended to act, met the approbation of Mr. Hülsemann's government. He concluded by stating that the principles and policy declared, in answer to the note of 30th September, to be maintained by the United States, as appropriate to their condition, and as being fixed and fastened upon them by their character, their history, and their position among the nations of the world, will not be abandoned or departed from until some extraordinary change shall take place in the general current of human affairs. Webster's Works, vol. vi. pp. 488–506.] — *L.*

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.[1]

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 preëxisting 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 organization 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. [20

Public debts.

II. As to public debts — whether due to or from the revolutionized State — a mere change in the form of government, or in the person of the ruler, does not affect their

[1] Vattel, Droit des Gens, liv. ii. ch. 12, §§ 183–197.

[20] On the occasion of the annexation of Texas, the British Government instructed their Minister to call the attention of the Texan Government to the treaties existing between Great Britain and Texas, and to remind them that the voluntary surrender of their independence by the government and people of Texas will not annul those treaties. On the contrary, that their stipulations would remain in precisely the same situation as if the Texans had remained an independent power. Earl of Aberdeen to Mr. Elliot, Dec. 3, 1845. Similar representations were made by France through M. Saligny, Chargé d'Affaires. Senate Doc. 29 Cong. 1 Sess. vol. vii. No. 375.] — *L.*

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 authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution.[1] The 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.[2] [21]

[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 9, §§ 8, 1–3. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1, 2, 3.

[2] Heffter, Das europäische Völkerrecht, § 24. Bona non intelliguntur nisi deducto aere alieno.

[21] The obligations incurred by the United States towards the creditors of Texas, by her annexation and admission, in 1845, as a member of the Union, has been deemed a case for the application of the rule in the text, though modified by the consideration that, except so far as her Federal duties interfered, Texas retained her internal sovereignty. By the treaty negotiated between the United States and Texas, but which was rejected by the Senate, in 1844, the United States assumed the payment of the debts of Texas, to an amount not exceeding $10,000,000, to be paid, however, almost exclusively out of the proceeds of the sales of her public lands; and President Tyler, in referring to the subject, in his annual message, December, 1844, says, "We could not with honor take the lands, without assuming the full payment of all incumbrances on them." By the resolution of Congress, 1st March, 1845, proffering annexation to Texas, and admission as a State on certain conditions, which were accepted by her, it is provided that the State of Texas, after ceding all public buildings, fortifications, and other property pertaining to the public defence, shall retain all the public funds, debts, taxes, and dues of every kind due the Republic of Texas, and all vacant and unappropriated lands lying within her limits, to be applied to the payment of the debts and liabilities of the Republic, and the residue, after discharging those debts and liabilities, to be disposed of as the State may direct; but in no event were those debts and liabilities to become a charge upon the government of the United States. Notwithstanding, however, this disclaimer of liability, by an act of Congress of 9th of September, 1850, on a cession to the United States of a portion of the territory of Texas and a further relinquishment by her of all claim upon the United States, for her debts or for indemnity on account of the surrender of the property, referred to in the resolution of annexation, the United States agreed to pay to the State of Texas $10,000,000 in consideration of the establishment of boundaries, cessions of claims to territory and relinquishment of claims, but no more than $5,000,000 were to be paid, till the creditors holding bonds, on which the duties for imports were pledged, should specially release all claims against the United States on account of such bonds. By the annexation and admission into the Union of Texas, all subsequent duties on imports were, of course, payable into the Federal Treasury; and this was understood to be the ground for the distinction between the creditors made in the act. Annual Reg. 1844, p. 305];

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

U. S. Statutes at Large, vol. v. p. 797; vol. viii. p. 446; Cong. Globe, 1849–50, Appx. p. 1564.

The Attorney-General having given an opinion (Opinions of Attorneys-Generals, vol. vi. p. 130,) that no part of the reserved $5,000,000 could be paid, until the complete discharge of the United States by all the creditors in question, an act was passed, on the 28th of February, 1855, by which $7,500,000 were appropriated *pro rata* among the creditors ascertained, in the manner therein mentioned, to be within the provisions of the act of the 9th of September, 1850, on their releasing all claim against the United States, the appropriation to be in lieu of the payment provided by that act. U. S. Statutes at Large, vol. x. p. 617.

The liability of the United States for the debts of Texas came before the mixed commission, under the convention with England of 1853, in the case of a British subject who had received, before the annexation, bonds secured by a pledge of the faith and revenue of Texas. It was disposed of on the ground that never having been made a subject for international interposition against the United States, it did not fall within the scope of the convention; but it seemed to be admitted that the liability of the United States, if any, arose, not from the merger, but from the transfer, under the Constitution of the United States, to the Federal Government of the duties on imports. It was said by the American Commissioner, in announcing his opinion, that it was an inaccurate view of the case to regard this annexation as an entire absorption of one nation and its revenues by another. "Texas is still a sovereign State, with all the rights and capacities of government, except that her international relations are controlled by the United States and she has transferred to the United States her right of duties on imports." And he seemed to consider any claim arising from the previous pledge of such duties to be limited to their value. The British Commissioner held that "the obligation of Texas to pay her debts is not in dispute, nor has it been argued that the mere act of her annexation to the United States has transferred her liabilities to the Federal Government, though certainly, as regards foreign governments, the United States is now bound to see that the obligations of Texas are fulfilled. It is the transfer of the integral revenues of Texas to the Federal Government, that is relied on as creating the new liability." Decisions of the Commission of Claims under the Convention of 1853, pp. 405–420.

The 13th article of the treaty of the 19th of April, 1839, for the separation of Belgium from Holland, provides for the division of the debt, by transferring to the charge of Belgium *rentes* to the amount of five millions of florins. Lesur, Annuaire, &c. 1839, Appx. p. 82.

In the treaties of Zurich, of November 10, 1859, by which the greater part of Lombardy was ceded by Austria to France and by the latter to Sardinia, there were, among other provisions, stipulations for the apportionment, between Austria and the new government, of the debts and assets of the *Monte Lombardo-Veneto* as well as of the national loan therein referred to, and that the new government should succeed to the rights and obligations resulting from contracts of the Austrian government for objects of public interest concerning the ceded territory and reciprocally for the reimbursement of moneys paid as caution-money, deposits or consignments by Lombard and Austrian subjects, communal districts, public establishments, and religious

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.[1] 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

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securities into the public banks of Austria and Lombardy respectively. The railroads formed the subject of a special article. Annual Register, 1859, p. 226. Marbois par Samwer, Nouveau Recueil, tom. xvi. pp. 519, 527.] — *L.*

[1] Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1–3. Vattel, Droit des Gens, liv. i. chap. 21, §§ 260, 261.

foreign governments and their subjects treat with the actual head of the State, or the government *de facto*, recognized 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 an usurper.[1] 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.[2]

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 power 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.[3]

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 14, § 16.

[2] Kluber, Droit des Gens, sec. ii. ch. 1, § 258.

[3] Conversationes Lexikon, art. *Domainen-verkauf.* Heffter, Das europäische Völkerrecht, § 188. Kluber, öffentliches Recht des deutschen Bundes, § 169. Rotteck und Welcker, Staats-Lexikon, art. *Domainen-kaufer.*

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 rigor 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 present government (Louis Philippe's) 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. [23

[23 The United States have not deemed it necessary for the various annexations of territory acquired by purchase, as in the case of Louisiana and Florida ceded by France and Spain, or of the portions of Mexico obtained from that country by conquest and purchase, to ask the recognition of other powers. In the case of Texas, whose independence of Mexico had not been acknowledged at the time of its annexation, Mr. Buchanan, Secretary of State, writes to Mr. Almonte, Minister of Mexico, March 10, 1845: "The undersigned is instructed to say that the admission of Texas, as one of the States of the Union, having received the sanction both of the legislative and executive departments of the government, is now irrevocably decided so far as the United States are concerned. Nothing but the refusal of Texas to ratify the terms and conditions, on which her admission depends, can defeat this object. It is too late at present to reopen a discussion that has already been exhausted, and again to prove that Texas has long since achieved her independence of Mexico, and stands before the world both *de jure* and *de facto* as a sovereign and independent State amid the family of nations." Cong. Doc., Senate, 1 Sess. 29 Cong. This subject had been a matter of correspondence, particularly with reference to the slavery question and the recognition of the independence of Texas by Mexico, between Mr. Packenham the British Minister at Washington, (communicating a despatch of the Earl of Aberdeen, of the 25th Dec. 1843,) and Mr. Calhoun, Secretary of State. It was also the

§ 12. 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.[1]

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 Supreme Ruler and Governor of the universe. The sovereignty of other States is limited and qualified in various degrees.

Equality of sovereign States.

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.

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subject of instructions from the latter to Mr. King, Minister at Paris, under date of the 12th of August, 1844. Calhoun's Works, vol. v. p. 379.

In Europe, however, when a change of territory is made, as it may affect the general balance of power and the relative influence of States, it is usual to communicate the fact to other States. In the case of the annexation of Savoy and Nice to France in 1860, the Imperial Government deemed it proper to enter into explanations not only with the French legislature, but it was the subject of diplomatic correspondence with other governments. In the Emperor's speech to the Chambers it is said: "Looking to the transformation of Northern Italy, which gives to a powerful State all the passes of the Alps, it was my duty, for the security of our frontiers, to claim the French slopes of the mountains." Annual Reg. 1860, p. 215]. The British government remarked that "a demand for cession of a neighbor's territory made by a State so powerful as France, and whose former and not very remote policy of territorial aggrandizement brought countless calamities upon Europe, cannot well fail to give umbrage to every State interested in the balance of power and in the maintenance of the general peace." The cession was, also, objected to by Great Britain, as affecting the stipulations of the Congress of Vienna respecting that portion of Savoy which formed part of the neutrality of Switzerland; and it was, furthermore, on that account the subject of repeated protestations on the part of the Swiss Government. Ib. Public Doc. 215, 257, 259. Annuaire des deux mondes, p. 87. See, also, Part IV. ch. 3, § 4, editor's note.] — *L.*

[1] Vattel, Droit des Gens, liv. i. chap. 1, § 4.

§ 13. Semi-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.[1]

City of Cracow.

Thus 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.[2]

By the final act of the Congress of Vienna, Art. 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 either 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.[3]

United States of the Ionian Islands.

By the convention concluded at Paris on the 5th of November, 1815, between Austria, Great Britain, Prussia, and Russia, it is declared (Art. 1,) that the islands of Corfu, Cephalonia, Zante, St. Maura, Ithaca, Cerigo, and Paxo, with their dependencies, shall form a single, free, and independent State; under the denomination of the United States of the Ionian Islands. The second article provides that this State shall be placed under the immediate and exclusive protection of His Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors. By the third article it is provided that the United States of the Ionian Islands shall regulate,

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[1] Kluber, Droit des Gens moderne de l'Europe, § 24. Heffter, Das europäische Völkerrecht, § 19.

[2] Acte du Congrès de Vienne du 9 Juin, 1815, arts. 6, 9, 10.

[3] Martens, Nouveau Recueil, tom. ii. p. 386. Klüber, Acten des Wiener Congresses, Band V. § 138. By a Convention, signed at Vienna, Nov. 6, 1846, between Russia, Austria, and Prussia, the city of Cracow was annexed to the Empire of Austria. The governments of Great Britain, France, and Sweden protested against this proceeding as a violation of the Federal act of 1815.

with the approbation of the protecting power, their interior organization: and to give all parts of this organization the consistency and necessary action, His Britannic Majesty will devote particular attention to the legislation and general administration of those States. He will appoint a Lord High Commissioner who shall be invested with the necessary authority for this purpose. The fourth article declares, that, in order to carry into effect without delay these stipulations, the Lord High Commissioner shall regulate the forms of convoking a legislative assembly, of which he shall direct the operations, in order to frame a new constitutional charter for the State, to be ratified by His Britannic Majesty. The fifth article stipulates, that, 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 are placed, as well as for the exercise of the rights incident to this protection, His Britannic Majesty shall have the right of occupying and garrisoning the fortresses and places of the said States. Their military forces shall be under the orders of the commander of the troops of His Britannic Majesty. The sixth article provides that a special convention with the government of the United States of the Ionian Islands shall regulate, according to their revenues, the object relating to the maintenance of the fortresses and the payment of the British garrisons, and their numbers in the time of peace. The same convention shall also ascertain the relations which are to subsist between this armed force and the Ionian government. The seventh article declares that the merchant flag of the Ionian Islands shall bear, together with the colors and arms it bore previous to 1807, those which His Britannic Majesty may grant as a sign of the protection under which the United Ionian States are placed; and to give more weight to this protection, all the Ionian ports are 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, shall be accredited to the United States of the Ionian Islands; and they shall be subject to the same regulations to which consuls and commercial agents are subject in other independent States.[1]

On comparing this act with the stipulations of the treaty of

[1] Martens, Nouveau Recueil, tom. ii. p. 663.

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" is completely sovereign, though under the protection of Austria, Prussia, and Russia; whilst the Ionian Islands, although they are to form "a single free and independent State," under the protection of Great Britain, are 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 are not only constantly obedient to the commands of the protecting power, but they are governed as a British colony by a Lord High Commissioner named by the British crown, who exercises the entire executive, and participates in the legislative power with the Senate and legislative Assembly, under the constitution of the State.[1] [28]

Besides the free city of Cracow and the United States of the Ionian Islands, several other semi-sovereign or dependent States are recognized by the existing public law of Europe. These are:

1. The Principalities of Moldavia, Wallachia, and Servia, under the *suzeraineté* of the Ottoman Porte and the protectorate of Russia, as defined by the successive treaties between

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[1] Martens, Précis, du Droit des Gens, liv. i. ch. 2, § 20. Note *a*, 8me édition.

[28] At the commencement of the Russian war an opinion had been given, as announced by Lord John Russell, in the House of Commons, 2d of June, 1854, by the law officers of the crown, that the Ionian Republic being under the protection of Her Majesty, could not be considered as a neutral State, and that the Ionian Republic must take part with Great Britain, with respect to the war in which she was engaged, though not bound to carry on active measures of warfare, and that, therefore, vessels sailing under the Ionian flag were not to be considered as sailing under a neutral flag. Hosack on Rights of Neutrals, p. 117. It was, however, subsequently decided in the British Court of Admiralty that the right of Great Britain was drawn from treaty not from conquest, and that by the 7th article of the Convention creating the protectorate, the trading flag of the Ionian Islands was acknowledged as the flag of a free and independent State. Great Britain might have included the Ionian Islands in the war, but she had not done so. The Ionian Islands are not included in the treaties made by Great Britain, unless specially named, nor were Ionian vessels within the clause of the order in council of the 15th April, 1854, which forbade British ships from trading with enemy's ports. Jurist, vol. i., N. S., p. 549. The Leucade. See also Twiss, Law of Nations, vol. i. p. 35.] — *L.*

these two powers, confirmed by the treaty of Adrianople, 1829.[1] [[24]

[1] Wheaton's Hist. of the Law of Nations, pp. 556–560.

[[24] Martens, Précis du Droit des Gens, liv. i. ch. 2, § 20, gives the following reference to authorities, establishing the claims of the Princes of Moldavia and Wallachia, to be included among semi-sovereign States. "Le Bret, Magazin, t. i. n. 2, p. 149; Busching Magazin, t. iii. n. 3; Voyez le traité de Käinardgi, de 1774, dans mon Recueil, t. iv. p. 606, de la 1re. ou t. ii. p. 286, de la 2e édit.; la convention expl., de 1779, dans mon Recueil, t. iii. p. 349 de la 1re. t. iii. p. 653, de la 2e édit.; le hatti-schérif de la Porte, du 28 Decémbre, 1783, dans mon Recueil, t. iii. p. 281, de la 1re. p. 710, de la 2e édit.; le traité de Yassy, de 1792, dans mon Recueil, t. v. p. 67.; le traité de Bucharest, de 1812, dans mon Nouveau Recueil, t. iii. p. 397."

The position of these Principalities was altogether anomalous, even before their occupation, in 1853, by Russia. By the several treaties determining their relations to the Porte, in 1774, 1779, 1792, 1812, further confirmed by the stipulations with Russia, in 1821, it is provided among other things, that Moldavia and Wallachia shall each have a chargé d'affaires of the Greek faith at Constantinople, who shall be received with all the consideration accorded to such persons under the law of nations. Klüber, Droit des Gens moderne de l'Europe, § 24, Ann. Reg. 1821, p. 250].

By the treaty of Adrianople, of 1829, between Russia and Turkey, it was stipulated that Moldavia and Wallachia being placed under the *suzeraineté* of the Porte, and Russia having guaranteed their prosperity, they were to preserve all their ancient privileges and immunities, including the enjoyment of their religion, perfect security, a national and independent administration, and the full liberty of trade. By a separate act annexed to the treaty, it was provided that the Hospodars, whose election it was stipulated by the treaty of Bucharest, of 1812, should be made by the General Assembly of the Divan, according to the ancient usage of the country, should be invested with their dignity for life, except in case of abdication or expulsion for specific crimes. They were to administer the internal government with the assistance of the Divans. The Sublime Porte engaged to retain no fortified place on the left bank of the Danube, nor to permit any settlement of its Mohammedan subjects in Moldavia and Wallachia. Mussulmans possessing landed property were to sell it to natives, and all the Turkish cities on the left bank of the Danube were to be restored to Wallachia. The governments of the Principalities, as being independent in their internal administration, were authorized to establish quarantine regulations, and to maintain a sufficient military force to compel obedience to their decrees. A pecuniary indemnity was to be substituted for the various contributions in kind, and the forced service (*corvée*) previously exacted. The inhabitants were to enjoy unlimited freedom of trade, subject only to such restraint as the Hospodars, with the consent of the Divans, might impose for the benefit of the country, and they were to be allowed to navigate the Danube in their own vessels as well as to trade to other parts of the Turkish dominions, with passports from their own governments.

In the case of Moldavia and Wallachia the treaty of Paris, of 30th March, 1856, provides for the continuance, under the *suzeraineté* of the Porte, of all existing privileges, including those of an armed force to preserve internal tranquillity and the safety of the frontiers as well as for ascertaining by a Divan *ad hoc* in each province the wishes of the populations in reference to the definitive organization of the Principalities. It was not, however, till the Porte had been compelled, on the demand of

2. The Principality of Monaco, which had been under the Protectorate of France from 1641 until the French revolution,

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the contracting powers and after the suspension of diplomatic intercourse by France, Prussia, Sardinia and Russia, whose propositions were ultimately concurred in by England and Austria, to annul as fraudulent the first elections, that the Divans were convened in October 1857. They were in each province nearly unanimous for a union under an hereditary Prince chosen from among the reigning houses of Europe. Their union had been proposed by France in the Congress of Paris, and Austria on that occasion supported Turkey, who still continued to oppose it, while England indicated a disposition to agree with the views of the Sultan and of the conterminous power.

The plenipotentiaries of the contracting powers finally concluded the convention of the 19th of August, 1858. It provides among other things that the Principalities, constituted under the denomination of the United Principalities of Moldavia and Wallachia, remain under the *suzeraineté* of the Sultan. Express reference is made to the capitulations emanating from the sultans Bajazet I., Selim I., Soliman II., and Mahomoud II., which regulate their relations with the Porte and which many hatti-scherifs, particularly that of 1834, have confirmed. Conformably, also, to the 22d and 23d articles of the treaty of 30th March, 1856, the Principalities continue to enjoy under the collective guaranty of the Porte, within the limits stipulated by the agreement of the contracting parties with the suzerain court, the privileges and immunities of which they are in possession. The executive power in each was to be exercised by the Hospodar elected by the assembly for life and who might be either a Wallachian or Moldavian, and the legislative by the Hospodar and general assembly or, in cases of common interest, by a central commission of the two Principalities. Moldavia was to pay a tribute of 1,500,000 and Wallachia of 2,500,000 piastres. The investiture of the Hospodars to be conferred by the Sultan, and the suzerain court was to arrange with the Principalities the measures of defence for their territories, in case of external aggression and to invite by an understanding with the guaranteeing powers the necessary measures for the reëstablishment of order if disturbed. The international treaties concluded by the Porte with foreign powers to be applicable, so far as they do not affect their immunities. The Hospodars were to be represented at the suzerain court by agents, Moldavians or Wallachians, not subject to any foreign power. In case of the violation of the immunities of the Principalities and the suzerain power fails to give redress, their proclamations may be brought by their agents before the representatives of the guaranteeing powers at Constantinople. There was to be a high Court of Cassation common to the two Principalities. All Moldavians and Wallachians to be equal before the laws, and persons of all Christian rites to enjoy equally political rights, which may be extended to those of other religions.

Conformably to the treaty of 30th of March, 1856, a hatti-scherif, in the terms of the Convention, was published in the Principalities. Contrary to the spirit, though not to the terms of the Convention, the same individual was elected, January 1859, Hospodar of Moldavia, and on the 6th of February, Hospodar of Wallachia. The question of the double election was submitted to the conference, which met anew on the subject and, at last, on the 5th of September, 1859, the Porte agreed, in consideration of the recommendation made by five of the guaranteeing powers, to confer exclusively, and for this time only, the investiture of Colonel Couza, as Hospodar of Moldavia and Wallachia, delivering to him two separate firmans, and that this prince, exceptionally

was replaced under the same protection by the treaty of Paris, 1814, art. 3, for which was substituted that of Sardinia by the treaty of Paris, 1815, art. 1.[1] [[25]

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called to the *hospodarat* of both Principalities, should maintain in each a separate and distinct administration. An administrative union, at least for the life of Couza, has since been conceded. In the conferences preceding the Convention of 1858, attempts were made, but without effect, to abolish the jurisdiction of foreign consuls within the Provinces. Annuaire des deux mondes, 1857-8, pp. 3, 689. Ib. 1858-9, pp. vi-xii. Martens par Samwer, Nouveau Recueil, tom. xv. p. 778; Ib. tom. xvi. p^le 2, pp. 41, 51.

As to the Servians, the treaty of Adrianople, of 1829, provided for carrying into effect the separate article of the Convention of Ackerman, of 25th September, 1826, which itself referred to the eighth article of the treaty of Bucharest, of 1812, the first which relieved them from the direct dominion of the Porte. By it, Turkey had, among other stipulations, bound herself to restore the districts separated from Servia, to grant the Servians freedom of religion and commerce, the election of their national chiefs, the independence of the internal administration, the consolidation of the several imposts into a single tax, permission for the merchants to travel with their own passports in the Ottoman States, the establishment of hospitals, schools, and printing-offices, and to provide for the exclusion of Mussulmans, with the exception of the Turkish garrisons, from Servia. The hatti-scherif, by which further concessions were to be confirmed, was to be communicated to Russia, whose government was to be kept informed of the execution of the stipulations of the treaty of Bucharest, in behalf of the Servians. The Prince of Servia, who was elected for life, shared his power with the Senate, also elected for life. A general assembly, (*Skuptschina,*) named by all the citizens, controlled the acts of the Prince and the Senate. Martens, Recueil de Traités, Supplément, tom. vii. p. 397; Annual Reg. 1829, pp. 476], 481]; Ib. 1826, p. 349]; Lésur, Annuaire Hist. 1826, app. p. 100; Annuaire des deux mondes, 1850, p. 798. By a firman of 1833, the Turks in Servia were to sell their property in five years and evacuate the country or retire within the citadels. Annuaire des deux mondes, 1857-8, p. 695.

What were the political relations of these Principalities at a period subsequent to the above mentioned treaties between Turkey and Russia, is elsewhere considered by our author. In a despatch to the Secretary of State, dated at Berlin, 24th May, 1843, Mr. Wheaton says: "Russia has a concurrent voice in the appointment of the Hospodars of Wallachia and Moldavia, and the right of interposing in the elections of the Princes of Servia. It seems probable that the control of Russia over Servia will hereafter be exercised in the same manner as in the Principalities of Moldavia and Wallachia, where Russian consuls exercise a similar influence over the local authorities to that exercised by the British residents at the courts of the native princes of India, whose dominions are not yet formally annexed to the Anglo-Indian Empire." The entire independence of these Principalities has been repeatedly the subject of consideration with the cabinets of Europe; and it was understood that the treaty

[1] Martens, Nouveau Recueil, tom. ii. pp. 5, 687.

[[25] Sardinia having ceded to France the county of Nice, by which Monaco was *enclavé*, the Prince of Monaco, by a treaty of the 2d of February, 1861, granted for a pecuniary indemnity to France, all his territory, except the city of Monaco. These districts had been previously annexed by Sardinia to Nice and included in her cession to France.] — *L.*

3. The Republic of Polizza in Dalmatia under the Protectorate of Austria.[1] [26]

of commerce between Austria and Great Britain, concluded in 1838, contained a secret article, by which these powers agreed to obtain its recognition by the Porte. Wheaton's MS. Despatches.

The Convention at Balta-Liman, concluded between Russia and the Porte, in 1849, purported to adopt measures against anarchical proceedings in the Principalities of Moldavia and Wallachia; it modified the appointment of the Hospodars, who, by virtue of its provisions, were named for seven years, from 16th June, 1849; and it also suspended the assemblies of the boyards, granted by the organic statute of 1831. It provided, furthermore, for the occupation of the provinces by a joint Russian and Turkish force, of which 10,000 men were to remain till the reforms were completed, and it stipulated for the residence of Russian and Turkish commissioners. Lesur, Annuaire, 1849, p. 568; Parliamentary Papers for 1849, vol. xxvii.

The 28th and 29th articles of the treaty of 30th of March, 1856, provide for Servia continuing to hold of the Porte, in conformity with the Imperial hatti-scherifs, thenceforward placed under the collective guaranty of the contracting parties, and which fix the rights and immunities of the Principality, including an independent and national administration, as well as full liberty of religion, legislation, commerce, and navigation. The previously stipulated right of garrison by the Porte in the fortresses (of which there are five), is preserved, but no armed intervention can take place, without the previous consent of the contracting parties. In the 14th and 16th conferences of the Congress, it was agreed that the ministers of the Porte should concert with the plenipotentiaries of the contracting powers as to the manner of putting an end to the abuses which future investigations might discover. Martens par Samwer, Nouveau Recueil de Traités, tom. xv. pp. 736, 778. The hereditary title was conferred on the elected Prince of Servia shortly after the treaty of Adrianople. After having renounced the dignity during an insurrectionary movement in 1839 the same prince was reinstalled, on 23d December, 1858, by the unanimous decision of the Skuptschina, and on his death, 26th September, 1860, his son was recognized by the Porte, as heir of the throne. Almanach de Gotha, 1861, p. 884.

Another semi-sovereign State in Turkey, which has been treated almost as independent by Austria, as well as Russia, is Montenegro. Its government, both political and ecclesiastical, had been for a century and a half, previous to 1852, vested in the bishop, who designated his successor by will. The spiritual and civil offices are, however, now divided, in consequence of the refusal of the predecessor of the present prince to assume holy orders. Annuaire des deux mondes, 1852–3, p. 633. The Austrian plenipotentiaries having intimated at the conference of the 25th of March, 1856, a desire to obtain from the plenipotentiaries of Russia assurances that that power did not mean to exercise in Montenegro powers analogous to those which had been abolished in the Danubian provinces, the latter declared that their government does not maintain with Montenegro other relations than those which arise from the sympa-

[1] Martens, Précis du Droit des Gens, liv. i. ch. 2, § 20.

[26] There is no longer a question as to Polizza. Heffter, Das europäische Völkerrecht, § 29, note 2. There are usually included among the semi-sovereign States the small Republic of Andorre in the Pyrenees between France and Spain, under the joint protectorate of the Emperor of the French and the Spanish Bishop of Urgel, and the Republic of San Marino under the protectorate of the Holy See.] — *L.*

4. 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 have all been absorbed in the sovereignty of the States composing the present Germanic Confederation, with the exception of the Lordship of Kniphausen, on the North Sea, which still retains its former feudal relation to the Grand Duchy of Oldenburgh, and may, therefore, be considered as a semi-sovereign State.[1]

5. 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, 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. In consequence of the measures subsequently taken by the contracting parties for the execution of this treaty, the hereditary Pachalick 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

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thies of the Montenegrins for Russia and the kind disposition of Russia for them. At the ensuing conference the plenipotentiaries of Austria, Great Britain, and Turkey declare that they consider the explanations of Russia on the subject of Montenegro to imply that Russia does not entertain with that power relations of an exclusively political character. Ali Pacha adds that the Porte considers Montenegro as an integral part of the Ottoman Empire and has no intention to change the actual condition of things. Martens par Samwer, Nouveau Recueil de Traités, tom. xv. pp. 736, 738. The aggression of Turkey against Montenegro in 1858 had for its result a collective intervention of the five great powers, and as a consequence of a disastrous defeat of the Turkish army sustained at Grahovo in that year, a commission, consisting of a French, Russian, Austrian, Prussian and a Montenegrin delegate, (to which latter Turkey consented with extreme difficulty,) was named to verify the possession of Montenegro, as it existed in 1856, and to report to the representatives of the great powers at Constantinople. Annuaire des deux mondes, 1858-9, p. 731. A war is now (1862) going on, in which the Prince demands the absolute independence of Montenegro, the hereditary power for his descendants and a new delineation of boundaries, so as to give him a port on the Adriatic.] — *L.*

[1] Heffter, Das europäische Völkerrecht, § 19.

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 Pacha should collect, in the name and as the delegate of the Sultan, the taxes and imposts legally established, it being, moreover, understood that the Pacha 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.[1]

§ 14. 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.[2]

Relations between the Ottoman Porte and the Barbary States.

The political relations between the Ottoman Porte and the Barbary States are of a very anomalous character. Their occasional obedience to the commands of the Sultan, accompanied with the irregular payment of tribute, does 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 are maintained, on the same footing as with other Mohammedan sovereignties. During the Middle Age, 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.[3]

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[1] Wheaton, Hist. Law of Nations, pp. 572–583.

[2] Ward's Hist. of the Law of Nations, vol. ii. p. 69.

[3] Sir L. Jenkins's Works, vol. ii. p. 791. Robinson's Adm. Rep. vol. iv. p. 5, The Helena.

"The Algerines, Tripolitans, Tunisians, and those of Salee," says Bynkershoek, "are not pirates, but regular organized 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 haberet rempublicam, curiam, ærarium, consensum et concordiam civium rationem aliquam, si res ità tulisset, pacis et fœderis.* (Philip, p. iv. 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. sect. 4, c. 5, n. ult.) lose the rights and privileges of sovereign States."[1]

The political relation of the Indian nations on this continent towards the United States, is that of semi-sovereign States, under the exclusive protectorate of another power. Some of these savage tribes have totally extinguished their national fire, and submitted themselves to the laws of the States within whose territorial limits they reside; [[27] 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.[2]

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 Constitu-

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. xvii.

[[27] By an act of Congress, passed March 3, 1843, the Stockbridge tribe of Indians, and each and every of them, were declared to be citizens of the United States. United States Statutes at Large, vol. v. p. 647.] — *L.*

[2] Cranch's Rep. vol. vi. p. 146, Fletcher *v.* Peck.

tion, 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 recognize 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 us 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 our government.[1]

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 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

[1] Peters's Rep. vol. v. p. 1, The Cherokee Nation *v.* The State of Georgia.

themselves, or in conformity with treaties, and with the acts of Congress.[1] [28]

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[1] Kent's Comment. on American Law, vol. iii. p. 383.

[28] The native tribes, who were found on the American continent at the time of its discovery, have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe, as if it had been vacant and unoccupied land, and the Indians continually held to be and treated as subject to their dominion and control. The United States have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory. It is too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority; and, where the country occupied by them is not within the limits of one of the States, Congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian. Howard's Rep. vol. iv. p. 572, The United States *v.* Rogers. "The Cherokee country may be considered a territory of the United States within the act of 1812, (empowering any person or persons, to whom letters testamentary or of administration have been or may hereafter be granted, by the proper authorities in any of the United States or the *territories thereof* to maintain any suit, &c. in the District of Columbia). In no respect can it be considered a foreign State or Territory, as it is within our jurisdiction and subject to our laws." Howard's Rep. vol. xviii. p. 104, Mackey *v.* Coxe.

The same rules, applicable to the aborigines elsewhere on the American continent, are supposed to govern in the case of the Mosquito Indians, within the territorial limits of the Republic of Nicaragua; to whom the United States deny any claim of sovereignty, or any other title than the Indian right of occupancy, to be extinguished at the will of the discoverer, though a species of undefined protectorate has, several times, been claimed over them by Great Britain. This subject gave rise to much discussion, on account of the contiguity of the territory to the proposed inter-oceanic communication; to promote which a Convention was concluded between the United States and Great Britain, on 19th April, 1850. In that Convention there is no reference to the Mosquito Protectorate; though, by a subsequent agreement between these powers, dated 30th April, 1852, to be proposed to the acceptance of the Mosquito king, as well as of Nicaragua and Costa Rica, there was a reservation to these Indians of a district therein described. But Nicaragua refused to enter into the arrangement, and protested against all foreign intervention in her affairs. Congressional Globe, 1852–3, vol. xxvi. p. 268. Ib. vol. xxvii. pp. 252, 286. U. S. Statutes at Large, vol. viii. p. 174. Annuaire des deux mondes, 1852–3, p. 741. Appendix, p. 922. President Fillmore's Message, Annual Reg. 1852, p. 301. See, also, for negotiations with Great Britain, subsequent to the inter-oceanic treaty, Cong. Doc. 32d Cong. 2d Sess. Senate, Ex. Doc. Nos. 12 and 27. Id. 33d Cong. 1st Sess. Senate, Ex. Doc. Nos. 8 and 13.

The difficulty with England was finally adjusted by the treaty of 28th of January, 1860, between Great Britain and Nicaragua, by which it was stipulated that Great Britain, without prejudice to any question of boundary between Nicaragua and Honduras, would recognize, as belonging to and under the sovereignty of Nicaragua, the country hitherto occupied or claimed by the Mosquito Indians within

States may be either single, or may be united together under a common sovereign prince, or by a federal compact. § 15. Single or united States.

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.[1] § 16. *Personal* union under the same sovereign.

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. 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 is thus that the king of Prussia is also

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the frontiers of the republic; that a certain designated district should be assigned to these Indians, but that it should remain under the sovereignty of Nicaragua, and should not be ceded by the Indians to any foreign prince or state, and that the British protectorate should cease three months after the exchange of ratifications. Martens par Swamwer, Nouveau Recueil, tom. xvi. p. 375. By a previous treaty with Honduras of 28th November, 1859, and which also recognized Ruatan and the other islands in the Bay of Honduras as a part of the Republic of Honduras, Honduras engaging not to cede said islands, or the right of sovereignty over them, to any nation or state whatever, Great Britain had stipulated, subject to the conditions and engagements specified in the treaty, and without prejudice to any question of boundary between Honduras and Nicaragua, to recognize as belonging to and under the sovereignty of Honduras, the country hitherto occupied or possessed by the Mosquito Indians within the frontier of that republic, whatever that frontier may be. Ib. p. 371. These arrangements were declared by President Buchanan in his annual message, December, 1860, to conform in every important particular with the amendments adopted by the Senate to a treaty concluded at London, 17th October, 1856, between the United States and Great Britain, and which were rejected by the British government. Annual Reg. 1860, p. 285]. There is some analogy between the relation of the native States of India to Great Britain and that of the Indian tribes to the United States. "The native States of India are instances of protected dependent States maintaining the most valuable relations with the British government under compacts with the East India Company. All these States acknowledge the supremacy of the British government, and some of them admit its right to interfere so far in their internal affairs, that the East India Company have become virtually sovereign over them. None of these, however, hold any political intercourse with one another, or with foreign powers." Twiss, Law of Nations, vol. i. p. 27.] — *L.*

[1] 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.

sovereign prince of Neufchatel, one of the Swiss Cantons; which does not, on that account, cease to maintain its relations with the Confederation, nor is it united with the Prussian monarchy.

So, also, the kingdoms of Sweden and Norway are united under one crowned head, each kingdom retaining its separate constitution, laws, and civil administration, the external sovereignty of each being represented by the king.

§ 17. *Real* union under the same sovereign.

The union of the different States composing the Austrian monarchy is a *real* union. 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 all 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 coördinate 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, (*Gesammtstaat*); 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. [29]

[29 In 1849, a uniform Constitution for all the States was established, and the charter for the one and indivisible Empire of Austria proclaimed. Annual Register, 1849, p. 317]. By the patent of the 31st December, 1851, the fundamental rights recognized by the Constitution of the 4th of March, 1849, were abolished, while centralization was maintained, and provision made for uniform municipal legislation. Annuaire des deux mondes, 1852–3, pp. 541–545. An Imperial diploma, issued on the 20th of October, 1860, concerning the political organization of the monarchy, the rights of each of the several kingdoms and countries, as well as the definition,

§ 18. 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.

§ 19. 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, the Duchy of Warsaw, with the exception

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consolidation, and political union (*Verband*,) of the common monarchy, (*gesammt-Monarchie*,) was followed by the organic law of the 27th of February, 1861. All legislation is exercised by the Emperor, in concurrence with the diets or council of the Empire (*Reichsrath*). To the latter belong all matters which are considered common to all parts of the Empire, viz.: the currency, customs, telegraphs, railroads, postal regulations, taxes, and public debt. The Diet of Hungary has, in conformity with its ancient constitutions, all legislative powers except those granted to the Council of the Empire. The organic law says: "As to our kingdoms of Hungary, Croatia, and Sclavonia, and our principality of Transylvania, we intend to reëstablish the ancient constitutions of those kingdoms, in conformity with the beforementioned diploma of the 20th of October, 1860, and we have not definitely pronounced on the political position of our kingdom of Dalmatia, in reference to our kingdoms of Croatia and Sclavonia." As to the other kingdoms and territories, the Council of the Empire possesses (the presence of the representatives of Hungary not being then necessary) all the powers of legislation not expressly reserved by the special constitutions to the several Diets. The Council of the Empire is composed of two houses. The House of Lords consists of princes of the imperial family, chiefs of families eminent by their great territorial wealth, archbishops and bishops having the rank of prince, and members appointed for life distinguished for their services to the Church or State, or in science or arts. The Chamber of Deputies is apportioned among the different kingdoms and countries constituting the empire. The members are chosen by the Diets of the kingdoms and countries from among the members representing in the said Diets the territories, cities, and corporations. The Emperor reserves the right to cause direct elections in case a Diet should refuse to send representatives to the Chamber of Deputies. Annuaire des deux mondes, 1860. Le Nord, 24re Octobre, 1860. Ib. 2 Mars, 1861. The Council of the Empire (*Reichsrath*,) has no legislative power, but only a consultative vote. Ib. March 6, 1862. At the opening of the Council of the Empire, 30th of April, 1861, Hungary was not represented, neither were her ancient *annexes*, Croatia and Sclavonia, including Dalmatia, nor Transylvania; and the Diet of Agram, representing the triune kingdom, had proposed terms of political union with Hungary. Le Nord, 21 Juillet, 1861. A real difficulty of a legislative or representative union between Austria and Hungary is, that the former is bound by the acts of the Confederation and the latter not.] — *L.*

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.[1]

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

Manifesto of the Emperor Nicholas, 1832.

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,

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[1] "Le Duché de Varsovie, à l'exception des provinces et districts, dont il a été autrement disposé dans les articles suivans, est réuni à l'Empire de Russie. Il y sera lié irrévocablement par sa Constitution, pour être possédé par S. M. l'Empereur de toutes les Russies, ses héritiers et ses successeurs à perpétuité. Sa Majesté Impériale se reserve de donner à cet état, jouissant d'une administration distincte, l'extension intérieure qu'elle jugera convenable. Elle prendra, avec ses autres titres celui de Czar, Roi de Pologne, conformément au protocle usité et consacré par les titres attachés à ses autres possessions.

"Les Polonais, sujets respectifs de la Russie, de l'Autriche, et de la Prusse, obtiendront une représentation et des institutions nationales, réglées d'après la mode d'existence politique que chacun des Gouvernemens auxquelles ils appartiennent jugera utile et convenable de leur accorder." — *Art.* 1.

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.[1] [30]

§ 20. Federal union.

4. Sovereign States permanently united together by a federal compact, either form a *system of confederated States*, (properly so called,) or a *supreme federal government*, which has been sometimes called a *compositive State*.[2] [31]

§ 21. Confederated States, each retaining its own sovereignty.

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

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[1] Wheaton's History of the Law of Nations, p. 434.

[30] By an Imperial ukase of 14th (26) March, 1861, the Council of State of the kingdom of Poland was reëstablished, all official acts thereafter to be in the name of the Emperor, as King of Poland. Le Nord, 6 Avril, 1861. And by another ukase of the 1st (13) January, 1862, the special department in the Council of the Empire for the affairs of Poland was suppressed, as being superfluous, since the reëstablishment of the Council of State for the kingdom of Poland. Ib., 22 Janvier, 1862.] — *L.*

[2] These two species of federal compacts are very appropriately expressed in the German language, by the respective terms of *Staatenbund* and *Bundesstaat*.

[31] The Confederation of 1778 and the existing Constitution of the United States, are examples of the two classes of cases referred to in the text.] — *L.*

union remains unimpaired; the resolutions of the federal body being enforced, not as laws directly binding on the private individual subjects, 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.

§ 22. Supreme federal government or compositive State.

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.

§ 23. Germanic Confederation.

Germany, as it has been constituted under the name of the Germanic Confederation, presents 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, [32] the King of Denmark for the Duchy

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[32] The terms of the 53d article of the Federal Act are, "His Majesty the Emperor of Austria enters into the Confederation for all his possessions, which formerly constituted part of the German Empire." The Imperial Legation declared to the Diet of the Confederation, in the meeting of the 6th of April, 1818, that, though the recognized political relations of ancient Lombardy might include it in the Austrian territories of the Confederation, it was not the Emperor's intention to extend the line of defence of the Germanic Confederacy beyond the Alps. He considered as making a part of the Confederacy only, 1st. The Archduchy of Austria; 2d. The Duchy of Styria; 3d. The Duchy of Carinthia; 4th. The Duchy of Carniola; 5th. The Austrian Frioul or Circle of Gorice (Gorice, Gradiska, Tolmein, Flitsch, and Aquileia); 6th. The Territory of the City of Trieste; 7th. The Principality of Tyrol with the Territories of Trent and Brixen with the exception of Weiler; 8th. The Duchy of Salzbourg; 9th. The Kingdom of Bohemia; 10th. The margraviate of Moravia; 11th. The Austrian part of the Duchy of Silesia, including the Duchies of Auschwitz and Zator; Hohengeroldseck (ceded in 1819 to the Grand Duchy of Baden).

of Holstein, and the King of the Netherlands for the Grand Duchy of Luxembourg, are 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 is declared to be the preservation of the external and internal security of Germany, the independence and inviolability of the confederated States. All the members of the Confederation, as such, are entitled to equal rights. New States may be admitted into the union by the unanimous consent of the members.[1] [33]

All her other territories Austria regarded as not included in the Confederation. Le Nord, 2 Dec. 1860.

On the same occasion, (April, 1818,) Prussia said that the king could not better prove the sincere interest which he continued to take in everything that secured the future repose of Germany and the perfect development of its internal power, than by uniting himself to the Germanic Confederation with all the German provinces of the monarchy, anciently attached to Germany by language, laws, and in general by nationality.

During the conferences of Dresden of 1850–1, attempts were made to bring into the Confederation all the possessions of Austria and to infer from the declarations, in 1815, of Austria and Prussia, that the clause of the Federal Act, as to the ancient possessions of the Empire, was facultative rather than obligatory. The memorandum of the French government addressed to the signers of the treaty of Vienna, maintained, on the other hand, that Austria had no power either to interpret or extend this article. She, as well as Prussia, had simply to execute it, by indicating those of her German possessions which should enter into the territorial circumscription of the Confederation. Memorandum, 5 Mars, 1851. Lesur, Annuaire, 1851, App. p. 174. By the Conventions of April and November, 1854, to which the Confederation, by their resolutions of 28th of July and of 9th of December, became a party, Prussia, (though she did not unite in the treaty of December 2d, establishing in certain contingencies an alliance offensive and defensive of Austria with England and France,) guaranteed to Austria, during the Crimean war, her non-Germanic possessions. The computed population of the Germanic Confederation in 1855 was 43,391,797, of which 12,909,919 belonged to Austria, and 13,173,235 to Prussia. By the census of 1857 the total population of the Austrian monarchy was 35,400,310, while that of the Prussian in 1858 was 17,739,913. Almanach de Gotha, 1859, pp. 658, 432, 713.] — *L.*

[1] Acte final du Congrès de Vienne, arts. 53, 54, 55. Deutsche Bundesacte, vom 8 Juni, 1815, art. 1. Wiener Schlussacte, vom 15 Mai, 1820, arts. 1, 6.

[33] The French memorandum, already cited, does not admit that this clause dispenses with the consent of the other powers, signers to the treaty of Vienna, in the case either of new States or of the aggrandizement of the existing ones; and it emphatically denies the right of secession. Austria cannot argue from the modifications, which she has thought proper to introduce into her particular constitution, a right to require a change in the nature of the Confederation. She cannot threaten to secede from the Confederation, if her demand is not granted. It is said, in effect, in the 53d

The affairs of the union are confided to a Federative Diet, which sits at Frankfort-on-the-Mein, in which the respective States are represented by their ministers, and are entitled to the following votes, in what is called the *Ordinary Assembly* of the Diet: —

	Votes.
Austria	1
Prussia	1
Bavaria	1
Saxony	1
Hanover	1
Wurtemburg	1
Baden	1
Electoral Hesse	1
The Grand Duchy of Hesse	1
Denmark (for Holstein)	1
The Netherlands (for Luxemburg) [34	1
The Grand Ducal and Ducal Houses of Saxony	1

article of the General Act, already cited, that the German governments establish among themselves *a perpetual Confederation*, and the final act of 1820 interpreting this clause expressly states in its 5th article that the Confederation is indissoluble by the very principle of its institution, so that none of the members have the right to leave it. Lesur, Annuaire, 1851, *loc. cit.*] — *L.*

[34 By the terms of the separation of Holland and Belgium (Part II. c. 1, § 11,) Luxemburg was given partly to Belgium, which had claimed the whole of it as well as of Limburg, and partly to Holland, the latter power being compensated by a portion of Limburg, as a part of the Germanic Confederation. The minister of the Netherlands at the sitting of the Diet at Frankfort, on 16th of August, 1839, stated that the king was disposed to enter for the Duchy of Limburg, as the treaty had arranged it, into the Germanic Confederation with the reservation that the Duchy should be governed by the same constitution, and subjected to the same system of administration as the kingdom of the Netherlands, but under the promise that this circumstance should in nowise affect the application to the Duchy of the Federal Constitution. The portion of Luxemburg, which is now a part of Belgium, is no longer connected with the Confederation. The exceptional position of the Netherland portion of Limburg, resulting from its relations with the Germanic Confederation, only exists for the objects, with respect to which the laws and institutions of the confederacy may be in opposition with the legislation of the Netherlands. Martens par Murhard, Nouveau Recueil, tom. vi. p. 356. By the constitution of the Netherlands, of the 4th of August, 1815, the Grand Duchy of Luxemburg was placed under the same sovereignty and governed by the same fundamental laws, as the other parts of the kingdom, except as to its relations with the Germanic Confederation. After the Belgic revolution it was separated from the Netherlands, both territorially and constitutionally. Limburg, which was erected into a duchy in 1839, when it became a member of the Germanic Confederation, in compensation for the part of Luxemburg ceded by Holland to Belgium, is placed absolutely under the same constitution as the other Netherland provinces. Revue des deux mondes, Mars 15, 1861, p. 405.] — *L.*

	Votes.
Brunswick and Nassau	1
Mecklenburg-Schwerin and Strelitz	1
Oldenburg, Anhalt, and Schwartzburg	1
Hohenzollern, Lichtenstein, Reuss, Schaumburg, Lippe, Waldeck, and Hesse Homburg	1
The Free Cities of Lubeck, Frankfort, Bremen, and Hamburg	1
Total	17

Austria presides in the Diet, but each State has a right to propose any measure for deliberation.

The Diet is formed into what is called a *General Assembly*, (*Plenum*,) for the decision of certain specific questions. The votes *in pleno* are distributed as follows: —

	Votes.
Austria	4
Prussia	4
Saxony	4
Bavaria	4
Hanover	4
Wurtemburg	4
Baden	3
Electoral Hesse	3
The Grand Duchy of Hesse	3
Holstein	3
Luxemburg	3
Brunswick	2
Mecklenburg-Schwerin	2
Nassau	2
Saxe Weimar	1
Gotha	1
Coburg	1
Meiningen	1
Hildburghausen	1
Mecklenburg-Strelitz	1
Oldenburg	1
Anhalt-Dessau	1
Anhalt-Bernburg	1
Anhalt-Coethen	1
Schwartzburg-Sondershausen	1
Schwartzburg-Rudolstadt	1
Hohenzollern-Hechingen	1
Lichtenstein	1
Hohenzollern-Sigmaringen	1
Waldeck	1
Reuss (elder branch)	1

	Votes.
Reuss (younger branch)	1
Schaumburg-Lippe	1
Lippe	1
Hesse-Homburg	1
The Free City of Lubeck	1
Frankfort	1
Bremen	1
Hamburg	1
Total	70

Every question to be submitted to the general assembly of the Diet is first discussed in the ordinary assembly, where it is decided by a majority of votes. But, in the general assembly, (*in pleno*,) two thirds of all the votes are necessary to a decision. The ordinary assembly determines what subjects are 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, must be submitted to the general assembly; and, in all these cases, absolute unanimity is necessary to a final decision.[1]

The Diet has power to establish fundamental laws for the Confederation, and organic regulations as to its foreign, military, and internal relations.[2]

All the States guarantee to each other the possession of their respective dominions within the union, and engage to defend, not only entire Germany, but each individual State, in case of attack. When war is declared by the Confederation, no State can negotiate separately with the enemy, nor conclude peace or an armistice, without the consent of the rest. Each member of the Confederation may contract alliances with other foreign States, provided they are not directed against the security of the Confederation, or the individual States of which it is composed. No State can make war upon another member of the union, but all the States are bound to submit their differences to the decision of the Diet. This body is to endeavor to settle

[1] Acte final, art. 58. Wiener Schlussacte, arts. 12-15. [2] Acte final, art. 62.

them by mediation; and if unsuccessful, and a juridical sentence becomes necessary, resort is to be had to an austrëgal proceeding, (*Austrägal-Instanz*,) to which the litigating parties are bound to submit without appeal.[1]

Each country of the Confederation is entitled to a local constitution of States.[2] The Diet may guarantee the constitution established by any particular State, upon its application; and thereby acquire the right of settling the differences which may arise respecting its interpretation or execution, either by mediation or judicial arbitration, unless such constitution shall have provided other means of determining controversies of this nature[3] [35]

In case of rebellion or insurrection, or imminent danger thereof in one or more States of the Confederation, the Diet may interfere to suppress such insurrection or rebellion, as threatening the general safety of the Confederation. And it may in like manner interfere on the application of any one State; or, if the local government is prevented by the insurgents from making such application, upon the notoriety of the fact of the existence of such insurrection, or imminent danger thereof, to suppress the same by the common force of the Confederation.[4]

In case of the denial or unreasonable delay of justice by any State to its subjects, or others, the aggrieved party may invoke the mediation of the Diet; and if the suit between private individuals involves a question respecting the conflicting rights and obligations of different members of the union, and it cannot be amicably arranged by compromise, the Diet may submit the controversy to the decision of an austrëgal tribunal.[5]

The decrees of the Diet are executed by the local governments of the particular States of the Confederation, on application to

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[1] Acte final, art. 63.

[2] "In allen Bundesstaaten wird eine landständische Verfassung stattfinden." Bundesacte, art. 13.

[3] Wiener Schlussacte, art. 60.

[35] This power has been attempted to be repeatedly applied, especially by the federal resolutions of the 27th March, 1854, and 24th March, 1860, to a controversy, which has existed since 1852, growing out of the attempt of the Elector of Hesse, by the constitution of that year, to abrogate the fundamental pact of 1831. The intervention of the Diet has, however, been without result. Le Nord, 14 Avril, 1862.] — *L.*

[4] Wiener Schlussacte, arts. 25–28.

[5] Ibid. arts. 29, 30.

them by the Diet for that purpose, excepting in those cases where the Diet interferes to suppress an insurrection or rebellion in one or more of the States; and even in these instances, the execution is to be enforced, so far as practicable, in concert with the local government against whose subjects it is directed.[1]

The subjects of each member of the union have the right of acquiring and holding real property in any other State of the Confederation; of migrating from one State to another; of entering into the military or civil service of any one of the confederated States, subject to the paramount claim of their own native sovereign; and of exemption from every *droit de détraction*, or other similar tax, on removing their effects from one State to another, unless where particular reciprocal compacts have stipulated to the contrary. The Diet has power to establish uniform laws relating to the freedom of the press, and to secure to authors the copyright of their works throughout the Confederation.[2]

The Diet has 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.[3] [[36]

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[1] Weiner Schlussacte, art. 32.

[2] Bundesacte, art. 18.

[3] Bundesacte, art. 19. Acte final, arts. 108–117.

[[36]] One of the objects of the federal pact of 1815 was the regulation of commerce between the different States. This duty was, however, not undertaken by the Diet, but in 1833 a commercial association between several States commenced under the name of Zollverein, at the head of which was Prussia, and which, in 1845, numbered upwards of twenty sovereign States as members. Another association called the Steuerverein was formed, in 1834, between Hanover and Brunswick, and with which Oldenburg soon after united. Through these unions uniform tariffs were established, all internal custom-houses were abolished, and the duties collected by the frontier States and distributed among the members of the leagues, according to their respective population. On the 4th of April, 1853, a treaty was concluded between all the members of the two associations uniting them and extending the existence of the Zollverein to the 31st of December, 1865. Martens par Samwer, Nouveau Recueil, tom. xvi. p. 267. This arrangement was preceded by a treaty of commerce between Austria and Prussia, of the 19th of February, by which, with the exception of certain monopoly articles (tobacco, salt, &c.,) they agreed to remove every prohibition between the two countries with respect to the exportation, importation, or the transit of merchandise. All the German States which, on the 1st of January, 1854, or subsequently, should belong to the Zollverein, were to have the privilege of acceding to the treaty, as well as the Italian States united, or which

The different Christian sects throughout the Confederation are entitled to an equality of civil and political rights; and the Diet is empowered to take into consideration the means of ameliorating the civil condition of the Jews, and of securing to them in all the States of the Confederation the full enjoyment of civil rights, upon condition that they submit themselves to all the obligations of other citizens. In the mean time, the privileges granted to them by any particular State are to be maintained.[1]

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 is composed, it does not appear that the Germanic Confederation can 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 is intended to embrace. In respect to their internal sovereignty, the several States of the Confederation do not form, by their union, one compositive State, nor are they subject to a common sovereign. Though what are called the fundamental *laws* of the Confederation are framed by the Diet, which has also power to make organic regulations respecting its federal relations; these regulations are 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. If there be cases where the Diet may rightfully enforce its own resolutions directly against the individual subjects, or the body of subjects within

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should be united, in a customs union with Austria. Ibid. p. 382. Annuaire des deux mondes, 1852-3, p. 494. The relations between the Zollverein and Austria are still regulated by the above treaty, though negotiations for the entry of Austria into the German (Prussian) Zollverein were to commence at Vienna, in December, 1860. Le Nord, 23 Octobre, 1860. A monetary treaty between Austria and the Zollverein was signed the 24th of January, 1857. Martens par Samwer, Nouveau Recueil, tom. xvi. pt. 1, p. 448, and between Prussia and the other German States the 7th of August, 1858. Ib. pt. 2, p. 470. Measures have been several years in progress for the establishment of a uniform code of commerce applicable to all Germany, and in January, 1860, the Diet initiated measures to establish a uniform civil and criminal legislation for the Confederation. Annuaire des deux mondes, 1860, p. 413.] — *L.*

[1] Bundesacte, art. 16.

any particular State of the Confederation, without the agency of the local governments, (and there appear to be some such cases,) then these cases, when they occur, form an exception to the general character of the union, which then so far becomes a compositive State, or supreme federal government. All the members of the Confederation, as such, are 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, does 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 contracting alliances with other States, foreign to the Confederation, is expressly reserved to all the confederated States, with the proviso that such alliances are not directed against the security of the Confederation itself, or that of the several States of which it is composed. Each State also retains its rights of legation, both with respect to foreign powers and to its co-States.[1] Although the diplomatic relations of the Confederation with the five great European powers, parties to the Final Act of the Congress of Vienna, 1815, are habitually maintained by permanent legations from those powers to the Diet at Frankfort, yet the Confederation itself is not habitually represented by public ministers at the courts of these, or any other foreign powers; whilst each confederated State habitually sends to, and receives such minister from other sovereign States, both within and without the Confederation. It is only on extraordinary occasions, such, for example, as the case of a negotiation for the conclusion of a peace or armistice, that the Diet appoints plenipotentiaries to treat with foreign powers.[2]

According to the original plan of confederation as proposed by Austria and Prussia, those States, *not having possessions out of Germany*, were to have been absolutely prohibited from mak-

[1] Klüber, Öffentliches Recht des teutschen Bundes, §§ 137–143.

[2] Klüber, §§ 148, 152 a. Wiener Schlussacte, § 49.

ing alliances or war with any power foreign to the Confederation, without the consent of the latter. But this proposition was subsequently modified by the insertion of the above 63d article of the Federal Act of 1815. And the limitations contained in that article upon the war-making and treaty-making powers, both of the Confederation itself and of its several members, were more completely defined by the Final Act of 1820.[1]

It results clearly from these provisions, that such of the confederated States, *as have possessions without the limits of the Confederation*, retain the authority of declaring and carrying on war against any power foreign to the Confederation, independently of the Confederation itself, which remains neutral in such a war, unless the Diet shall recognize the existence of a danger threatening the federal territory. The sovereign members of the Confederation, having possessions without the limits thereof, are 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 undertakes a war in his character of a European power, the Confederation, whose relations and obligations are unaffected by such war, remains a stranger thereto; in other words, it remains neutral, even if the war be defensive on the part of the confederated sovereign as to his possessions without the Confederation, unless the Diet recognizes the existence of a danger threatening the federal territory.[2] [87]

[1] Wheaton's Hist. Law of Nations, pp. 447, 448, 457–460.

[2] Wiener Schlussacte, arts. 46, 47. Klüber, Öffentliches Recht des teutschen Bundes, § 152 f.

[87] It was the 47th article of the Final Act, which was invoked by Austria on occasion of the Italian war, in 1859, as menacing her territory within the Confederacy. Of such an eventuality the Diet is the sole judge. On that occasion the most hostile feelings towards France were manifested in Bavaria, Saxony, Grand Ducal Hesse, Wurtemberg, and Baden; but Baron Schleinitz wrote to the Prussian diplomatic agents that the Cabinet of Berlin would not regard the Italian question as a federal affair, and that it would not admit the application to it of the 47th article. "If it was attempted," he said, "to raise a question of this nature with the Diet, Prussia would regard any decision of the majority as incompetent to bind her and would persevere in considering the question of Italy a European question, as to which she would maintain her liberty of action." But it was on the proposition of the Prussian Minister, that, in view of the complications that might arise out of the war, the Diet, on the 23d of April, placed the federal contingents on a war-footing, though nothing more was done than to develop the defensive resources of the Confederation.

Russia sent to her agents abroad a despatch, on the affairs of Italy, dated the 15th (27th) of May, in which Prince Gortschakoff said, "The German Confederation is

It seems, also, to result from these provisions, taken in connection with the above-mentioned modification in the original plan of Confederation, that even those States *not having possessions without the limits of the Confederation*, retain the sovereign authority of separately declaring and carrying on war, and of negotiating and making peace with any power foreign to the Confederation, excepting in the single case of a war declared by the Confederation itself; in which case, no State can negotiate with the enemy, nor conclude peace or an armistice, without the consent of the rest.

In other cases of disputes, arising between any State of the Confederation and foreign powers, and the former asks the intervention of the Diet, the Confederation may interfere as an ally, or as a mediator; may examine the respective complaints and pretensions of the contending parties. If the result of the investigation is, that the co-State is not in the right, the Diet will make the most serious representations to induce it to renounce its pretensions, will refuse its interference, and, in case of necessity, will take all proper means for the preservation of peace. If, on the contrary, the preliminary examination proves that the confederated State is in the right, the Diet will employ its good offices to obtain for it complete satisfaction and security.[1]

The Germanic Confederation is a system of confederated States.

It follows, that not only the internal but the external sovereignty of the several States composing the Germanic Confederation, remains unimpaired, except so far as it may be affected by the express provisions of

a combination purely and exclusively defensive. It was under this title that it entered into the public law of Europe, on the basis of treaties to which Russia affixed her signature. No hostile act has been committed by France against the Confederation, and no treaty obligatory on it exists, which would authorize an attack on that power. Consequently, if the Confederation is induced to adopt hostile acts against France on conjectural facts, and as to which it has obtained more than one guarantee, it will falsify the object of its creation and disregard the spirit of the treaties, which have consecrated its existence."

The Baron de Beust, Saxon Minister of Foreign Affairs, in his reply of the 15th of June to this note, denies that the Confederacy is exclusively a defensive institution, the very treaties to which Russia refers recognizing in it the right of peace and war. And he refers to the Crimean war as a precedent to show this, inasmuch as it was not even then intimated by Russia that the resolutions of the Diet, in reference to the eventual attack on the non-Germanic possessions of Austria and Prussia, or on the Austrians in the Danubian provinces were in violation of the treaties. Annuaire des deux mondes, 1858–9, pp. 596, 1009, 1017.] — *L.*

[1] Wiener Schlussacte, arts. 35–49. Klüber, § 462.

the fundamental laws authorizing the federal body to represent their external sovereignty. In other respects, the several confederated States remain independent of each other, and of all States foreign to the Confederation. Their union constitutes what the German public jurists call a *Staatenbund*, as contradistinguished from a *Bundesstaat;* that is to say, a supreme Federal Government.[1]

Act of the Diet of 1832.

Very important modifications were introduced into the Germanic Constitution, by an act of the Diet of the 28th of June, 1832. By the 1st article of this act it is declared, that, whereas, according to the 57th article of the Final Act of the Congress of Vienna, the powers of the State ought to remain in the hands of its chief, and the sovereign ought not to be bound by the local constitution to require the coöperation of the legislative Chambers, except as to the exercise of certain specified rights; the sovereigns of Germany, as members of the Confederation, have not only the right of rejecting the petitions of the Chambers, contrary to this principle, but the object of the Confederation makes it their duty to reject such petitions.

Art. 2. Since according to the spirit of the said 57th article of the Final Act, and its inductions, as expressed in the 58th article, the Chambers cannot refuse to any German sovereign the necessary means of fulfilling his federal obligations, and those imposed by the local constitution; the cases in which the Chambers endeavor to make their consent to the taxes necessary for these

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[1] Kluber, §§ 103 a, 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'independance et de l'inviolabilité de ses états confédérés."

And the *Schlussacte*, of 1820, declares: —

Art. 1. The Germanic Confederation is an international union of the sovereign Princes and Free Cities of Germany, formed for the maintenance of the independence and inviolability of the confederated States, as well as for the internal and external security of Germany.

Art. 2. In respect to its internal relations, this Confederation forms a body of States independent between themselves, and bound to each other by rights and duties reciprocally stipulated. In respect to its external relations, it forms a collective power established on the principle of political union.

purposes depend upon the assent of the sovereign to their propositions upon any other subject, are to be classed among those cases to which are to be applied the 25th and 26th articles of the Final Act, relating to resistance of the subjects against the government.

Art. 3. The interior legislation of the States belonging to the Germanic Confederation, cannot prejudice the objects of the Confederation, as expressed in the 2d article of the original act of confederation, and in the 1st article of the Final Act; nor can this legislation obstruct in any manner the accomplishment of the federal obligations of the State, and especially the payment of the taxes necessary to fulfil them.

Art. 4. In order to maintain the rights and dignity of the Confederation, and of the assembly representing it, against usurpations of every kind, and, at the same time, to facilitate to the States which are members of the Confederation the maintenance of the constitutional relations between the local governments and the legislative Chambers, there shall be appointed by the Diet, in the first instance, for the term of six years, a commission charged with the supervision of the deliberations of the Chambers, and with directing their attention to the propositions and resolutions which may be found in opposition to the federal obligations, or to the rights of sovereignty, guaranteed by the compacts of the Confederation. This commission is to report to the Diet, which, if it finds the matter proper for further consideration, will put itself in relation with the local government concerned. After the lapse of six years, a new arrangement is to be made for the prolongation of the commission.

Art. 5. Since according to the 59th article of the Final Act, in those States where the publication of the deliberations of the Chambers is secured by the constitution, the free expression of opinion, either in the deliberations themselves, or in their publication through the medium of the press, cannot be so extended as to endanger the tranquillity of the State itself, or of the Confederation in general, all the governments belonging to it mutually bind themselves, as they are already bound by their federal relations, to adopt and maintain such measures as may be necessary to prevent and punish every attack against the Confederation in the local Chambers.

Art. 6. Since the Diet is already authorized by the 17th article

of the Final Act, for the maintenance of the true meaning of the original act of confederation, to give its provisions such an interpretation as may be consistent with its object, in case doubts should arise in this respect, it is understood that the Confederation has the exclusive right of interpreting, so as to produce their legal effect, the original act of the Confederation and the Final Act, which right it exercises by its constitutional organ, the Diet.[1]

Act of the Diet of 1834.

Further modifications of the federal constitution were introduced by the act of the Diet of the 30th of October, 1834, in consequence of the diplomatic conferences held at Vienna in the same year, by the representatives of the different States of Germany.

By the 1st article of this last-mentioned act, it is provided that, in case of differences arising between the government of any State and the legislative Chambers, either respecting the interpretation of the local constitution, or upon the limits of the cooperation allowed to the Chambers, in carrying into effect certain determinate rights of the sovereign, and especially in case of the refusal of the necessary supplies for the support of government, conformably to the constitution and the federal obligations of the State, after every legal and constitutional means of conciliation have been exhausted, the differences shall be decided by a federal tribunal of arbitrators, appointed in the following manner: —

2. The representatives, each holding one of the seventeen votes in the ordinary assembly of the Diet, shall nominate, once in every three years, within the States represented by them, two persons distinguished by their reputation and length of service in the judicial and administrative service. The vacancies which may occur, during the said term of three years, in the tribunal of arbitrators thus constituted, shall be in like manner supplied as often as they may occur.

3. Whenever the case mentioned in the first article arises, and it becomes necessary to resort to a decision by this tribunal, there shall be chosen from among the thirty-four, six judges arbitrators, of whom three are to be selected by the government, and three by the Chambers. This number may be reduced to two, or in-

[1] Wheaton's Hist. Law of Nations, pp. 460–486.

creased to eight, by the consent of the parties: and in case of the neglect of either to name judges they may be appointed by the Diet.

4. The arbitrators thus designated shall elect an additional arbiter as an umpire, and in case of an equal division of votes, the umpire shall be appointed by the Diet.

5. The documents respecting the matter in dispute shall be transmitted to the umpire, by whom they shall be referred to two of the judges arbitrators to report upon the same, the one to be selected from among those chosen by the government, the other from among those chosen by the Chambers.

6. The judges arbitrators, including the umpire, shall then meet at a place designated by the parties, or, in case of disagreement, by the Diet, and decide by a majority of voices the matter in controversy according to their conscientious conviction.

7. In case they require further elucidations before proceeding to a decision, they shall apply to the Diet, by whom the same shall be furnished.

8. Unless in case of unavoidable delay under the circumstances stated in the preceding article, the decision shall be pronounced within the space of four months at farthest from the nomination of the umpire, and be transmitted to the Diet, in order to be communicated to the government of the State interested.

9. The sentence of the judges arbitrators shall have the effect of an austrëgal judgment, and shall be carried into execution in the manner prescribed by the ordinances of the Confederation.

In the case of disputes more particularly relating to the financial budget, the effect of the arbitration extends to the period of time for which the same may have been voted.

10. The costs and expenses of the arbitration are to be exclusively borne by the State interested, and, in case of disputes respecting their payment, they shall be levied by a decree of the Diet.

11. The same tribunal shall decide upon the differences and disputes which may arise, in the free towns of the Confederation, between the Senate and the authorities established by the burghers in virtue of their local constitutions.

12. The different members of the Confederation may resort to the same tribunal of arbitration to determine the controversies arising between them; and whenever the consent of the States respectively interested is given for that purpose, the Diet shall

take the necessary measures to organize the tribunal according to the preceding articles.[1] [38

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[1] For further details respecting the Germanic Constitution, see Wheaton's History of the Law of Nations, p. 455, *et seq.*

[38] In 1848, an attempt was made to establish a new German union, which was to extend to all the German nationality, whether connected with the old Confederation or not, on the basis of a federal government or confederation of all the States, with one general Diet or Parliament, and a Central Executive at Frankfort. A national Parliament, elected on the recommendation of an assembly somewhat informally convened at Frankfort in March, 1848, and with the approbation of the Diet, met on the 18th of May, of that year. The members were chosen by the people of the German States, (including Schleswig and Holstein as well as several of the provinces of Prussia which had not belonged to the Confederation,) in proportion to their respective populations and in the manner prescribed by the local constitutions. This Parliament adopted a law for the creation of a provisional central power, which was confided to the Archduke John of Austria, who was installed as Vicar of the Empire on the 12th of July. The Provisional Central Power was vested with the right of deciding on questions of peace and war, and, with the consent of the Assembly, of making treaties with foreign powers. The Diet, representing the old Federal Constitution of Germany, communicated to the Archduke, on his election, the assent of their respective governments. A constitution was, at the same time, proposed, by which the Confederation was to be a Constitutional Monarchy, with a Diet of two Chambers. The "Emperor of Germany" was to be hereditary and inviolable, the ministers being responsible for all acts, and the existing German sovereigns to be members, though not exclusively, of the Upper Chamber, of which the other members were to be elected by the sovereigns, or the local Diets of the States; — the Lower Chamber to be elected for six years from electoral districts of equal population, one third retiring biennially. A Court of Imperial Judicature was to be established to have cognizance of all disputes between German States and princes, of disputes between citizens of different States, and disputes between princes and their State Diets; also of all imperial fiscal matters. Free municipal constitutions to be guaranteed; a national guard; unrestrained freedom of public meetings; and absolute freedom of religion and the press. Lesur, Annuaire, 1848, p. 400. Annual Register, 1848, p. 367.] Austria refused to take any part in a confederation of this character; but the Assembly proceeded to the adoption of the Constitution, and, on the 28th of March, 1849, elected the King of Prussia Emperor of Germany. The result, however, of his appeal to the other German States, being, that Austria, Wurtemburg, Bavaria, and Hanover, at once declared their decided dissent, and the Frankfort Assembly having refused some modifications of the Constitution, on which the king insisted, he gave a distinct and unequivocal refusal, on the ground that the Imperial Supremacy was an unreal dignity, and the Constitution only a means, gradually, and under legal pretences, to set aside its authority and introduce a Republic.

The Plenipotentiaries of Prussia, Hanover, and Saxony, published, as an *annexe* of the treaty of the 30th of May, 1849, the draught of a new Imperial Federal Constitution, intended to embrace, under one Executive, all the vast and powerful kingdoms belonging to the Teutonic family. It was preceded by an address which stated that "because the Frankfort Assembly ceased to exist as a legal body when it completed its plan of a constitution, which could not be accepted by the Government

§ 24. 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

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without alteration; all the after-acts of the Chamber were to be considered as exceeding its powers, and without validity." The constitution thus proposed did not go into operation; and by the treaty of the 30th of September, the Central Power, in the name of all the Confederated governments, was confided provisionally, till the 1st of May, 1850, to Austria and Prussia, the Lieutenant-General of the Empire (the Archduke John,) resigning his functions. Austria convened at Frankfort, on the 10th of May, 1850, the Diet under the Federal Act of 1815, while Prussia contended that the assumption of a political superiority by Austria, and the summoning of the old Diet, were contrary to the spirit of the Confederation, and the resolution passed by it on the 13th of July, 1848, which abolished the former organization of the whole body. Two rival congresses were sitting at the same time, one at Berlin, headed by Prussia, and one at Frankfort, over which Austria presided. The object of the former was to establish a new Confederation, of which Prussia should be the acknowledged leader; of the latter to preserve to Austria her old preëminence, while taking into consideration a new organization of the Diet. After warlike demonstrations on the part of Austria and Prussia, for which an intervention in the disputes between the Elector of Hesse Cassel and his Diet was the apology, a conference of the different German States was had at the close of the year 1850, at Dresden, on the invitation of the two principal powers. This meeting, after ineffectual efforts on the part of Austria to bring all the States of her Empire into the Germanic Confederation, resulted in the restoration, assented to in May, 1851, by all the German powers, of the old Frankfort Diet, as it had existed since 1815. Annual Reg. 1848, p. 362]; Id. 1849, pp. 347], 364]; Id. 1850, pp. 313], 320]; Id. 1851, p. 276]. Lésur, Annuaire, 1850, p. 418. Annuaire des deux mondes, 1850, p. 103.

The position of the States of the Confederation whose sovereigns are foreign princes, (not German,) has not been without embarrassment. This has been particularly the case with regard to Holstein in its relations with Denmark, involving, also, appeals to the Diet from the German population of Schleswig, though not ostensibly a part of the Confederation. For the intervention of the Diet in the controversy between the Duchies and the King of Denmark, an apology was afforded in the question of the succession of the crown connected with the integrity of the Danish States, the merits of which controvery are discussed in a "*Mémoire sur l'Histoire du Droit de la Succession à la Couronne de Danemark, par M. Wheaton,*" read before the French Institute, *Compte Rendu, Mars*, 1847. The Duchies of Schleswig and Holstein were under the same sceptre as Denmark, but in the kingdom, on the failure of heirs in the male line, then anticipated, the females of the same line are called to the throne; while in the Duchies of Schleswig and Holstein, and in Lauenburg, ceded to Denmark in 1815 by Prussia, in substitution for Swedish Pomerania, (Schoëll, Histoire des traités, tom. xi. p. 145,) as a partial indemnity for Norway, after the extinction of the males of the elder royal line, the males of the next collateral line succeed. This view of the case, however, was not acquiesced in by the reigning monarch, at least as regards Schleswig and Lauenburg; and though he admitted that there were doubts as to Holstein, he declared that every effort would be made to maintain the integrity of the Danish States. Lésur, Annuaire, 1848, p. 133. While Holstein and Schleswig were supposed to be united by a rule of succession which would continue the union of the Duchies, long established for administrative purposes, they

States, for their common defence against external and internal violence, but a supreme federal government, or compositive

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both claimed to be considered a portion of the Germanic Confederation. It would appear that Christian I. had obtained an act, signed on 18th of February, 1474, from the Emperor Frederick III., by which he united Schleswig and the county of Holstein with the canton of Storman into one State, adding to it the country of the Ditmarses, and that these three territories were erected into a Duchy, as a fief of the Empire. Combes, Histoire de la Diplomatie Slave et Scandinave, p. 45. But Holstein alone had been represented by Denmark in the Diet under the Federal pact of 1815.

It was contended by Denmark, that the Duchy of Schleswig, which she now proposed to incorporate into the kingdom, had always, with the exception of a brief interval, during which it enjoyed a doubtful state of independence, been a fief of the crown of Denmark, and that it never had belonged to the old German Empire, while Holstein had been, from time immemorial, a fief of Germany. On the other hand, it has been maintained that "by declaring that the actual territorial *circonscriptions* should serve for the future as the basis of all international relations, the treaties of Vienna acknowledge at the same time not only the union of Holstein and of the Germanic Confederation, but also the right of the Confederation to protect Holstein in all the relations which unite her strictly to Schleswig, as these relations were then in full force." L'intérêt de la France dans la question Slesvig-Holstein, par M. Schleiden, p. 25. So early as 1846, the Diet of the Germanic Confederation charged itself with this subject, on the application of Holstein, in order to preserve the rights of the Confederation and of the collateral branches to the succession. While the King of Denmark declared to the insurgents, who had sent deputies in April, 1848, to Copenhagen, to demand the union of Schleswig and Holstein, and their separation from the kingdom, that he was willing to give to Holstein the most liberal constitution and to unite it with the Germanic Confederation at Frankfort, but that he could not abandon the political assimilation of Schleswig to Jutland and the other islands. Annual Register, 1848, 344].

Prussia took the initiative, in 1848, in the recess of the Diet, in sustaining Schleswig-Holstein against Denmark, and the Frankfort Assembly approved the conduct of the King of Prussia, and declared that the Confederation was bound to maintain the interests and rights of the Duchy of Holstein, in union with Schleswig, as being included in the Germanic Confederation. The King of Prussia was requested to represent to the King of Denmark the necessity of evacuating Schleswig, or should that be of no avail, to order out the troops of the Confederation to conquer it, and the Provisional Government of the Duchies was acknowledged by the Confederation, and placed temporarily under the protection of Prussia. Russia and Sweden protested against the interference of Germany, and an armistice was concluded, but not till actual hostilities had occurred. They were renewed the next year, and in 1850 a peace was concluded between Denmark, Prussia, and the Confederation, replacing, as to the contending parties, the *status ante bellum*. A temporary administration was formed for the Duchies, chosen in part by Denmark, and in part by Prussia, acting for the central power of Germany, which transferred, in 1851, its authority to commissioners of the Germanic Confederation, to be restored after establishing the old relations between Schleswig and Holstein, into the hands of their legitimate sovereign. This was not done till after the King's proclamation of 29th January, 1852, in accordance with arrangements between Denmark, Austria, and Prussia, in behalf of the Confederation, for the organic relations of the Duchies with the kingdom, prom-

State, acting not only upon the sovereign members of the Union, but directly upon all its citizens in their individual and corporate

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ising a common constitution, embracing Denmark, Holstein, and Schleswig, but which was to make of Schleswig a separate province, and strengthen the relations between it and Holstein. In Denmark there was already in force the Constitution of 1849, which had been intended to extend to Schleswig, but which was prevented by the insurrection. Thus the same minister was responsible to a constitutional monarchy in Denmark, and justiciable before the *Rigsraad*, while he was absolute in Schleswig and Holstein. The common constitution was not proclaimed till the 2d of October, 1855, and was suspended for Holstein and Lauenburg the 6th of November, 1858, in consequence of the resolution of the Federal Diet of the 12th of August preceding, which body, however, did not find the action of Denmark satisfactory. Annuaire des deux mondes, 1858–9, p. 524. The position of Holstein and Schleswig is unsettled to this day, Holstein resisting every regulation founded on the basis of the unity of the monarchy and not responding to the legitimacy of the traditional union of the Duchies. Attachment to Schleswig and to Germany are the points contended for. Le Nord, 15 Mars, 1861. And the very last communications were identical notes, under date of 14th February, 1862, from Austria and Prussia, in which they declare that the relations of Schleswig with Denmark had been fixed in 1851 and 1852 by an international transaction between Prussia and Austria, representing the Germanic Confederation and Denmark, which had been sanctioned by the Confederation, and that it was not permitted to alter, by unilateral legislative acts, under whatever form, stipulations based on arrangements of an international character. Denmark maintains in her answer her former attitude, declaring that she cannot go beyond the concessions already made. Le Nord, 19 et 20 Mars, 1862.

The matter of the succession was supposed to have been settled by a treaty, concluded in May, 1852, at the invitation of His Danish Majesty, between Denmark, Great Britain, Austria, France, Russia, Prussia, and Sweden, so as to insure the unity and integrity of the Danish dominions. The King of Denmark, with the assent of the Hereditary Prince, and of the nearest cognates, and in concert with the Emperor of Russia, as head of the elder branch of the House of Holstein-Gottorp, agreed that in default of issue in a direct line of Frederick III., of Denmark, his crown should devolve on Prince Christian of Schleswig-Holstein-Sonderbourg-Glücksbourg, and on the issue of his marriage with Louisa, born Princess of Hesse. By this arrangement several, both of the agnate and cognate lines were passed over. It was expressly provided by the treaty that the reciprocal obligations of the King of Denmark and of the Germanic Confederation, concerning the Duchies of Holstein and Lauenburg, established by the federal pact, and the existing laws should not be altered by it. Hansard's Debates, vol. cxxiv. 3d series, p. 440. Annuaire, &c., 1851–2, App. p. 961. Annual Reg. 1852, p. 441. So late as the 2d of February, 1861, the Grand Duke of Oldenburg advised the King of Denmark that he should abolish the *Rigsraad*, which only existed, in fact, for Schleswig and Denmark, and the common constitution, which had lost all legal effect by not being established in Holstein and Lauenburg, and convoke the ancient historical States of the two united Duchies of Schleswig and Holstein, and submit to them a constitution answering to the actual condition of things, and by which the personal unity may be established anew in its purity. He added: "In my opinion it is only the General Assembly of the two Duchies which has the right to regulate the new order of succession, and to give it that legal value of which it is still deprived, for the two Duchies." That measure

capacities. It was established, as the Constitution expressly declares, by "the people of the United States, in order to form a

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had been presented to the Diet of Denmark, and approved by the law of the 31st of July, 1853. Le Nord, 21 Mars, 1861.

Contrary to the usage which prevailed with the Diet of the Confederation of 1815, which received foreign ministers, but did not maintain regular missions on its own part, there was an interchange of legations between the United States and the German Empire. Nor were the functions of these ministers confined to mere ordinary relations. In the project to create among other federal institutions a German navy, a war-steamer was purchased by the Imperial Government in the United States, the sailing of which was objected to in consequence of the existence of the war with Denmark, as a violation of the American Neutrality Act of 20th of April, 1818. The vessel was only permitted, after a protracted negotiation, to leave an American port, on a bond being executed in compliance with the statute, that it should not be employed to cruise or commit hostilities against any State with which the United States were at peace. Annuaire des deux mondes, 1852–3, p. 485. Cong. Doc. 31st Cong. 1 Sess. H. of R. Ex. Doc. No. 5.

Though not successful in any plan of Constitution which would make her sovereign the nominal, as well as real political, chief of Northern Germany, the effect of the Zollverein has been to render Prussia the representative of the minor States in their relations with foreign powers, not only in commercial affairs, but, as a reference to the Extradition Treaty with the United States will show, in other matters.

The Zollverein was not confined to the establishment of commercial intercourse between its own members, but it entered into treaties, through Prussia, whose government had a full power for that purpose, with foreign nations. One of this character, formed on the basis of equivalent and reciprocal reductions of duties, and to effect which had been the principal object of his mission at Berlin, was signed by Mr. Wheaton, on behalf of the United States, on 25th of March, 1844, but for the reasons hereinafter mentioned, it did not go into effect. Several other treaties of commerce have been made by the Zollverein with European States, with Mexico, and with some of the Republics of South America, and in 1857 one was concluded with Persia. See Martens par Samwer, Nouveau Receuil, t. iii–xvi.

The States of the second order satisfied that a perfect union between their sovereigns could alone save their autonomy, held at Wurzburg, in 1859, conferences in which Bavaria, Saxony, Hanover and Grand Ducal Hesse were represented; in order to devise some measure of federal reform, that might satisfy the universal demand for national unity. Austria, also, sympathized with these States, as well from her desire to weaken the unitarian party as to check the movements of the Prussian Cabinet. Annuaire des deux mondes, 1858, pp. 636–643. Ib. 1860, pp. 441, 447.

A proposition was accordingly made, in November, 1861, by Saxony, whose Minister of Foreign Affairs, M. Beust, had taken the lead in 1859 in the proposed movement of the Confederation, for coöperating in her Italian war with Austria. Its principal features were to establish, in connection with the existing Diet, a national assembly of 120 members, one half (less a bare majority,) of whom should be composed equally of Austrians and Prussians, and the remainder elected by the legislative Chambers of the other German States. The seat of the Diet was to be removed from Frankfort, and it was to sit one month in the year at Ratisbon, when Austria should preside, and one month at Hamburg under the presidency of Prussia. During the recess, there was to be a triad executive composed of Austria, Prussia, and another State.

more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare,

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This suggestion did not meet the views of either of the great powers. Count Rechberg, in his note of the 5th of November, adhered to the idea of a reform in the national sense of the German federal constitution, and admitted that the initiative belonged to the middle States; but he objected to the Saxon *projet* as reposing upon the fundamental principle that, in the place of the presidency, conferred on Austria by the federal pact, the presidency was to be alternated between Austria and Prussia. The principle of the *alternat* could only be accepted by the Austrian government, on the condition that the Germanic Confederacy, in the quality of a *unitaire* power, should extend its system of defence to the non-Germanic possessions of Austria and Prussia, its consent to which it did not consider probable. The Austrian note, also, said that the fundamental principles of M. Beust's project — a greater concentration of federal action, united with the representative element, — would be more easily applied, if the seat of the Diet was not changed and the federal assembly sit permanently at Frankfort. In that case, it would be possible, also, to establish a presidency, which should be held in rotation by Austria, Prussia and a third power, which should represent the other German States.

Count Bernstoff, having, in his answer of the 20th of December, declined the Dresden *projet* of reform, and brought forward, in turn, a *programme*, the fundamental principle of which was no other than the creation of a restricted Confederation under the direction of Prussia in the great German Confederation, Austria with Saxony and the other secondary powers, in an identical note of the 2d of February, 1862, controverts the proposition that, according to the federal pact which embraces all Germany, while the international character of the Confederation is maintained in all its purity, at the same time a stricter union of a part of the members of the Confederation can be left to the free understanding of their respective governments. They deny that the 11th article of the federal pact, which authorizes the different governments of Germany to form alliances, can have any application to a case, which, instead of being a treaty of alliance, would be a subjection of their sovereignty to Prussia. They declare that they cannot consider the creation of a *soi-disant*, limited federative State in Germany, as justified by the 11th article of the federal pact; but, on the contrary, irreconcilable with the essence and organization of the German Confederation and as implying its dissolution in fact, if not in law. The note declares that it is possible to introduce important ameliorations, answering to the progress of the political internal life of Germany and including the creation of a more efficient federal executive and the regulation of the action of the Confederacy in the affairs of the common legislation, with the concurrence of delegates from the representative assemblies of Germany; and it concludes by proposing a conference for that purpose.

In a note of the Chargé d'Affaires of Prussia, at Dresden, of the 4th February, 1862, to the Baron de Beust, it is said: "If the Royal government has not continued to exchange views with M. de Beust on this grave subject, this refusal, on our part, is the result of a conviction that the divergence of principle is unfortunately too great to hope for any agreement. For the same motive the Royal government is not inclined to take part in conferences, which propose to create an executive power for all the Confederation, aside of which there should be for the common legislation a national representation, composed of all the States who form part of it. These views have already been announced to the governments, which addressed the identical notes to the Prussian Cabinet." Le Nord, 29 Nov. 1861. Ib. 14, 15, 18 Février, 1862.

and secure the blessings of liberty to them and their posterity." 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.

Legislative power of the Union.

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 dock-yards 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. [39

A resolution was adopted by the Prussian Chamber of Deputies, at their late session, (March, 1862,) that, while the federal bond between the German territories of Austria and the rest of Germany was maintained within this great Confederation, Prussia and the other German States, without affecting their internal autonomy, should unite in a restricted Confederation for their military, diplomatic, political and commercial affairs, in which the crown of Prussia should alone exercise the executive power, and in which a common national representation should concur in the legislation and exercise a constitutional control over the executive power. Le Nord, 3 Mars, 1862.] — *L.*

[39 The powers of Congress, enumerated in the text, are those contained in article 1, sec. 8, of the Constitution. Article 4, sec. 3, first paragraph, provides, more-

Executive power.

To give effect to this mass of sovereign authorities, the executive power is vested in a President of the

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over, for the admission by Congress of new States into the Union, with the proviso that no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.

Among the powers of the federal government of the United States once questioned, but now deemed to be settled by repeated precedents, universally acquiesced in, is that of acquiring foreign territory, and forming from it new States. This was done by the treaty of 1803, with France, by which Louisiana was ceded; by the cession, in 1819, by Spain, of the Floridas; and by that of California and New Mexico, by Mexico, in 1848. All these treaties contain provisions, by which the inhabitants of the ceded territory were to be incorporated into the Union of the United States, so soon as might be consistent with the principles of the federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities, of citizens of the United States. The power of the general government to acquire new territory was discussed in the Senate, on the occasion of the Louisiana treaty, and was placed on the ground that the United States, in common with all other nations, possess the power of making acquisitions of territory, by conquest, cession, or purchase. In that case, it was held, that it was competent for the treaty-making power to bind the United States, as between nations, to the admission of the ceded territory into the Union, even though the action of Congress or an amendment of the Constitution might be necessary to effect the object. The Supreme Court of the United States have also said, that the Constitution confers, absolutely, on the government of the Union the powers of making war and of making treaties; and, consequently, that that government possesses the power of acquiring territory, either by conquest or by treaty. And it was conceded in the argument, that the third section of the fourth article of the Constitution, authorizing the admission of new States into the Union, gives to Congress a power, only limited by their discretion, to admit as many new States as they may think proper, in whatever manner soever the territory comprising those new States may have been acquired. Elliot's Debates, vol. iv. p. 207. Peters's Rep. vol. i. p. 511, American Insurance Company *v.* Canter. Story on the Constitution, vol. iii. p. 156–161.

The admission of Texas differed from other cases, not only in being a merger in the American Union of a foreign republic, whose independence had been recognized by Great Britain and France, as well as the United States, but by the manner in which it was effected. The treaty previously negotiated for that purpose not having been ratified by the Senate of the United States, President Tyler made a communication, on 10th of June, 1844, to the House of Representatives, in which he offered his coöperation to effect the result, by any other expedient compatible with the Constitution. The two houses of Congress passed a resolution, approved by the President, 1st March, 1845, giving their consent that the territory included in the Republic of Texas might be erected into a State, to be called the State of Texas, with a Republican form of government, to be adopted by the people of the said Republic by deputies in convention assembled with the consent of the existing government, in order that the same might be admitted as one of the States of the Union, on the conditions contained in the resolution. The conditions having been accepted by the existing government, and the people of Texas, in convention, having formed a State

United States, chosen by electors appointed in each State in such manner as the legislature thereof may direct. [40 The

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Constitution, which was laid before Congress, Texas was, on 29th December, 1845, admitted into the Union, on an equal footing with the original States. Congressional Globe, 1843–4, Part I. pp. 6, 662. Ib. Part II. p. 448. United States Statutes at Large, vol. v. p. 797. Ib. vol. ix. p. 108.

The second paragraph of the 3d section of the 4th article, providing that Congress shall have the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," applies, it has been maintained by the Supreme Court, only to the property, which the United States held in common at the time and has no reference whatever to any territory or other property, which the new sovereignty might itself acquire. The power to govern such territory is derived as "the inevitable consequence of the right to acquire territory." But, though Congress is competent to acquire and temporarily govern a territory, it must be for admission as a State and not to be held as a colony. Citizens of the United States emigrating to it cannot be ruled as mere colonists. While it remains a territory, Congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States and may establish a territorial government, but with powers not exceeding those which Congress itself by the Constitution is authorized to exercise over citizens of the United States, in respect to their rights of persons or rights of property. The Constitution recognizes slaves as property, and pledges the federal government to protect it, and Congress cannot exercise any more authority over property of that description than it can constitutionally exercise over property of any other kind. Howard's Rep. vol. xix. pp. 443, 447. Dred Scott *v.* Sanford.

[* The powers of the President are defined in the 2d article of the Constitution. It was decided by the Supreme Court of the United States, in reference to the Mexican war, that, on the conquest of a country, the President may establish a provisional government, which may ordain laws and institute a judicial system, which will continue in force after the war and until modified by the direct legislation of Congress or by the territorial government established by its authority. Howard's Rep. vol. ix. p. 615, Fleming *v.* Page. Ib. vol. xvi. p. 190, Cross *v.* Harrison. Ib. vol. xx. p. 177, Leitensdorfer *v.* Webb. In the case of California, occupied by the arms of the United States in 1846 and ceded to them by Mexico by the treaty of 1848, no territorial government was established by Congress, and the provisional government remained in force till its admission into the Union in 1850. United States Statutes at Large, vol. ix. p. 452. As to New Mexico the provisional government continued till the establishment of a territorial government, by the act of the 9th of September, 1850. Ib. p. 446. See also Halleck on International Law, p. 778. In a case that occurred in 1857, Mr. Attorney-General Cushing considered that martial law was only to be exercised by the commander of a foreign army, in a time of war, in an enemy's country, and in such case its operation would only be limited by international law. He held that the Mexican cases were not applicable to a question of martial law in one's own country as administered by its military commanders, and he concluded that, according to the commentators on the Constitution, the right to suspend the writ of habeas corpus and also of judging when the exigency has arisen is in Congress. February 3, 1857. Opinions of Attorneys-General, vol. viii. p. 374. That the suspension of the power of the Court to issue the writ rested with the legislature, was the view of Chief Justice Marshall (Cranch's Rep.

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. [41 The judicial power also extends to all cases

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vol. iv. p. 75, *Ex parte* Bollman,) as well as of Chief Justice Taney, (Case of Merryman). The present Attorney-General advised the President that he is to decide the political considerations which may require the suspension, and that his authority under the Constitution is not affected by the powers vested by the judiciary act of 1789 in the judges, in reference to the writ of habeas corpus. Mr. Bates's Opinion, July 5, 1861, p. 12, Cong. Doc. The same view is taken in a note of the 14th October, 1861, from Mr. Seward to Lord Lyons, with regard to the summary arrest of British subjects, in which he says: "It does seem necessary to state for the information of the British government, that Congress is, by the Constitution, invested with no executive power or responsibility whatever; and, on the contrary, that the President of the United States is, by the Constitution and laws, invested with the whole executive power of the government and charged with the supreme direction of all municipal or ministerial civil agents, as well as of the whole land and naval forces of the Union; and that invested with those ample powers, he is charged by the Constitution and laws with the absolute duty of suppressing insurrection as well as of preventing and repelling invasion; and that for these purposes he constitutionally exercises the right of suspending the writ of habeas corpus, wherever and wheresoever, and to whatsover extent, the public safety, endangered by treason or invasion in arms, in his judgment requires. Parliamentary Papers, 1862. North American, No. I. p. 95.] — *L.*

[41 "There is at Washington" (said a distinguished foreigner who, in the diplomatic service of France, had witnessed the origin of the American Republic, and was subsequently a party to the act by which its most important territorial aggrandizement was effected,) "a power, which has neither guards nor palaces nor treasures; it is neither surrounded by clerks nor overloaded with records. It has for its arms only truth and wisdom. Its magnificence consists in its justice and in the publicity of its acts. This power is called the Supreme Court of the United States. It exercises the judicial authority in all cases affecting the general interests of the United States in their relations with one another and with foreign nations. The members of this tribunal can only be removed from office on account of bad conduct and after a trial. Their permanent tenure is an additional guarantee of their probity and of acquirements which are every year increased. This court has functions that alarm some friends of liberty. But what have they to fear from a power whose justice constitutes its whole strength, which can, it is true, reduce the other powers to inaction by declaring that they are proceeding contrary to the Constitution, but which would raise the whole republic against it, if its decision was not clearly correct?" Marbois's History of the Cession of Louisiana, translated by W. B. Lawrence, p. 37. Philad. 1830.

It was supposed by the framers of the Constitution, that the peaceful remedies

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.

The treaty-making power is vested exclusively in the President and Senate; all treaties negotiated with foreign States being subject to their ratification. [42] No State

Treaty-making power.

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through the judiciary would be adequate to maintain unimpaired the conflicting functions of the federal and State governments, arising from the complex distribution of power between them. The Federalist, No. LXXX. p. 364, ed. 1852. And for upwards of seventy years, that the authority of this high tribunal of the Union to interpret the Constitution and laws was undisputed by the other departments of the federal government, it was sufficient for all its proposed objects.

The act of May 2, 1792, which was the first to provide "for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," was, except as respects foreign invasion and insurrection against the government of a State, made strictly subsidiary to the action of the judiciary. Not only did the act refer, in terms, to the laws being opposed or their execution obstructed in any State, "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by this act," but the notification of the fact to the President, by an associate justice or district judge, was a requisite preliminary to his action in the case. United States Statutes at Large, vol. i. p. 264. In the Pennsylvania insurrection of 1794, Marshall says: "The evidence which had been transmitted to the President was laid before one of the associate justices, who gave the certificate which enabled the Chief Magistrate to employ the militia in aid of the civil power." Life of Washington, vol. ii. p. 343, ed. 1836. And though the notification of a judge is not required by the act of February 28, 1795, the contingency on which the call is to be made is expressed in that law in the same words as in the preceding act. United States Statutes at Large, vol. i. p. 424.

The Supreme Court decided with reference to a case arising during the war of 1812, when the militia were called out to repel invasion, that the President was the exclusive judge of the existence of the exigency contemplated by the act. Wheaton's Rep. vol. xii. p. 22, Martin v. Mott. And the same construction is given by the present Attorney-General to the other contingencies for which it provides. He says: "In such a state of things the President must of necessity be the sole judge, both of the exigency which requires him to act and of the manner in which it is most prudent for him to employ the powers entrusted to him, to enable him to discharge his constitutional and legal duty — that is to suppress insurrection and execute the laws. And this discretionary power, he says, is fully admitted by the Supreme Court in the case of Martin v. Mott." Mr. Bates's Opinion, July 5, 1861. Cong. Doc.] — *L.*

[42 There is an apparent departure from the principle, that all negotiations with foreign powers must be with the general government, and that foreign powers are

of the Union can enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit

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not to interfere in the relations between the United States and individual States, in the provision contained in the fifth article of the treaty of August 9th, 1842, that certain payments should be made by the government of the United States to the States of Maine and Massachusetts. This stipulation, which might be construed to justify foreign interference with our federal relations, was deemed by Lord Ashburton to call for a disclaimer, on the part of Great Britain, of the assumption of any responsibility for these engagements, his negotiations having been with the General Government only. Lord Ashburton to Mr. Webster. Webster's Works, vol. vi. p. 289.

But though the government of the United States is, under the Constitution, alone competent to contract with a foreign power, a treaty may contain provisions requiring, as preliminary to its going into operation, the passage of laws, or the performance of other acts by the individual States; but such conditions would no more make them parties to the negotiation than the British American Provinces are to the Convention of the 5th of June, 1854, between the United States and Great Britain, to which the subjoined remarks of the American Attorney-General refer:— "In the case of that treaty, it is stipulated between the high contracting parties that, before it shall take full effect, certain laws shall be enacted by the Provincial Parliaments of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island; but that stipulation is entered into not for any object of the United States, but for purposes of the domestic policy of the British government, in its relation to those provinces. In like manner, the federal government, if it had seen cause, might have proposed a correspondent stipulation, in regard to its coast fisheries; for instance, that the treaty should take effect as to that matter only, on condition of certain laws being enacted by the Legislative Assemblies of such of the several States of the Union as are specially affected by that part of the treaty, in having their coast fisheries thrown open to the subjects of the United Kingdom. But if such a stipulation had been proposed, it would have been for considerations appertaining to the relation of the federal government to the individual States of the Union, and not on account of any relation of theirs to the United Kingdom." Opinion of Mr. Cushing, Oct. 3, 1854. Opinions of Attorneys-General, vol. vi. p. 756.

It would seem, from a debate in the House of Commons, that in 1850, as well as subsequently, negotiations were carried on, by order of his government, direct between the British Consul at Charleston and the State authorities, for a modification, so far as respects British subjects, of a local law for the imprisoning, during the stay of the vessel in port, of any free negro or colored persons employed on board of a vessel coming from any other State or foreign port. This law, it was admitted by the English Secretary for Foreign Affairs, was not an infraction of the Commercial Convention of 1815; the rights and privileges which it guarantees being "subject always to the laws and statutes of the two countries respectively." See Convention, July 3, 1815. U. S. Statutes at Large, vol. viii. p. 228. The reason stated for transferring the negotiations from the federal to the State government was, that the American Secretary of State had intimated that, if England persisted in demanding the concession, the only course for the United States to adopt would be to give the notice required for terminating the Convention. Hansard's Parl. Deb. 3d Series, vol. cxxviii. p. 136.

In 1824, complaint having been made by the British Minister at Washington of this South Carolina law, the opinion of the Attorney-General was, "that it was in-

bills of credit; make anything but gold and silver coin a tender in the payment of debts; pass any bill of attainder *ex post facto*

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compatible with the National Constitution and the laws passed under it, and therefore void." Mr. Wirt to Mr. Adams, Secretary of State, May 28, 1824. The remonstrance of the British Minister and the opinion of the Attorney-General were forwarded by President Monroe's orders to the Governor of South Carolina, and by him laid before the legislature, but the law was not repealed. British and Foreign State Papers, 1824–5, p. 638.

The complaint having been renewed by Sir Charles Vaughan in 1831, the matter was referred to the Attorney-General, Mr. Berrian, who advised President Jackson, March 25, 1831, that the conflict with the Constitution of the United States had been assumed without sufficient attention to the terms of the Convention or the laws of the Union, and that the South Carolina Port Bill, having for its object the regulation and government of free persons of color within its limits, was a law strictly belonging to her internal police. Opinions of Attorneys-General, vol. ii. p. 427.

It may be remarked in this connection, that publicists recognize the right of governments to exclude certain classes of foreigners, in conformity with their internal policy. Heffter, Droit Internat. par Bergson, § 62, I. p. 132. Some of the non-slaveholding States of the American Union either prohibit the immigration of free persons of color or impose severe restrictions on their residence. Hurd's Law of Freedom and Bondage, vol. ii. p. 134.

A question as to the right of the treaty-making power to affect duties on imports, was raised in the case of the Convention negotiated by Mr. Wheaton with the Zollverein already alluded to. Though recommended by the President in two successive annual messages and in submitting the treaty to the Senate, the Committee of Foreign Relations of that body reported, that it was "an innovation on the ancient and uniform practice of the government to change (by treaty) duties laid by law;" that "the Constitution, in express terms, delegates the power to Congress to regulate commerce and to impose duties, and to no other; and that the control of trade and the function of taxing belong, without abridgment or participation, to Congress." The Senate having omitted to give their assent to the treaty before their adjournment, the Secretary of State, Mr. Calhoun, in communicating to Mr. Wheaton the result of their proceedings, with a view to the extension of the time for the exchange of ratifications, states, that the objections of the committee were opposed to the uniform practice of the government; and he refers to numerous treaties, which contain stipulations changing the existing laws regulating commerce and navigation, and duties laid by law. "So well," says he, "is the practice settled, that it is believed it has never before been questioned. The only question, it is believed, that was ever made was, whether an Act of Congress was not necessary, to sanction and carry the stipulations making the change into effect." The President had announced to the Senate that, when it was ratified, he would transmit the treaty and accompanying documents to the House of Representatives, for its consideration and action. Cong. Globe, 1843–4, p. 6. Ib. 1844–5, p. 5. Cong. Doc. 28th Cong. 1st Sess. Senate, executive, confidential. Mr. Calhoun to Mr. Wheaton, 28th June, 1844, MS.

It may here be noticed, that the objections made to the Zollverein treaty, founded on the competency of the treaty-making power of the federal government, seem no longer to be deemed tenable, inasmuch as the Reciprocity treaty of June, 1854, in reference to the trade between the United States and the British Provinces, though materially varying the existing tariff, was at once ratified, and a law to carry it into

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 the 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.

The American Union is a supreme federal government.

It is not within the province of this work to determine how far the internal sovereignty of the respective States composing the 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.* [43

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effect passed, as of course, through Congress. United States Statutes at Large, vol. x. p. 1089.] — *L.*

[43 That the Constitution cannot be amended, much less abrogated, except in the form prescribed in the instrument, was maintained even by the legislature of South Carolina in 1828, in a document ascribed to the pen of Mr. Calhoun. It says: "By an express provision of the Constitution, it may be amended or changed by three fourths of the States; and thus each State, by assenting to the Constitution with this provision, has modified its original right as a sovereign, of making its individual consent necessary to any change in its political condition; and by becoming a member of the Union has placed this important power in the hands of three fourths of the States, and in whom the highest power known to the Constitution actually resides." Calhoun's Works, vol. vi. p. 36. And when the same State, in 1832–3, assumed to nullify an act of Congress, it was distinctly placed on her right to interpose in the last resort to arrest an unconstitutional law within her own limits, and without ceasing to be a member of the Union; though on that occasion the right

The Swiss Confederation, as remodelled by the federal pact of 1815, consists of a union between the then

§ 25. Swiss Confederation.

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of each State to secede peaceably from the Union, "whenever it may deem such course necessary for the preservation of its liberty or vital interest," was proclaimed. Ib p. 95. Benton's Debates of Congress, vol. xii. p. 12.

Though President Buchanan had in his annual message, December, 1859, congratulated Congress that the supreme judicial tribunal of the country, "which is a coordinate branch of the government," had settled the question of slavery in the territories by sanctioning and affirming those principles of constitutional law, which established the right of every citizen to take his property of every kind into the common territory belonging equally to all the States of the Confederacy and to have it protected there under the Federal Constitution, and that neither Congress nor any human power had any authority to annul or impair this vested right, an ordinance was passed, on the 20th of December, 1860, by a convention in South Carolina, repealing the ordinance adopting the Constitution of the United States and declaring the union subsisting between South Carolina and other States, under the name of the United States, to be dissolved. Annual Register, 1859, p. 270]. Moore's Rebellion Record, 1860–1, p. 2. The document, accompanying this ordinance, does not allege that effect has not been given to the decisions of the Supreme Court on the subject of slavery, or that any of them infringe on the rights of the Southern States; but they place their secession on the violation by fourteen States, through laws nullifying or rendering useless the acts of Congress for fulfilling the obligations imposed by the fourth article of the Constitution. That article provides that "no person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but he shall be delivered up, on claim of the party to whom such service or labor may be due." Ib. p. 8.

The course of South Carolina was before the inauguration of President Lincoln, 4th March, 1861, followed by six other States, which formed a provisional government under the title of "the Confederated States of America." They, also, had adopted a Constitution identical in most respects with that of the United States, which went into operation in February, 1861.

President Buchanan, in anticipation of these proceedings had, in his annual message, December, 1860, declared that, "In order to justify secession as a constitutional remedy, it must be on the principle that the Federal Government is a mere voluntary association of States, to be dissolved at pleasure by any one of the contracting parties. . . . Such a principle is wholly inconsistent with the history as well as the character of the federal Constitution." "Secession," he says, "is neither more nor less than revolution." In discussing the duties imposed on the Executive under the circumstances, he remarks: "The only acts of Congress on the statute book bearing upon this subject are those of the 28th of February, 1795, and 3d of March, 1807, (the latter authorizing the employment of land and naval forces to suppress insurrection, when lawful to call out militia). These authorize the President, after he shall have ascertained that the marshal, with his *posse comitatus*, is unable to execute civil or criminal process, in any particular case, to call forth the militia and employ the army and navy to aid him in performing the service, having first commanded the insurgents 'to disperse and retire peaceably to their respective abodes within a limited time.' This duty cannot by possibility be performed in a State where no judicial authority exists to issue process, and where there is no

twenty-two Cantons of Switzerland; the object of which is declared to be the preservation of their freedom, independence, and

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marshal to execute it, and where, even if there were such an officer, the entire population would constitute one solid combination to resist him."

He then inquires: "Has the Constitution delegated to Congress the power to coerce a State into submission which is attempting to withdraw or has actually withdrawn from the Confederacy? If answered in the affirmative, it must be on the principle that the power has been conferred upon Congress to declare and make war against a State. After much serious reflection I have arrived at the conclusion that no such power has been delegated to Congress, or to any other department of the federal government. So far from this power having been delegated to Congress, it was expressly refused by the convention which framed the Constitution." In confirmation of these views, Mr. Buchanan cites the observation of Mr. Madison in the federal Convention, in 1787, that "the use of force against a State would look more like a declaration of war than the infliction of punishment; and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound."

As to the property of the United States in the seceding States, he says that "this has been purchased for a fair equivalent by the consent of the legislature of the State 'for the erection of forts, magazines, arsenals,' &c., and over these the authority 'to exercise exclusive legislation' has been expressly granted by the Constitution to Congress. It is not believed that any attempt will be made to expel the the United States from this property by force; but, if in this I should prove to be mistaken, the officer in command has received orders to act strictly on the defensive." He denies the power of the Executive to recognize the independency of a seceding State, which would be virtually to dissolve the existence of the Union, and in no wise resembles the recognition of a *de facto* foreign government; and he, therefore, submits the whole subject in all its bearings to Congress. Congressional Globe, 1860–1. Appendix, p. 3. Congress adjourned without taking any action in the matter.

President Lincoln, in his inaugural address, 4th March, 1861, does not concur with his predecessor, as to the arbiter for the decision of constitutional questions. He says: "If the policy of the government on vital questions, affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal." On the subject of secession he holds that, "in contemplation of universal law, and of the Constitution, the union of these States is perpetual. Perpetuity is implied in the fundamental law of all national governments." "It follows from these views that no State, upon its own mere motion, can lawfully get out of the Union; that *resolves* and *ordinances* to that effect are legally void; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary according to circumstances."

Without referring to the secession or rebellion apparently consummated in seven States and to the Confederacy attempted to be established by them, he declares: "I therefore consider that, in view of the Constitution and the laws, the Union is unbroken; and to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all

security against foreign attack, and of domestic order and tranquillity. The several Cantons guarantee to each other their

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the States. In doing this there needs be no bloodshed or violence; and there shall be none unless it be forced upon the national authority. The power confided to me will be used to hold, occupy, and possess the property and places belonging to the government, and to collect the duties and imposts, but beyond what may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere. Where hostility to the United States, in any interior locality, shall be so great and so universal as to prevent competent resident citizens from holding the federal offices, there will be no attempt to force obnoxious strangers among the people for that object." Congressional Globe, 1860-1, p. 1434.

Soon after Mr. Lincoln's inauguration commissioners were sent by the Confederate States accredited to the President of the United States. The Secretary of State, (Mr. Seward) in refusing to receive them, states that he was altogether precluded by the principles announced in the President's inaugural address, from admitting or assuming that the States referred to by them have in law or in fact withdrawn from the Federal Union, or that they could do so in any other manner than with the consent and concert of the people of the United States, to be given through a national convention, to be assembled in conformity with the provisions of the Constitution of the United States. Of course, he cannot act upon the assumption, or in any way admit that the so-called Confederate States constitute a foreign power, with whom diplomatic relations ought to be established. Memorandum filed in the Department of State, March 15, 1861.

Most of the forts and arsenals, as well as other public property of the United States in the seceded States had been taken possession of without resistance, at or before the passage of secession ordinances, but an attack by the Confederates on Fort Sumter, in the harbor of Charleston, South Carolina, on the 12th of April, 1861, was the signal for inaugurating actual war. On the 15th of the same month the President of the United States issued his proclamation declaring that the laws of the United States were opposed and obstructed in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by law," and calling out the militia of the several States of the Union to the number of 75,000 men, to suppress such combinations and to cause the laws to be executed. The President of the Confederate States having met this proclamation by one of the 17th of April, inviting applications for letters of marque and reprisal, President Lincoln, on the 19th, proclaimed that he had deemed it advisable to set on foot a blockade of the ports of the seceded States, "in pursuance of the laws of the United States and of the law of nations in such case provided." At the same time, persons acting under the letters of marque of the Confederates were threatened with punishment as pirates. A further proclamation, of the 3d of May, in advance of the meeting of Congress, (by whom, during the session convened for 4th of July, the military forces were augmented to upwards of 600,000 men,) called for additional volunteers, as well as made a large increase of the regular army and navy. United States Statutes at Large, 1861, pp. ii. iii. On the other hand, an act of the Congress of the Confederate States was passed on the 6th of May, recognizing a state of war with the United States. The proclamation of the President of the United States, treating the Confederate States as in a state of insurrection was met on the 17th of April by the secession of Virginia, whose course was followed successively by

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, Zurich, and Lucerne, which are called the directing Cantons, (*Vorort.*) 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 Zurich, 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

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Tennessee, Arkansas, and North Carolina, while Maryland was exposed to earnest efforts to bring her into the Southern Confederacy, and Missouri and Kentucky were, for a time, the scenes of intestine war. Thus the case passed from the domain of constitutional law, and with armies, whose combined aggregate would exceed a million of men, was submitted to the arbitrament of the sword. The subject is here referred to, as many questions of international law, to which the contest has given rise, have commanded and must continue to command attention in these annotations.] — *L.*

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.[1]

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

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.[2]

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

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 have been 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 have all proved abortive; and Switzerland still remains subject to the federal pact of 1815, except that three of the original Cantons, — Basle, Unterwalden, and Appenzel, — have been dismembered, so as to increase the whole number of Cantons to twenty-five. But as each division of these three original Cantons is entitled to half a vote only in the Diet, the total number of votes still remains twenty-two, as under the original federal pact.[3] [44

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[1] Martens, Nouveau Recueil, tom. viii. p. 173.

[2] Merlin, Répertoire, tit. *Ministre Public.*

[3] Wheaton, Hist. Law of Nations, pp. 494–496.

[44] In 1846, a separate armed league of the seven Catholic Cantons, termed *Son-*

derbund, was formed. They had been previously connected by a league, called the League of *Sarnen*; but their new organization became professedly an armed Confederation. Its members bound themselves to furnish contingents of men and money, and to obey a common military authority — all declared to be exclusively for purposes of common defence. This association being at variance with the sixth article of the federal pact, which says, "No alliances shall be formed by the Cantons among each other, prejudicial either to the general confederacy or the rights of the other Cantons," it was resolved by the Diet to be illegal, and declared to be dissolved. At the same time, the excitement was increased by the decree, directing the same Cantons to expel the Jesuits from their territories. These orders not being complied with, the Diet determined to carry them into effect by force, which was done before the proffer of mediation by the five great powers was received. These events were not however without their influence upon the subsequent occurrences of 1848. On the 12th of September of that year a new constitution was voted by the Diet. It commences by acknowledging the sovereignty of the Cantons, but in subordination to the sovereignty of the State. All Swiss citizens are declared equal before the laws. The constitution guarantees, likewise, the Cantonal constitutions; reserving the right of interposing in constitutional questions which may arise in the Cantons. Every separate alliance among the Cantons, every *Sonderbund*, is prohibited. The right of peace or war, and the power of concluding treaties, political or commercial, belong to the Confederation. If any disturbances arise in the interior of any Canton, the federal government may interpose without awaiting an application to it; and it is its duty to interpose when these disturbances compromise the safety of Switzerland. The Confederation has not the right of maintaining a permanent army; but the contingents of the Cantons are organized under federal laws. The treasury of the Confederation pays part of the expenses of military instruction, which is directed and superintended by federal officers. The principle of the organization of the army is, that every Swiss citizen is held to military service.

The Confederation may construct, or grant aid for the construction, of public works. It may suppress the tolls, and transit duties between the Cantons, and collect, at the frontiers of Switzerland; duties of importation, of exportation, and of transit. It is intrusted with the administration of the posts throughout Switzerland; it exercises a supervision over the roads and bridges, fixes the monetary standard, and establishes uniformity of weights and measures; it secures to all Swiss, of every Christian creed, the right of settling, under certain conditions, in any part of the Swiss territory. Freedom of worship, according to any of the acknowledged Christian creeds, is guaranteed; as well as the liberty of the press, and the right of assembling together. The Confederation claims the right of sending out of the territory foreigners, whose presence may compromise the internal tranquillity of Switzerland, or its external peace. The supreme authority is exercised by a Federal Assembly, divided into two Houses or Councils; the National Council, and the Council of the States. The National Council consists of one deputy elected for every twenty thousand souls. The Council of the States is composed of forty-four deputies named by the Cantons; two for each. The two Councils choose a Federal Council, the General-in-Chief, and the Chief of the General Staff. The Federal Council is composed of seven members, chosen for three years; and only one member can be chosen from the same Canton. The duties of this Federal Council consist in superintending the interests of the Confederation abroad, and especially its international relations. In cases of urgency, and during the recess of the Federal Assembly, it is authorized to levy the necessary troops, and dispose of them, subject to the duty of convoking the Councils immediately, if the troops raised exceed two thousand men, or if they

remain in service more than three weeks. The Council renders an account of its proceedings to the Federal Assembly, at every ordinary session. There is a federal tribunal, for the administration of justice in federal matters; and trial by jury is provided in criminal cases. Annual Reg. 1847, p. 370.] Annuaire des deux mondes, 1850, p. 37. Texte officiel de la Constitution fédérale Suisse, pp. 4, 16, 22.

It was only in 1857 that the anomalous condition of Neufchâtel ceased. The rights of the kings of Prussia as sovereigns of Neufchâtel and Valengin go back to the cession made of that country in 1707, by William of Orange to his cousin Frederick, first king of Prussia. In 1806 it was granted, as a sovereign principality, to Marshal Berthier, which act was recognized by all the powers of Continental Europe. The twenty-third article of the Final Act of the Congress of Vienna restored Neufchâtel to the King of Prussia, making, however, this principality and the county of Valengin a Canton of the Helvetian Republic. In 1848, a revolution overturned violently the authority of the King of Prussia. It was, notwithstanding, recognized and maintained by the first protocol of the conferences held at London, 24th May, 1852, between the plenipotentiaries of the five great powers. With a view of restoring to their families those of his Neufchâtel subjects who had been imprisoned on account of their fidelity, the King of Prussia consented to cede his rights to the Principality of Neufchâtel. A treaty to that effect was signed 26th May, 1857, between Austria, France, Great Britain, Prussia, Russia, and Switzerland, by which the State of Neufchâtel, thereafter independent, continued to form a part of the Swiss Confederation by the same title as the other Cantons. De Cussy, Précis Historique, p. 421. This subject had been brought forward in the Congress of Paris of 1856, but without any action being taken on it. Baron de Manteuffel then remarked that the principality of Neufchâtel was probably the only point in Europe where, contrary to the treaties and to what had been formally recognized by all the great powers, a revolutionary authority, which disregards the rights of the sovereign, governed. Martens par Samwer, Nouveau Recueil, t. xv. p. 761.] — *L.*

PART SECOND.

ABSOLUTE INTERNATIONAL RIGHTS OF STATES.

PART SECOND.

ABSOLUTE INTERNATIONAL RIGHTS OF STATES.

CHAPTER I.

RIGHT OF SELF-PRESERVATION AND INDEPENDENCE.

§ 1. Rights of sovereign States, with respect to one another.

THE rights, which sovereign States enjoy with regard to one another, may be divided into rights of two sorts: *primitive*, or *absolute* rights; *conditional*, or *hypothetical rights*.[1]

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.

§ 2. Right of self-preservation.

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. It is not only a right with respect to other States, but a duty

[1] Klüber, Droit des Gens Moderne de l'Europe, § 36.

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. [45

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 correspondent 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.

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

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[45 M. Hautefeuille denies the right of one nation to make the refusal of another to trade with it a ground of intervention in its affairs. He does not adopt even the distinction of Grotius between those things which are indispensable for the support of life and those which only satisfy conventional wants, the demands of luxury. He cannot recognize the principle contended for by Wolff and Lampredi, that to furnish provisions to people who are in need of them, is not only a duty, but that, in case of extreme distress, they have a right to take them on paying the price. If this rule were admitted, the right would not be restricted to objects of first necessity, like corn, but would extend to objects which, if not absolutely necessary for human life, are required for the maintenance of States. Cotton, for example, is so extensively used that France, and especially England, could not be deprived of it without being exposed to terrible convulsions. He particularly condemns the war which England carried on against China on account of the opium trade. Droits des nations neutres, tom. i. tit. 2, § 2, p. 108, 2me ed.] — *L.*

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 less than three leagues from the city of Basle.[1]

§ 3. 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 recognized 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 aggrandizement 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 aggrandizement of a 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

[1] Martens, Recueil de Traites, tom. ii. p. 469.

neighbors. 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 is 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 neighbors, 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.[1]

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 aggrandizement 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. 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.

[1] Senior, Edinb. Rev. No. 156, art. 1, p. 329.

Wherever the 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 aggrandizement 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 favor 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 coloring 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, whilst 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 patronize 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.[1]

Wars of the Reformation.

The same remarks will apply to the more recent, but not less

[1] Wheaton, Hist. Law of Nations, Part I. §§ 2, 3, pp. 80–88.

§ 4. Wars of the French Revolution.

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 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 reëstablished 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 neighboring States.

Alliance of the five great European powers.

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.

§ 5. Congress of Aix-la-Chapelle, of Troppau and of Laybach.

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 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. 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.[1]

§ 6. Congress of Verona.

The British government also declined being a party to the proceedings of the Congress held at Verona, in

[1] Lord Castlereagh's Circular Dispatch, Jan. 19, 1821. Annual Register, vol. lxii. Part II. p. 737.

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 interests 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 reconquest and liberation of the European continent from the military dominion of France; and, having subverted that dominion, it took the state of possession, as established by the peace, under the joint protection of the alliance. It never was, however, intended as an 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. If the end of the last and the beginning of the present 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.[1]

§ 7. 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

[1] Confidential Minute of Lord Castlereagh on the Affairs of Spain, communicated to the Allied Courts in May, 1823. Annual Register, vol. lxv.; *Public Documents*, p. 93. Mr. Secretary Canning's Letter to Sir C. Stuart, 28th Jan. 1823, p. 114. Same to the Same, 31st March, 1823, p. 141.

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. 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 by menace, in the dispute between them, as a motive for recognizing the latter without delay.[1]

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 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 recognized, 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 correspondent 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.

[1] Memorandum of Conference between Mr. Secretary Canning and Prince Polignac, 9th October, 1823. Annual Register, vol. lxvi. p. 99. *Public Documents.*

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.[1] [[46]

§ 8. British interference in the affairs of Portugal in 1826.

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

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[1] President Monroe's Message to Congress, 2d December, 1823. Annual Register, vol. lxv. *Public Documents*, p. 193*.

[[46] President Polk having, in 1848, based, on what was supposed to be the Monroe doctrine, a recommendation to take possession of Yucatan, in order to prevent its becoming a colony of any European power, Mr. Calhoun, who was a member of the Monroe Cabinet, explained the circumstances connected with that declaration. It was made in concert with Great Britain, in order to prevent the intervention of the "Holy Alliance," in aiding Spain to regain her sovereignty over her revolted provinces. Mr. Canning had informed Mr. Rush (Minister of the United States at London) of the project, assuring him, at the same time, that, if sustained by the United States, Great Britain would resist. Speech in U. S. Senate, May 15, 1848. Calhoun's Works, vol. iv. p. 454. This is in accordance with the statement of Sir James Mackintosh, in his Speech of June, 1824. Works, p. 555. The message itself would seem, however, to have a more extended application. It was with reference to the discussions then pending with Russia, as to the northwest coast of America, that it is said: "The occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European power." Annual Register, 1823, p. 185*.] — *L.*

1825. The constitution of Brazil had provided that its crown should never be united on the same head with that of Portugal; and Dom Pedro resigned the latter to his infant daughter, Dona 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 neighboring kingdom, countenanced the pretensions of Dom 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 succored by the Spanish authorities 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 honor.[1]

§ 9. Interference of the Christian powers of Europe, in favor of the Greeks.

The interference of the Christian powers of Europe, in favor 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 immediately 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. [47] These principles are fully recognized 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

[1] Mr. Canning's Speech in the House of Commons, 11th December, 1826. Annual Register, vol. lxviii. p. 192.

[47] "Foreign intervention in a civil war may be excusable, when the interest of humanity evidently requires it or when the essential interests of a State are injured by a civil war in a neighboring State. But in both these cases, the law of nations only allows the intervention on condition that it shall be equal for both parties, that is to say, not carrying on hostilities against the one and protecting the other, and it must be without any object but to cause the war to terminate." Riquelme Elementos de Derecho Público, tom. i. p. 172. | — *L.*

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 reëstablishing 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 powers 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 2d 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 3d 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 proposed 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 favor, 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 have supposed, the Turks belong to a family or set of nations which is not bound by the general international law of Christendom, they have 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 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.[1] [48

§ 10. Interference of Austria, G. Britain, Prussia, and Russia, in the internal affairs of the Ottoman Empire, in 1840.

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.[2] 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, Pacha 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

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[1] 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 3d of February, 1830, and accepted by Greece and the Ottoman Porte.

[48 In 1850, an attempt was made by England alone to obtain, through her fleet blockading the harbor of Athens, and without the intervention of the other parties to the treaty, reclamations on the government of Greece for private injuries to British and Ionian subjects, which led to the proffer of the mediation of France and to the remonstrances of Russia. The difficulty was not finally settled, without a misunderstanding between the French and English governments and the temporary withdrawal of the French Ambassador from London. Annuaire des deux mondes, 1850, p. 151.] — *L.*

[2] Vide supra, Part I. ch. i. § 10.

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 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 Pacha 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 Mahmoud 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 neither 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 pachalic of which was confirmed to him, according to the conditions contained in the separate article of the convention.[1] [49

§ 11. Interference of the five great European powers in the Belgic revolution of 1830.

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 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 con-

[1] Wheaton's Hist. Law of Nations, pp. 563–583.

[49] England, in connection with one or more of the great powers, by participating with Russia in her interference with the internal affairs of Turkey, constantly endeavored to prevent the exclusive protectorate of the Czar (which seemed to have been permanently secured, in 1833, by the alliance of Unkiar Skelessi,) and to protract the duration of the Ottoman Empire as a barrier for her East India possessions, as well as a means to prevent the establishment of a great maritime State, for which the Sultan's dominions in Europe present such facilities. Apprehension of the separate intervention of Russia, also, induced the other powers to take into their own hands the negotiations between Mehemet Ali and the Porte. And though France refused, on account of the terms offered to the Pacha being deemed less favorable than she thought proper, to join in the convention of 1840, and which was therefore confined to Russia, Great Britain, Austria, and Prussia, "the French Minister of Foreign Affairs, (M. Guizot,) expressly stated that, if the execution of the treaty should be resisted by the Pacha of Egypt, and a Russian army should be landed in Asia Minor, so as to produce a new complication, endangering the European balance of power, France reserved the right of acting as her honor and interest might ultimately dictate." Mr. Wheaton to Secretary of State, August 5, 1840, MS. By accepting the invitation to participate with the four other great powers in the treaty of the ensuing year, July 13, 1841, for closing the Dardanelles to foreign ships of war, and which recognized the submission of Mehemet Ali, France was reëstablished in her European relations. Lesur, Annuaire, 1841, p. 153, App.] — *L.*

test, 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 recognized 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 Luxembourg, 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 bases of her public law. These conditions were subsequently incorporated into a definitive treaty, concluded between Belgium and Holland in 1839, by which the independence of the former was finally recognized by the latter.[1]

§ 12. Independence of the State in respect to its internal government.

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. [50

[1] Wheaton's Hist. Law of Nations, pp. 538–555.

[50] "The conduct of a sovereign, however blamable it may be, so long as it does not attack or threaten the rights of other sovereigns does not give to them any right of intervention. For no sovereign can constitute himself a judge of the conduct of another. Nevertheless it is the duty of others to try with him the means of an amicable intercession, and if in spite of this advice, he perseveres in his conduct, if he continues to tread under foot the laws of justice, it is proper to break off all relations with him. Whenever matters assume the character of civil war, foreign powers may effectually intervene and assist the party whose cause is just, provided their assistance is invoked. The law is the same for States as individuals. If it permits an individual to fly to the assistance of his neighbors, whose existence or fundamental rights are threatened, for a stronger reason will it permit States to do so." Heffter, Das europäische Völkerrecht, § 46.

§ 13. Mediation of foreign States for the settlement of the internal dissensions of a State. Treaties of mediation and guaranty.

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. [51]

Such a title may also grow out of positive compact previously existing, such as treaties of mediation and

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It was in consequence of the number of political arrests under the government of the King of the Two Sicilies, the cruelty with which the victims were treated and the unfairness of their trials, that England and France, through their Ministers, made in 1856 friendly remonstrances to the King and Ministers, with a view of bringing them to a better sense of justice. This advice being indignantly rejected, both countries withdrew their legations from Naples, and French and English squadrons were held in readiness to act if the withdrawal of official protection threatened the least danger to the subjects of either nation.

The Russian government, in a circular from Prince Gortschakoff to the diplomatic agents of Russia, remonstrated against the course pursued by England and France. While admitting that "as a consequence of friendly forethought, a government should give advice to another," he adds, "to endeavor to obtain from the King of Naples concessions, as regards the internal government of his States, by threats or by a menacing demonstration, is a violent usurpation of his authority, an attempt to govern in his stead; it is an open declaration of the strong over the weak." Annual Register, 1856, p. 234.]

This subject was adverted to by Lord Clarendon at the Congress of Paris of 1856. It is a principle, he said, that no government has the right to intervene in the internal affairs of other States, but there are cases where an exception to this rule becomes equally a right and a duty. We do not wish that the peace should be broken, and there is no peace without justice; we must then bring to the knowledge of the King of Naples the wish of the Congress for an amelioration of his system of government, — a wish that cannot be without effect, and demand of him an amnesty in favor of those persons who have been condemned or imprisoned without trial for political offences. Martens par Samwer, Nouveau Recueil, tom. xv. p. 759.] — *L.*

[51] The difference between a mediator and an arbitrator consists in this: that the arbitrator pronounces a real judgment, which is obligatory, and that the mediator can only give his counsel and advice. The mediation, indeed, is often a simple formality to bring the parties together, and which is afterwards continued from respect to the mediator. Garden, Traité de la Diplomatie, tom. i. p. 436, note. The reference, in pursuance of the convention of 1827, of the question respecting the north-eastern boundary of the United States by the British and American governments, to the King of the Netherlands, was a case of arbitration, though, as the award did not profess to follow the submission but merely recommended a conventional line which it designated, it was not obligatory. Amer. Ann. Reg. 1830–1, p. 146. The plenipotentiaries to the Congress of Paris of 1856, in their 22d protocol, express, in the name of their governments, the wish that the States between whom serious difficulties may arise, would, before appealing to arms, have recourse, as far as circumstances will admit, to the good offices of a friendly power. Martens par Samwer, Nouveau Recueil, tom. xv. p. 767.] — *L.*

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.

The Republic of Geneva was connected by an ancient alliance with the Swiss Cantons of Berne and Zurich, 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 giving rise to new disputes in 1768, 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.[1]

The present constitution of the Swiss Confederation was also adjusted, in 1815, by the mediation of the great allied powers, and subsequently recognized 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 their respective local constitutions of government.[2]

So also the local constitutions of the different States composing the Germanic Confederation may be guaranteed by the Diet on the application of the particular State in which the constitution is established; and this guarantee gives the Diet the right of determining all controversies respecting the interpretation and execution of the constitution thus established and guaranteed.[3]

And the Constitution of the United States of America guarantees to each State of the federal Union a republican form of

[1] Flassan, Histoire de la Diplomatie Française, tom. v. p. 78, tom. vii. pp. 27, 297.

[2] Acte Final du Congrès de Vienne, art. 74.

[3] Wiener Schlussacte, vom 15 Mai, 1820, art. 62. Corpus Juris Germanici, von Mayer, tom. ii. p. 196.

government, and engages to protect each of them against invasion, and, on application of the local authorities, against domestic violence.[1]

§ 14. 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 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.[2] [52]

§ 15. Exceptions growing out of compact or other just right of intervention.

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 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

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[1] Constitution of the United States, art. 8.

[2] Vattel, Droit des Gens, liv. i. ch. 5, §§ 66, 67.

[52] The theory that all government originates with the people, whatever form they may give to its administration, has been practically appealed to in the recent changes of political organization. It received its fullest application in France in the case of the restoration, by a *plébiscite*, in 1852, of the Imperial dignity in the person of Napoleon III. Lesur, Annuaire, 1852, pp. 176–184. And the Emperor, deferring to the principle, required the consent of the people of Savoy and Nice, before incorporating them into the Empire. Martens par Samwer, Nouveau Recueil, tom. xvi. p. 539. It is the sole basis of the title of Victor Emmanuel to his new acquisitions, save that of Lombardy. Indeed, notwithstanding the previous manifestations of the populations, M. Thouvenel declared that the French government could not divest themselves of the moral responsibility arising from the treaty of Zurich, unless the principle of *universal suffrage*, which constitutes its own legitimacy, became also the foundation of the new order of things in Italy. M. Cavour to M. Nigra, February 29, 1860. Annuaire des deux mondes, 1860, p. 103.] — *L.*

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 Germanic Empire, the King 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, as well as a temporal sovereign, the Emperor of Austria, and the Kings of France and Spain have, by ancient usage, each a right to exclude one candidate.[1]

§ 16. Quadruple alliance of 1834, between France, Great Britain, Portugal, and Spain.

The quadruple alliance, concluded in 1834 between France, Great Britain, 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 already stated in another work 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

[1] Klüber, Droit des Gens moderne de l'Europe, Part II. tit. 1, ch. 2, § 48.

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 neighbors. 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 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 Dom 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 pru-

dence 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.[1] [53

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[1] Wheaton's Hist. Law of Nations, pp. 523–538.

[53] With reference to the civil war in Portugal, in 1846–7, Lord Palmerston, in a despatch of the 6th of April, 1847, to Sir H. Seymour, said that the quadruple treaty had reference to the succession to the throne, which has always been deemed a matter that might be justly considered as involving the political interests of foreign States, and that it did not authorize intervention in other respects. Friendly interposition was independent of the quadruple alliance, though Portugal had addressed herself in preference to such of her allies as were parties to that treaty. Hansard's Parl. Deb., 3d Series, vol. xcii. pp. 306, 1291.

As to the then pending controversy Lord Palmerston is reported to have said that Her Majesty's Government, as the organ of a power, bound to Portugal by the ties of interest and by the obligations of treaty, might offer its good services. If the Lisbon government and the Oporto junta should each agree to refer the matter in difference between them to the decision of Great Britain, Her Majesty's government would cheerfully accept the task thus imposed upon them, and would use their utmost endeavors to settle these difficulties in a just and permanent manner, with all due regard to the dignity of the crown on the one hand, and the constitutional liberties of the nation on the other. The apology for the intervention between the Queen and her subjects was, that Spain was determined to intervene at all events, and with the concurrence of France.

Lord John Russell said: "In 1827 there was an interference between Turkey and Greece, the Sultan not being allowed to use his own forces against those that had revolted. In 1831, Belgium revolted against a sovereign who, by the treaty of Vienna, by all the oaths that they had taken, had a full right to their allegiance. In the first place, when the Duke of Wellington was Prime Minister and the Earl of Aberdeen Foreign Secretary, there were protocols on the part of England and France, establishing an armistice in that country; and in the next place when the Prince of Orange was marching against the Belgians and expecting to gain a victory over their forces, which were more newly levied than his own, the English Ambassador, Sir Robert Adair, stopped the Prince in his movement and told him that he must proceed no further. Was not that interference — interference *for* the welfare, for the security of Belgium, for the establishment of a free Constitution in Belgium, separate from Holland, and maintaining the peace of Europe?" As to the subject under discussion, he said: "We wished, if possible, that the civil war should cease by the offer of fair terms on the part of the Queen's government and by the acceptance of those terms on the part of the Junta. But neither party having been willing to listen to a compromise, seeing Portugal in the dreadful state to which it was reduced, seeing that if we did not interfere we should only prolong that misery; that if we allowed Spain to interfere alone or with the assistance of France, we should inflict another kind of misery on Portugal and injure our own alliance with that country; seeing, at last, that it came to be a question whether we would maintain that ancient alliance — whether we should endeavor to remedy the

disasters of Portugal, we at last agreed to interfere." Debates, H. of Commons, July 11, 1847. Hansard's Parl. Debates, 3d Series, vol. xciii. p. 417–466.

The Queen having accepted the offer of the British government to mediate, and agreed to open a negotiation with the insurgents on terms which they refused to accept, the British government determined, with the assent of Spain and France, to interfere with force. A protocol was previously agreed on by the plenipotentiaries of the four powers, offering to the Junta, in the Queen's name, certain conditions, which were not however accepted by the rebels, till after some naval and military demonstrations on the part of England and Spain. Annual Register, 1847, p. 346].

Other events, falling within the provisions of this chapter, which have occurred since the original work underwent its last revision by the author, would seem to require notice, as illustrating the existing international law of Europe and America.

The Revolution, which commenced in France, in February, 1848, became, by subsequent events, like that of 1830, a mere dynastic change. As the resolution of the National Assembly, in May, 1849, recommending "a fraternal compact with Germany, the reëstablishment of Poland, and the emancipation of Italy," were without result, except as they may have encouraged abortive movements, attended with disastrous consequences to those who placed confidence in the declarations of France; and as, on the other hand, the great powers did not follow the course adopted, in the case of the Revolution of 1789, nor sanction any change in the number or position of the States of Europe, as in the separation of Holland and Belgium, the dethronement of Louis Philippe and of the Orleans branch of the Bourbon family furnishes, of itself, no matter for comment in a treatise of International Law; unless, indeed, we regard the accession of Napoleon III. by universal suffrage as the inauguration anew of a principle, which, by its application to Italian unity, has been made the basis of a national autonomy.

The overture for the mediation of England and France in the war of 1848–9, between Piedmont and Austria, was founded on a proposition, made the 24th of May, 1848, in the name of Austria, and communicated at the same time at London and Milan, by which Austria renounced all right over Lombardy, except an equitable apportionment of the debt; Venice to have a separate administration, a distinct army, and to be governed by an Archduke. This was declined by the Lombards, without consulting Charles Albert, and subsequent events confined the mediation to taking the stipulations of the treaties of Vienna as the sole basis of peace. Revue des deux mondes, Juillet, 1854, tom. vii. p. 23.

The good offices proffered by England and France, in 1853, for the benefit of the Lombards naturalized in Sardinia, after receiving letters of denaturalization from Austria, which freed them from all allegiance, but whose property was, notwithstanding, being confiscated by the latter power, in violation of the treaty between the two States, was a mere mediation in the cause of humanity. Annuaire des deux mondes, 1853–4, p. 169.

The mediation offered by England and France to the Sicilians, in 1849, on the basis of separate political institutions for the two portions of the kingdom, and declined by them, was not sustained by arms; and the subjugation of the island by the Neapolitans followed. Lesur, Annuaire, 1849, p. 615.

The occupation of Rome, the same year, by the French army, more properly comes within the cases of intervention, which affect questions of international policy, than any of the preceding transactions; though it was avowedly made on grounds of an exceptional nature, arising from the peculiar character of the Holy Father as the head of the Church. Lamartine said: "As to Rome, France proposed to meet other Catholics on the subject of the Pontiff;" and "Austria, Spain, and Naples," it was stated by the Prince President as a motive for interference, "were coalescing

to restore the Pope to the plenitude of his power. France would restore him to his liberty, but would have the right to give advice." The same circumstances, which induced the French occupation of Rome, still continue; though the political condition of Italy, by the removal of the Austrian garrisons from the Legations, now no longer subject to the Papal See, and the establishment of one government throughout the greater part of the Peninsula, render still more embarrassing the anomalous condition of the remaining possessions of the Church. As yet, all propositions to relieve the pontiff from the cares of civil government, confining him, with ample revenues from the contributions of Christendom, to his ecclesiastical functions, have failed to receive the sanction of the Catholic world.

Austria, referring to the suggestion of making Rome the capital of the new kingdom of Italy, said: "It is true that so long as the French army shall cover with its protection the Sovereign Pontiff, such an iniquity will not be consummated. But it is not just that the government of the Emperor should support alone the embarrassments and risks of this protection, which equally interests the entire Catholic world, who are disposed to assume their share of them. Even in 1848, when similar events had appeared to put in peril the life and rights of the sovereign pontiff, Austria, Spain, and France hastened to defend interests so dear to them, and to unite their flags for the aid of the Pope and of his rights. In consequence of military considerations, it was judged more suitable that the French army should enter alone into the capital of Christendom and maintain there alone public order and the rights of the Pope — a mission, of which France has since acquitted herself with so much glory. If the government of the Emperor, in his constant solicitude for the Catholic interests, finds that the moment has come to unite the efforts of the Catholic powers in favor of the pontifical sovereignty, Austria and Spain are ready to contribute their forces to secure the safety of an institution which has been consecrated by ages. The capital of the Catholic world only belongs to Catholic nations, — residence of the sovereign Pontiff, containing the establishments and archives of Catholicism, no one has the right to despoil them of it, and the Catholic powers are in duty bound to maintain him there." Prince de Metternich to M. de Thouvenel. Paris, 28th May, 1861.

M. de Thouvenel, under date of the 6th of June, 1861, in a note which was also addressed *mutatis mutandis* in reply to one of the same import from the Spanish Minister, says: "I will not dissemble that (the principle of non-intervention, which has saved the peace of Europe, excluding now as it did a year ago the use of force,) there exists a close connection between the regularization of the facts which have so considerably modified the situation of the Peninsula and the Roman question. The government of the Emperor would be very happy to learn that Austria and Spain judged it possible to enter, likewise, into the only mode which, as it seems to it, can conduct without new convulsions to a practical result; but it does not, under any supposition, hesitate to give assurance that it will not adhere, on its part, to any combination incompatible with the respect which it professes for the independence and dignity of the Holy See, and which would be at variance with the object of the presence of its troops at Rome." Le Nord, 24 Juin, 1861.

In a note of the Spanish Minister of Foreign Affairs, of the date of the 25th of June, 1861, it is said, that "considerations altogether special, which derive their origin from history, must be invoked in the examination of the Roman question. Those considerations result from the very nature of this mixed power, at once temporal and spiritual, whose preservation is of the utmost importance to Catholicism. . . . The Catholic peoples consider Rome as a common property, whose preservation is the object of their entire solicitude, and besides the immutable principles of right which defend it, they are controlled in their views by considerations altogether peculiar to the case. . . . We desire to call the attention of the Catholic powers to the ex-

amination of the situation of the Holy See and to an investigation of the most effectual means to ameliorate it. Europe will always remain devoted to the profound and serious preoccupations, which, even the report of ulterior objects tending to make Rome the capital of a new kingdom of Italy, awakens in every mind. In consideration of this state of things, the necessity of inviting the Catholic powers to concert measures for the amelioration of the situation of the Holy Father is evident." Le Nord, 17 Juillet, 1861.

The Emperor having in his address to the French Chambers, at the session of 1862, declared that, in acknowledging the new kingdom of Italy, he "had determined to contribute by his sympathetic and disinterested counsels to conciliate two causes, whose antagonism everywhere agitates the minds and consciences," the question of the temporal power of the Pope becomes indissolubly connected with that of Italian unity. It is, however, proper here to remark that the idea of effecting an arrangement on the basis of a convention between the Catholic States continues to be repudiated by France. "We have caused it to be understood," said the representative of the government to the Senate, "that it was impossible to sanction the creation of a sort of Catholic international law; that in treaties there could only be a question of the temporal power, and that if a Congress was assembled to examine the question, all the powers, even those which were not Catholic, had the right to sit in it." M. Billaut, Sénat, Séance du 3 Mars. Le Nord, 6 Mars, 1862.

The declaration of the Pope, in his allocution of the 25th March, 1862, that the "temporal power," though necessary to the independence of the Church could not be considered an essential dogma of faith, may have some effect in diminishing the difficulties of effecting a satisfactory arrangement. Le Nord, 29 Mars, 1862.

The effective intervention of Russia, in the war between Hungary and Austria, on the appeal of the latter, was placed by the Czar on the ground of protecting himself against insurrection in Poland; while the case of Hungary, with the right, avowed by the United States, of acknowledging any nation which had established its independence in fact, without awaiting the action of its former masters, is fully elucidated in the correspondence between the American and Austrian governments; Part I. c. 2, § 10, editor's note [19, *supra*, p. 49. In the instructions hereafter cited to our Minister in Paris, on occasion of the assumption of the Imperial dignity by Napoleon III., the cardinal principle of our policy from the time of Washington, that every nation has a right to govern itself according to its own will, and to change its institutions at its own discretion, will be found reaffirmed, Part III. c. 1, § 4, editor's note, *infra*.

The fitting out of expeditions against Cuba, in 1851, from the United States, though in violation of their laws, was made the apology for an intervention on the part both of England and France, so far as sending orders to their naval commanders to prevent, by force, the landing of adventurers from any nation on the island of Cuba, with hostile intent. Both powers deemed it incumbent on them to make known these instructions to the government of the United States.

In reply to an oral communication made, on the 27th September, 1851, by the British Chargé d'Affaires to the acting Secretary of State, it was stated, that "The President is of opinion, that so far as relates to this Republic and its citizens, such an interference as would result from the execution of those orders, if admitted to be rightful in themselves, would nevertheless be practically injurious in its consequences, and do more harm than good. Their execution would be the exercise of a sort of police over the seas in our immediate vicinity, covered as they are with our ships and our citizens; and it would involve, moreover, to some extent, the exercise of a jurisdiction to determine what expeditions were of the character denounced, and who were the guilty adventurers engaged in them."

In a note of 22d October, 1851, to M. de Sartiges, Mr. Crittenden says: "There is another point of view, in which this intervention, on the part of France and England, cannot be viewed with indifference by the President. The geographical position of the island of Cuba, in the Gulf of Mexico, lying at no great distance from the mouth of the river Mississippi, and in the line of the greatest current of the commerce of the United States, would become, in the hands of any powerful European nation, an object of just jealousy and apprehension to the people of this country. A due regard to their own safety and interest must, therefore, make it a matter of importance to them who shall possess and hold dominion over that island. The government of France and those of other European States were long since officially apprised by this government, that the United States could not see, without concern, that island transferred by Spain to any other European State. President Fillmore fully concurs in that sentiment, and is apprehensive that the sort of protectorate introduced by the order in question might, in contingencies not difficult to be imagined, lead to results equally objectionable."

To this, on 27th October, 1851, M. de Sartiges answered: — "First, that the instructions issued by the government of the (French) Republic were spontaneous and isolated; secondly, that those instructions were exclusive, for an exclusive case, and applicable only to the class, and not to the nationality, of any pirate or adventurer that should attempt to land, in arms, on the shores of a friendly power." . . . "The instructions, which have been issued to the commanding officer of the French station, were only intended to apply to a case of piracy the article of the maritime code in force concerning pirates." It was further said: "Those general considerations do not prevent [M. de Sartiges] from acknowledging that the interest which a country feels for another is naturally increased by reason of proximity; and his government, which understands the complicated nature as well as the importance of the relations existing between the United States and Cuba, has seriously considered the declaration formerly made by the government of the United States, and which has been renewed on this occasion, 'that that government could not see, with indifference, the island of Cuba pass from the hands of Spain into those of another European State.' The French government is likewise of opinion that, in case it should comport with the interests of Spain, at some future day, to part with Cuba, the possession of that island, or the protectorship of the same, ought not to fall upon any of the great maritime powers of the world."

This correspondence was closed with a note of Mr. Webster, dated November 18, 1851, in which he says: "Inasmuch as M. de Sartiges now avers that the French government had only in view the execution of the provision of its maritime code against pirates, further discussion of the subject would seem to be for the present unnecessary." Cong. Doc. 32 Cong. 1 Sess. Senate, Ex. Doc. 1, p. 74–82.

But, on 23d April, 1852, separate notes, though of the same tenor, inclosing copies of a despatch from their respective ministers of foreign affairs, (M. de Turgot and the Earl of Malmesbury,) and of the draft of a tripartite convention, were addressed by the Ministers of France and England to the Secretary of State. The only substantive article of the convention was: "The high contracting parties hereby severally and collectively disclaim, both now and for hereafter, all intention to obtain possession of the island of Cuba; and they respectively bind themselves to discountenance all attempts to that effect on the part of any power or individuals whatever." The accompanying communications contained disclaimers, by England and France, of any such intention by either of those powers, and referring to the previous course of the United States, it is assumed, that "all three parties appear to be fully agreed to repudiate, each for itself, all thought of appropriating Cuba,

and that it would therefore seem as if all that remained to be done was to give practical effect to the views entertained in common by the three powers." This they proposed to do, either by the above convention or by the interchange of formal notes to the same effect.

In acknowledging these notes, on 29th April, 1852, Mr. Webster says: "It has been stated, and often repeated to the government of Spain by this government, under various administrations, not only that the United States have no design upon Cuba themselves, but that, if Spain should refrain from a voluntary cession of the island to any European power, she might rely on the countenance and friendship of the United States to assist her in the defence and preservation of that island. At the same time, it has always been declared to Spain that the government of the United States could not be expected to acquiesce in the cession of Cuba to any European power. . . . The present Executive of the United States entirely approves of this past policy of the government, and fully concurs in the general sentiments expressed by M. de Turgot, and understood to be identical with those entertained by the government of Great Britain." He deemed it his duty, at the same time, to remind the ministers, and through them their governments, that "the policy of the government of the United States has uniformly been to avoid, as far as possible, alliances or agreements with other States, and to keep itself free from international obligations, except such as affect directly the interests of the United States themselves."

The French and English Ministers, on 8th of July, 1852, again refer to the proposed convention. In their respective notes, which, like the former ones, only differ in being written by each in his own language, they place the right of intervention of their governments, as well on their general commercial interests as on the special interests, which their subjects, and the government of France, on their own account, have in the question as creditors of Spain. "There is," they say, "at the present time, an evident tendency in the maritime commerce of the world to avail itself of the shorter passages from one ocean to another offered by the different routes existing or in contemplation across the isthmus of Central America. The island of Cuba, of considerable importance in itself, is so placed, geographically, that the nation which may possess it, if the naval forces of that nation should be considerable, might either protect or obstruct the commercial routes from one ocean to the other. Now, if the maritime powers are, on the one hand, out of respect to the rights of Spain, and from a sense of their international duty, bound to dismiss all intention of obtaining possession of Cuba, so, on the other hand, are they obliged, out of consideration for the interests of their own subjects or citizens, and the protection of the commerce of other nations, who are entitled to the use of the great highways of commerce on equal terms, to proclaim and assure, as far as in them lies, the present and future neutrality of the island of Cuba." They also state, "that British and French subjects, as well as the French government, are, on different accounts, creditors of Spain for large sums of money. The expense of keeping up an armed force in the island of Cuba of 25,000 men is heavy, and obstructs the government of Spain in the efforts which they make to fulfil their pecuniary engagements." The confining to European governments an exclusion from the future sovereignty of Cuba is animadverted on: "The word 'European' in juxtaposition with the word 'power,' might justify, on the part of the British and French governments, some doubt as to the signification of the declaration of the United States; and it might be thought that the United States, while, by their declaration, they exclude other nations from profiting by the chances of future possible events, have not debarred themselves by that declaration from availing themselves of such events."

The convention is, in conclusion, declared to have but two objects in view, — "the one a mutual renunciation of the future possession of Cuba; the other an engagement to cause this renunciation to be respected."

Mr. Everett, having become Secretary of State, announces, on 1st December, 1852, in answer to the preceding notes, that the President declines the invitation of France and England for the United States to become a party to the proposed convention. "The President does not covet the acquisition of Cuba for the United States; at the same time, he considers the condition of Cuba as mainly an American question. The proposed convention proceeds on a different principle. It assumes that the United States have no other or greater interest in the question than France and England; whereas it is necessary only to cast one's eye on the map to see how remote are the relations of Europe and how intimate those of the United States with this island." After assigning, as one of the reasons for refusing to become a party to the convention, its certain rejection by the Senate, he expresses a doubt "whether the Constitution of the United States would allow the treaty-making power to impose a permanent disability on the American government, for all coming time, and prevent it from doing what has been so often done in times past. In 1808, the United States purchased Louisiana of France; and in 1819, they purchased Florida of Spain. It is not within the competence of the treaty-making power, in 1852, effectually to bind the government in all its branches; and, for all coming time, not to make a similar purchase of Cuba. Among the oldest traditions of the federal government is an aversion to political alliances with European powers. The alliance of 1778 with France, — at the time of incalculable benefit to the United States, in less than twenty years came near involving us in the wars of the French Revolution, and laid the foundation of heavy claims upon Congress, not extinguished to the present day. It is a significant coincidence, that the particular provision of the alliance which occasioned those evils, was that under which France called upon us to aid her in defending her West India possessions against England.

"But the President has a graver objection to entering into the proposed convention. He has no wish to disguise the feeling that the compact, although equal in its terms, would be very unequal in substance. France and England, by entering into it, would disable themselves from obtaining possession of an island remote from their seats of government, belonging to another European power, whose natural right to possess it must always be as good as their own — a distant island in another hemisphere, and one which by no ordinary or peaceful course could ever belong to either of them. The United States, on the other hand, would, by the proposed convention, disable themselves from making an acquisition which might take place without any disturbance of existing foreign relations, and in the natural order of things. The island of Cuba lies at our doors. It commands the approach to the Gulf of Mexico, which washes the shores of five of our States. It bars the entrance of that great river which drains half the North American continent, and with its tributaries forms the largest system of internal water communication in the world. It keeps watch at the door-way of our intercourse with California by the Isthmus route. If an island like Cuba, belonging to the Spanish crown, guarded the entrance of the Thames and the Seine, and the United States should propose a convention like this to France and England, those powers would assuredly feel that the disability assumed by ourselves was far less serious than that which we asked them to assume." "Even now the President cannot doubt that both France and England would prefer any change in the condition of Cuba to that which is most to be apprehended, viz.: an internal convulsion which should

renew the horrors and the fate of San Domingo." Mr. Everett thus intimates a final objection to the convention: "M. de Turgot and Lord Malmesbury put forward, as the reason for entering into such a compact, 'the attacks which have lately been made on the island of Cuba by lawless bands of adventurers from the United States, with the avowed design of taking possession of that island.' The President is convinced that the conclusion of such a treaty, instead of putting a stop to these lawless proceedings, would give a new and powerful impulse to them. It would strike a death-blow to the conservative policy hitherto pursued in this country towards Cuba. No administration of this government, however strong in public confidence in other respects, could stand a day under the odium of having stipulated with the great powers of Europe, that in no future time, under no change of circumstances, by no amicable arrangement with Spain, by no act of lawful war, (should that calamity unfortunately occur,) by no consent of the inhabitants of the island, should they, like the possessions of Spain on the American continent, succeed in rendering themselves independent; in fine, by no overruling necessity of self-preservation should the United States ever make the acquisition of Cuba." Cong. Doc. 32d Cong. 2d Sess. Senate, Ex. Doc. No. 13.

Lord John Russell in a dispatch, dated 16th of February, 1853, to Mr. Crampton, says: —

"It is doubtless perfectly within the competence of the American government to reject the proposal that was made by Lord Malmesbury and M. Turgot, in reference to Cuba. Each government will then remain as free as it was before to take that course which its sense of duty and a regard for the interests of its people may prescribe.

"It would appear that the purpose, (of Mr. Everett,) not fully avowed, but hardly concealed, is to procure the admission of a doctrine, that the United States have an interest in Cuba, to which Great Britain and France cannot pretend. In order to meet this pretension, it is necessary to set forth the character of the two powers who made the offer in question, and the nature of that offer. Mr. Everett declares, in the outset of his despatch, that 'the United States would not see with indifference the island of Cuba fall into the possession of any other European government than Spain.'

"The two powers most likely to possess themselves of Cuba, and most formidable to the United States, are Great Britain and France.

"Great Britain is in possession, by treaty, of the island of Trinidad, which, in the last century, was a colony of Spain. France was in possession, at the commencement of this century, of Louisiana, by voluntary cession from Spain. These two powers, by their naval resources, are, in fact, the only powers who could be rivals with the United States for the possession of Cuba. Well, these two powers are ready voluntarily to 'declare, severally and collectively, that they will not obtain, or maintain for themselves, or for any one of themselves, any exclusive control over the said island, nor assume nor exercise any dominion over the same.'

"Thus, if the object of the United States were to bar the acquisition of Cuba by any European State, this convention would secure that object.

"But if it is intended, on the part of the United States, to maintain that Great Britain and France have no interest in the maintenance of the present *status quo* in Cuba, and that the United States have alone a right to a voice in that matter, Her Majesty's government at once refuses to admit such a claim. Her Majesty's possessions in the West Indies alone, without insisting on the importance to Mexico, and other friendly States, of the present distribution of power, give Her Majesty an interest in this question which she cannot forego.

"The possessions of France in the American seas give a similar interest to France, which, no doubt, will be put forward by her government. Nor is this right at all invalidated by the argument of Mr. Everett, that Cuba is to the United States as an island at the mouth of the Thames or the Seine would be to England or France."

After discussing Mr. Everett's remark, that the conclusion of the proposed treaty, instead of putting a stop to lawless expeditions against Cuba, would give a new impulse to them, the correctness of which position is questioned, Lord John Russell concludes: —

"Nor can a people so enlightened fail to perceive the utility of those rules for the observance of international relations, which, for centuries, have been known to Europe by the name of the Law of Nations. Among the commentators on that law, some of the most distinguished American citizens have earned an enviable reputation, and it is difficult to suppose that the United States would set the example of abrogating its most sacred provisions.

"Nor let it be said that such a convention would have prevented the inhabitants of Cuba from asserting their independence. With regard to internal troubles, the proposed convention was altogether silent. But a pretended declaration of independence, with a view of immediately seeking refuge from revolts on the part of the blacks, under the shelter of the United States, would be justly looked upon as the same in effect as a formal annexation.

"Finally, while fully admitting the right of the United States to reject the proposal that was made by Lord Malmesbury and M. de Turgot, Great Britain must at once resume her entire liberty; and, upon any occasion that may call for it, be free to act, either singly or in conjunction with other powers, as to her may seem fit."

Mr. Crampton, addressing, April 18, 1853, the Earl of Clarendon, who had succeeded to the office of Secretary of State for Foreign Affairs, says, that the foregoing despatch was read to the American Secretary of State, Mr. Marcy, and a copy delivered to him, and that, at the same time, a communication, of similar import, was made to him by the French Minister. Mr. Marcy, it is added, replied that —

"It would, of course, be necessary for him again to read over the despatches, in order to comprehend their full import; but, as far as he could now judge, the opinion of the two governments seemed to coincide in reference to two points, namely, the one, that the right of the United States to decline the proposals made to them by the English and French governments was admitted; the other, that some of the general positions taken by Mr. Everett, in his note of the 1st of December, 1852, appeared to those governments to render a protest against them on their part necessary, lest it might hereafter be inferred that those positions had been acquiesced in by them.

"We replied that, without pretending to point out to Mr. Marcy what further step he was or was not to take in this matter, the object which our respective governments had in view seemed to us to be, generally, such as he had stated it; and that we, for our part, considered the discussion of the subject closed, by the communication which we had just made.

"Mr. Marcy appeared to receive our observations in a conciliatory manner, and concluded by expressing his hope and belief, that no misunderstanding would arise between the great maritime powers in regard to this matter."

This note would not be complete without including, in the same connection, the following extracts from Mr. Marcy's instructions to Mr. Buchanan, Minister in London, dated July 2, 1853: —

"I ought not to close this communication without indicating the views of the President, in relation to the intervention of Great Britain, in conjunction with France, in the affairs of Cuba. These powers proposed to this government, in April, 1852, to enter into a tripartite convention, for guaranteeing the Spanish dominion over Cuba. The proposition was very properly declined. To this course neither England nor France could justly take exceptions; but they have conjointly expressed dissatisfaction with certain parts of the letter of Mr. Everett, rejecting their overture. At this time I shall only state the fact, that a distinct intimation is conveyed, by both England and France, that they will resist the transfer of Cuba to the United States, and assist Spain in case of any foreign interference in aid of the Cubans, whether openly or covertly applied, in any attempt they may make to escape from the Spanish yoke.

"The course of England and France, in sending their ships of war on to our coast during the late disturbances respecting that island, without previous notice or specification of their object, and the supervision they claimed to exercise along that coast, were (to use the mildest expression) not respectful to this Republic.

"For many reasons, the United States feel a deep interest in the destiny of Cuba. They will never consent to its transfer to either of the intervening nations, or to any other foreign State. They would regret to see foreign powers interfere to sustain Spanish rule in the island, should it provoke resistance too formidable to be overcome by Spain herself.

"When it was understood that Spain had applied to the allied sovereigns of Europe for assistance to recover her revolted colonies in America, the government of the United States protested in emphatic terms against such a procedure, and if the protest had failed in its object, this government would undoubtedly have had recourse to other means to arrest such interference.

"Cuba, whatever may be its political condition, whether a dependency or a sovereign State, is of necessity our neighbor. It lies within sight of our coast. In carrying on trade between some of our principal cities, our vessels must pass along its shores. Intercourse with it is unavoidable. Standing in that geographical relation, it is imperative upon us to require from it, whatever may be its condition, all the observances imposed by good neighborhood. It must be to the United States no cause of annoyance in itself, nor must it be used by others as an instrument of annoyance.

"We should very much regret that the general condition of things in Cuba, or any particular occurrences there, should be such as to act so powerfully upon the feelings of individuals among us, as to impel them to any unlawful enterprises against that island; but if, unhappily, that should be the case, the government of the United States will do its whole duty to Spain, and use all the repressive means authorized by law, or required by honor, to restrain our citizens within the limits of duty. In this respect, Spain will have no good cause to complain, or any other nation a fair occasion to intervene.

"In spite of all that has been promised by Spain, and all that has been done by other powers, to suppress the slave-trade, the possession of Cuba favors its continuance, and is a formidable obstacle to its suppression.

"If you should ascertain that Great Britain has entered into any engagements with Spain, to uphold this connection with Cuba, under any modification of it which is likely to be injurious to the United States, or to the well-being of the other governments on this continent, you will have recourse to such arguments and persuasions as, in your judgment, will induce her to abandon them."

The proposed tripartite convention was among the cases of intervention referred to by Phillimore. "The North American United States," he says, "refused to be parties to this treaty; but the right of intervention, on the part of England and France, was steadily proclaimed, both on account of their own interests and on account of those of friendly States in South America, as to 'the present distribution of power' in the American seas." Phillimore on International Law, vol. i. p. 466.

The policy which, since Spain by the independence of her continental possessions ceased to be an important American power, had governed the United States, with reference to Cuba, was fully disclosed in the papers communicated by President Fillmore to Congress, in July, 1852, and which comprise the correspondence on that subject, going back to 1822. At that period, England, not apprehending the embarrassments which, since the emancipation of the negroes in her own islands, the character of the population would occasion her, desired the possession of Cuba, to give her the command of the Gulf of Mexico; and it was particularly feared, that, should she take the side of Spain, in the war in which the latter was about to be engaged with France, the price of English interposition might be the cession to her of the two remaining islands of Cuba and Porto Rico. Our policy ever has been, that, while we were content that those islands should remain with Spain, and would infringe no obligations of good neighborhood to obtain them otherwise than by her voluntary act, we would never allow them to pass into the hands of any great maritime power. Not only have England and France been constantly apprised that we would not consent to their occupation by either of them, but, in 1826, at the same time that it was officially announced to France, "that the United States could not see with indifference Porto Rico and Cuba pass from Spain into the possession of any other power," we effectually intervened with Mexico and Colombia to suspend an expedition which those Republics were fitting out against them. The United States, however, even at that period, explicitly declared to Spain that they could enter into no engagement of guarantee, as such a course was utterly inconsistent with our standing rules of foreign policy. Con. Doc. 32d Cong. 1st Sess. No. 120.

In the summer of 1854, a conference was held by the Ministers of the United States, accredited at London, Paris, and Madrid, with a view to consult on the negotiations which it might be advisable to carry on simultaneously, at these several courts, for the satisfactory adjustment with Spain of the affairs connected with Cuba. The joint despatch of Messrs. Buchanan, Mason, and Soulé to the Secretary of State, dated Aix-la-Chapelle, Oct. 18, 1854, after remarking that the United States had never acquired a foot of territory, not even after a successful war with Mexico, except by purchase or by the voluntary application of the people as in the case of Texas, thus proceeds: "Our past history forbids that we should acquire the island of Cuba without the consent of Spain, unless justified by the great law of self-preservation. We must, in any event, preserve our own conscious rectitude, and our self-respect. Whilst pursuing this course, we can afford to disregard the censures of the world, to which we have been so often and so unjustly exposed. After we shall have offered Spain a price for Cuba far beyond its present value, and this shall have been refused, it will then be time to consider the question, Does Cuba, in the possession of Spain, seriously endanger our internal peace, and the existence of our cherished Union? Should this question be answered in the affirmative, then by every law, human and divine, we shall be justified in wresting it from Spain, if we possess the power; and this upon the very same principle that would justify an individual in tearing down the burning house of his neighbor, if there were no other means of preventing the flames from destroying his own home. Under such circumstances, we ought neither to count the cost nor regard the odds which Spain might enlist against us. We for-

bear to enter into the question, whether the present condition of the island would justify such a measure. We should, however, be recreant to our duty, be unworthy of our gallant forefathers, and commit base treason against our posterity, should we permit Cuba to be Africanized, and become a second St. Domingo, with all its attendant horrors to the white race, and suffer the flames to extend to our own neighboring shores, seriously to endanger or actually to consume the fair fabric of our Union." And lest there might be any misapprehension of this language, as implying the alternative of cession and seizure, except as the result of absolute necessity, Mr. Marcy, Secretary of State, writes, Nov. 13, 1854, to Mr. Soulé, "To conclude that, on the rejection of a proposition to cede, seizure should ensue, would be to assume that self-preservation necessitates the acquisition of Cuba by the United States; that Spain has refused, and will persist in refusing, our reclamations for injuries and wrongs inflicted, and that she will make no arrangement for our future security against the recurrence of similar injuries and wrongs." Cong. Doc. 33d Cong. 2d Sess. H. R. No. 93. See for the documents *in extenso*, the last edition of this work, Appx. p. 672, and Lawrence on Visitation and Search, Appx. p. 205.

The most recent indications of the views of the American government, (including those in President Buchanan's last annual message, Dec., 1860,) confirm the preceding statement, and show that while the United States would have deemed the acquisition of Cuba of the highest importance, and would have given more than a full equivalent to Spain for a transfer of its sovereignty, they would not, without a more imminent necessity than has existed, have made her refusal to sell it to them a ground for taking forcible possession of it, as essential to the safety of the Union. Cong. Globe, 36th Cong. 2d Sess. Appx. p. 4.

The improved condition of Spain as to her internal affairs, and the position which she has again recently assumed among the great nations of the world, are well calculated to remove the apprehensions, both of a transfer of her West India possessions to one of the great maritime powers of Europe, and of her inability to maintain her international obligations, which were the considerations, that had seemed to render especially desirable to the United States the cession of Cuba.

No country has, within a short period, manifested more favorable developments than Spain. Though her liberal constitution, promulgated by the valorous legislators of Cadiz in 1812, was the object of the attack against free institutions by the Holy Alliance, at Verona, in 1822, to which Louis XVIII. was commissioned to give effect, that constitution, with essential improvements, including the division of the Cortes into two chambers, was adopted anew in 1837. It underwent further reforms in 1845, but it was not till 1857 that the organic law, as it now exists, was finally established. Cos-Gayon. Diccionario de Derecho Administrativo Español, p. 359.

Spain, moreover, in her internal prosperity is now reaping the fruits of her railroad system inaugurated in 1855; while both the Morocco expedition of 1859–60 and the happy termination of the civil war, by which it was followed, have done much to restore the ancient *prestige* of the monarchy. Indeed, there is already a question of the admission of Spain into that Council hitherto restricted to the five great powers, by which the general superintendence of European politics has been exercised. Annuaire des deux mondes, 1860, p. 244. It is, mainly, the indisposition of some of the powers to recognize the existing state of facts in Italy, which prevents the formal acknowledgment of her renovated condition. Austria fears that what is accorded to Spain cannot be withheld from the new kingdom of Italy.

Before the commencement of hostilities in 1853–4, the ostensible object of which was, on the one side, the intervention claimed in pursuance of treaties in favor of the Christian population of Turkey, and, on the other, the preservation of the Ottoman Empire as of essential importance to the balance of power among the States of Europe, attempts were made to reconcile the difficulties by negotiation.

At a conference of the representatives of England, Austria, France and Prussia, held at Vienna, in July, 1853, a note was agreed on, to be simultaneously assented to by Russia and Turkey. It was unhesitatingly accepted by the Emperor of Russia, but declined by the Porte, unless modified. The objectionable clause was the promise "to allow the Greek worship to participate in a spirit of high justice *in the advantages conceded to other Christians by convention or special agreement.*" Annual Reg. 1853, p. 2?0]. "In stipulating that Turkey should remain faithful to the spirit and the letter of treaties 'granting to the Greek Church' equal privileges with other Christian communities, it placed twelve millions of the Sultan's subjects in the same category with a few small bodies of Christians, who had been, by special firmans, excepted from political allegiance to the Porte. The Divan modified the text, with respect to the equality of rights with other Christians by the reservation 'being subjects of the Porte.' The Emperor refused to recognise the modification." N. Amer. Review, Oct. 1855, p. 479.

The negotiations having thus failed, war was declared on the 4th of October, 1853, by the Porte against the Emperor of Russia. On the 27th and 28th of March following, France and England also placed themselves in hostility to the Czar; while Austria and Prussia, parties to the original conferences on the affairs of Turkey, continued their diplomatic relations with the Court of St. Petersburg, though by a protocol of the 9th of April, between the four powers, they bound themselves to remain united in the double object of maintaining the integrity of the Ottoman Empire, and of providing, by every means compatible with the Sultan's independence and sovereignty, for the civil and religious liberties of the Christian subjects of the Porte. They agreed not to enter into any definitive arrangement with Russia or with any other power at variance with the principle of the protocol, without previously deliberating thereon in common, and in virtue of the treaty of June 14, 1854, Austria occupied the Danubian Principalities vacated by Russia.

On the 20th April of the same year, an alliance had been formed between Austria and Prussia to take effect offensively, in case Russia should incorporate the Principalities or cross the Balkans, and which by the treaty of the 26th of November was extended, so that Prussia was to assist Austria, if attacked in her own dominions or in the Principalities. To these arrangements the Germanic Confederation became a party, by their resolutions of the 24th of July and the 9th of December. On the latter occasion they affirmed the four points, which had been agreed on in notes exchanged on the 8th of August, between England and France and Austria, as the necessary basis of peace. But Prussia was no party to the treaty of the 2d of December 1854, by which in certain contingencies an alliance offensive and defensive was established between Austria, and England and France. Martens par Samwer, &c., tom. xv. pp. 572, 579, 599.

"Sardinia," who, as it was said in 1861 in the Italian Parliament, "fought in the Crimea to acquire the right of addressing the great powers in favor of Italy," by her treaty of the 26th of January, 1855, with England and France, not only gave her adhesion to the alliance against Russia, but agreed to furnish a military contingent for the war, a stipulation with which she fully complied. Lesur, Annuaire, &c., 1855, p. 630.

To the results of the hostilities, terminated by the treaty of the 30th of March,

1856, so far as respects the relations of the Porte to its Christian subjects and tributary States, reference has elsewhere been made; (Part I. c. 1, § 10, editor's note [6, p. 22; Ib. c. 2, § 18, editor's note [24, p. 62, *supra*). In the necessity of the occupation, from considerations of humanity, of Syria, despite the disavowal by the great powers of all right, either collectively or separately, to interfere with the subjects of the Porte or with the internal administration of the Empire, there is afforded an illustration of the inefficiency of the Sultan's firman and of the necessity of terminating the anomalous condition of affairs in Turkey.

As Phillimore, while objecting to the absorption of the Sultan's dominions in any of the great States of Europe, says: "It is not true that Christian Europe requires, as a condition of her security, the existence of a Mahometan power within her boundaries. It is conceivable that Constantinople may again become the seat of a Christian government, capable of maintaining the position and supporting the character of an independent kingdom." Phillimore's International Law, vol. i. p. 461. There is this marked difference between the Ottoman Empire and the other Mohammedan and Pagan States, that, while in the latter the people of a different religion are confined to foreigners engaged in commerce, or to travellers passing through their territory, the great majority of the inhabitants of Turkey in Europe, and in the Danubian Principalities the entire population, profess the Christian creed. Had a State capable of taking the place of the Ottoman Empire in the balance of power resulted from the treaty of July 6, 1827, not only would the rights of the Christian populations have been secured, but all pretext for the war of 1853–6 been avoided.

At the Congress of Paris, which followed the Russian war, Count Cavour discussed, what had been alluded to by the British plenipotentiaries, the anomalous condition of the Pontifical States, arising from the Austrian occupation, which had already lasted seven years; and he referred to Bologna, which was in a state of siege, and to the effect on the political equilibrium and the real danger to Sardinia arising from the permanent occupation of the Legations and of the Duchy of Parma by Austria. The Austrian plenipotentiaries were induced to unite in the declaration of the French plenipotentiaries of a desire to see the Pontifical States evacuated by France and Austria, so soon as it could be done consistently with the tranquillity of the country and the consolidation of the authority of the Holy See. Martens par Samwer, Nouveau Recueil, &c., tom. xv. 763–4.

Before the commencement of the war of 1859, between Austria, on the one side, and Sardinia and France, on the other, Russia had proposed a conference of the five powers to settle the Italian complications. As a condition precedent to the Congress, Austria required the disarmament of Sardinia and the disbandment of the Italian volunteers. A proposition for a general disarmament, made by England, and to which France, Russia, and Prussia assented, was accepted by Sardinia. It, however, failed to meet the views of Austria, and a categorical demand for the immediate reduction of the army of Sardinia to a peace-footing and the dismissal of the Italian volunteers was made by her, with the declaration that unless a satisfactory response was received within three days, the Emperor would have recourse to arms. In his manifesto announcing the war, he made an appeal to the Germanic Confederation, assuming that his Italian dominions were the ramparts of Germany. Manifeste de l'Empereur d'Autriche, le 28 Avril, 1859.

The other great powers did not actively interfere in the contest, but France sustained Sardinia, declaring that Austria had brought matters to that condition that it was necessary that "she should rule to the Alps, or that Italy should be free to the Adriatic;" that "the end of the war was to restore Italy to herself, not to make her

change masters;" that "France was not going to foment disorder nor to shake the power of the Holy Father, whom we have replaced upon his throne, but to relieve him from that foreign oppression, which weighs on the whole Peninsula." Proclamation de l'Empéreur des François, 3 Mai, 1859.

The preliminaries of Villafranca, of July 1859, agreed to by the Emperors in person, were between Austria and France alone. They stipulated that the two sovereigns would favor the formation of an Italian Confederacy under the honorary Presidency of the Pope; that the Emperor of Austria would cede to the Emperor of the French his rights on Lombardy, with the exception of the fortresses of Mantua and Peschiera; and that he would transfer the ceded territories to the King of Sardinia; that Venetia, remaining under the crown of the Emperor of Austria, would make a part of the Italian Confederation; that the Grand Duke of Tuscany and the Duke of Modena might return to their States, giving a general amnesty; and that the two Emperors should ask of the Holy Father to introduce indispensable reforms into his States.

These preliminaries were incorporated into the treaty of Zurich, between the same parties, of 10th of November, 1859, which provided in detail for the conditions of the transfer of Lombardy and the apportionment of the debt and other matters incident to the change of government. As to the deposed Italian princes, it says: "As the territorial boundaries of the independent States of Italy, which were not parties to the late war, cannot be changed except with the concurrence of the powers which presided at their formation, and recognized their existence, the rights of the Grand Duke of Tuscany, of the Duke of Modena, and of the Duke of Parma, are expressly reserved as regards the high contracting parties." They also declare that they will unite their efforts "in order to obtain from His Holiness that his government should take into serious consideration the necessity of introducing into the administration of his States the reforms acknowledged to be indispensable." By the treaty of the same date, the obligations connected with the transfer of Lombardy to France were assumed by her. A third treaty, to which Sardinia, as well as France and Austria, was a party, recites the wishes of the parties "to complete the conditions of the peace, the preliminaries of which were agreed on at Villafranca, and had been converted into a treaty, concluded the same day between France and Austria," and their desire to recognize by a common act the territorial cessions as stipulated in a treaty also concluded that day between the Emperor of France and the King of Sardinia. This treaty contains no reference either to the proposed Confederation or to the restoration of the deposed Italian princes. Martens par Samwer, Nouveau Recueil, tom. xvi. pp. 505–538.

Nor was it followed by any active intervention for them on the part of either Austria or France. Though Victor Emmanuel withdrew from the several States of Central Italy his representatives, who, during the war, were sent to them on their proclaiming him Dictator, Tuscany, Parma, Modena, and the Legations, before the conclusion of the treaty, formally declared, by the acts of their national assemblies, their annexation to Piedmont and their determination to constitute a part of a powerful kingdom of Italy. The European Congress, to which the king professed to refer his answer as to the proffered sovereignty, was never held, and the question having been submitted to *universal suffrage*, their annexation was proclaimed in March, 1860. The only serious objection interposed by any foreign power to these arrangements, was on the part of France. That was professedly based on the great aggrandizement of a neighbor, and was met by the cession of Savoy and Nice by Sardinia, and its annexation to the French Empire.

The revolution in the Two Sicilies commenced without the open support of Sar-

dinia, though it was avowedly carried on for the benefit of Victor Emmanuel, under the direction of a partisan general, who had just quitted his service. To a strong protest of France, Cavour replied, May 15, 1860, "Sardinia condemns the enterprise of Garibaldi as energetically as France can do; but while his audacious expedition is contrary to the interests of Piedmont, it appeals to the sympathies of the people with whom Garibaldi is a hero; and the government is unable to use force against a man who controls so great a popular force."

The enterprise was not, however, consummated without the aid of the regular forces of the King of Sardinia and his own personal presence. This interposition, as well as the occupation of Ombria and the Marches, was placed on the ground of protecting the Peninsula from anarchy and disorder, and allowing the populations to manifest their true sentiments. Memorandum du gouvernement Sarde, 12 Septembre, 1860.

Prince Napoleon, whose relation to the throne of France, as well as intimate connection with the royal family of Italy, gives force to his words, in addressing the Senate, admitted that in the case of the Roman provinces and Naples, the strict law had not been pursued, but he contended that circumstances not only excused but compelled a violation of the written law. That the government of Naples was overturned by the feeble means brought against it by Garibaldi, is its greatest condemnation. It is a proof that the revolution was made in the minds of all, and that the power which oppressed the country could not last. "I say that Piedmont, by going to Naples in the face of the revolution which had just broken out there, has arrested anarchy in Italy. It ought not to have permitted Garibaldi to make any foolish attempt against Rome or against Venice. There was but one way for the King of Piedmont to arrest Garibaldi's course, and that was, to take into his own hands the flag and the cause of Garibaldi. Victor Emmanuel has taken them, and has made them triumph." Discours de Son Altesse Impériale le Prince Napoléon, prononcé au Sénat, 1 Mars, 1861, p. 51.

At an early period, an effort was made by the government of Francis II. to induce the intervention of foreign powers in proclaiming the integrity of his dominions. The Emperor Napoleon replied to an application for the mediation of France for the pacification of Sicily, the king promising to proclaim the French constitution of 1852, that mediation was only possible between two powers, and, unless the revolution was recognized, no power could place itself as mediator between the King of Naples and his subjects. France, however, avowedly in consequence of the direct aid furnished to the Neapolitan revolution by Sardinia, and the invasion of Ombria and the Marches, withdrew (30th October, 1860,) her minister from Turin, but in June, 1861, she agreed to recognize the new "kingdom of Italy," the title of which had been established by a law promulgated on the 17th of March.

In the despatch of M. Thouvenel to the Chargé d'Affaires at Turin, it is said: "Our views have not changed since the interview of Warsaw, when we had occasion to make them known to Europe, as well as to the cabinet of Turin. In then declaring that we considered the principle of non-intervention as a rule of conduct for all the powers, we added that an aggression, on the part of the Italians, would not obtain the approbation of the government of the Emperor. We continue in the same sentiments, and we decline in advance all participation in, or responsibility for the *projets*, of which the Italian government will have to assume alone the perils, and endure the consequences. The cabinet of Turin, on the other hand, will take notice of the duties which our position creates for us in reference to the Holy See, and I should consider it superfluous to add that, in establishing closer official relations with the Italian government, we, by no means, intend to weaken the value of

the protestations of the Court of Rome against the invasion of several provinces of the Pontifical States. The government of King Victor Emmanuel can, no more than we, contest the force of the considerations of every nature, which are connected with the Roman question and necessarily control our determination, and it will understand that, in acknowledging the King of Italy, we must continue to occupy Rome, so long as sufficient guarantees shall not protect the interests which induced us to go there." M. Thouvenel to the Count de Rayneval, 15 Juin, 1861.

In announcing to the diplomatic agents of France the Emperor's recognition of Italy, it is added: "We believe that we may congratulate ourselves on the way in which it has been appreciated in Europe. The cabinets, as well as public opinion, have generally regarded it as favorable to the preservation of peace; and it is especially so considered at Berlin. We have had occasion to be gratified with the sentiments of moderation with which the Russian government has expressed itself. The language even of the cabinet of Vienna has been satisfactory. We could not flatter ourselves that we had caused it to share our opinions on the state of Italy; but it has rendered full justice, and the Pontifical government also, to the declarations with which we accompanied, at Turin, the recognition of King Victor Emmanuel, as to the maintenance of our troops at Rome." Dépêche circulaire du 4 Juillet, 1861. Le Nord, 2 Février, 1862.

The views of England on the revolution in the Two Sicilies are given in a despatch of Lord J. Russell to Sir J. Hudson, October 27, 1860. "Her Majesty's government have no intention to raise a dispute upon the reasons which have been given, in the name of the King of Sardinia, for the invasion of the Roman and Neapolitan States." Were the people of Italy justified in asking the assistance of the King of Sardinia to relieve them from governments with which they were discontented; and was the King of Sardinia justified in furnishing the assistance of his arms to the people of the Roman and Neapolitan States? After stating that the governments in question provided so ill for the administration of justice, the protection of personal liberty, and the general welfare of the people, that their subjects looked forward to the overthrow of their rulers as a necessary preliminary to all improvement, and that a conviction had prevailed since 1848 that the only manner in which the Italians could secure their independence of foreign control was by forming a strong government for the whole of Italy, the Secretary concludes, on the authority of Vattel discussing the lawfulness of the assistance given by the United Provinces to the Prince of Orange when he invaded England and overturned the throne of James II., that Her Majesty's government do not feel justified in declaring that the people of Southern Italy had not good reasons for throwing off their allegiance to their former governments, and Her Majesty's government cannot, therefore, pretend to blame the King of Sardinia for assisting them. Annual Reg., 1860, p. 294. Lord John Russell announced, March 30, 1861, to the Sardinian Envoy, that he would, thereafter, receive him as Envoy of the "King of Italy." Almanach de Gotha, 1862, p. (41.)

One of the first consequences of the intestine difficulties between the North and the South was a disregard of what has been deemed to be the Monroe doctrine, in the acceptance by Spain, without, as far as is understood, any remonstrance from the United States, by the royal decree of the 19th of May 1861, of the proffered return to its allegiance of the old Spanish colony of St. Domingo. Restored to that monarchy by the treaties of 1814–15, it attempted, in accordance with the example of the provinces of the adjacent continent, its independence in 1822, which, after an annexation of twenty-two years to the other portion of the island (Hayti), it resumed in 1844 as the Dominican Republic. As such it was acknowledged by Spain, by the treaty of the 18th of February 1856. Annuaire des deux mondes, 1860, p. 712.

A more important case, of the intervention of Europe in the affairs of America, is the Convention of the 31st of October 1861 between England, Spain and France. The preamble declares that the Sovereigns of the above countries "feeling themselves compelled by the arbitrary and vexatious conduct of the authorities of the Republic of Mexico" have agreed to conclude a Convention to combine their common action "to demand from those authorities more efficacious protection for the persons and properties of their subjects, as well as a fulfilment of the obligations contracted towards their Majesties." The 1st article provides for despatching to the coasts of Mexico combined naval and military forces, "the total of which shall be sufficient to seize and occupy the several fortresses and military positions on the Mexican coast," and the commanders are authorized to execute "the other operations, which may be considered on the spot most suitable to effect the object specified in the preamble of the convention and specifically to insure the security of foreign residents." That the intervention extends to other matters than those avowed is apparently disclaimed by the second article, which declares that the contracting parties "engage not to seek for themselves, in the employment of the contemplated coercive measures, any acquisition of territory nor any special advantage, and not 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 freely the form of its government." Provision was made for the accesion of the United States, the contracting parties "being aware that the government of the United States, on its part, has, like them, claims to enforce upon the Mexican Republic." "But, as by delaying to put into execution the 1st and 2d articles, they would incur a risk of failing in the object which they desire to attain, they have agreed not to defer, with the view of obtaining the accession of the government of the United States, the commencement of the above mentioned operations beyond the time at which their combined forces can be assembled in the neighborhood of Vera Cruz." London Gazette, 15th November, 1861. 37th Cong. 2d Sess. H. of R. Ex. Doc. No. 100, p. 368.

The subject is thus adverted to in the Queen's Speech, opening Parliament, February, 1862:—

"The wrongs committed by various parties and by successive governments in Mexico upon various foreigners resident within the Mexican territory, and for which no satisfactory redress could be obtained, have led to the conclusion of a convention between Her Majesty, the Emperor of the French and the Queen of Spain, for the purpose of regulating combined operations on the coast of Mexico, with a view to obtain that redress which has hitherto been withheld."

And among the Public Documents laid before the French Chambers, January, 1862, are the following instructions signed by M. Thouvenel to the Admiral commanding the French fleet in the Gulf:—

"The Allied Powers, as I have already said, do not propose to themselves any other object than that which is indicated in the convention; they interdict themselves from interfering in the internal affairs of the country, and particularly from exercising any pressure on the wishes of the people as to the choice of their government. There are, however, certain hypotheses which imposed themselves on our foresight, and which we were obliged to examine. It might happen that the presence of the allied forces on the Mexican territory would determine the right-minded part of the population, fatigued with anarchy and eager for quiet and order, to attempt an effort to constitute in the country a government presenting those guarantees of force and stability which have been wanting to all those which have there succeeded each other since the independence.

"The Allied Powers have a common and too manifest interest in seeing Mexico quit

the state of social dissolution into which she is plunged; which paralyzes the development of her prosperity, renders null, for her and the rest of the world, all the riches with which Providence has endowed that privileged soil, and obliges them to have recourse periodically to costly expeditions, in order to remind ephemeral and senseless governments of their duties. That interest engages them not to discourage attempts of the nature of those which I have just pointed out to you, and you ought not to refuse them your encouragement and your moral support if by the position of the men who should take the initiative in them, and by the sympathy which they may meet with among the great mass of the people, they should present chances of success for the establishment of an order of things of a nature to secure to the interests of resident foreigners the protection and the guarantees which have hitherto been wanting. — The Emperor's government relies on your prudence and on your discernment to judge of, in concert with His Majesty's Commissioner, whose knowledge acquired by his residence in Mexico will be valuable to you, the events which may develop themselves before you, and to determine the extent to which you may be called on to take part in them."

In the annual *Exposé* of the state of the empire, laid before the Senate and Corps Législatif, it is said: "Though the sole motive and only object of the expedition is to prove to our countrymen that the Emperor is not insensible to their complaints, and to show to the government of Mexico that our patience has arrived at an end, we should assuredly have great satisfaction, if the intervention, in which the three powers have been compelled to engage, should produce for Mexico herself a salutary crisis, of a nature to favor the reorganization of that magnificent country with the strength, prosperity, and independence in which it is wanting." Le Nord, 31 Janvier, 1862.

Nor is it only from official declarations that the views of the Emperor (which would seem to have some justification in the fact that, during the last forty years, Mexico has had thirty-six different forms of government and seventy-three Presidents) are to be inferred. The eminent senator, Michel Chevalier, writes: "The probable expectation of the governments themselves, as well of England as of France and Spain, is the overthrow of the system of government established in Mexico since its independence, — a system which has completely failed to secure to that beautiful country the most indispensable elements of social order and political prosperity. The complement of our hypothesis is, that the monarchical system — but a monarchy perfectly independent and as liberal as possible — will be substituted for a nominal republic, which is only an object of ridicule; for the essence of republican government is the reign of law, and, in modern times, of law made in the interest of all. Now, in Mexico, there is no longer law; what reigns there is the caprice, ignorance, and avidity of a handful of military chieftains, making, in turn, ephemeral attempts at power." Revue des deux mondes, 1er Avril, 1862, p. 514.

To a note from the Ministers of Spain, France, and Great Britain, under the date of the 30th of November, 1861, inviting the United States to accede to the convention, with a view of obtaining, through a common action, the redress of their grievances against the Republic of Mexico, Mr. Seward replied on the 4th of December. After reciting the terms of the convention, he says: —

"The undersigned having submitted the subject to the President, will proceed to communicate his views thereon.

"First. As the undersigned has heretofore had the honor to inform each of the plenipotentiaries now addressed, the President does not feel himself at liberty to question, and does not question, that the sovereigns represented have undoubted right to decide for themselves the fact whether they have sustained grievances and

to resort to war against Mexico for the redress thereof, and have a right also to levy the war severally or jointly.

"Secondly. The United States have a deep interest — which, however, they are happy to believe is an interest held by them in common with the high contracting powers and with all other civilized States — that neither the sovereigns by whom the convention has been concluded shall seek to obtain any acquisition of territory, or any advantage peculiar to itself, and not equally left open to the United States, and every other civilized State, within the territories of Mexico; and especially that neither one nor all of the contracting parties shall, as a result or consequence of the hostilities to be inaugurated under convention, exercise in the subsequent affairs of Mexico any influence of a character to impair the right of the Mexican people to choose and freely to constitute the form of its own government.

"The undersigned renews on this occasion the acknowledgment heretofore given, that each of the high contracting parties had informed the United States substantially that they recognized this interest; and he is authorized to express the satisfaction of the President with the terms in which that recognition is clearly embodied in the treaty itself.

"It is true, as the high contracting parties assume, that the United States have, on their part, claims to urge against Mexico. Upon due consideration, however, the President is of opinion that it would be inexpedient to seek satisfaction of their claims at this time through an act of accession to the convention. Among the reasons for this decision, which the undersigned is authorized to assign, are, — First, that the United States, so far as it is practicable, prefer to adhere to a traditional policy recommended to them by the Father of their country, and confirmed by a happy experience, which forbids them from making alliances with foreign nations. Second, Mexico being a neighbor of the United States on this continent, and possessing a system of government similar to our own in many of its important features, the United States habitually cherish a decided good-will towards that Republic, and a lively interest in its security, prosperity, and welfare.

"Animated by these sentiments, the United States do not feel inclined to resort to forcible remedies for their claims at the present moment, when the government of Mexico is deeply disturbed by factions within, and war with foreign nations. And, of course, the same sentiments render them still more disinclined to allied war against Mexico, than to war to be urged against her by themselves alone.

"The undersigned is further authorized to state to the plenipotentiaries, for the information of the sovereigns of Spain, France, and Great Britain, that the United States are so earnestly anxious for the safety and welfare of the Republic of Mexico, that they have already empowered their Minister residing there to enter into a treaty with the Mexican Republic, conceding to it some material aid and advantage, which, it is hoped, may enable that Republic to satisfy the just claims and demands of the said sovereigns, and so avert the war which these sovereigns have agreed among each other to levy against Mexico. The sovereigns need not be informed that this proposal to Mexico has been made, not in hostility to them, but with a knowledge of the proceeding formally communicated to them, and with the hope that they might find, through the increased ability of Mexico, to result from the treaty, and her willingness to treat with them upon just terms, a mode of averting the hostilities which it is the object of the convention now under consideration to inaugurate. What has thus far been done by the American Minister at Mexico, under those instructions, has not yet become known to this government, and the information is looked for with deep interest. Should those negotiations offer any sufficient grounds on which to justify a proposition to the high contracting parties in behalf of Mexico, the undersigned will hasten to submit such a proposition to those powers. But it is to be

understood, first, that Mexico shall have acceded to such a treaty; and, secondly, that it shall be acceptable to the President and Senate of the United States.

"In the mean time the high contracting parties are informed that the President deems it his duty to provide that a naval force should remain in the Gulf of Mexico, during the conflict which may arise between the high contracting parties and that Republic; and that the American Minister residing in Mexico be authorized to seek such conference in Mexico with the belligerent parties as may guard each of them against inadvertent injury to the just rights of the United States, if any such should be endangered.

"The undersigned having thus submitted all the views and sentiments of this government on this important subject to the high contracting parties, in a spirit of peace and friendship, not only towards Mexico, but towards the high contracting parties themselves, feels assured that there will be nothing in the watchfulness which it is thus proposed to exercise, that can afford any cause for anxiety to any of the parties in question."

It was early suggested by the American Secretary of State, that, in order to prevent all apology for the expedition against Mexico, the necessary means for meeting the interest of the foreign debt should be provided by the United States, till Mexico could resume the payment of it. The adverse views of the Senate on this point were not known before the proposition was declared unacceptable at London, as well as at Paris and Madrid. M. Thouvenel said "it might not be possible to prevent the United States offering money to Mexico, or to prevent Mexico receiving money from the United States, but neither England nor France ought in any way to recognize the transaction." Earl Cowley to Earl Russell, September 24, 1861. Lord Russell told Mr. Adams "that their demands embraced not only the payment of interest on a debt which might be settled by naming a fixed sum, be it more or less, but also comprehended satisfaction for the injuries done to British subjects; that England could hardly transfer those obligations to the United States." Earl Russell to Earl Cowley, September 27, 1861.

M. Calderon said to Sir J. Crampton that the terms which Spain would require had been embodied in the treaty concluded with Miramon and confirmed by the treaty Mon-Almonte. "Upon the fulfilment of those engagements the Spanish government would insist, and all that they would demand in addition to these would be the infliction of due punishment upon the perpetrators of the assassinations which had since been committed upon Spanish subjects." Sir J. Crampton to Earl Russell. December 15, 1861.

Earl Russell in his instructions to Sir C. Wyke of the 30th of March, 1861, admits "that it has not been the custom to interfere authoritatively on behalf of those who have chosen to lend their money to foreign governments, and the Mexican bondholders have not been an exception to this rule." But he places the interposition of the British government on this point, on the arrangements made with the government of Juarez at Vera Cruz, by which customs receipts were in certain proportions to be assigned to the holders of the bonds. And though the agreement never assumed the form of a treaty it is insisted that their claims have acquired the character of international obligations. No. 100. 37th Cong. 2d Sess. H. of R. Ex. Doc. pp. 188, 205, 308, 391.] — *L.*

CHAPTER II.

RIGHTS OF CIVIL AND CRIMINAL LEGISLATION.

§ 1. Exclusive power of civil 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. [[54] In the two other cases he is considered subject to the laws, but only

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[[54] The doctrine of the publicists is that, whenever a child attains his majority, according to the law of his domicile of origin, he becomes free to change his nationality, and to choose another domicile; and even in the case of a subject of a country, England for example, which refuses the liberty of expatriation, the original tie is preserved only in the interests of the nation to which the individual belonged, and without affecting, with reference to his adopted country, the validity of the naturalization acquired there. Fœlix, Droit International Privé, § 28, note, tom. 1, p. 55, 3me edit. There would seem to be a conflict, as is explained in Appendix No. 1, (Naturalization and Expatriation,) between the decisions of the federal courts, with respect to the natural right of expatriation and the action of the executive, in the case of claims made for naturalized citizens of the United States in the country of their origin.

There is no general legislative enactment in the United States as to the age of majority. In regard to the majority of males the rule of law is uniform in all the States of the Union, not excepting Louisiana, it being fixed at twenty-one years; and though in some of the States females have an enlarged capacity at eighteen, the general rule of complete capacity is the same for both sexes. And in questions of federal rule it may be assumed as the common law of the United States. Mr. Cushing, August 29, 1856; Opinions of Attorneys General, vol. viii. p. 65.] —*L.*

in a limited sense. In the foreign countries, where he possesses real property, he is called a non-resident land owner, (*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.[1] Private international law.

§ 2. Conflict of laws.

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 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."[2]

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 recognize 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."[3]

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[1] Fœlix, Droit International Privé, § 3. [2] Id. § 9. [3] Id. § 10.

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 far 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.

There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States — *ex comitate, ob reciprocam utilitatem.* The public good and the general interests of nations have caused 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.

"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 neighboring 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 neighbors. 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." [1]

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

[1] Bohier, Observations sur la coutume de Bourgogne, ch. 23, §§ 62, 63, p. 457.

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.[1] [[55]

§ 3. 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

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[1] Huberus, Prælect. tom. ii. lib. i. tit. 8, de Conflictu Legum.

[[55] *Commissions Rogatoires*, by which testimony is obtained for the courts of a country, through the instrumentality of foreign tribunals, are very usual in the different States of Europe. It is only the English and American judges that do not resort to them. In the case of proceedings in the courts of those countries, requiring proof from abroad, a commission to take the testimony is addressed to one or more individuals, in the place where the testimony is to be obtained, authorizing them to examine the witnesses on oath, on interrogatories sent to them. This examination is, however, necessarily voluntary on the part of the witnesses; as is also the acceptance of the duties of the commission, by the persons named in it. Moreover, the magistrates of the place may object to the execution of the commission, as an infringement on the exclusive judicial power which belongs to every State, throughout the whole extent of its territory. See Fœlix, Droit International Privé, tit. IV. § 239 et seq., tom. i. p. 437, 3me ed. Prior to the act of March 2, 1855, no law existed for the execution of foreign rogatory commissions to take testimony in the United States. Opinions of Attorneys General, vol. vii. p. 56. By that act it is provided that "where letters rogatory shall have been addressed from any court in a foreign country to any circuit court of the United States and a United States commissioner is designated by said circuit court to make the examination of witnesses in said letters mentioned, the said commissioner shall have power to compel the witnesses to appear and depose in the same manner, as to appear and testify in court." United States Statutes at Large, vol. x. p. 630.] — *L.*

confusion and prejudice to its own interests. Hence it follows, that the law of a place where real property is situated governs exclusively as to the tenure, the title, and the descent of such property.[1]

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.[2]

But this application of the rule is peculiar to American and British law. According to the international jurisprudence recognized 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.[3] [56]

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[1] "Fundamentum universæ hujus doctrinæ diximus esse, et tenemus, subjectionem hominum infra leges cujusque territorii, quamdiu illic agunt, quæ facit ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed hæc ratio non convenit rebus immobilibus, quando illæ spectantur, non ut dependentes à liberâ dispositione cujusque patris-familias, verum quatenus certæ notæ lege cujusque reipublicæ ubi sitæ sunt, illis impressæ reperiuntur; hæ notæ manent indelebiles in istâ republica, quidquid aliarum civitatum leges, aut privatorum dispositiones, secus aut contra statuant; nec enim sine magnâ confusione prejudicioque reipublicæ ubi sitæ sunt res soli, leges de illis latæ, dispositionibus istis mutari possunt." Huberus, liv. i. tit. 3, de Conflictu Leg. § 15.

[2] Wheaton's Rep. vol. iii. p. 212. — Robinson *v.* Campbell. Cranch's Rep. vol. vii p. 115. United States *v.* Crosby.

[3] Fœlix, Droit International Privé, § 52. "Hinc Frisius habens agros et domos in

[56] The French law of 23–26 March, 1855, by requiring every act, in reference to the transfer *inter-vivos* of real property, or of rights susceptible of hypothecation, to be inscribed in the *bureau des hypothèques de la situation des biens*, prevents the operation of transfers made elsewhere, according to the law of the place where made. Tripier, Codes François, p. 1618. "No one maintains that a form expressly imposed as an exclusive one by the *lex situs*, can ever be dispensed with." Westlake, Private International Law, § 87.] — *L.*

§ 4. 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 (movable and immovable) was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the decedent.[1] 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 Napoleon, 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 both real and personal property in France, and of taking by succession *ab intestato*, or by will, in the same manner with native subjects.[2]

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provincia Groningensi, non potest de illis testari, quia lege prohibitum est ibi de bonis immobilibus testari, non valente jure Frisico adficere bona, quæ partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia legum diversitas in illâ specie non afficit res soli, neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, lex Reipublicæ non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a lege loci impressus læditur aut imminuitur." Huberus, ubi supra.

[1] Du Cange (Gloss. Med. Ævi, voce *Albinagium* et *Albani*) derives the term from *advenæ*. 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.

[2] Rotteck et Welcker, Staats-Lexicon, art. *Gastrecht*, Band. 6, § 362. Vattel, liv.

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.[1] 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."[2] [57

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ii. ch. viii. §§ 112–114. Klüber, Droit des Gens, Part II. tit. 1, ch. ii. §§ 32, 33. Von Mayer, Corp. Jur. Confœd. Germanicæ, tom. ii. p. 17. Merlin, Repertoire, tit. *Aubaine*.

[1] Kent's Comm. on Am. Law, vol. ii. pp. 67–69. 5th edit.

[2] Treaty of 1828, between the United States and Prussia, art. 14. Elliot's Am. Diplom. Code, vol. i. p. 388.

[57] Besides the improvement of our commercial relations generally, Mr. Wheaton's original instructions on his entering on his German mission contemplated the abolition of the *droit d'aubaine* and *droit de détraction*, as operating most injuriously on emigration to the United States. With Prussia the arrangement had been made, by the treaty of 1828, and the same provision was introduced in the treaty of commerce with Hanover, in 1840; but the full power which had been given in 1839, to conclude separate conventions with the several States of Germany, was withdrawn, soon after it was granted, in consequence of the refusal of the Senate to ratify a similar one with Switzerland; and it was not till Mr. Upshur was charged with the State Department, that, by instructions of November 18, 1843, it was re-

§ 5. Lex domicilii. As to personal property, the *lex domicilii* of its owner prevails over the law of the country where such prop-

newed. Treaties were made, in pursuance of these instructions, with Wurtemburg, Hesse Cassel, Saxony, Nassau, and Bavaria. Baden declined making any, in consequence of the vested interest which some of her subjects had in these duties. All these conventions abolish the *droit de détraction*. In transmitting one of them, Mr. Wheaton says: — "The tax imposed on the funds removed by emigrants, who leave this country, amounts, in Saxony and most of the German States, to ten per centum on the capital thus transferred. This amount is so much clear gain to us, in the capital thus brought into the country by the rich peasants and others, who sell their real property here, and emigrate in great numbers to the United States." The *droit d'aubaine* is equally oppressive, subjecting to a like duty all property, which emigrants to the United States might derive, on the death of relatives in the country of their origin; and the duty imposed in such cases is also, in general, ten per cent. on the capital. Mr. Wheaton to the Secretary of State, May 14, 1845.

The local law of most of the States of the American Union, being based on the feudal principles of the English common law, is less favorable to foreigners becoming land-owners than that of France, and other countries of the Continent of Europe, where aliens are permitted to hold real estate, and to take, *ab intestato* and by will, as native subjects. The treaties above referred to only provide, like the previous one with Prussia, that when land, within the territory of one of the parties, would descend to a citizen or subject of the other, were he not disqualified by alienage, he shall have two years, at least, (which is substituted for the indefinite term, *reasonable time*, in the treaty with Prussia,) in which to dispose of it; and, in the treaty with Saxony, this provision is made to apply to those who take by devise, as well as by descent. The general power, however, of disposing of property by will, donation, or otherwise, by the citizens or subjects of the one country, in favor of those of the other, is confined to personal property; and when, in the treaty with Bavaria, it was attempted to apply it also to "real estate," the Senate refused their ratification, unless these words were stricken out. This will explain their being in a parenthesis on the face of the original; and they are printed in the same way in the United States Statutes at Large, vol. ix. p. 827.

In the despatch from which we have already quoted, the impolicy of preventing aliens from purchasing real estate is discussed, and its effect, in withholding investments of German capital, shown; but this subject has been generally regarded in the United States as a matter for State legislation. It had been supposed not to be always easy to reconcile the exclusive authority of the federal government, through the treaty-making power, to enter into agreements with foreign States, in cases in which the concurrence of the latter is essential, with the control reserved by the States over all affairs of internal or municipal cognizance. And when in the treaty of the 23d of February, 1853, with France, it was proposed to remove the disability on French subjects holding land, the stipulation, on the part of the United States, (probably on account of a doubt of the authority of the general government to go further,) only extended to an engagement that the President would recommend to the several States to pass the laws necessary to secure a reciprocity. But a decision having been made in the State of Iowa, adverse to the power of the federal government to provide by treaty for the devise or descent to aliens of real property, contrary to the policy of the State laws, at the suggestion of the Minister of Prussia, Baron de Gérolt, the opinion of the Attorney-General was taken on the subject; It was to this effect: "The power, which the Constitution bestows on the President,

erty is situated, so far as respects the rule of inheritance:— *Mobilia ossibus inhærent, personam sequuntur.* Thus the law of

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with the advice and consent of the Senate, to make treaties, is not only general in terms and without any express limitation, but it is accompanied with absolute prohibition of exercise of treaty-power by the States. That is, in the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Whatever there is of general question in the matter, has been duly considered by the Courts of the United States, in construing the 9th article of the treaty between the United States and Great Britain of November 19, 1794, which stipulated in substance that British subjects might continue to hold lands in the United States and grant, sell, and devise the same in like manner as if resident citizens; and that neither they, nor their heirs or assigns should, as respecting said lands, be regarded as aliens: with reciprocal engagements of the same tenor on the part of Great Britain. Here, all impediment of alienage was absolutely levelled with the ground, despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. (Fairfax's Lessee *v.* Hunter's Lessee, 7 Cranch, p. 627. See also Ware *v.* Hylton, 3 Dall. p. 242.) There is also a recent judicial decision in the State of California, in which the power is affirmed and in application to the precise article of the treaty with Prussia. (The People *v.* Gerke, MS.) I think the conclusions of the Court in that case are just and true, and in accordance with the Constitution." Mr. Cushing, February 26, 1857. Opinions of Attorneys General, vol. viii. p. 415.

See also, for the abrogation of the *droit d'aubaine*, the Convention of the United States with the Hanseatic Republics, of 1827, art. 7, United States Statutes at Large, vol. viii. p. 370; with Austria, of 1829, art. 11, ib. p. 400; also the Convention with Austria, 1848, art. 11, ib. vol. ix. p. 445; with Brazil, of 1828, art. 11, ib. vol. viii. p. 392; with Mexico, of 1831, art. 13, ib. vol. viii. p. 414; with Russia, of 1832, art. 10. ib. vol. viii. p. 448; with the Two Sicilies, of 1845, art. 6, ib. vol. ix. p. 836; with Chili, of 1832, art. 9, vol. viii. p. 435; with Venezuela, of 1836, art. 2, ib. vol. viii. p. 470; with Peru-Bolivia, of 1836, art. 8, ib. vol. viii. p. 489; with Sardinia, of 1838, art. 18, ib. vol. viii. p. 520; with Hanover, of 1840, (concluded by Mr. Wheaton,) art. 7, ib. vol. viii. p. 556; and the Convention of Hanover, of 1846, (concluded by Mr. Mann,) art. 10, vol. ix. p. 865. This last Convention contains an article, by which its advantages may be extended to other States of the Germanic Confederation, provided they confer similar favors upon the United States to those accorded by the Kingdom of Hanover. Under this provision, Oldenburg acceded, on the 10th of March, 1847, ib. vol. ix. p. 868, and Mecklenburg-Schwerin, on 9th December, 1847, ib. vol. ix. p. 910. See also treaty with Ecuador, of 1839, art. 12, ib. vol. viii. p. 538; the Conventions with Würtemberg, of 1844, ib. vol. viii. p. 588; Hessè Cassel, of 1844, ib. vol. ix. p. 818; Saxony, of 1845, ib. vol. ix. p. 830; Nassau, of 1846, ib. vol. ix. p. 849; Bavaria, of 1845, ib. vol. ix. p. 827. The five last Conventions were those concluded at Berlin, by Mr. Wheaton; each of them is entitled "A Convention for the Mutual Abolition of the Droit d'Aubaine and Taxes on Emigration," to which subjects they exclusively relate. See further, Conventions with Swiss Confederation, May 18, 1847, ib. vol. ix. p. 902; Nov. 25, 1850, ib. vol xi. p. 590; with the Sandwich Islands, Dec. 20, 1849, ib. vol. ix. p. 979; New Granada, Dec. 12, 1846, ib. p. 886; Guatemala, March 3, 1849, ib. vol. x. p. 878; San Salvador, ib. 891, (art. 3d and 12th, give power to citizens of each country reciprocally to purchase and hold lands

the place, where the owner of personal property was domiciled at the time of his decease, governs the succession *ab intestato* as to his personal effects wherever they may be situated.[1] 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.[2] But these doubts have been overruled in a more recent 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

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and all kinds of real estate and to succeed to personal or real estate by testament or *ab intestato*); Peru, July 26, 1851, ib. p. 933; Brunswick-Luneburg, vol. xi. p. 601; the Two Sicilies, ib. p. 644.

The treaty of 1778, with France, repealed, in favor of the United States, the *droit d'aubaine* and *droit de détraction;* and it gave a reciprocal right to the citizens and subjects of either of the respective countries to dispose, by testament, donation, or otherwise, of immovable as well as movable property, in the country of the other, and stipulated that their heirs might succeed *ab intestato*, without naturalization. The treaty of 1794, with England, provided that alienage should not affect British subjects who then held land in the United States, or American citizens who held land in Great Britain, and that they might hold, grant, sell, or devise the same, as if they were natives, and that neither they nor their heirs should be regarded, as to such land, as aliens. The Convention of 1800, between the United States and France, also provided for the liberty of disposing, by the citizens of either country of their property, immovable as well as movable, in the other, in favor of such persons as they should think proper, by testament, donation, or otherwise, and that they should succeed without naturalization and be exempt from any duty; but this was not to derogate from any laws of either State against emigration; and in case the laws of either country should restrain strangers from the exercise of the rights of property, as to real estate, it is further provided that such real estate may be sold, or otherwise disposed of, to citizens of the country where it may be. United States Statutes at Large, vol. viii. pp. 18, 122, 182. See, also, Wheat. Rep. vol. i. p. 359, Martin *v.* Hunter; Ib. vol. ii. p. 259, Chirac *v.* Chirac. The treaty with France, of 23d February, 1853, the former treaties being no longer operative, contains a provision, authorizing Frenchmen in all of the States of the Union whose existing laws permit it, to hold personal and real property by the same tenure and in the same manner as citizens of the United States, and an engagement of the President to recommend to the other States the passage of laws necessary for that purpose. France accords to American citizens the same privileges within her territory, with the reservation of the ulterior right of establishing reciprocity. United States Statutes at Large, vol. x. p. 992.] — *L.*

[1] Huberus, Prælect. tom. ii. lib. i. tit. 3, de Conflict. Leg. §§ 14, 15. Bynkershock, Quæst. Jur. Pub. lib. i. cap. 16. See also an opinion given by Grotius as counsel in 1613, Henry's Foreign Law, App'x, p. 196; Merlin, Répertoire, tit. Loi, § 6, No. 3; Fœlix, Droit International Privé, § 37.

[2] Per Sir J. Nicholl, in Curling *v.* Thornton, Addams' Eccles. Rep. vol. ii. p. 17.

disposition of personal property, as it would in the case of a mere foreigner.[1]

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 recently recognized 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, having executed a will in India, ineffectual to convey Scottish heritage; and a question having arisen whether his heir at law (who claimed the heritable bonds as heir) was also entitled to a share of the movable 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 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.[2]

§ 6. 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.[3]

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[1] Stanley v. Bernes, Haggard. Eccles. Rep. vol. iii. pp. 393–465. Moore v. Davell, vol. iv. pp. 346, 354.

[2] Trotter v. Trotter, Wilson and Shaw's Rep. vol. iii. pp. 407–414.

[3] "Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnes-

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 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.[1]

This general rule is, however, subject to the following exceptions:

Naturalization.

1. To the right of every independent sovereign State to naturalize foreigners and to confer upon them the privileges of their acquired domicile. [58]

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

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que ei subjectos obligant, nec ultra. Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur." Huberus, tom. ii. l. i. tit. 3, De Conflict. Leg. § 2.

[1] Pardessus, Droit Commercial, Part VI. tit. 7, ch. 2, § 1. Fœlix, Droit International Privé, liv. i. tit. 1, § 31. "Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subjecti sunt, fruantur et subjiciantur." Huberus, tom. ii. l. i. tit. 3, De Conflict. Leg. § 12.

[58] For naturalization and expatriation, see Appendix, No. 1, by Mr. Lawrence.] —*L.*

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 country and that foreign country; and that the circumstance of his returning to his native country for a mere temporary cause would not deprive him of those advantages. [59

[59 But foreigners who, by an acquired domicile, participate in the commercial privileges of citizens or subjects of a country must, also, share the inconveniences to which the latter are subjected. Case of Laurent, Convention of 1853, p. 158.

To an application made by M. de Sartiges, Minister of France, for indemnity for French merchants, resident at Greytown, for losses sustained by the bombardment of the town, in May, 1854, by an American ship of war, it was answered by Mr. Marcy, Secretary of State, Feb. 26, 1857, "If there were persons in Greytown when it was bombarded who did not belong to the political organization there established, and who suffered in consequence of that bombardment, they can only resort for indemnity, if entitled to it, to that community. It was to that community they committed their persons and property, and by receiving them within its jurisdiction it assumed the obligation of protecting them. Nothing can be more clearly established than the principle that a foreigner domiciled in a country can only look to that country for the protection he is entitled to receive while within its territory, and that if he sustains injury from the want of that protection, the country of his domicile must indemnify him."

In illustration, Mr. Marcy referred to the case of Antwerp, where property before the revolution of 1830 had been deposited in Dutch government warehouses, which were destroyed by Dutch troops during the war. Antwerp having become a part of Belgium, the British law officers decided, and all the other powers concurred and acquiesced in their opinion, that there was no claim on the Netherlands, while the claim preferred by the Ministers of France, Great Britain, Prussia, and the United States, on Belgium was placed solely on the ground that the obligation to indemnify for such losses rested upon the country within which the injury was inflicted. No claim was made on Great Britain by any foreign power for the injuries sustained by the bombardment of Copenhagen in 1807. Mr. Marcy was not aware that the principle, that foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of their wars, has ever been seriously controverted or departed from in practice. No power assailing an enemy's country is required to discriminate between the subjects of that country and foreigners domiciled therein; nor can the latter, with any better right than the former, claim indemnity in any case except from the country under whose jurisdiction they have placed themselves.

"The applicants have assumed that Greytown was a sovereign State at the time it was bombarded, and that they were there as foreign merchants engaged in trade. It is not presumed they will shift their position, and adopt that which the United States have heretofore taken, and still maintain, in regard to the character of the community at Greytown. Though the people at that place had adopted the form and arrangements of a political organization, their characters and conduct did not in the opinion of this government entitle them to stand before the world in the attitude

Sovereign right of every independent State over the property within its territorial limits.

2. The sovereign right of every independent State to regulate the property within its territory constitutes another exception to the rule.

Thus the personal capacity to contract a marriage, as to age, consent of parents, &c., is regulated by the law of the State of which the party is a subject; but

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of an organized political society. During the period of their association they had earned for themselves no better character than that of a marauding establishment, too dangerous to be disregarded, and too guilty to pass unpunished. If the subjects or citizens of foreign States chose to become dwellers among such an assemblage, and intrust their property to such a custody, they can have no just cause to complain, no good grounds for the redress of injuries resulting from the punishment inflicted upon the offending community. In this aspect of the case, the situation of these foreigners would not be unlike that of a person who should indiscreetly place his property on board of a piratical ship. If that ship were captured, and the property destroyed or lost, the owner could have no pretence of claim against the captors. It was his fault that he inconsiderately exposed it to such a contingency." 35 Cong. 1 Sess. Senate, Ex. Doc. No. 9, pp. 4–7.

This subject having been brought, as affecting the claims of British merchants, before Parliament, Lord Palmerston said: "It is undoubtedly a principle of international law that, when one government deems it right to exercise acts of hostility against the territory of another power, the subjects and citizens of third powers, who may happen to be resident in the place attacked, have no claim whatever upon the government which in the exercise of its national rights commits these acts of hostility. For instance it was deemed necessary for us to destroy Sebastopol. There may have been in that town Germans, Italians, Portuguese, and Americans, but none of these parties had any ground upon which to claim from the English and French governments compensation for losses sustained in consequence of these hostilities. Those who go and settle in a foreign country must abide the chances which may befall that country, and if they have any claim it must be upon the government of the country in which they reside; but they certainly can have no claim whatever upon the government which thinks right to commit acts of hostility against that State. Therefore we were advised, and I think rightly, that British subjects in Greytown had no ground upon which they could call upon the government of this country to demand from the government of the United States compensation for injuries which they suffered in the attack upon that town. We may think that the attack was not justified by the cause that was assigned. But, as an independent State, we have no right to judge the motives which actuated another State in asserting the rights and vindicating the wrongs which it supposed its citizens or subjects have sustained. The American government has determined not to give compensation to any of the parties. They have refused, I believe, to give compensation to their own citizens, who suffered by the bombardment. I know they do not intend to give compensation to Germans, French, Spaniards, or any subjects of other governments settled at Greytown at that time. Her Majesty's government, therefore, acting under the advice of those who are most competent to give an opinion upon the subject, and deeming the advice in accordance with international practice, have foregone demanding any compensation for those subjects of Great Britain, who have been so unfortunate as to have been injured by the bombardment of Greytown."

the effects of a nuptial contract upon real property (*immobilia*) in another State are determined by the *lex loci rei sitæ*. *Huberus*,

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The Attorney-General said, "If the law advisers of the crown could have found that conformably with the international law of Europe satisfaction could have been demanded from America for the losses sustained at Greytown, they would unquestionably have pressed upon the government advice to that effect. France was, also, concerned, and had refrained, as well as England, from pressing any demand for satisfaction that could not be legally obtained. Every jurist admitted that in a case like the Greytown bombardment, no compensation could be enforced for losses sustained. The principle, which governed such cases, was that the citizens of foreign States, who resided within the arena of war, had no right to demand compensation from either of the belligerents for losses or injuries sustained." As an instance, he called to mind the bombardment of Copenhagen. Hansard's Parl. Debates, 3d Series, vol. cxlvi. pp. 37–49. Debate in House of Commons, June 19, 1857.

On a subsequent occasion Mr. Adams inquired, "whether it was the intention of Her Majesty's government to introduce any measure enabling them to grant compensation to British merchants whose property at Uleaborg, in the Gulf of Bothnia, had been destroyed on the 2d of June, 1854, by the boats of a squadron under the command of Admiral Plumridge."

Lord Palmerston said, "That the proceedings in this matter must be regulated by the principle which he had stated to be an international principle when a question arose as to the losses sustained by British subjects at Greytown. He then stated the principle of international law to be that persons who were domiciled in a foreign country must abide by the fate of that country in peace and war, and that therefore no demand could properly be made upon the American government for losses sustained by British subjects in Greytown in consequence of hostilities between that place and the United States. The same principle applied to the case to which the honorable gentlemen now referred. There were certain British subjects, and probably the subjects of other States, who were domiciled or had property in the Russian territory. Those persons must take the chance of the protection of the Russian empire; and if by any circumstance the place where their property was situated became the scene of hostile operations, no claim could possibly be set up by those persons, whatever country they might belong to, against the government whose forces carried on the hostilities by which they had been made to suffer." Ib. p. 1045, House of Commons, July 17, 1857.

Phillimore says, "The distinction between domiciled persons and visitors in, or passengers through, a foreign country, is never to be lost sight of; because it must affect the application of the rule of law which empowers a nation to enforce the claims of its subjects in a foreign State." The foreign domicile, according to him, does not take away this power, but it renders the invocation of it less reasonable, and the execution of it more difficult. A subject, who has deliberately domiciled himself in another State, can have no ground of complaint, if he be subjected to many taxes and impositions from which the simple stranger would, by the usage of nations, be exempt. More especially, if, being permitted by the law of his domicile, he had purchased land, and thus incorporated himself, as it were, into the territory of a foreign country, he cannot require his native government to interfere on the subject of the operation of municipal laws, or the judgment of municipal tribunals, upon his rights of immovable property in this foreign land. The case must be one of flagrant violation of justice, which would lay the foundation of international re-

indeed lays down the contrary doctrine, upon the ground that the foreign law, in this case, does not affect the territory imme-

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monstrance in such a matter; unless, indeed, the provisions of some particular treaty or some public proclamation of the foreign government take the case out of the application of the general law." International Law, vol. ii. p. 6.

In Mohammedan and Pagan States, there exists almost an entire exterritoriality for the Franks; while in Christian Europe and the United States, foreigners, so far as regards protection and local allegiance, stand almost in the same relation with the native or naturalized subjects or citizens. "All that we can demand of Austria," said Mr. Marcy to the American Minister at Vienna, "and this we can demand as a right, is that in her proceedings against American citizens for offences committed within her jurisdiction, she should give them the full and fair benefit of her system and deal with them as she does with her own subjects or those of other foreign powers." April 6, 1855. MS. Department of State.

The bearing of the principle of domicile on protection was elucidated in two cases, which came before the American government. In one of them it felt bound to recognize the obligations of foreign nationality, voluntarily assumed by a native-born citizen, and not to interpose the claims of American citizenship, to protect him against the consequences of acts committed against the country of his adoption. In the other, it protected, under the American flag, when arrested in a country (which was not his domicile of origin) by the functionaries of the sovereign who had expatriated him, — a foreigner who, by circumstances, had ceased to owe allegiance to any other country, and who had obtained a domicile in the United States, by doing everything that the law permitted to acquire the rights of American citizenship.

Mr. Webster, Secretary of State, refused to consider as entitled to the protection of the United States a native-born citizen, who, after having taken out letters of domiciliation to enable him to transact business in Cuba, as a Spanish subject or domiciled foreigner, was charged with being implicated in the Lopez expedition of 1850. In answer to a resolution of the House of Representatives, he said, December, 1850, "No man can carry the ægis of his national American liberty into a foreign country and expect to hold it up for his exemption from the dominion and authority of the laws and sovereign power of that country, unless he be authorized so to do by the virtue of treaty stipulations." Thrasher's case. Cong. Doc. 32d Cong. 1st Sess. H. R. Ex. Doc. No. 10.

In Koszta's case, Mr. Marcy held "The right to protect persons having a domicile, though not native-born or naturalized citizens, rests on the firm foundation of justice; and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard." The Secretary of State to Mr. Hulsemann, August 29, 1853. Cong. Doc. 33d Cong. 1 Sess. H. R. Ex. Doc. No. 91.

The States of Spanish America exposed, as they have been from the very commencement of their existence, to constant revolutionary movements, would seem, in reference to this subject, to occupy an intermediate place between those Christian States, where life and property are deemed to be secure, and Turkey, China, and other countries, where the principle of exterritoriality is maintained. In some cases, a right to interfere in favor of our citizens domiciled in other countries, is to be found in the violation of the express stipulations of treaties. In those made with the Spanish American Republics by the United States, beginning with the one with Colombia, October 3, 1824, there is an article by which "both the contracting powers promise and engage, formally to give their *special protection* to the per-

diately, 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 immovable property within the territorial jurisdiction.

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. 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. But if there be an express ante-nuptial contract, the rights of the parties under it are to be governed by the *lex loci contractus*.

By the general international law of Europe and America, a certificate of discharge obtained by a bankrupt in the country of which he is a subject, and

Effect of bankrupt discharge and title of

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sons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of the one or the other, *transient or dwelling therein*," &c. United States Statutes at Large, vol. viii. p. 310. And it will be recollected that the declared object of the recent tripartite treaty between Spain, France, and Great Britain, is not only "a fulfilment of the obligations contracted towards their Majesties by Mexico," but "a more efficacious protection for the persons and properties of their subjects." The reclamations which, apart from those founded on contract, Great Britain presents in this case, arising as they do from the seizure of moneys, even from the house of the British legation, made by the opposing faction when in possession of the capital, and during a civil war, are strong illustrations of the necessity of the rule, that holds a State always liable for the acts of its *de facto* authorities. Earl Russell instructs Sir C. Wyke, March 30, 1861, that "Great Britain does not recognize any party as constituting the Republic in its dealings with foreign nations, but holds the entire Republic, by whatever party the government of it may, from time to time, be administered, to be responsible for wrongs done to British subjects by any party or persons at any time administering the powers of government." Vide supra, Part I. ch. 2, § 11, subd. iv. p. 57. Part II. ch. 1, § 16, editor's note [53, pp. 157-9.] — *L.*

assignees in another country.

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 movable) 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 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.[1]

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. 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 law of the State of

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[1] Bell's Commentaries on the Law of Scotland, vol. ii. pp. 681–687. Rose's Cases in Bankruptcy, vol. i. p. 462. Kent's Commentaries on American Law, vol. ii. pp. 393, 404–408, 459, (5th edit.). Cranch's Rep. vol. v. p. 289, Harrison *v.* Sterry. Wheaton's Rep. vol. xii. pp. 153–163, Ogden *v.* Saunders.

which the party is a subject, the marriage ceremony is always regulated by the law of the place where it is celebrated; 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.

§ 7. 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 everything 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.[1]

Exceptions to its operation.

This qualification of the rule suggests the exceptions which arise to its application. And,

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 contractus*, 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. [[60] But the tribu-

[1] "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicitur." Huberus, tom. ii. l. i. tit. 3, de Conflict. Leg. § 2. "Effecta contractuum, certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur præjudicium, in jure sibi quæsito.' Ib. § 11.

[60] On the other hand, a contract, though to do a thing illegal at the place where

nals 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.[1] [[61]

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the suit was brought, and where the contract may have been made, has been enforced, when it was legal at the place of execution, as in the case of lotteries authorized in Kentucky and prohibited in New York. In that case it was declared that this rule would not apply to the sustaining of an obligation executed to carry into effect a foreign law sanctioning what was plainly contrary to morality. Hill's (New York) Reports, vol. vi. p. 529, Kentucky *v.* Bassford. See Westlake's Private International Law, §§ 192, 196.] — *L.*

[1] Pardessus, Droit Commercial, part. vi. tit. 7, ch. 2, § 8. Emérigon, Traité d'Assurance, tom. i. pp. 212–215. Park on Insurance, p. 341, (6th ed.). The moral equity of this rule has been strongly questioned by Bynkershoek and Pothier.

[[61] This principle is condemned by modern jurists. Story says, "An enlightened policy, founded upon national justice, as well as national interest, would seem to favor the opinion of Pothier in all cases where positive legislation has not adopted the principle, as a retaliation upon the narrow and exclusive revenue system of another nation. The contrary doctrine seems, however, firmly established in the actual practice of modern nations, without any such discrimination, too firmly, perhaps, to be shaken, except by some legislative act abolishing it." Conflict of Laws, § 257. Westlake holds that "The internal jurisprudence of every country must contain full details on the kind and degree of that connection with an illegal object which will vitiate a contract not directly aiming at it; and the same ancillary protection should be thrown, with an impartial hand, round those foreign laws of which we admit the obligation within their proper limits. Thus no recovery should anywhere be suffered on a contract made in one country to insure a ship in violation of the navigation or customs laws of another; such an insurance would be subsidiary to the breach of a foreign law. On the same principle the courts refuse to take cognizance of any claims arising out of loans made or expenses incurred to assist governments at peace with Great Britain, until such insurgents have been recognized by her as a new State, though the pecuniary part of such transactions may have its seat entirely in England." Westlake, Private International Law, § 199.

Heffter says: "To the present time the special laws of the States of Europe have maintained an almost unanimous silence as to the protection which is due to the rights and particular interests of foreign governments. The egotistical practice of States has not hesitated to deny the necessity of such a protection. Smuggling into a foreign country, (*contrebande à l'étranger*) for example, continues, according to the constant jurisprudence of the tribunals, to be considered as a matter perfectly lawful, of which a party has no occasion to be ashamed." Heffter gives, in the French translation of his work, a decree of the Court of Appeals for the Rhenish provinces, of which he was a member, deciding that a contract for the purpose of smuggling goods into a friendly country was contrary to good morals and to the laws. He, at the same time, says that the French jurisprudence professes less liberal principles; and refers to the decrees of the Court of Cassation of the 25th of March and 25th of August, 1835, establishing that an association for carrying on the illicit introduction of merchandise into a foreign country, as well as a contract for the insurance of it, is lawful.

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.[1] 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. [62] 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 has been recognized between the different States of the American Union, upon similar grounds of public policy.[2] [63

Foreign marriages.

English law.

He cites, in favor of his views, Pfeiffer, Prakt. Ausf. iii. 83, and the Spanish author, Pando, Elem. de derecho intern. p. 144. Heffter, Droit Intern. public, par Bergson, p. 66.] — *L.*

[1] "Si licitum est, eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione, prejudicii aliis non creandi." Huberus, De Conflict. Leg. l. i. tit. 3, § 8. He puts, as an example of this exception, the case of parties going into another country, merely to evade the law of their own as to majority and guardianship. "Sæpe fit, adolescentes sub curatoribus agentes, furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem, aliave loca, in quibus curatorum consensus ad matrimonium non requiritur, juxta leges Romanas, quæ apud nos hac parte cessant. Celebrant ibi matrimonium, et mox redeunt in patriam. Ego ita existimo, hanc rem manifeste pertinere ad eversionem juris nostri; et ideo non esse magistratus, huic obligatos, è jure gentium, ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii sua facilitate, jus patriis legibus contrarium, scientes, volentes, impertiuntur." De Conflict. Leg., Id. § 123.

[62] By the act of 19 & 20 Vic. c. 96, "no 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." Stephens's (Blackstone's) Commentaries, vol. ii. p. 269.] — *L.*

[2] Haggard's Consist. Rep. vol. ii. p. 428–433. Kent's Commentaries, vol. ii. p. 98.

[63] Story on Conflict of Laws, § 89. The same doctrine has been applied in Massachusetts, to admit the legitimacy of the issue of a person who had been divorced *a vinculo* for adultery, and had been declared by the local law incompetent to marry

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.[1] [64

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again, but who had gone into a neighboring State, and there contracted a new marriage, and had issue by that marriage; and the widow by such second marriage has, likewise, been declared entitled to dower in the real estate of her husband. Ib. §§ 123, 124.]

[1] Merlin, Repértoire, tit. *Loi*, § 6. Toullier, Droit Français, tom. i. Nos. 118, 576.

[64 "There can be little doubt that foreign countries, where such marriages are celebrated, will follow their own law and disregard that of France." Story on Conflict of Laws, § 90. For a *resumé* of the laws of the States which have, and of those which have not, adopted the principle of the French Code, see Fœlix, Des Mariages Contractés en Pays Etranger. Rev. Etr. et Franç. tom. viii. p. 633. Droit International Privé, tom. ii. p. 861, 3me ed.

The question of the validity of the marriage of a Frenchman abroad, in conformity to the law of the country where the marriage was celebrated, but within the required age and without the consent of the parents, came up before the tribunal of the First Instance in Paris, in February, and before the *Cour Imperiale* in June, 1861, in the case of Madame Paterson, and Jerome Bonaparte, her son, on the liquidation of the estate of His Imperial Highness, Prince Jerome, deceased June 24, 1860. The court, after adverting to previous decisions of the family council, invoked as conclusive, and considering, among other things, that, though the marriage of December 24, 1803, was celebrated according to the forms and with the publicity required by the local statutes, Jerome Bonaparte was then only nineteen years of age, and the clauses of the Code Napoleon relative to marriage had been promulgated in the month of March preceding; that, according to article 3d of the Code, the laws concerning the state and capacity of Frenchmen govern Frenchmen abroad; that, according to article 170, the publications prescribed by article 63, and the consent of parents in conformity with article 148, were required, neither of which were complied with, that these legal dispositions were notified, in October, 1803, by the French Minister to the father and relatives of Madame Paterson; that an authentic protest of *Madame Mère* against the aforesaid marriage, dated 3 Ventose, year XIII., was followed by two decrees of the Emperor Napoleon, dated 11 and 30 Ventose of the same year, one prohibiting all officers of the *état civil* from receiving on their registers the transcription of the act of celebration of the pretended marriage, and the other declaring the marriage null and void, that it could never produce any civil effects, and that the children born and to be born could never claim any right of relationship founded on that union; and considering that, two years later, the marriage of His Imperial Highness with the Princess of Wurtemburgh was celebrated in France, with all the formalities prescribed by law, and that, on the 2d of January, 1813, Madame Paterson obtained from the General Assembly of Maryland an act annulling the marriage contract with Jerome Bonaparte, the court dismissed the demand. The family council had also decided that the claimants were not entitled, on the facts above stated, to the benefits of the 201st and 202d articles of the Code, which give

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

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to the party contracting a marriage, in good faith, declared void, and to the children, the civil effects of a marriage. The Pope refused to annul this marriage, on the application of Napoleon. Thiers, Consulat et Empire, tom. viii. p. 28. See note of Mr. Jerome Napoleon Bonaparte on the notice of the marriage by Thiers, and the answer of Prince Napoleon, ib. tom. xvii. p. 901.

As the omission of the publications, ordered by art. 63, is not an absolute cause of nullity, so it has been decided that it will only nullify the marriage of a Frenchman contracted abroad, when it takes place *dans un but de clandestinité, et afin de se soustraire aux exigences de la loi françoise.* Giovanetti *v.* Orsini, Dalloz. 1^me^ partie, p. 9, cited by Westlake, § 341.

In a case growing out of the Sussex Peerage "all the judges agreed that the Royal Marriage Act was in force in foreign countries as well as in England, and that a marriage at Rome, if otherwise valid, when contracted between individuals who did not come within the scope of the Royal Marriage Act, became of no effect if one of the contracting parties was included within the provisions of that act and had married without the consent of the king." In that case testimony was offered and not contradicted that a marriage at Rome of two Protestants before a Protestant clergyman, would be deemed a valid marriage there. Annual Register, 1844, p. 345. The principle of the Royal Marriage Act is that while "it professes to make certain persons incapable of contracting marriage without the consent of the sovereign, what it really does is what it can do, namely, to prevent such persons from contracting matrimony within the British dominions without such consent, and to prevent British judges from acknowledging any matrimony which the same persons may similarily contract out of the British dominions." Westlake, Private International Law, § 348.

As to marriages in foreign countries, it is provided by the British statute, 4 George 4, c. 91, that marriages solemnized in the chapel or house of an ambassador or resident minister, or the chapel of a British factory abroad, or the house of any British subject residing at such factory, or by the chaplain or other person officiating by authority within the lines of a British army abroad, shall be as valid as if solemnized in the British dominions in due form of law; and by 12 and 13 Vict. c. 68, that all marriages solemnized in the manner in that act provided, in any foreign country or place where there shall be a British consul duly authorized to act in that behalf, shall be as valid (if either of the parties be a subject of the realm) as if solemnized within Her Majesty's dominions with a due observance of all forms required by law. Stephen's Commentaries on the Laws of England, vol. ii. p. 270.

Mr. Cushing, attorney-general, in an opinion of the 4th of November, 1854, says: "In regard to the contract of marriage, the general principle in the United States is, that, as between persons *sui juris*, marriage is to be determined by the law of the place where it is celebrated. If valid there, then although the parties be transient persons, and the marriage not in form or substance valid according to the law of their domicile, still it is valid everywhere; with some exceptions, perhaps, of questions of incest and polygamy. If invalid where celebrated, it is invalid everywhere." Story's Conflict of Laws, § 113; Bishop on Marriage, § 125.

"The only exceptions to this last proposition, namely, that marriages not valid by the *lex loci contractus* are not valid anywhere else, are, first, in favor of marriages where parties are sojourning in a foreign country, where the law is such that it is impossible for them to contract lawful marriage under it. Secondly, in certain cases in which,

parties, the contract is to be executed in another country, everything which concerns its execution is to be determined by the

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in some foreign countries, the local law recognizes a marriage as valid when contracted according to the law of domicile. Thirdly, where the law of the country goes with the parties, that is, in the contingency of their personal exterritoriality, as in the case of an army and its followers invading or taking possession of a foreign country, (Ruding *v.* Smith, 2 Hagg. C. R. 371; Huber. Prælec. J. C. de Con. Leg., l. i. tit. 3, § 10; J. Voet. in Dig. l. xxii. tit. 2); and perhaps of an army *in transitu* through a friendly State, (Wheaton's El. Part II. ch. 2, § 9; III. 3); and of a foreign ship of war in the ports of the nation, (The Exchange, 7 Cranch, 136.)

"It follows, by necessary consequence, save in the excepted cases enumerated, that a marriage, celebrated in any given place, must be celebrated according to the law of the place, and by a person whom those laws designate, unless the person by whom, or the premises in which, it is celebrated possess the privileges of exterritoriality.

"Therefore, it may be, according to the opinion of Lord Stowell, that the presence of a foreign sovereign sojourning in a friendly country, or that of his minister plenipotentiary, or the act of a clergyman in a chapel or hotel of such sovereign, or his ambassador, may give legality to the marriage between subjects of his or members of his suite. Ruding *v.* Smith, 2 Hagg. C. R. 371; Prentiss *v.* Tudor, 1 Hagg. C. R. 136; 1 Burge on Col. & For. Laws, p. 168.

"But even such right of a foreign sovereign or his ambassador to celebrate a marriage, if it exist, applies only to his subjects, countrymen, or suite. A marriage celebrated by such sovereign or his ambassador in a foreign country, between citizens of that country, or foreigners residing there or sojourning there, would derive no force from him: it would be null and void, unless legal according to the law of the place.

"Consuls, it is still more evident, have no shadow of power to celebrate marriage between foreigners. Nor can they between their own countrymen, unless expressly authorized by the law of their own country: because according to the law of nations, they have not the privileges of exterritoriality, like an ambassador.

"In countries where the mere consent of the parties, followed by copulation, constitutes marriage, as in Scotland, (McAdam *v.* Walker, 1 Dow's R. 148; Dalrymple *v.* Dalrymple, 2 Hagg. C. R. 97,) and where the presence and testimony of any person whatever suffices to prove the consent, there a marriage contracted before a foreign consul might be valid, not because he is consul, but because the consent makes the marriage.

"If the parties to the marriage are at the time actually in their own proper domicile, as in the case of Spaniards domiciled in Barcelona, and married there, it is clear that the local jurisdiction is absolute and complete, and that a consul of the United States has no more right to celebrate a marriage between such parties there than he has to undertake the duties of Captain-General.

"Suppose, however, that the parties are foreigners to the foreign place, and at the same time not citizens of the United States?

"The general rule is, that the civil obligations of a person follow him into a foreign country, save that in some countries forms are prescribed, according to which a subject may relieve himself of his allegiance to his natural sovereign and the consequent civil obligations. It is believed that many of the persons who emigrate from Europe to the United States, have not taken these preliminary steps; and therefore, until they shall have acquired a new domicile in the United States,

law of that country. Those writers who affirm that this exception extends to everything respecting the nature, the validity, and

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and while they are sojourning in some other foreign country on their way for, and previous to, their embarkation, they must of necessity be still subject to the law of their domicile in so far as this law is respected by the country of their transit or of their temporary sojourn; and the question of the validity of their marriage there by a foreign consul must depend on this legal condition of the parties in the countries of Europe.

"In order to appreciate the legal relations in Europe of a marriage between parties foreign to the place of marriage, we may take, as a convenient example, the state of the law in France.

"In France, of course, all Frenchmen must conform to the precise provisions of their own law; nay, as a general rule, if they marry abroad, still they must observe certain of the conditions of the Code Civil, in order to give effect to the marriage in France. Code Civil, No. 170; Fœlix, *ubi supra*, No. 88.

"In regard to such foreign marriages of Frenchmen it has been adjudged by the courts of that country, that, — 1. Frenchmen long established in a foreign country, and who have reserved no habitation and have no domicile in France, are not held to the forms of public notice there required by the Code. Dalloz, Dict. Jur., Mariage, No. 374.

"2. Generally, all acts appertaining to the civil condition of Frenchmen abroad may be proved by the modes of proof practised in the foreign country; and, therefore, a marriage may be proved by witnesses, or by the certificate of a diocesan, when celebrated in a foreign country where no registers of civil condition exist conformable to the code. Dalloz, *ubi supra*, Nos. 346–356.

"3. There are no differences of opinion as to the point that Frenchmen, who marry abroad, must conform to the provisions of the Code as to capacity, age, consent, and other conditions of substance; but there are contradictory decisions and opinions as to the point whether it be or not essential to the validity of such marriage that there should have been previous publication of bans in France; and whether, if this be a radical defect, it is curable or not; (Dalloz, *ubi supra*, Nos. 357–375;) because the article of the Code (No. 170,) which legalizes a marriage contracted between Frenchmen abroad according to the forms used in the foreign country, adds, provided (*pourvu*) the marriage be preceded by the publication of bans, and do not contravene the other conditions of law, as prescribed by the 1st and 2d chapters of the 5th title of the Code. See Toullier, Droit Civil, tom. 1, Nos. 576–579.

"4. The Code (arts. 47 and 48) provides that any civil act of Frenchmen abroad shall be valid if it be drawn up in pursuance of the forms of the place, according to the rule *locus regit actum*; or if it has been received conformably to the laws by the diplomatic agents or consuls of France. It has been doubted whether this applies to marriage; though the better opinion is that it does. (Dalloz, *ubi supra*, Nos. 362, 363; Toullier, Droit Civil, tom. i. No. 360; Merlin, Répert., Mariage, p. 641.) It is said, however, that if one of the parties to a marriage by a French consul abroad is French and the other not, then the marriage is null, because the consul has no jurisdiction as to the party not French, and the marriage may be attacked by either party. Dalloz, *ubi supra*, Nos. 365, 366. In one of the cases where this point was decided, the parties possessed an act of marriage, with twenty years' cohabitation, and two children. Proudhon, Tr. des Personnes, tom. i. note *a*.

"5. Finally, a marriage contracted in France by a foreigner according to the ex-

the interpretation of the contract, appear to have erred, in supposing that the authorities are at variance on this question

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terior forms prescribed by the law would be null, of intrinsic nullity, if the foreigner infringed any of the prohibitions of his statute personal, that is, of the personal law of his domicile. Fœlix, *ubi supra*, § 88.

"In the Dutch Netherlands, in addition to the conditions of competency and of publication of bans, there must be a legal contract before the proper magistrate, without which the marriage is a nullity. (Van der Linden, by Henry, p. 83.) As to this, no exception is made in favor of any persons whatever, being foreigners, or *in itinere*, or otherwise. See Ruding *v.* Smith, 2 Hagg. C. R. 371, note.

"So, in Spain, marriage must be solemnized by prescribed rule, that is, through the intervention of the parish priest, or other clergyman with license of his ordinary, according to the articles of the Council of Trent concerning the reformation of matrimony. Tapia, Febrero Novis., lib. i. cap. 2; Sala, Derecho real de España, lib. i. tit. 4.

"It may be, that a marriage between foreigners, celebrated by a consul of the United States abroad, though utterly null in the country where it is celebrated, might, if the parties emigrate to this country, acquire validity in some of the States of the Union, as a marriage proved by repute and by cohabitation following consent, according to the old rule of the common law. Even then, the certificate of the consul would not constitute the marriage; it would serve at most only as proof of consent, to be connected with proof of cohabitation.

"But the practice of celebrating such marriages would be objectionable even then, because it is in fraud of the local jurisdiction, and contrary to the dictates of international comity, if not to positive law.

"In what precedes, the inquiry has been treated as relating entirely to marriages assumed to be legalized by consuls of the United States residing officially in any of the countries of Christendom.

"For, in regard to States not Christian, although we make treaties with them as occasion may require, and assert in our intercourse with them all such provisions of the law of nations as are of a political nature; yet we do not suffer, as to them, that full reciprocity of municipal obligations and rights which obtains among the nations of Christendom.

"In regard to the States not Christian, not only the Mohammedan States but all the rest, it seems to me that the true rule is, that contracts of citizens of the United States in general, and especially the contract of marriage, are not subject to the *lex loci*, but must be governed by the law of the domicile; and that, therefore, in such countries, a valid contract of marriage may be solemnized, and the contract authenticated, not only by an ambassador, but by a consul of the United States.

"The English authorities come to substantially the same conclusion, for similar reasons. They lay down the broad rule that where, owing to religious or legal difficulties, the marriage is impossible by the *lex loci*, still a lawful marriage may be contracted, and of course authenticated by the best means of which the circumstances admit, as in many cases of marriages contracted in the East Indies and in other foreign possessions of Great Britain. See Catterall *v.* Catterall, 1 Roberts, 580.

"This doctrine is conformable to the canon law, which gives effect to what are called *matrimonia clandestina*, that is, marriages celebrated without observance of the religious and other formalities decreed by the Council of Trent (Cavalario, Derecho Canonico, tom. ii. p. 172; Escriche, s. v. Matr.), when contracted in countries where,

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 contractus*, the latter by the law of the place where it is to be carried into execution.[1]

§ 8. Lex fori.

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.

Thus, if a contract made in one country is attempted to be

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if those decrees were enforced, there could be no marriage. (Walter, Derecho Ecclesiastico, § 292-294.) Nay, in such countries, in the absence of a priest, there may be valid marriage by consent alone, conformably to the canon law as it stood before the Council of Trent, either by *verba de præsenti* or by *verba de futuro cum copulâ*, as happened *ex necessitate rei*, under the Spanish law, in remote parts of America. Of course, in circumstances like this, a marriage might be legalized by a mere military commandant. Patton *v.* Phil. & New Orleans, 1 La. An. R. 98. See, also, Hallett *v.* Collins, 10 How. p. 174.

"Seeing that by the common law of marriage, as now received in all or nearly all the States of the Union, marriage is a civil contract, to the validity of which clerical intervention is unnecessary, (Bishop on Marriage, § 163,) it would seem to follow, at least as to all those countries, barbaric or other, in which there is in fact no *lex loci*, or those Mohammedan or Pagan countries in which, though a local law exists, yet Americans are not subject to it, that there the personal statute accompanies them, and the contract of marriage, like any other contract, may be certified and authenticated by a consul of the United States.

"But this doctrine does not apply to the countries of Europe, and their colonies in America or other parts of the world, in all which there is a recognized law of the place, and the rule of *locus regit actum* is in full force. There, in my opinion, a consul of the United States has no power to celebrate marriage between either foreigners or Americans." Opinions of Attorneys General, vol. vii. p. 22.

By the act of June 22, 1860, § 31, "All marriages in the presence of any consular officer *in a foreign country*, between persons who would be authorized to marry, if residing in the District of Columbia, shall have the same force and effect, and shall be valid to all intents and purposes, as if the said marriage had been solemnized within the United States. And in all cases of marriage before any consular officer, the said consular officer shall give to each of the said parties a certificate of such marriage, and shall also send a certificate thereof to the Department of State, there to be kept; which certificate shall specify the names of the parties, their ages, places of birth and residence. United States Statutes at Large, 1859–60, p. 79. The above section, though general in its terms, is appended to the act for carrying into effect the treaties with China and other non-Christian nations.] — *L.*

[1] Fœlix, Droit International Privé, § 74.

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.[1] [[65]

§ 9. Foreign sovereign, his ambassador, army, or fleet, within the territory of another State.

III. The municipal institutions of a State may also operate beyond the limits of its territorial jurisdiction, in the following cases: —

1. The person of a foreign sovereign, 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.[2]

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 con-

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[1] Kent's Commentaries, vol. ii. p. 459, 5th ed. Fœlix, Droit International Privé, § 76.

[[65] The rule of the Supreme Court of the United States has always been that the laws of a foreign country, designed only for the direction of its own affairs, are not to be noticed by other countries, unless proved as facts; and that the sanction of an oath is required for their establishment, unless they can be verified by some other authority, that the law respected not less than the oath of an individual. The court decided that the Code Civil, which is contained in one of the volumes of the "Bulletin des Lois, à Paris, l'imprimerie royale," with the indorsement, "Le Garde des Sceaux de France, à la Cour Suprême des États Unis," which was sent to the Supreme Court in the course of our international exchanges of laws with France, which Congress had acknowledged, and to reciprocate which they had made an appropriation, was authenticated in such a way as that it might be received by the court, for the purpose of proving what the law of France was in the case under consideration. Howard's Reports, vol. xiv. p. 429. Ennis et al. *v.* Smith et al.

By the 69th article, § 9, of the French Code of Civil Procedure, in case of proceedings against foreigners, a copy of the writ (*exploit*) is required to be sent to the department of Foreign Affairs. This is done in order that it may reach the party interested; and the rule is, for the department to send it to the proper French diplomatic agent, to be delivered to the Ministry of Foreign Affairs of the government to which he is accredited. Fœlix, Droit International Privé, § 150.] — *L.*

[2] Bynkershoek, de Foro Legat. cap. iii. § 13, and cap. ix. § 10.

sidered as a continued residence in his own country, and he retains his national character, unmixed with that of the country where he locally resides.[1] [[66]

[1] Vide infra, Part III. ch. 1.

[[66] "It is universally agreed that an ambassador appointed from among the subjects of the State to which he is accredited, remains subject to its jurisdiction in private matters, and, if any inconvenience is suffered thereby, the government which appointed him has but its own choice to blame. But here the same distinction exists as in the case of the sovereign-subject. Such an ambassador is exempt from the jurisdiction in everything which directly relates to his ministry; (Vattel, l. 4, § 112;) and an opinion was expressed by Lord Campbell (Duke of Brunswick *v.* King of Hanover, 2 H. of L. 26,) that a British subject, who is neither sovereign nor an ambassador, is equally exempt from British jurisdiction, in respect of what he has done by the authority of a foreign government's instrument of State, for acting under which he has had the sanction of the sovereign of this kingdom." Westlake, Priv. Inter. Law, § 138, p. 120.

It is a sufficient answer to a suit brought against a foreign functionary, for seizing a vessel as such functionary, that it was done by virtue of the powers vested in him by his government. Opinions of Attorneys General, June, 1794, vol. i. p. 46, Collot's case. And, in a subsequent case, the Attorney-General gave it as his opinion, that "it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does, in pursuance of his commission, to any judicial tribunal in the United States." Ib. December, 1797, vol. i. p. 81. A case which arose in 1840, growing out of the arrest, by the State authorities of New York, of an Englishman charged with arson and murder, in connection with the capture and destruction, in the preceding year, within the jurisdiction of that State, of a steamboat employed by the Canadian insurgents, led to a diplomatic discussion of this subject. The local authorities refused to discharge the accused without trial; but the failure to convict him, by the verdict of the jury, put a practical termination to the controversy. And to prevent the recurrence of transactions of this nature, by which the action of one of the States might jeopard the foreign relations of the federal government, the Act of 29th August, 1842, (United States Statutes at Large, vol. v. p. 539,) was passed, for bringing such cases under the cognizance of the United States' judges, at the inception of the proceedings. Webster's Works, vol. ii. pp. 119, 120. Ib. vol. v. pp. 116, 120, 125, 133. Ib. vol. vi. pp. 254, 266. United States Statutes at Large, vol. v. p. 539. Hill's (New York) Reports, vol. i. p. 377. S. C. Wendell's Reports, vol. xxv. p. 483. The People *v.* McLeod.

In an examination of the subject by Mr. Wheaton, it was remarked, that this case involved two very grave points: the one — the right, on the part of the British authorities, to go into American territory, and to take possession, by force, of a vessel belonging to a citizen of the United States; the other — the right of the tribunals of the country to try, as an offence against its criminal jurisdiction, an act committed under the authority of a foreign government.

Though the latter point had been practically settled by the verdict of acquittal, Mr. Wheaton took occasion to present it to the publicists of Europe, in connection with our complex system, which prevented the federal government, which alone conducts our foreign relations, from interfering effectually and promptly with the proceedings of the State judiciary. In this case, however, the difficulty did not arise

3. A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign

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from any defect in the organic law, which extends the power of the federal judiciary to such cases, but from an omission in the Judiciary Act of 1789, which was subsequently supplied as above mentioned by the Act of the 29th of August, 1842. As the law at the time stood, the case would have been brought to the Supreme Court of the United States, but only after a final decision of the highest court of the State, had McLeod been willing, instead of going to trial, on the question of fact, to have submitted to a succession of appeals. In the event of an unfavorable verdict on his trial, he might have obtained an arrest of judgment from the court on the question of international law involved; and had the courts of New York decided against him, he might have taken an appeal to the Supreme Court of the United States, and, according to the true principles of public law, it could only have been, on the failure of the central government to interfere, after the decision in the last resort, that the English government could have had recourse to reprisals. This is according to the opinion given by Lord Mansfield, when Solicitor-General, and the other law officers of the Crown, in the celebrated case of the Silesian loan. In the various demands that our government has made for indemnity, it has ever been distinctly admitted that it was only after a condemnation by the highest court, or where the uniform course of proceeding was such as to make a condemnation morally certain, that the government of the United States was justified in making reclamations, on account of their citizens, for illegal seizures; and such was the opinion expressed by Lord Chancellor Loughborough to the British and American Commission under the treaty of 1794. (Trumbull's Reminiscences of his own Times, p. 193.) Mr. Wheaton remarks that in all free countries governed by representative constitutions, the courts are independent of the immediate action of the executive power, though, in England, where the prosecution may be terminated *in limine* by the intervention of the Crown, authorizing the Attorney-General to enter a *nolle prosequi*, the responsibility of the government would commence on its refusal to arrest a proceeding against a foreign subject, of which the government of the latter had just reason to complain.

As to the other point — the United States could not admit that, though The Caroline might have been a piratical vessel, the whole American nation had become pirates. On the contrary, it was maintained that the United States had, as far as possible, fulfilled their duties as a neutral State, which the British government itself admitted, in its communications with other foreign powers; and it was shown that all that England could contend for, in her contest with the insurgents of Canada, was to have the rights that a sovereign may exercise towards his subjects who had rebelled, and those which are allowed to a belligerent, in time of war, with reference to neutral States. It is an incontestible principle that no act of hostility can be exercised by belligerents within the limits of neutral territories. Nor did the case fall within the very doubtful exception, suggested by Bynkershoek, of an attack commenced out of the territory, and continued, *dum fervet opus*, within it, and which, even in such a case, according to the publicists, was always subject to the condition that any injury that might accrue from it, either to person or property, was to be regarded as an act of aggression. The conditions here annexed to the exercise of the right are scarcely compatible with its existence; but in the case of The Caroline the contingency did not arise. It was not the continuation of a pursuit into an enemy's territory, but a premeditated attack of the military authorities of the

sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place.[1]

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. [67]

Decision of the Supreme Court of the United States, in the case of an American ship, seized in 1810, at St. Sebastien, by order of Napoleon.

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, a vessel which had originally belonged to an American citizen, but had been seized and confiscated at St. Sebastien, 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.

In delivering the judgment of the Court in this case, Mr. Chief Justice Marshall stated that the jurisdiction of courts of

province of Upper Canada, executed during the night against an American vessel at anchor in a harbor of the United States, on the shores of the Niagara Strait, which separates the respective territories of the two countries. All the writers on public law, especially the English, agree in forbidding such an act of hostility, within neutral territory, even against an enemy. De la question de juridiction qui s'est presentée devant les cours des Etats-Unis dans l'affaire de Macleod, par M. Henri Wheaton, Ministre des Etats-Unis à Berlin. Revue Et. et Fr. tom. ix. p. 31]. — *L.*

[1] "Exceptis tamen ducibus et generalibus, alicujus exercitûs, vel classis maritimæ, vel ductoribus etiam alicujus navis militaris, nam isti in suos milites, gentem, et naves, libere jurisdictionem sive voluntariam sive contentiosam, sive civilem, sive criminalem, quod occupant tanquam in suo proprio, exercere possunt," etc. Casaregis, Disc. 136, 174.

[67] Mr. Wheaton, in a notice of Ortolan's work, *Diplomatie de la Mer*, concedes that the proposition in the text, which he had adopted on the authority of preceding writers, was too absolute and admits of exceptions. He thinks that on this subject the French jurisprudence and legislation have established the true distinction, which should be acknowledged by all, as being conformable to the universal law of nations. Rev. de Droit. Franç et Etr. tom. ii. p. 206. Those rules are given in this treatise (p. 201, *infra*,) when stating the law of France, as to the exemption of private vessels from the local jurisdiction.] — *L.*

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.

Exemption of the person of the foreign sovereign from the local jurisdiction.

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 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 infracting 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.

Exemption from the local jurisdiction of foreign troops passing through the territory.

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. [68

But if, without such express permission, an army should be

[68 In January, 1862, the Secretary of State of the United States transmitted an order to the Marshal and all other Federal officers in Portland directing that the agents of the British government should have all proper facilities for landing and conveying to Canada, or elsewhere, troops and munitions of war of every kind, without exception. The occasion of the order was the expected arrival of a steamer from England bound to Quebec and Montreal with troops.

"The immediate grounds for this proceeding were, that it was supposed that a passage of the troops and munitions named across the territory of the United States, by the Grand Trunk Railroad, would save the persons concerned from risk and suffering, which might be feared, if they were left to make their way, in an inclement season, through the ice and snow of a northerly Canadian voyage.

"The principle upon which this concession was made to Great Britain is that, when humanity, or even convenience, renders it desirable for one nation to have a passage for its troops and munitions through the territory of another, it is a customary act of comity to grant it, if it can be done consistently with its own safety and welfare. It is on this principle that the United States continually enjoy the right of the passage of troops upon the Panama Railroad, across the territories of the Republic of New Granada.

"The United States claim and enjoy, by the concession of all friendly nations, the kindred comity of entering their ports with ships and munitions of war; and they have conceded a reciprocal comity to the naval marine of Great Britain, France, and indeed all other friendly nations.

"In withholding this customary comity from Great Britain in the present case, this government must necessarily act upon either a conviction that the passage of the troops and munitions through our territory would be injurious or hazardous to the public safety or welfare, or else it must capriciously refuse to that power what would be granted cheerfully to any other, or refuse to grant to Great Britain now what would have been cheerfully accorded at another time, and under some different circumstances.

"No foreign nation inimical to Great Britain is likely to complain of the United States for extending such a comity to that power. If, therefore, there be any danger to be apprehended from it, it must come in the form of direct hostility on the part of the British government against the United States. The United States have not only studiously practised the most perfect justice in their intercourse with Great Britain, but they have also cultivated on their part a spirit of friendship towards her as a kindred nation, bound by the peculiar ties of commerce. The Grand Trunk Railroad, a British highway extended through the territories of the United States to perhaps the finest seaport of our country, is a monument of their friendly disposition. The reciprocity treaty, favoring the productions of British North America in the markets of the United States, is a similar monument of the same wise and benevolent policy." — Mr. Seward to the Governor of Maine, January 17, 1862.] — *L.*

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 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 imminently 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 privilege 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 general-

ly 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 favor 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 sovereign, 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."[1]

Equally impossible was it to conceive, that a prince who stipu-

[1] Vattel, Droit des Gens, liv. 4, ch. 7, § 92.

lates 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 in which it must have been understood to be asked.

Distinction between public and private vessels.

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.

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 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 con-

strued, 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 rites 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.[1]

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 prince and assuming the character of a private individual; but he cannot be presumed 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.[2] [69

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[1] Bynkershoek, de Foro Legat. cap. iv.

[2] "Anno 1668, privati quidam Regis Hispanici creditores, tres ejus regni naves bellicas, quæ portum Flissingensem subiverant, arresto detinuerunt, ut inde ipsis satisfieret, Rege Hispanico ad certum diem per epistolam in jus vocato ad judices Flis-

[69 Several cases are cited by M. Fœlix, as decided by the French tribunals, from which the conclusion is deduced, that "no suit or proceeding can be brought against

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 favor

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singenses; sed ad legati Hispanici expostulationes Ordines Generales, 12 Dec. 1668, decreverunt, Zelandiæ Ordines curare vellent, naves illæ continuò demitterentur liberæ, admoneretur tamen per literas Hispaniæ Regina, ipsa curare vellet, ut illis creditoribus, in causâ justissimâ, satisfieret, ne repressalias, quas imploraverunt, largiri tenerentur." Bynkershoek, cap. iv.

property of any kind belonging to a foreign government. It has been decided that no private person can lay an attachment (*former une saisie-arrêt*) in France upon the funds of a foreign government, and that the courts are incompetent to decide upon the validity of such attachment (*saisie-arrêt*)." This doctrine was applied, January 22, 1849, in the case of a French creditor of the Spanish government by the Court of Cassation, annulling a decree of the Court of Pau of May 6, 1845, and more recently, January 12, 1856, by the Court of Paris in a case where the Bey of Tunis was concerned. Fœlix, Droit International Privé, § 215, vol. i. p. 393, 3me edition. Exemption from suit refers to merely hostile proceedings, and not to those where according to rules of pleading in the English Court of Chancery and in those of several of the American States, it is necessary to make a person defendant for his own interest, as where the court is called on to distribute a fund in which a foreign sovereign or State may have an interest. The effect is to make the suit perfect as to parties; but, as to the sovereign or State made a defendant in cases of that kind, the effect has not been to compel such sovereign or State to come in and submit to judgment in the ordinary course, but to give the sovereign an opportunity to come in to claim his right or establish his interest in the subject-matter of the suit.

"A more complicated case," says Westlake, "is that in which the foreign character entitling to the exemption is combined with subjection here. It has been decided that no suit can be maintained against a foreign sovereign who is also a British subject, for acts done in virtue of his authority as sovereign, notwithstanding the process may have been served upon him while exercising in this country his rights as such subject. (Duke of Brunswick *v.* King of Hanover, 6 Beav. 1; 2 H. of L. 1). But is such a person 'liable to be sued in the courts of this country, in respect of any acts and transactions done by him, or in which he may have been engaged as a British subject?' (Ib. 6 Beav. 57). The affirmative was held by Lord Langdale, and we may admit, as implied by Lord Brougham, 'that supposing a foreign sovereign, being also a naturalized subject in this country, had a landed estate in this country, and entered into any transactions respecting it, as a contract of sale or mortgage,' then 'a court of equity in this country might compel him specifically to perform his contract.' (S. C. 2 H. of L. 24). For strict law would support the jurisdiction, and we should probably think our dignity as much involved in maintaining, as his in repelling it." Private Inter. Law, § 137, pp. 118–120.] —*L.*

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 necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.[1]

Law of France, as to the exemption of private vessels from the local jurisdiction.

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 above judgment of the Supreme Court of the United States; or, to speak more correctly, the legislation of France waives, in favor 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

[1] Cranch's Rep. vol. vii. pp. 135–147. The Schooner Exchange v. McFadden and others.

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.

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 taking 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 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 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[1] 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 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

[1] 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*.

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." [1] [70

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[1] Ortolan, Régles Internationales de la Mer, tom. i. pp. 293–298. Appendice, Annexe H. p. 441.

[70] See a review of Ortolan's work, by Mr. Wheaton, Rev. Etr. et Fr. N. S. t. ii. p. 206, and editor's note [67, p. 191, *supra*. The Convention of February 23, 1853, art. 8, between France and the United States, § 11, editor's note, *infra*, adopts, as to acts of interior discipline, the principle of the French law, and submits all such matters to the consuls, to the exclusion of the local authorities.

As to whether the local authorities, in a foreign port, have a right to interfere with the condition of persons or things, on board of a merchant vessel, as established by the laws of the country to which it belongs, and especially whether they can do so when such vessel has been brought into port by unlawful force, see the correspondence between Mr. Webster and Lord Ashburton, in the case of The Creole. Webster's Works, vol. vi. p. 303, and the note of the Attorney-General, Mr. Legaré, to Lord Ashburton, July 20, 1842. Opinions of Attorneys General, vol. iv. p. 98.

This case was also the subject of an article by Mr. Wheaton. The facts were these. An American planter sailed from Richmond, Virginia, on board of this vessel, with one hundred and thirty-five slaves belonging to him, whom he was carrying to New Orleans. In the Straits, between Florida and the Bahama Islands, the negroes revolted, killed their master, put the captain in irons, and wounded several of the crew, and then took possession of the vessel and carried her into Nassau. The governor arrested nineteen of the slaves concerned in the revolt and assassination, and set the others at liberty. As to the prisoners, he asked the direction of his government.

The case arose before the extradition treaty with Great Britain, but subsequent to the abolition of slavery in the West Indies. The inquiry is preceded by an exposition of the law of nations, in reference to extradition, substantially the same as is given in these "Elements," which work was, indeed, quoted in this very matter, by Lord Campbell, during a debate in the House of Lords, in which he, as well as Lord Brougham, Lord Denman, and Lord Lyndhurst, took part. Mr. Wheaton then remarks that slavery has existed, as a fact, among the most civilized nations; and that though the slave-trade has been abolished by all the powers of Europe and America, its fruits still remain in the United States, Brazils, and the Spanish colonies, the British emancipation act never having been followed in those countries. The independence of every nation in this matter must be respected; and it was to attribute an immense and unheard of power to the legislation of a single nation, to accord to it the right of changing the laws which control the property of all nations. Until Sommersett's case, in 1771, slavery was recognized in England, and slaves were publicly sold at the Exchange. Even so late as 1827, Lord Stowell decided that, though slaves arriving in England were free while they remained there, and their masters could not send them out of the country, yet if they returned to the colonies, no matter by what means, their ancient condition was restored. (Hagg. Adm. Rep. vol. ii. p. 96 — The Slave Grace.) The laws of France formerly preserved, to a greater or less extent, the control of the master over the slaves brought with him from the colonies; but since 1791, the slave who voluntarily seeks an asylum in

Whatever may be the nature and extent of the exemption of the public or private vessels of one State Exemption of public or private ves-

France, under ordinary circumstances, may claim the protection of the maxim which frees whomever touches the soil; but the French ports cannot become a refuge for robbers, to find succor and impunity for crimes committed against the persons and property of a friendly nation.

Mr. Wheaton shows that, though in the Netherlands, in the Middle Ages, foreign slaves were free on touching the soil, a distinction was made in favor of masters arriving from the colonies, accompanied by their slaves. In Denmark, a slave from the colonies may be reclaimed by his master. In Prussia, masters travelling with their slaves preserve their rights over them. The Civil Code of Prussia declares that slavery is not tolerated in the Prussian States, and that no Prussian subject can or ought to bind himself to become a slave. However, foreigners who arrive in Prussia with their slaves, to sojourn there during a limited time, preserve their rights over their slaves; but if those foreigners are definitively established in the kingdom, or if Prussian subjects introduce there slaves purchased abroad, these slaves become free. 4 Allgemeines Landrecht, Theil ii. tit. 5, § 196. According to this provision, in a case which arose in 1854, "it was decided that the rights of a master, who takes a slave into Prussian territories for a limited time, are respected, and that the slave has no right to claim his freedom, simply because he is on Prussian soil." Mr. Vroom, Minister of the United States at Berlin, July 28, 1856. It was only in 1836 that the rule was first established in Massachusetts, that slaves temporarily brought into that State were free. The Court say: "The precise question presented by the claim of the respondent is, whether a citizen of any one of the United States, where negro slavery is established by law, coming into this State for any temporary purpose of business or pleasure, staying some time, but not acquiring a domicile here, who brings a slave with him as a personal attendant, may restrain such slave of his liberty during his continuance here, and convey him out of this State on his return, against his consent. Until this discussion, I had supposed that there had been adjudged cases on this subject in this commonwealth; and it is believed to have been a prevalent opinion among lawyers, that if a slave is brought voluntarily and unnecessarily within the limits of this State, he becomes free, if he chooses to avail himself of the provisions of our laws; not so much because his coming within our territorial limits, breathing our air or treading on our soil, works any alteration in his status or condition, as settled by the law of his domicile, as because by the operation of our laws, there is no authority on the part of the master, either to restrain the slave of his liberty whilst here, or forcibly to take him into custody, in order to his removal. There seems, however, to be no decided case on the subject reported." Commonwealth *v.* Aves, cited, in Story on the Conflict of Laws, § 95. Formerly, the law of Pennsylvania contained a provision in favor of members of Congress, foreign ministers, and consuls and sojourners, the latter being allowed to retain their slaves six months. In New York, travellers might take their slaves through the State, but they could not be kept there more than nine months. 1 R. S. 657, § 6 (repealed by chap. 247 of 1841). Kent said, "This exception in favor of the master voluntarily bringing his slaves into the State temporarily as a traveller, prevails, also, by statute, in Rhode Island, New Jersey, and Pennsylvania, and it is an act of comity on the part of the State, and was not required by the Constitution of the United States, article 4, sec. 2, subd. 3, nor by act of Congress, Feb. 12, 1793, for they only apply to persons *escaping* or being *fugitives* from service or labor." Kent's Commentaries on

sels from the local jurisdiction does not extend to justify acts of aggression against the security of the State.

from the local jurisdiction in the ports of another, it is evident that this exemption, 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

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American Law, vol. ii. p. 257. The provision in the Rhode Island Statutes, under which the above-mentioned privilege was conceded, was omitted in the Digest of 1844.

In Russia, and other countries where slavery still existed, extradition by the authorities of the country to which the serf escapes prevailed; while in Spain and Portugal, masters bringing their slaves from the colonies preserve their property in them. Hence Mr. Wheaton concluded that the nations of Europe have not established it, as an invariable rule, having the force of a moral law, that an individual, a slave in the country from whence he departs, becomes free when he touches European soil; and if they had, it would not follow that it applied to the case of The Creole.

The only remaining question was, whether the particular circumstances, connected with the arrival of The Creole in the port of Nassau, constituted such an exception to the general rule as to authorize the American government to ask any satisfaction of the English government.

Mr. Wheaton regards the affair of The Creole neither as a case of the extradition of the offenders by the government of the country, where they have committed a crime, nor as the ordinary one of slaves seeking an asylum in a country where slavery is not tolerated. The general principle is undoubted, that the vessels of a country, on the ocean, and beyond the territorial limits of any other nation, are subject to its exclusive jurisdiction, and that they only pass under the jurisdiction of a foreign State when they voluntarily enter its ports. The Creole never ceased to be subject exclusively to American jurisdiction. Entering into a friendly port, against the will of the owner and captain, and in consequence of a crime on the high seas, cognizable only by the courts of the United States, The Creole continued to enjoy the rights of her flag, and the captain had a claim for the assistance of the local authorities to regain possession of his vessel. The negroes could not be said to have arrived in English territory; they could not be considered as mixed with the inhabitants; and whatever the generality of its expression, the law could not be taken to be applicable to slaves arriving in the country in consequence of crime, and against the will of their owners. Examen des questions de juridiction qui se sont elevées entre les gouvernements Anglois et Américain dans l'affaire de la Créole. Rev. Etr. et. Fr. tom. ix. p. 345. See Phillimore on International Law, vol. i. p. 343.

No adjustment having been made, during the negotiations of 1842, of the cases arising out of the liberation of American slaves, in the Bahama and Bermuda islands, by their respective authorities, from vessels forced in to escape shipwreck, or actually shipwrecked, they were brought before the joint commission, sitting in London, under the Convention of February 8, 1853, (United States Statutes, vol. x. p. 988,) for the settlement of all claims of the subjects of Great Britain on the government of the United States, and of the citizens of the United States on that of Great Britain, presented to either government for its interposition with the other, since the treaty of Ghent, of 24th of December, 1814. The American and English commissioners not being able to agree on these claims, they were referred, according to the provis-

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, ainé, 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

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ions of the treaty, to the umpire. By his decision, which was final, a full indemnity was accorded for the value of the slaves on board of The Creole. The principles contended for by the American government and discussed in the argument of Mr. Wheaton, were thereby recognized, and sustained. Similar adjudications were, also, rendered in several other cases. Report of Decisions of Commissioners under Convention of 1853, p. 242.

In 1856, a case arose in reference to seamen, supposed not to be citizens of the United States, who having committed a mutiny at sea, on board of the American vessel Atalanta, were brought back in the vessel to Marseilles, where on the application of the Consul of the United States they were received and imprisoned by the local authorities on shore. Six of them were afterwards on his application taken from prison and placed on board of The Atalanta for conveyance to the United States under charge of crime. Then, with notice to the Consul, but in spite of his remonstrances, the local authorities went on board of The Atalanta, forcibly resumed possession of the prisoners, and replaced them in confinement on shore. Mr. Mason, in a note of the 27th of June, 1856, says: "It is the first instance, in which a vessel wearing the flag of the United States, lying in a French port, or a French ship lying in a port of the United States has, since the date of the treaty, been visited by police officers without the authority of the Consul." MS. Department of State. The correspondence between the two governments having been submitted to the Attorney-General of the United States, he concurred in opinion with the American Minister, that the local authority of Marseilles exceeded its lawful power in substance, as well as in form, and that there could be no conflict on the part of France with other powers on account of the nationality of the prisoners, for they were always in the constructive, if not in the actual, custody of the United States. Opinions of Attorneys General, vol. viii. p. 73.] —*L.*

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.[1]

The exemption of public ships from the local jurisdiction does not extend to their prize goods taken in violation of the neutrality of the country into which they are brought.

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 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.[2]

§ 10. Jurisdiction of the State over its public and private vessels on the high seas.

4. 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.

Vattel says that the domain of a nation extends to

[1] Sirey, Recueil général de Jurisprudence, tom. xxxii. partie i. p. 578. M. Dupin, aîné, has published his learned and eloquent pleading in this memorable case, in his *Collection des Réquisitoires*, tom. i. p. 447.

[2] Wheaton's Rep. vol. vii. p. 352. The Santissima Trinidad.

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.[1] Grotius holds that sovereignty may be acquired over a portion of the sea, *ratione personarum, ut si classis qui maritimus est exercitus, aliquo in loco maris se habeat.* But, as one of his commentators, Rutherforth, has observed, though there can be no doubt about the jurisdiction of a nation over the persons which 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.[2]

This jurisdiction which the nation has over its public and 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 in 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.[3]

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 the slave-trade,) unless the visitation and search be expressly permitted by international compact.[4]

Every State has an incontestable right to the service of all its members in the national defence, but it can give effect to this

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[1] Vattel, liv. i. ch. 19, § 216, liv. ii. ch. 7, § 80.

[2] Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. iii. § 13. Rutherforth's Inst. vol. ii. b. 2, ch. 9, §§ 8, 19.

[3] Sir L. Jenkin's Works, vol. i. p. 714.

[4] Dodson's Adm. Rep. vol. ii. p. 238, The Louis. Wheaton's Rep. vol. x. pp. 122, 123, The Antelope. Wheat. Rep. vol. xi. pp. 39, 40, The Marianna Flora; *et vide infra*, § 15.

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. [71 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, for deserters and other persons liable to military and naval service, has been 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 are the most deeply interested in the question, formed one of the principal objects of the late war between them. It is to be hoped that the sources of this controversy may be dried up by the substitution of a registry of seamen, and a system of voluntary enlistment with limited service, for the odious practice of impressment which has hitherto 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.[1]

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

[71 A State may recall its subjects settled abroad, whenever it deems proper. Nevertheless, to obtain their return, it possesses no means of coercion and cannot demand the assistance of the foreign authorities. A government is not even obliged to authorize the publication in its territory of the letters of recall sent by a foreign government. Heffter, § 59. As to claims for military service from individuals naturalized elsewhere, temporarily returning to the country of their origin, see Appendix, No. I.] — *L.*

[1] Edinburgh Review, vol. xi. art. 1. Mr. Canning's Letter to Mr. Monroe, September 23, 1807. American State Papers, vol. vi. p. 103.

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, and not unfrequently exercised without the least regard to what justice and humanity would have dictated, even if the right itself had been admitted, took possession of the public mind of America; and this feeling, it was well known, coöperated with other causes to produce the state of hostilities which ensued.

At different periods, both before and since 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 treated of; 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 question stood at that moment where it stood fifty years ago. The nearest approach to a settlement was a convention, proposed in 1803, and 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 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 a British cruiser enters 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. This 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 incorporated 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," says an authority not unknown or unregarded on either side of the Atlantic, "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."

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 late war, a condition so favorable 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 endeavored 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 recognize, 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 distinguished person to whose hands were first intrusted the seals of the Department 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 present interest or emergency existed 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 honor 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.[1] [[72]

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[1] Wheaton's Hist. Law of Nations, pp. 737–746. Mr. Webster's Letter to Lord Ashburton, August 8, 1842.

[[72] President Jefferson refused to submit to the Senate, on account of the omission of any provision with regard to impressment, a treaty concluded *sub spe rati* in 1806, between the American ministers, Messrs. Pinkney and Monroe, and Lords Holland and Auckland. The official note, which the Plenipotentiaries of the United States

IV. The municipal laws and institutions of any State may operate beyond its own territory, and within

§ 11. Consular jurisdiction.

had received from the British Commissioners, pledging their government to caution in the exercise of the practice, so far from being deemed a substitute for an express stipulation against it, might have been regarded as a recognition of the pretension; while a proposed reservation, at the moment of signing the treaty, and which was intended to justify the retaliatory measures that might be founded on the French decree of the 21st of November 1806, and control our proceedings towards a third party, would alone have rendered a ratification on our part inadmissible. By the British government it was expressly declared that their ratification would not be given, unless the French either withdrew the Berlin decree or the United States gave them assurances that they would not submit to it. Wait's American State Papers, vol. vi. p. 368. In the negotiations in 1814, at Ghent, the American Ministers were authorized, if Great Britain would agree to abolish impressment, to stipulate to exclude all natural-born subjects of the belligerent party not naturalized before the commencement of a war, from the public and private naval service of the neutral, and even to extend the exclusion to all those naturalized after the exchange of the ratifications of the treaty. And with the express view of meeting the case, the 12th section of the Act of 3d March, 1813, (U. S. Statutes at Large, vol. ii. p. 811,) "for the regulation of seamen on board the public and private vessels of the United States," had provided that no person subsequently arriving in the United States should be admitted to become a citizen who should not, for *the continued term of five years next preceding his admission, have resided in the United States, without being, at any time during the said five years, out of the territory of the United States.* Looking to the habits of life of seamen, this provision was deemed entirely equivalent to the total prohibition of their naturalization, and was intended to meet the suggestions made during the negotiations of 1806, between Lord Holland and Lord Auckland and Mr. Monroe and Mr. Pinkney; when it was proposed that it should be made penal for British commanders to impress American citizens from on board of American vessels on the high seas, and for officers of the United States to grant certificates of citizenship to British subjects. American State Papers, vol. vi. p. 323. Such an arrangement had been also suggested at the time of the proposed armistice, at the commencement of the war, by Mr. Russell, in a conference with Lord Castlereagh, when the entire exclusion of all subsequently naturalized citizens was offered by us, as a consideration for the discontinuance of the practice of impressment. Ib. vol. ix. p. 147.

The negotiations of 1818 were conducted by Messrs. Gallatin and Rush, on the part of the United States, and by Mr. Robinson, (afterwards Lord Goderich,) and Mr. Goulburn, on the part of Great Britain. An arrangement on the basis of the exclusion of all natural-born citizens or subjects of either power thereafter naturalized, from serving in the public or private marine of the other, was, as in the negotiations, both previous and subsequent, a subject of discussion; and we are informed that a satisfactory adjustment only failed to be effected because the British insisted on two points of detail. The one regarded as naturalized seamen, within the provision of the treaty, those only whose names should be inserted in the lists, specifying the places of their births and the dates of their naturalization, which each government was to furnish to the other, within twelve months after the ratification of the treaty; and the other made the exclusion imposed by the treaty, apply to those seamen who were naturalized after its date and before its ratification. From the fact that, anterior to the adoption of the federal constitution, the several States ex-

the territory of another State, by special compact between the two States.

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ercised the power of naturalization, and that the acts of Congress did not require, for several years, the birthplace of the aliens, who were naturalized, to be recorded, and that minor children of naturalized persons, if within the limits of the United States, become, by the naturalization of their fathers, naturalized, it would have been impossible for us to have made the necessary returns. Nor were the British satisfied with our proposition to throw the burden of proof of their naturalization on such seamen as might not be included in the lists. The other provision, however conformable to the rule in ordinary cases, was objected to as giving a retroactive operation to the treaty with regard to such seamen as might be naturalized in the period intervening between its date and ratification. Mr. Rush expressed the confident belief, which would seem likewise to have been that of Mr. Gallatin, that "had Lord Castlereagh (who was then attending the Congress of Aix-la-Chapelle) been in London there would not have been a failure." Rush's Memoranda of a Residence in London, p. 432.

Impressment was again discussed without result, under similar instructions to Mr. Rush, in 1823. Mr. Adams, Secretary of State, to Mr. Rush, July 28, 1823. Cong. Doc. 18th Cong. 2d Sess. Senate, confidential.

Impressment was also one of the numerous subjects confided to Mr. Gallatin, in 1826. In consequence, however, of what had previously occurred, that eminent diplomatist, though authorized to receive and discuss, was not permitted to make any new proposals; and he found that, "though Mr. Canning (who was then Premier) was, as Lord Castlereagh had been, ahead of public opinion or national pride, he did not feel himself quite strong enough to encounter those sentiments, and to give new arms to his adversaries; and notwithstanding his conviction that an agreement, such as he might expect, was extremely desirable, he was not prepared, at that time, to make the proposal." Mr. Gallatin to Mr. Clay, Secretary of State, 28th July, 1827. After the departure of Mr. Gallatin, an intimation was given, by Lord Dudley, of the disposition of the Ministry, of which the Duke of Wellington had then become the head, to enter into an arrangement on the basis on which it was understood that the United States were willing to treat. This suggestion of the British Secretary for Foreign Affairs was duly communicated to the government, at Washington, though without resulting in any new negotiation. Mr. Lawrence, Chargé d'Affaires, to Mr. Clay, April 5, 1828. MS. Despatches. Mr. Barbour, on going as Minister to London, received, June 13, 1828, the same instructions as had been given to Mr. Gallatin. Moreover, as to any attempt to exercise the claim, "You will," said Mr. Clay, "on the first instance of the impressment of an American seaman remonstrate in strong but respectful terms against it, and let the British government know that this government cannot and will not submit to it." Ex. Doc. No. 111, 33d Cong. 1st Sess. But, though not brought again to the notice of the British government, the provision of the Act of 1813, which was equivalent to a practical prohibition to naturalize foreign seamen, remained on our statute-book as a means to conciliate the pretensions of England with the immunity of our flag, till the 26th of June, 1848, when the condition of continuous residence was stricken out of the law. United States Statutes at Large, vol. ix. p. 240.

England never contended that she had a *belligerent* right to take her subjects from neutral ships. The Prince Regent, in his declaration of the causes of the war of 1812, puts the exercise of the right of impressment, as incidental to that of search for

Such are the treaties by which the consuls and other commercial agents of one nation are authorized to exercise, over their

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enemy goods and contraband. It was never claimed that British men of war could enter a neutral merchant-ship for the purpose of searching for seamen; but, he said, that he could never admit that, "in the exercise of the undoubted and hitherto undisdisputed right of searching neutral merchant-vessels in time of war," the impressment of British seamen, when found therein, can be deemed any violation of a neutral flag; nor that taking such seamen from on board such vessels can be considered a hostile measure or a justifiable cause of war. Annual Register, 1813, p. 2.

The pretension of Great Britain to take, under the claim of indefeasible allegiance, her subjects and particularly her seamen, is not to be confounded with the belligerent right of arresting on board of neutral vessels the persons assimilated to contraband of war, the exercise of which on a recent occasion gave rise to the intervention of European powers, who had adopted a conventional principle wholly different from the rule of the law of nations as expounded by the admiralty tribunals of England and the United States. The seizure, in November 1861, by the commander of an American war-steamer, from on board of a British mail-contract steamer, of the Ministers or Commissioners from the so-called Confederate States to England and France, with their secretaries of legation, while *in itinere* to their destination, with the demand for their surrender by the British government, will be appropriately discussed elsewhere. (Part IV. ch. 3, §§ 24, 25.) It is here referred to only so far as it is supposed to be connected with the impressment question.

Though the rule for which the continental statesmen and publicists contend, by securing for all persons on board of neutral vessels, except in the specified case of those engaged in the actual military service of the enemy, absolute immunity, might exclude any further application of the offensive practice of impressment, it is to be noted that that claim, made by Great Britain alone, stands on a very different basis from the case of the Confederate Commissioners. The right to arrest Messrs. Slidell and Mason, if valid at all, existed *jure belli*, that is to say, by the law of nations, and was wholly independent of municipal law; while "the claim of a belligerent to search for and seize on board neutral vessels, on the high seas, persons under his allegiance, does not rest on any belligerent right under the law of nations, but on a prerogative derived from municipal law, and involves the extravagant supposition, that one nation has a right to execute, at all times and in all cases, its municipal laws and regulations on board the ships of another nation, not being within its territorial limits." Mr. Madison, Secretary of State, to Mr. Rose, March 1, 1808. Parliamentary Papers. Leopard and Chesapeake, February, 1809, p. 29.

In a review of the case of The Trent, from an English source, it is said: "All that the Federal States government can urge is, that we did much the same thing ourselves before the war of 1812, when we stopped American ships and took out of them seamen whom we claimed as British. In point of fact, it was not the same thing, for we merely asserted on the part of the crown a right to the services of our own sailors; we imputed to the ships in which those sailors might be found no breach of neutrality, and consequently we had no right to take them before a prize court, and therefore, if the right was to be exercised at all, it was necessary that it should be exercised by our naval officers." The writer adds, "But we do not undertake to justify all our acts half a century ago. The law of impressment has been abolished, and it is very certain that during the last fifty years nothing of the kind has been attempted, or even imagined by England. The law of nations is deduced from the

own countrymen, a jurisdiction within the territory of the State where they reside. The nature and extent of this peculiar juris-

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actual practice of nations; and as we during our last war (though sorely in need of sailors) did not revive our claim to take our sailors out of American ships, the claim must be held to have been conclusively abandoned." — Quarterly Review, No. CCXXI., January, 1862, art. 8, p. 140, Am. ed.

"The truth is," says another English publicist, "that this practice never rested upon any principle of the law of nations at all, but upon a principle of municipal law at variance with the law of nations. That principle was the doctrine of the inalienable allegiance of subjects to their sovereign. The inference was that the sovereign had a municipal right to claim the persons and services of his subjects wherever they could be found; and that, in particular, seamen were not protected by a neutral flag, and had no right to serve a neutral power without the king's license. He might take them, under the old municipal theory of allegiance, wherever they could be found. But by the modern conceptions of the law of nations, territorial independence is the more powerful principle of the two. Within the territorial limits, or under the flag of another State, every foreign sovereignty becomes subject. By the law of prize a captor has no property in a captured vessel or her cargo until the rightfulness of the seizure has been decided by a court administering the law of nations; but as the seizure of British seamen in foreign ships on their allegiance to King George was a municipal right and not a right under the law of nations, the courts of admiralty had no jurisdiction in the matter." — Edinburgh Rev. No. CCXXXIII. art. 10, January, 1862, p. 138. Am. ed.

But, though Earl Russell, in his note of the 3d of December, 1861, in making the demand for the liberation of the Commissioners, places it on no specific ground, Mr. Seward might be deemed fully justified by M. Thouvenel's reference, in his despatch to the French Minister at Washington, of the same date, to the previously declared sentiments of the American government, and by the approbation with which the intervention based on that statement was received in London, to infer from the British demand not only an assimilation to the continental law of contraband, subsequently adopted by them in terms, but as a consequence thereof, an abandonment of any pretension to take persons, whether English subjects or others, from neutral vessels, on any pretext whatever, not within the conceded exception of military persons in the actual service of the enemy.

The Secretary of State, accordingly, places his acquiescence in the British application on its conformity with those principles, which have ever influenced the American government in resisting the right of impressment and in refusing to permit a naval officer of a belligerent to pronounce, on his own responsibility, on the liberty of any individual found in a neutral ship. "If," he says, "I decide this case in favor of my own government, I must disavow its most cherished principles, and reverse and forever abandon its essential policy. The country cannot afford the sacrifice. If I maintain those principles and adhere to that policy, I must surrender the case itself. It will be seen, therefore, that this government could not deny the justice of the claim presented to us in this respect upon its merits. We are asked to do to the British nation just what we have always insisted all nations ought to do to us. Nor have I been tempted at all by suggestions that cases might be found in history, where Great Britain refused to yield to other nations, and even to ourselves, claims like that which is now before us. Those cases occurred when Great Britain, as well as the United States, was the home of generations which, with all their

diction depend 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. [[73] The resident consuls

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peculiar interests and passions, have passed away. She could in no other way so effectually disavow any such injury as we think she does by assuming now as her own the ground upon which we then stood. It would tell little for our own claims to the character of a just and magnanimous people, if we should so far consent to be guided by the law of retaliation, as to lift up buried injuries from their graves to oppose them against what national consistency and the national conscience compel us to regard as a claim intrinsically right. Putting behind me all suggestions of this kind, I prefer to express my satisfaction that, by the adjustment of the present case upon principles confessedly American, and yet, as I trust, mutually satisfactory to both of the nations concerned, — a question is finally and rightly settled between them, which, heretofore exhausting not only all forms of peaceful discussion but also the arbitrament of war itself, for more than half a century, alienated the two countries from each other and perplexed with fears and apprehensions all other nations." Mr. Seward to Lord Lyons, December 26, 1861. Parliamentary Papers, 1862. North America, No. 5, p. 26. 37th Cong. 2d Sess. Senate Ex. Doc. No. 8. p. 12.] — *L.*

[[73] Full instructions to the American consuls, as applicable to the jurisdiction accorded to them in the different countries where their functions are to be performed, and the acts of Congress then in force in reference to consular officers, will be found in the "Regulations prescribed by the President for Consular Officers of the United States." Washington, 1856.

The provisions of the consular convention of the 23d February, 1853, as to holding real estate by citizens of the United States and of France in the two countries respectively, have been already referred to in this chapter, (§ 4, Editor's note [57, p. 170, *supra*,) and those articles which relate to the personal immunities and privileges of the consuls will more appropriately come under another head, (Part III. ch. 1. § 22.)

There are other clauses affecting the consular jurisdiction, which it is deemed proper to introduce here, the more especially as some of the stipulations which this convention contains are not in any other treaties made by the United States. By it the consuls-general, consuls, vice-consuls, or consular agents have the right of taking, at their offices or bureaux, at the domicile of the parties concerned, or on board ship, the declarations of captains, crews, passengers, merchants, or citizens of their country, and of executing there all requisite papers. They have the right, also, to receive at their offices or bureaux, conformable to the laws and regulations of their country, all acts of agreement executed between the citizens of their own country and the citizens or inhabitants of the country in which they reside, and even all such acts between the latter, provided that these acts relate to property situated, or to business to be transacted, in the territory of the nation to which the

of the Christian powers in Turkey, the Barbary States, and other Mohammedan countries, exercise both civil and criminal juris-

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consul or the agent before whom they are executed may belong. Copies of such papers, duly authenticated by the consuls-general, consuls, vice-consuls, or consular agents, and sealed with the official seal of their consulate or consular agency, shall be admitted in courts of justice throughout the United States and France, in like manner as the originals. The respective consuls-general, consuls, &c., it is provided, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences; but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew, whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls, made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls.

The respective consuls-general, consuls, &c., may arrest the officers, sailors, and all other persons making part of the crews of ships of war, or merchant vessels of their nation, who may be guilty or be accused of having deserted said ships and vessels, for the purpose of sending them on board, or back to their country. To that end, the consuls of France in the United States shall apply to the magistrates designated in the Act of Congress of May 4, 1826; that is to say, indiscriminately to any of the federal, state, or municipal authorities; and the consuls of the United States in France shall apply to any of the competent authorities, and make a request in writing for the deserters, supporting it by an exhibition of the registers of the vessel and list of the crew, or by other official documents, to show that the men whom they claim belonged to said crew. Upon such request alone, thus supported, and without the exaction of any oath from the consuls, the deserters, not being citizens of the country where the demand is made, either at the time of their shipping or of their arrival in the port, shall be given up to them. All aid and protection shall be furnished them, for the pursuit, seizure, and arrest of the deserters, who shall even be put and kept in the prisons of the country, at the request and at the expense of the consuls, until these agents may find an opportunity of sending them away. If, however, such opportunity should not present itself within the space of three months, counting from the day of the arrest, the deserters shall be set at liberty, and shall not again be arrested for the same cause.

The respective consuls-general, consuls, &c., shall receive the declarations, protests, and reports of all captains of vessels of their nation, in reference to injuries experienced at sea; they shall examine and take note of the stowage (*arrimage*); and when there are no stipulations to the contrary between the owners, freighters, or insurers, they shall be charged with the repairs. If any inhabitants of the country in which the consuls reside, or citizens of a third nation, are interested in the matter and the parties cannot agree, the competent local authority shall decide.

All proceedings relative to the salvage of American vessels wrecked upon the coasts of France, and of French vessels wrecked upon the coasts of the United

diction over their countrymen, to the exclusion of the local magistrates and tribunals. This jurisdiction is ordinarily sub-

States, shall be respectively directed by the consuls-general, consuls, and vice-consuls of the United States in France, and by the consuls-general, consuls, and vice-consuls of France in the United States, and until their arrival, by the respective consular agents, wherever an agency exists. In the places and ports where an agency does not exist, the local authorities, until the arrival of the consul in whose district the wreck may have occurred, and who shall be immediately informed of the occurrence, shall take all necessary measures for the protection of persons and the preservation of property. The local authorities shall not otherwise interfere than for the maintenance of order, the protection of the interests of the salvors, if they do not belong to the crews that have been wrecked, and to carry into effect the arrangements made for the entry and exportation of the merchandise saved. It is understood that such merchandise shall not be subjected to any custom-house duty, if it is to be reëxported; and if it be entered for consumption, a diminution of such duty shall be allowed, in conformity with the regulations of the respective countries. United States Statutes at Large, vol. x. p. 992.

Besides the provision in the treaty with France, the United States have or have had treaties with Belgium, Brazil, the Hanseatic Towns, Central America, Chili, Colombia, Ecuador, Greece, Hanover, Mexico, Peru, Peru-Bolivia, Portugal, Prussia, Russia, Sardinia, Spain, Sweden, Venezuela, the Two Sicilies, New Grenada, Mecklenburg-Schwerin, and Austria, reciprocally authorizing the arrest, in their respective ports, of any sailors who have deserted from the public or private vessels of the other of the contracting parties, and stipulating for the aid of the local authorities for their apprehension. See U. S. Statutes at Large, vols. viii. and ix. More recent treaties, on this subject, are those with Guatemala, March 3, 1849. Ib. vol. x. p. 897. San Salvador, Jan. 2, 1850. Ib. p. 897. New Granada, May 4, 1850. Ib. p. 904. Netherlands Colonial Convention, January 22, 1855. Ib. p. 1154. To give effect to the provision on this subject in the treaty of 1822, with France, the act of May 4, 1826, referred to in the existing treaty, was passed. U. S. Statutes at Large, vol. iv. p. 160. A further act was also passed, March 2, 1829, which applies to all cases of foreign governments having treaties with the United States stipulating for the restoration of seamen. This law makes it the duty, on the application of the consul, of all courts and magistrates having jurisdiction to issue warrants for the examination of the persons charged; and if, on examination, the facts stated are found to be true, such person, not being a citizen of the United States, shall be delivered to the consul, to be sent back to the dominions of his government. Ib. p. 360. The treaty of 1844 with China, art. 29, provided, as does the 18th article of the treaty of 1858, for the apprehension and delivery to the consuls, by the local authorities, of all mutineers or deserters from on board of vessels of the United States in China. Ib. vol. viii. p. 598. U. S. Treaties, 1859–60, p. 75. With Great Britain it has, hitherto, been found impossible to make any similar arrangement. "In March 1855, Mr. Buchanan submitted a *project* of three articles to Lord Clarendon, who proposed to substitute the accession of the United States to the foreign deserters act of 1852, which applies in terms to seamen, not being slaves, who desert from merchant ships, &c. This is a distinction, to which this government can never assent, nor can we ever accede to any treaty stipulation, acknowledging the right of a foreign government to inquire into or determine the status of seamen on board of our own vessels, the

ject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the

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civil condition of such persons being determined solely by our own laws." Mr. Cass, Secretary of State, to Mr. Dallas at London, 8th October, 1860. MS. Department of State. The act to carry into effect the treaties for the surrender of seamen cannot be applied to countries having no such treaties, and where no such treaty exists the executive or judicial authorities of the United States have no power to arrest, detain, and deliver up a mariner on the demand of the consuls or other agents. Opinions of the Attorneys General, vol. vi. p. 148. Mr. Cushing, Oct. 14, 1853.

In the treaty of 1828, with Prussia, art. 10, (U. S. Statutes at Large, vol. viii. p. 382,) there is a provision, that the consuls, vice-consuls, and commercial agents, shall have a right, as such, to sit as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities; unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country, or the consuls should require their assistance. An act of Congress, passed 8th of August, 1846, for carrying into effect the provisions of this and similar treaties, gives authority to the Circuit and District Courts of the United States, and the commissioners appointed by them, to issue the necessary process to enforce the award, arbitration, or decree of the consul. U. S. Statutes at Large, vol. ix. p. 79. A provision similar to that in the treaty with Prussia is to be found in the 12th art. of the treaty of 1837, with Greece; 8th art. of the treaty of 1832, with Russia; in the 5th art. of the treaty of 1840, and in the 9th art. of the treaty of 1846, with Hanover; to which latter Mecklenburg-Schwerin acceded; in the 4th art. of the treaty with Austria of 1848, and in the 1st art. of the treaty of 30th of April, 1852, between the United States and the Hanseatic Towns. See U. S. Statutes at Large, vols. viii. and ix. before cited, and vol. x. p. 962. See also treaty with the Two Sicilies, ib. vol. x. p. 650; with the Netherlands, ib. p. 1155, and the treaty of the 11th of July, 1861, with Denmark, additional to the treaty of the 26th of April, 1826.

As to the right of consuls to take possession of the property of American decedent citizens, Mr. Cass, Secretary of State, remarks that "the act of Congress and the consular regulations confer the power subject to the condition, where the laws of the country permit. It would be more convenient for the United States consuls to administer upon the property of their countrymen, who may die in France. As its exercise, however, was merely an act of courtesy, on the part of the French authorities, if they deem it expedient to put an end to the practice, it would appear that they are merely exercising a right, which they have reserved." Mr. Cass to Mr. Calhoun, Chargé d'Affaires at Paris, 12th December, 1859, MS. State Department. The legislative acts of the United States proceed on the assumption that consular officers will collect and remit the assets of deceased Americans. Their authority to do this will depend, of course, on the law of the foreign country; if permitted by that law and so far as permitted, the consul may do it, but not otherwise, nor further, unless allowed by treaty. And so it is with respect to foreign consuls in the States of the Union. Regulations for Consular Officers of the United States, § 370.

Consuls of the United States, in the countries of Christendom having treaty relations with the United States, are required to see to the detention of persons charged with the commission of crimes at sea or in port, under circumstances giving jurisdiction to the courts of the United States. They have authority to send such per-

infliction of pecuniary penalties; and, in offences of a higher grade, the functions of the consul are similar to those of a police magistrate, 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.[1]

By the treaty of peace, amity, and commerce, concluded at Wang Hiya, 1844, between the United States and the Chinese Empire, it is stipulated, art. 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." Art. 25. "All questions in regard to rights, whether of property or of person, arising between citizens of the United States 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." [[74]

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sons home for trial, and in that view to inquire into the facts of the alleged crime But the authority of the consul in such case is ministerial, not judicial, in its nature. Mr. Cushing, February 11, 1857. Opinions of Attorneys General, vol. viii. p. 380.] — *L.*

[1] De Steck, Essai sur les Consuls, sect. vii. § 30–40. Pardessus, Droit Commercial, Part. VI. tit. 6, ch. 2, § 2, ch. 4, §§ 1, 2, 3. Miltitz, Manuel des Consuls, tom. ii. Part. II. p. 70–78, 102–135, 162–201, 695–779, 853–866. The various treaties between the United States and foreign powers, by which the functions and privileges of consuls are reciprocally regulated, will be found accurately enumerated and fully analyzed in the above treatise of Baron de Miltitz, tom. ii. Part. II. p. 1498–1598.

[[74] Mr. Cushing, afterwards Attorney-General, was the American Minister for the negotiation of the treaty of 1844, with China. He says: "I entered China with the formed general conviction that the United States ought not to concede to any foreign State, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign State be of our own family of nations, — in a word a Christian State." "In China I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the Empire; while the Portuguese attained the same object through their own local jurisdiction at Macao. This exemption in behalf of citizens of the United States is agreed to in terms by the letter of the treaty of Wang-Hiya. By that treaty the laws of the Union follow its citizens, and its banner protects them, even within the domain of the Chinese Empire." Mr. Cushing to Mr. Calhoun, September 29, 1844. MS. State Department.

§ 12. 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

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The 25th article of this treaty is repeated in terms in the 27th article of the treaty of June 18, 1858, and the 21st is renewed by the 11th article of the same treaty which stipulates that "subjects of China guilty of any criminal act towards citizens of the United States shall be punished by the Chinese authorities according to the laws of China, and citizens of the United States, either on shore or in any merchant vessel, who may insult, trouble, or wound the persons or injure the property of Chinese, or commit any other improper act in China, shall be punished only by the consul or other public functionary thereto authorized, according to the laws of the United States. Arrests in order to trial may be made by either the Chinese or the United States authorities." Treaties of the United States, 1859–1860, pp. 73–77.

The consuls of the Christian States of Europe have, throughout the Levant, for centuries, exercised jurisdiction over their countrymen, as well as over others under their protection, and controlled, to a greater or less degree, the relations of the Franks with the people of the country. The 20th and 21st articles of the treaty of 1787, with Morocco, provide, that if any of the citizens of the United States, or *any persons under their protection*, should have disputes with each other, the consul should decide between the parties; and whenever the consul should require any aid or assistance from the government to enforce his decision, it should be immediately granted to him. The consul was also to assist at any trial against a citizen of the United States for killing or wounding a Moor, or against a Moor for killing or wounding an American citizen. U. S. Statutes at Large, vol. viii. p. 103. In the treaties which existed with the former Regency of Algiers, while the consul was to settle any disputes between citizens of the United States, those between subjects of the Regency and of the United States were to be decided by the Dey in person; and between citizens of the United States and other powers having consuls at Algiers, by the respective consuls of the parties. U. S. Statutes at Large, vol. viii. pp. 135, 227, 247. The treaty with Tunis, of 1797, contains the same provision as the treaty with Morocco; and it also provides for the presence of the consul, in case of any commercial dispute between Americans and the subjects of the Dey. Ib. p. 160. By the treaty of 1830, with the Ottoman Porte, it is provided that the consuls and vice-consuls of the United States shall be furnished with *barats* or *firmans*; that in disputes and litigations between the subjects of the Porte and citizens of the United States, the parties shall not be heard, nor judgment pronounced, unless the American dragoman is present; and all cases exceeding 500 piastres are to be submitted to the Sublime Porte. Even Americans who have committed offences are not to be arrested or put in prison by the local authorities; but they are to be tried by the minister or consul, and punished according to the offence, — following, in this respect, the usage observed towards other Franks. U. S. Statutes at Large, vol. viii. p. 409.

"On the general doctrine in force in the Levant, of the exterritoriality of foreign Christians, has been founded a complete system of peculiar municipal and legal administration, consisting of: 1. Turkish tribunals for questions between subjects of the Porte and foreign Christians. 2. Consular courts for the business of each

compact, such as conventions with foreign States, and acts of confederation, by which the State may be united in a league with

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nation of foreign Christians. 3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation. 4. Mixed tribunals of Turkish magistrates and foreign Christians at length substituted by common consent in part for cases between Turks and foreign Christians. 5. Finally, for causes between foreign Christians, the substitution also, at length, of mixed tribunals in place of the separate consular courts, an arrangement introduced, at first, by the legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the legations of other foreign Christians. (See De Clercq et de Vallat Guide des Consulats, liv. viii. c. 2, sect. 1, §§ 7, 8, tom. 2, p. 351, 2me ed.) I conceive that, notwithstanding the apparent silence of the fourth article (of our treaty) upon the whole subject of the civil affairs of Americans, and the seeming reference of their crimes alone to 'the usage observed towards other Franks,' yet the engagement in the second article secures to Americans in Turkey, and consequently to the consuls of the United States, the same rights and privileges which are enjoyed by those of Austria, Great Britain, France, or Russia." Mr. Cushing, October 23, 1855. Opinions of Attorneys General, vol. vii. p. 569. See for the treaty of February 25, 1862, Part I. ch. 1, § 10, Editor's note [6, p. 24, *supra*.

The treaty of the 20th of March, 1833, with Siam, stipulates for the privilege of appointing American consuls, provided it is accorded to any other power except the Portuguese. United States Statutes at Large, vol. viii. p. 455. A subsequent treaty, of May 29, 1856, provides for placing the interests of American citizens under a consul to reside at Bangkok. Any disputes, arising between American citizens and Siamese subjects, shall be heard and determined by the consul, in conjunction with the proper Siamese officers; and criminal offences will be punished, in the case of American offenders, by the consul, according to American laws, and in the case of Siamese offenders by their own laws, through the Siamese authorities. But the consul shall not interfere in any matters referring solely to Siamese; neither will the Siamese authorities interfere in questions which only concern citizens of the United States. Ib. vol. xi. p. 684.

The treaty of the United States with the Sultan of Muscat, 21st of September, 1833, authorizes the appointment of consuls in the ports of the Sultan, where the principal commerce is carried on, and which consuls shall be the exclusive judges of all disputes or suits wherein American citizens shall be engaged with each other. Ib. vol. viii. p. 459.

The treaty of 31st March, 1854, with Japan, contains a provision that there shall be appointed, by the government of the United States, consuls or agents, to reside in Simoda, at any time after the expiration of the eighteen months from the date of the signing of this treaty, provided either of the two governments deem such arrangement necessary. Ib. vol. xi. p. 598. By the treaty of June 17, 1857, it is provided, that Americans committing offences in Japan shall be tried by the American consul-general, or consul, and shall be punished according to American laws. Japanese committing offences against Americans shall be tried by the Japanese authorities, and punished according to Japanese laws. Ib. vol. xi. p. 723.

By the subsequent treaty of July 29th, 1858, Americans committing offences against Japanese shall be tried in American consular courts, and when guilty shall be punished according to American law. Japanese committing offences against

other States, for some common purpose. By the stipulations of these compacts, it may part with certain portions of its judicial

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Americans shall be tried by the Japanese authorities, and punished according to Japanese law. The consular courts shall be opened to Japanese creditors to enable them to recover their just claims against American citizens, and the Japanese courts shall, in like manner, be open to American citizens for the recovery of their just claims against the Japanese. United States Treaties, 1759–1860, p. 104.

By the treaty of June 23, 1850, with the Sultan of Borneo, American citizens accused of any crime are to be exclusively tried by the American consul, and in case any disputes or differences shall arise between American citizens, or between American citizens and the subjects of the Sultan of Borneo, and between American citizens and the subjects of any other power, the American consul shall hear and decide the same. Ib. vol. x. p. 910.

By the treaty of December 13, 1856, with the Shah of Persia, all suits and disputes arising in Persia between Persian subjects and citizens of the United States, shall be carried before the appropriate Persian tribunal and discussed and decided according to equity in the presence of an employé of the consul or agent of the United States. All suits and disputes in the Empire of Persia, between citizens of the United States, to be decided by the consul or agent of the United States according to the laws thereof. All suits and disputes in Persia between citizens of the United States and the subjects of other foreign powers, to be tried and adjudicated by the intermediation of their respective consuls and agents. In the United States, Persian subjects, in all disputes arising between themselves, or between them and citizens of the United States, or foreigners, shall be judged according to the rules adopted in the United States respecting the subjects of the most favored nation. Persian subjects residing in the United States, and citizens of the United States residing in Persia, shall, when charged with criminal offences, be tried and judged in Persia and the United States in the same manner as are the subjects and citizens of the most favored nation residing in either of the above-mentioned countries. Ib. vol. xi. p. 710.

An act was passed, August 11, 1848, to carry into effect the provisions of the treaties with China and the Ottoman Porte, by vesting judicial powers in the commissioner and consuls in China, and the minister and consuls in Turkey. The laws of the United States were extended over the citizens of the United States in China; and where they were deficient, the common law; and if neither the common law nor statutes of the United States furnished suitable remedies, the commissioner was, by decrees and regulations which should have the force of law, to supply the deficiencies; such regulations and decrees to be transmitted to the President, to be laid before Congress. The decision of the consul, who, in cases of intricacy, or in criminal cases of importance, was to be aided in his judgment by one or more citizens of the United States, was subject, in civil cases, beyond a certain amount, to an appeal to the commissioner. The only capital cases were murder, and insurrection or rebellion against the Chinese government; and in all other cases the punishment was fine and imprisonment, with an appeal in certain cases to the commissioner; and no person could be convicted of a crime punishable with death, unless the consul and his associates all concurred in opinion, and the commissioner approved of the conviction. The commissioner and the consuls might call on the Chinese authorities to support them in the exercise of the powers confided to them. The provisions of the act, so far as they related to crimes committed by citizens of the United

power, or may modify its exercise with a view to the attainment of the object of the treaty or act of union.

States, were extended to Turkey, in conformity with the treaty of 1830. United States Statutes at Large, vol. ix. p. 276.

Another act was passed, June 22, 1860, to carry into effect the treaties with China, Japan, Siam, Persia and other countries, by giving judicial powers to ministers and consuls in those countries. They are empowered in regard to crimes and misdemeanors, to arraign and try all citizens of the United States charged with offences against law, committed in such countries, and upon conviction to sentence them and to issue process to carry the sentence into execution.

In regard to civil rights, whether of property or person, they are invested with all judicial authority necessary to execute the provisions of the treaties, and it is provided that their jurisdiction shall embrace all controversies between citizens of the United States and all others to the extent of the terms of such treaties, which jurisdiction, in criminal and civil matters, shall, in all cases, be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry such treaties into effect; but, in all cases, where such laws are not adapted to the object or are deficient in the provisions to furnish suitable remedies, the common law, including equity and admiralty, shall be extended in like manner over such citizens and others in the said countries, and if defects still remain to be supplied, the ministers in the said countries shall by decrees and regulations, which shall have the force of law, supply such defects and deficiencies. Forms of process, &c., are to be prescribed by the ministers, which regulations are to be sent to the Department of State.

Each consul, at the port for which he is appointed, may issue warrants for the arrest of any citizen of the United States, charged with committing in the country an offence against law, and may arraign, try, and sentence him to punishment, which, except in cases otherwise provided for, shall be by fine and imprisonment. The cases where the decision shall be with and where without appeal are provided for; as is also the calling by the consul to his assistance in certain cases of one or more citizens of the United States.

Consuls have also jurisdiction in all civil cases arising under the treaties, which are to be decided by them alone or, in the cases provided for, with the assistance of not less than two, nor more than three citizens.

The Minister of the United States is to decide all cases, civil and criminal, which may come before him by appeal, and to issue all process necessary to execute the power. "Murder and insurrection or rebellion against the government of either of the said countries, with intent to subvert the same," are capital offences punishable with death; but no person shall be convicted of either, unless the consul and his associates in the trial all concur, and the minister approves the conviction.

The minister may postpone the execution and, if he finds mitigatory circumstances, may submit the case to the President for pardon. Criminal cases not of a heinous character may be adjusted by the parties concerned or aggrieved, with the assent of the minister or consul; and the settlement of civil controversies by mutual agreement or by arbitration is favored. Ministers and consuls may call on the local authorities to aid and support them.

The provisions of the act, so far as relates to crimes and offences committed by citizens of the United States, to extend to Turkey, under the treaty of May 7, 1830, to be executed there by the ministers and consuls of the United States, appointed to reside therein, who are *ex officio* vested with the powers conferred upon the minister

Subject to these exceptions, the judicial power of every State is coextensive with its legislative power. At the same time, it

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and consuls in China for the above purposes, so far as regards the punishment of crime and also for the exercise of jurisdiction in civil cases, wherein the same is permitted by the laws of Turkey, or its usages, in its intercourse with the Franks, or other foreign Christian nations.

It is also provided that capital cases by citizens of the United States for murder or insurrection against the government of either of the countries mentioned, or offences amounting to felony by the laws of the United States, may be tried before the Minister of the United States in the country where the offence is committed, if allowed jurisdiction; and it shall be competent for the ministers to issue all manner of writs, to prevent the citizens of the United States from enlisting in the military service of either of the said countries, to make war upon any foreign power with whom the United States are at peace or in the service of one portion of the people against any other portion of the same people; and he may carry out this power by a resort to such force as may at the time be within his reach, belonging to the United States.

Provision is made for the appointment of marshals, and for the rent of buildings for prisons. The jurisdiction of the minister for cases of civil redress or of crimes shall be appellate only, except as above provided.

The provisions of the act are extended to Persia, to be exercised by the minister and consuls, and to be applied to the cases mentioned in the treaty as cited in this note. They are also extended to Tripoli, Tunis, Morocco, and Muscat, so far as the same can be executed by the consuls, in conformity with the provisions of the treaties with those countries, and in accordance with the usages of the said countries in their intercourse with the Franks, or other foreign Christian nations. The consuls and commercial agents at islands, or in countries not inhabited by any civilized people or recognized by any treaty with the United States, are authorized to try, hear, and determine all cases in regard to civil rights, to the extent of $1000, and to give judgment according to the laws of the United States and according to the equity and right of the matter, in the same manner as justices of the peace are now authorized and empowered, where the United States have exclusive jurisdiction; and they are invested with the same powers as consuls in China, &c., for the trial of offences or misdemeanors. The provision as to marriages has been already noticed. (§ 7, Editor's note [64, p. 187. United States Statutes at Large, 36th Cong. 1st Sess. ch. 179, 1859–60, p. 72–79.

"The consuls (of Christian powers) in the Levant and in the Barbary States enjoy entire freedom of religion, with the liberty of having their private chapels and admitting their countrymen to worship in them. Their houses are inviolable asylums. They can be neither arrested nor tried; but if they abuse their position they will be sent back to their governments. They are not obliged to appear personally before the tribunals to which it is sufficient to send their dragomans. They can freely go out of the country when they wish. They have gratuitously granted to them a guard of janissaries or other soldiers. No tax, no impost is paid by them, by their employés, or by their servants. They have no custom-house duties to pay for articles for their use. Nothing of theirs can be confiscated or retained. They have jurisdiction over the property of their countrymen who die within their consulates without heirs. In case of wrecks they control everything done in relation to salvage, and collect the articles saved. They are the natural judges of their countrymen without the intervention

does not embrace those cases in which the municipal institutions of another nation operate within the territory. Such are the

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of the territorial authorities, except in case it is required by the consul himself. In case of a dispute, or even when a crime has been committed by an individual of their nation upon a subject of the country, the local authority to which the cognizance of it belongs cannot regularly proceed in a suit nor pronounce judgment without the participation of the consul, and the presence of his interpreter at the trial, in order to defend the interests of the individual of his nation. They can receive under their protection all the foreign vessels or individuals that may apply to them for it. If an individual who is under their protection should be arrested, they can on becoming security for him, (*en s'en rendant cautions,*) claim him, &c." Mensch, Manuel Pratique du Consul, p. 4. See, also, for the jurisdiction of consuls in the Levant, China, Muscat, &c., Moreuil, Manuel des Agents Consulaires, pp. 127, 377. De Clercq et de Vallat, Guide des Consulats, tom. ii. p. 345, 2me edit. Oppenheim, Handbuch der Consulate. Kap. xiv. Seite 147, Garcia de la Vega, Guide des Agents, p. 299.

A case occurred in 1853, which brought fully into view the right of ministers and consuls in the Levant to afford protection as well to those who were not subjects or citizens of their own country as to their compatriots. Martin Koszta, by birth an Hungarian, and of course a subject of the Emperor of Austria, fled after the political movements of 1848–9, in which he had taken part, to Turkey. His extradition was demanded by Austria, but he was released with others after being confined at Kutahia, on the understanding that he should leave Turkey. He came to the United States and made, on the 31st of July, 1852, the usual preliminary declaration of his intention to become a citizen of the United States. After remaining there a year and eleven months, he returned to Turkey, on account, as he alleged, of business of a private nature, and placed himself under the protection of the United States Consul at Smyrna and Chargé d'Affaires at Constantinople, who furnished him with a *tezkereh*, the passport usually given by foreign consuls in Turkey to persons to whom they extend protection. While waiting for an opportunity to return to the United States, he was seized by ruffians or hirelings, and thrown into the sea from whence he was taken up by a boat's crew lying in wait for him from an Austrian brig-of-war, forced on board of the vessel and confined in irons. This was done without the authority of the Turkish governor, who had refused to grant the Austrian consul any authority to arrest Koszta.

The efforts of the American Consul and Chargé d'Affaires to obtain Koszta's release having been fruitless, the captain of an American sloop-of-war, which happened to be in the harbor demanded his release, intimating that if the demand was not complied with he should resort to force. An arrangement was then made by which the prisoner was delivered to the custody of the French Consul-General, to be kept by him until the United States and Austria should agree as to the disposition of him.

To a note of the Austrian Minister, Mr. Hüselmann, of the 29th of August, 1853, demanding the President's consent to Koszta's surrender to the Consul-General of Austria at Smyrna and the disavowal of the acts of the American agents, with satisfaction for the alleged outrage, the Secretary of State replied on the 30th of September, declining the application and expressing the President's confident expectation that the Emperor of Austria would take proper measures to cause Koszta to be restored to the same condition that he was in before he was seized in the streets of Smyrna.

Mr. Marcy maintained the claim of Koszta to American nationality, on account of

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.[1]

§ 18. Extent of the judicial

I. The judicial power of every independent State, then, extends, with the qualifications mentioned, —

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his domicile and inchoate citizenship, connected with the circumstances of his exile, by which it was contended that, according to the laws of Austria herself, his expatriation became complete. Those views will be found stated at length in the last edition of this work, pp. 126–136, note (*a*). But, it is believed that it was unnecessary in Koszta's case to inquire what, under ordinary circumstances, would be the effect of a declaration of intention to become a citizen on his right to American protection in a foreign country. It would have been sufficient, it is conceived, to have rested the case on the *tezkereh*, which he had received from the Consul and Chargé d'Affaires, to which the Secretary of State thus refers at the close of his argument: —

"By the laws of Turkey and other Eastern nations, the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates, and other European establishments in the East, are in the constant habit of opening their doors for the reception of such inmates, who are received irrespective of the country of their birth or allegiance. It is not uncommon for them to have a large number of such *protéjés*. International law recognizes and sanctions the rights acquired by this connection.

"The Lords of Appeals in the High Court of Admiralty in England decided in 1784, that a merchant carrying on trade at Smyrna, under the protection of a Dutch consul, was to be considered a Dutchman as to his national character." Wheaton's International Law, Part IV. c. 1, § 18; 3 Rob. Adm. Reports, p. 12.

This decision has been examined and approved by the eminent jurists who have since written treatises on international law.

"According to the principle established in this case, Koszta was invested with the nationality of the United States, if he had it not before, the moment he was under the protection of the American Consul at Smyrna and the American Legation at Constantinople. That he was so received is established by the *tezkereh* they gave him, and the efforts they made for his release.

"Having been received under the protection of these American establishments, he had thereby acquired, according to the law of nations, their nationality; and when wronged and outraged as he was, they might interpose for his liberation, and Captain Ingraham had a right to coöperate with them for the accomplishment of that object.

"If the conclusions heretofore arrived at are correct, the Austrian agents had no more right to take Koszta from the soil of the Turkish dominions than from the territory of the United States, and Captain Ingraham had the same right to demand and enforce his release as he would have had if Koszta had been taken from American soil, and incarcerated in a national vessel of the Austrian Emperor." Cong. Doc. 33d Cong. 1st Sess. Senate Ex. Doc. No. 1.] — *L.*

[1] Vide supra, § 9, p. 188.

1. To the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory.[1] power over criminal offences.

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.[2]

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.[3]

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 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. 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 favor 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

[1] Ibid. § 6, p. 171. [2] Ibid. §§ 9, 10, pp. 191, 209. [3] Vide infra, § 15.

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.[1]

Laws of trade and navigation.

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.

Extradition of criminals.

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 committed 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, Rutherforth, Schmelzing, and Kent.[2] According to Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, 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 mutual comity and convenience, requires to be confirmed and regulated by special compact, in order to give it the force of an international law.[3]

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[1] Fœlix, Droit International Privé, §§ 510–532. See American Jurist, vol. xxii. pp. 381–386.

[2] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. xi. §§ 3–5. Heineccius, Prælect. in Grot. j. t. Burlamaqui, tom. ii. Part. IV. ch. 3, §§ 23–29. Vattel, liv. ii. ch. 6, §§ 76, 77. Rutherforth, Inst. of Nat. Law, vol. ii. ch. 9, p. 12. Schmelzing, systematischer Grundriss des praktischen europäischen Völkerrechts, § 61. Kent's Comm. vol. i. pp. 36, 37, (5th ed.)

[3] Puffendorf, 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,

And the learned Mittermeyer 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 Germanic Confederation and the North American Union, this obligation is limited to the cases and conditions mentioned in the federal compacts.[1]

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.[2] [75]

The Constitution of the United States provides, (art. 4, s. 2,) 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."

By the 10th article of the treaty concluded at Washington on the 9th August, 1842, between the United States and Great

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Part II. tit. 1, ch. 2, § 66. Leyser, Meditationes ad Pandect. Med. 10. Kluit, de Deditione Profugorum, § 1, p. 7. Saalfeld, Handbuch des positiven Völkerrechts, § 40. Schmaltz, europäisches Völkerrecht, p. 160. Heffter, Das europäische Völkerrecht, § 63. Mittermeyer, Das deutsche Strafverfahren, Theil i. § 59, pp. 314–319.

[1] Mittermeyer, Ibid.

[2] See Mr. Jefferson's Letter to M. Genet, Sept. 12, 1793. The decision of Mr. Chancellor Kent, *in re* Washburn, Johnson's Ch. Rep. vol. iv. p. 166, is counterbalanced by that of Chief Justice Tilghman, in Respublica *v.* Deacon, Sergeant & Rawle's Rep. vol. x. p. 125; by that of Mr. Chief Justice Parker, in Respublica *v.* Green, Massachusetts Rep. vol. xvii. pp. 515–548; and by the judgment of the Supreme Court of the United States, in Holmes *v.* Jennison, Peters's Rep. vol. xiv. p. 540.

[75 Though the Chief Justice, with whom three of the other judges concurred, declared, in 1840, that "the exercise of this power by the individual *States*, is totally contrary to the powers granted to the United States, and repugnant to the Federal Constitution," the question was left, by the decision of the Supreme Court, an open one. Peters's Rep. vol. xiv. p. 540. Holmes *v.* Jennison. There was at that time no subsisting conventional arrangement on the subject, the only previous provision of the kind having been contained in the treaty of 1794 with England, which had been limited to twelve years. United States Statutes at Large, vol. viii. p. 129.] — *L.*

Britain, it was "agreed that the United States and Her Britannic Majesty 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 been there 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 fugitives. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive." [76

By the convention concluded at Washington on the 9th November, 1843, between the United States and France, it was agreed:

"Art. 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

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[76 Neither *larceny* nor *constructive larceny*, consisting of embezzlement of money by a bank officer, is within the provisions of the treaty of 1842. It is the established rule of the United States, neither to grant nor to ask for extradition of criminals as between us and any foreign governments, unless in cases for which stipulation s made by express convention. Mr. Cushing's Opinions, Aug. 19, 1853, and April 21, 1854. Opinions of Attorneys General, vol. vi. pp. 85, 431.] — *L.*

other: Provided, That this shall be done only when the fact 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.

"Art. 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.

"Art. 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.

"Art. 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.

"Art. 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." [77

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 principal of these rules are, 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.[1] [78

[77 The terms "*vol qualifié crime*," in the French law, cannot be made to include a breach of trust, made grand larceny by the laws of California. Mr. Cushing, February 28, 1856. Opinions of Attorneys General, vol. vii. p. 643. But it will include the case of "*vols commis à l'aide de fausses clefs*," (robbery committed by means of false keys) and it thus embraced the case of individuals "who, after having abstracted values for a considerable sum from the chest of the Northern Railroad Company had taken refuge in the United States," though they could not be comprehended in the provisions of the original treaty in reference to "embezzlement by public officers." Mr. Cushing, September 30, 1856. Ib. vol. viii. p. 106.

By the convention of February 10th, 1858, the provisions of the preceding conventions are extended to persons charged, as principals, accessories, or accomplices, with forging or knowingly passing or putting in circulation counterfeit coin or bank-notes or other paper current as money, with intent to defraud any person or persons; embezzlement by any person or persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment. United States Statutes at Large, vol. xi. p. 741.] — *L.*

[1] Ortolan, Règles Internationales de la Mer, t. i. p. 340.

[78 A convention for the same object as those with England and France, was made with Prussia, on her own behalf and that of several other German States, on the 29th of April, 1845; but it differed from the preceding ones in that each power excepted the extradition of its own subjects. The preliminary note from Baron Bulow, on which the negotiations were opened, had contained the two following conditions: — 1st. That neither of the contracting parties should be required to deliver up *its own subjects*. Such an extradition to foreign tribunals would apparently be as little compatible with the legislation of the United States as with that of Prussia and the other German States. 2dly. That when a fugitive criminal has committed a new crime in the State where he shall be found, his extradition shall not take place until he shall have been tried for this new crime and shall have undergone the punishment for it. Baron Bulow to Mr. Wheaton, February 17, 1844.

The instructions under which it was negotiated were given by Mr. Calhoun, but, before it was received in this country, Mr. Buchanan had become Secretary of State. President Polk, in submitting it to the Senate, called their attention to the difference in question; and it is presumed that it was on that ground that the treaty was not

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.[1]

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ratified. President Polk's Message to the Senate, December 15, 1845. The proposed exception, which was a *sine qua non* with Prussia, grew out of the difference between the systems of criminal jurisprudence which prevail on the continent of Europe and in England and the United States. It is not necessary, in most European States, that the offence should be committed within the jurisdiction of the country in which the accused is tried, but he is justiciable by his sovereign, wherever the crime occurred. The treaty of extradition between Russia and Prussia, concluded in 1844, and which was transmitted by Mr. Wheaton to the Department of State, fully explains this view. It provides that, "if the accused is a subject of the sovereign of that country where he has sought refuge, after having committed a criminal offence in the country of the other sovereign, he shall not be delivered up, but the sovereign of whom he is a subject shall cause justice to be promptly and strictly administered against him, according to the laws of the country. But if any individual whatever has been arrested in the country where he has committed a criminal offence, or any misconduct whatever, (*excès quelconque,*) the sovereign of the country where the arrest takes place shall cause justice to be administered against him, and the punishment he incurred to be inflicted upon him, even if such individual be a subject of the other sovereign." Mr. Wheaton to Mr. Calhoun, July 17, 1844. Mr. Buchanan, Secretary of State, in a despatch to Mr. Rush, Minister in Paris, 26th of September, 1847, adverts to the failure on the part of several continental powers to conclude extradition treaties with the United States, because they would not consent to surrender their own citizens, who, after having committed crimes in the United States, might escape to their own country. This government, he says, cannot consent to such an exception. 1st. Because from our constitution and laws, Federal and State, there could be no mutuality in such a provision. On the continent of Europe, where the civil law prevails, if, for example, a citizen of Switzerland should commit a crime in Wisconsin and take refuge in his own country, he might be tried there and punished, though from the expense and difficulty in obtaining the necessary testimony, he would be almost certain to escape. Not so in regard to an American citizen. Should he commit a crime in Switzerland and flee to the United States, no existing tribunal of this country could try and punish him; and it is very questionable whether such a tribunal could be created. 2dly. Such an exception might be embarrassing with regard to our naturalization laws. Under it citizens by naturalization could certainly not be surrendered. Who is such a citizen? We must ever maintain that a naturalized citizen is, in all respects, entitled to the same rights and privileges as if he were a native. In what condition would be the subject of a foreign kingdom, who had emigrated to this country, declared his intention of becoming a citizen, and resided here some years? MS. Department of State.

A new treaty of extradition was made, June 16, 1852, at Washington, between the United States and Prussia, acting in her own behalf, and in behalf of several of the German States, viz.: Saxony, Electoral Hesse, Ducal Hesse, Saxe-Weimar-Eisenach, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Brunswick, An-

[1] Bynkershoek Quæst. Jur. Pub. lib. i. cap. 22. Note to Duponceau's Transl. p. 174.

§ 14. Extraterritorial operation of a criminal sentence.

A criminal sentence pronounced under the municipal law in one State can have no direct legal effect in another. If it is a sentence of conviction, it cannot be executed without the limits of the State in which it is

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halt-Dessau, Anhalt-Bernburg, Nassau, Schwarzburg-Sondershausen, Schwarzburg-Rudolstadt, Waldeck, Reuss, elder and junior branch, Lippe, Hesse-Homburg, and the free city of Frankfort. It provides, as in the one originally negotiated by Mr. Wheaton, that none of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of the convention. It recites as a reason, "that whereas the laws and constitution of Prussia and of the other German States, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States." When a person accused of any of the offences enumerated in the treaty, shall have committed a new crime in the territory where he has sought an asylum, he shall not be delivered till he has been tried and punished or acquitted. There is, also, a provision that the stipulations of the convention shall be applied to any other State of the Germanic Confederation, which may thereafter declare its accession thereto. The crimes enumerated in the convention, and on account of which fugitives are to be delivered up on mutual requisitions, by their governments, or their ministers, officers, or authorities, respectively made, are murder, assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party. United States Statutes at Large, vol. x. p. 964. Several States not included originally therein have become parties to the convention, viz.: Bremen, June 16, 1852, Ib. p. 970; Mecklenburg-Strelitz, Ib. p. 970; Wurtemburg, Ib. p. 971; Mecklenburg-Schwerin, Ib. p. 971; Oldenburg, Ib. p. 972; Schaumburg-Lippe, Ib. p. 972.

A treaty with the same provisions as the one with Prussia, was made with Bavaria, September 12, 1853. Ib. vol. x. p. 1022. Mr. Buchanan, who concluded it at London with Baron de Cetto, declared that the exemption as to her own subjects having been made to Prussia, it could not now be denied. Mr. Buchanan to Mr. Marcy, 2d September, 1853. MS. Department of State. A similar convention was entered into with Hanover, January 18, 1855. Ib. p. 1138.

In the treaty with Sweden and Norway, of the 21st of March, 1860, there is the exception as to citizens or subjects of the country, with a somewhat more comprehensive enumeration of crimes and an express exclusion of political offences. United States Treaties, 1860–61, p. 158.

The treaty of 20th December, 1849, between the United States and the King of the Hawaiian Islands, contains the same provisions as the treaty with England, of 1842, in relation to the extradition of criminals. United States Statutes at Large, vol. ix. p. 981. The convention of November 25, 1850, with the Swiss Confederation, has not the exceptional provisions of the German treaties; but it expressly stipulates that it shall not apply to offences committed before the date thereof, nor to those of a political character. Ib. vol. xi. p. 593. The exception as to citizens of the country, as well as one as to past and to political offences, is in the treaty with the Two Sicilies, of the 1st of October, 1855. Ib. p. 653. These are also in the

pronounced, upon the person or property of the offender; and if he is convicted of an infamous crime, attended with civil dis-

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treaty with Austria, July 3, 1856, Ib. 692; and with Baden, of January 30, 1857, Ib. 714.

An act of Congress for giving effect to the treaty stipulations with foreign governments was approved on the 12th of August, 1848. It vests the justices of the Supreme Court of the United States, the district judges, and the commissioners appointed for the purpose by any of the United States courts, and also the judges of the several State courts, upon complaint made on oath or affirmation, with power to arrest persons charged with offences falling within the provisions of any of the treaty stipulations; and if, on hearing the testimony, it be deemed sufficient to sustain the charge under the provisions of the treaty, it shall be the duty of the judge or commissioner to certify the same to the Secretary of State, with all the testimony taken before him, that a warrant may issue on the requisition of the proper authorities of the foreign government; and the judge or commissioner shall issue his warrant for the commitment of the person charged, to a proper jail, till the surrender is made. The Secretary of State is authorized, under his hand and seal of office, to order such offenders to be delivered to such persons as the foreign government may authorize to receive them. United States Statutes at Large, vol. ix. p. 302. By the act of June 22, 1860, it is provided that any depositions, warrants, and other papers, or copies thereof, shall be admitted and received upon the hearing of an extradition case, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper or other document so offered is authenticated in the manner required by the act. Ib. 1859–60, p. 84.

In a case under the British treaty the question came before the Supreme Court of the United States, whether a judge or commissioner could proceed without the previous authorization of his own government, and whether the agents of a foreign government have a right to call on our judicial officers to act, in advance of authority from the President. There was a diversity of views on this point among the members of the court, though a majority were, on other grounds, against entertaining an appeal from the decision of the commissioner, or granting an original writ of *habeas corpus*. By the judges who sustained the action of the commissioner, independently of any initiatory proceeding on the part of the Executive, it was maintained:

"That an executive order of surrender to a foreign government is purely a national act, is not open to controversy; nor can it be doubted that the executive act must be performed through the Secretary of State by order of our Chief Magistrate, representing this nation. But it does not follow that Congress is excluded from vesting authority in judicial magistrates to arrest and commit, preparatory to a surrender.

"The treaty with Great Britain is equally binding on us as the act of Congress, and it likewise confers jurisdiction and authority on the judges and magistrates of the respective governments, to issue warrants for the apprehension of fugitives, and for hearing and considering the evidence produced against them; and also provides, that the committing magistrate shall certify as to the sufficiency of the evidence, to the executive authority, so that a warrant of surrender may issue. Congress was scrupulously careful, neither to limit or extend the treaty stipulations. According

qualifications in his own country, such a sentence can have no legal effect in another independent State.[1]

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to the terms of the statute no doubt is entertained that the judicial magistrates of the United States, designated by the act, are required to issue warrants and cause arrests to be made, at the instance of the foreign government, on proof of criminality, as in ordinary cases when crimes are committed within our own jurisdiction, and are punishable by the laws of the United States."

On the other hand, it was said:

"No demand was made upon this government, by the government of Great Britain claiming the surrender. This government was passed by, and the requisition made by the consul, directly upon the magistrate, on the ground, as contended for, namely, that the consent or authority of the Executive is unnecessary to warrant the institution of the proceedings; and, in support of their propriety and regularity, the position is broadly taken, and without which the proceedings cannot be upheld, that according to the true interpretation of the treaty, any officer of Great Britain, however inferior, properly represents the sovereign of that country, who may choose to prosecute the alleged fugitive in making the requisition, and is entitled to the obedience of the judicial tribunals for that purpose, and if sufficient evidence is produced before them to arrest and commit, that a surrender may be made; and that in this respect, such officer is put on the footing of any of the prosecuting officers of this government, who are authorized to institute criminal proceedings for a violation of its laws; that the country is open to him, throughout the limits of the Union, and the judicial tribunals bound to obedience on his requisition and proofs, to make the arrest and commitment. This is the argument. Now, upon recurring to the terms of the treaty, it will be seen, that no such stipulations were entered into, or intended to be entered into, by either government, or any authority conferred to justify such a proceeding. The two nations agree that upon 'mutual requisition by them, or their officers or authorities respectively made,' — that is on a requisition made by the one government, or by its ministers or officers properly authorized upon the other — the government upon whom the demand is thus made, shall deliver up to justice all persons charged with the crimes, as provided in the treaty, who shall have sought an asylum within her territories. In other words, on a demand, made by the authority of Great Britain upon this government, it shall deliver up the fugitive; and so in respect to a demand by the authority of this government upon her. This is the exact stipulation entered into, when plainly interpreted. It is a compact between the two nations in respect to a matter of national concern — the punishment of criminal offenders against their laws — and where the guilty party could be tried and punished only within the jurisdiction whose laws have been violated. The duty or obligation entered into is the duty or obligation of the respective nations; and each is bound to see that it is fulfilled, and each is responsible to the other in case of a violation. When the *casus fœderis* occurs, the requisition or demand must be made by the one nation upon the other. And under our system of government, a demand upon the nation must be made upon the President, who has charge of all its foreign relations, and with whom only foreign governments are authorized or even permitted to hold any communication of a national concern. He alone is authorized by the Constitution to negotiate with foreign governments, and enter into treaty obligations binding on the nation; and, in respect to all questions arising out of these obligations,

[1] 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.

But a valid sentence, whether of conviction or acquittal, pronounced in one State, may have certain indirect and collateral

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or relating to our foreign relations, in which other governments are interested, application must be made to him. A requisition or demand, therefore, upon this government must, under any treaty stipulation, be made upon the Executive, and cannot be made through any other department, or in any other way." Howard's Reports, vol. xiv. p. 108. In Re Kaine.

The general result of this case is, that under the British treaty the proceeding may either commence with a mandate from the President or by a warrant direct from the officer authorized to enforce it. Foreign governments may apply to ours in the first instance. That course, under the decision of the Supreme Court, is the safer, though it may not be a necessary one; but in either event the subsequent proceedings are under the direction of the examining magistrate, and cannot be controlled by the President. But there can be no actual extradition without proper requisition to that effect addressed by the foreign government to the Secretary of State; though it may be effected, in the absence of a diplomatic representative of the demanding government, through other intermediate agencies recognized by the law of nations. Opinions of Attorneys General, vol. vi. p. 91. Mr. Cushing, August 31, 1853. Ib. vol. viii. p. 240. December 18, 1856. It had been decided previously to the act of 1848, that the Supreme Court had no jurisdiction to issue a *habeas corpus* for the purpose of reversing a decision of a Judge at chambers, under the treaty of 1843, with France. Howard's Rep. vol. v. p. 176. In the Matter of Metzger. In England the requisition must always be made through the Executive government, and in treaties of this description the preliminary action of the legislature is there necessary. At the time of the signature of the treaty of 1842, the British Minister stated that the rendition treaty could have no effect in the British dominions in Europe till Parliament acted on it. In Canada it could have an immediate effect. Lord Ashburton to Mr. Webster, August 9, 1842. An act of Parliament, 6 & 7 Vict. ch. 76, passed July, 1843, empowers one of the principal Secretaries of State, or the Secretary for Ireland, to issue his warrant, signifying that a requisition had been made, in pursuance of this treaty, and requiring all justices, &c., to aid in apprehending the person charged with the crime; and the same functionaries are the officers to order the delivery of the party to the persons authorized to receive him.

The practice of our own government, as well as that of Great Britain, requires that all claims of extradition should be founded on a judicial warrant, with proper evidence to justify the warrant; the United States will not, therefore, make a demand on Great Britain for a person alleged to be a fugitive from the justice of one of the United States without the exhibition of a judicial warrant, issued on sufficient proof by the local authority. Opinions of Attorneys General, vol. vi. p. 485. Mr. Cushing, May 31, 1854. But in granting his mandate, at the request of a foreign government, for the purpose of commencing proceedings, the President does not need such evidence of the criminality as would justify an order of extradition, but only *primâ facie* evidence. Ib. p. 217. Mr. Cushing, November 9, 1853.

A case arose, in 1860, on a demand for extradition under the English treaty, of a slave charged with murder in the State of Missouri, and who had escaped to Canada. The provincial Court of Queen's Bench, in refusing to discharge the negro, held, "The whole argument in the prisoner's favor must rest upon the proposition that he was a slave, and killed the person he is said to have done in freeing himself

effects in other States. If pronounced under the municipal law in the State where the supposed crime was committed, or to

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from slavery, and that slavery not being recognized or tolerated in this country, the prisoner therefore is not guilty of murder, whatever other offence it might amount to. That argument is a fallacy; for the two governments in making the treaty were dealing with each other upon the footing that each had at that time recognized laws applicable to the offences enumerated. It is true that the moment a slave puts his foot upon Canadian soil he is free; but the British government never contemplated that he should also be free from the charges of murder, piracy, or arson, though the crime was committed in the endeavor to obtain freedom. The agreement to surrender to each other criminals of certain classes was, of course, based upon the fact of the persons being criminals by the laws of the country from which they came, provided the evidence of criminality, according to the laws of the place where the fugitive so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed. Whether the prisoner were a slave or not, is not the question we have to deal with. We find that slavery is recognized by the laws of the State of Missouri. All that we are called upon to say is whether the prisoner might be legally put upon his trial for murder, provided the homicide had occurred in Canada, under the same circumstances as is alleged in the depositions."

This decision was, however, rendered inoperative by the subsequent grant of a writ of *habeas corpus* by the Court of Queen's Bench in England. 36th Cong. 2d Sess. Senate Ex. Doc. 11.

A mere notification from a foreign legation that a party guilty of a crime has escaped and perhaps fled to the United States, is not sufficient to justify the preliminary action of the President. The general rule is that the government of which extradition, whether by comity only (Klüber, § 66. Martens, Précis, § 101,) or by treaty, is demanded, before it is called on to act must have reasonable *primâ facie* evidence of the guilt of the party submitted to it as well as the demand by the Executive authority. Opinions of Attorneys General, vol. vii p. 6. Mr. Cushing, Nov. 2, 1854.

A *mandat d'arrêt* issued upon suitable evidence by the proper judicial authority of France, and setting forth the crime imputed to the accused, is sufficient to justify the preliminary action of the President for the arrest of the alleged fugitive, leaving the ulterior question of his actual tradition to depend on the full evidence of criminality then, as it appeared from the despatch of the Minister of Foreign Affairs, on its way from France. Ib. pp. 285, 537. Mr. Cushing, June 18, 1855, October 4, 1855. But to justify the commencement of proceedings in extradition, it must appear that the criminal acts charged were committed in the territorial jurisdiction of the demanding government. Ib. vol. viii. p. 215. Mr. Cushing, November 29, 1856.

In the construction of the British treaty of extradition a crime committed at sea, on board of an American vessel, has been considered the same as if committed in the territory of the United States. Mr. Buchanan to Mr. Marcy, August 3, 1855. MS. State Department. Mr. Cushing also considers, in reference to the French treaty, where a crime is committed at sea, it is committed within the putative territory of the Union, is justiciable by the federal judiciary alone, and is, therefore, rightfully a case of extradition. Opinions of Attorneys General, vol. viii. p. 84. Mr. Cushing, September 6, 1856. See § 9, Editor's note [70, p. 207, *supra*.

The United States have no treaty stipulations with any country for the delivery

which the supposed offender owed allegiance, the sentence, either of conviction or acquittal, would, of course, be an effectual bar

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up of political offenders. Mr. Gallatin was instructed, in 1826, during the administration of President J. Q. Adams, to propose to Great Britain the mutual surrender of deserters from the military and naval service, and from the merchant service of the two countries, in connection with a mutual surrender of all persons held to service or labor under the laws of one party who should escape into the territories of the other. At that time, slavery prevailed in the British West Indies, and it was supposed that there would be some reciprocity in the returning of fugitives from thence; whilst it was believed that Great Britain would obtain an advantage over us in the reciprocal restoration of military and maritime deserters, which would compensate for any that we might secure over her in the mutual delivery of fugitives from labor. Mr. Clay, Secretary of State, to Mr. Gallatin, 19 June, 1826.

Mr. Gallatin says that at his last conference the British plenipotentiaries reiterated the declaration that their government would not accede to the proposal of a mutual surrender of fugitive slaves, taking refuge in any part of America, within the dominions of the other party. The reason alleged for refusing to accede to a provision of that kind was that they could not, with respect to the British possessions, where slavery was not admitted, depart from the principle recognized by the British courts that every man is free who reaches British ground. "It has been intimated to me informally that such was the state of public opinion here on that subject that no administration could or would admit in a treaty a stipulation such as was asked for. No specific reason has been entered on the protocol by the British plenipotentiaries." Mr. Gallatin to Mr. Clay, September 26, 1827.

The House of Representatives having in the interim passed a resolution, requesting the President to open a negotiation with the British government for the recovery of fugitives who make their escape from the United States into Canada, Mr. Barbour was instructed, June 13, 1828, to renew the proposal. He was told by Lord Aberdeen that similar complaints had been made by other powers having West India possessions; that whilst he would be happy to grant the most substantial remedy, yet in the present state of public feeling on this subject which, he said, might be properly called a mania, the application of the remedy was an affair of some difficulty. He added that Sir George Murray, the head of the Colonial Department, intended to bring the subject before Parliament, when he hoped the evil complained of would be obviated, as he could not conceive that any people would wish to see their numbers increased by such subjects. Mr. Barbour to Mr. Clay, 2d October, 1828. British and Foreign State Papers, 1829–30, p. 1221. Martens, par Murhard, Nouveau Recueil, tom. iii. p. 238. For the treaties respecting seamen deserting from vessels, and the acts of Congress to carry them into effect, see § 11, note [73, p. 221, *supra*.

Besides the ordinary treaties of extradition noticed in the appropriate place, one between the United States and Mexico, of December 16, 1862, has been promulgated since the preceding pages went to press. The enumerated crimes, of which the list is more comprehensive than usual, are murder, (including assassination, parricide, infanticide, and poisoning); assault with intent to commit murder, mutilation, piracy, arson, rape, kidnapping, defining the same to be the taking and carrying away of a free person by force or deception; forgery, including the forging or making, or knowingly passing and putting into circulation counterfeit coin or bank-notes, or other paper current as money, with intent to defraud any person or persons; the introduc-

(*exceptio rei judicatæ*) to a prosecution in any other State. If pronounced in any other foreign State than that where the offence

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tion or making of instruments for the fabrication of counterfeit coin or bank-notes or other paper current as money; embezzlement of public moneys; robbery; defining the same to be the felonious and forcible taking from the power of another of goods or money to any value, by violence or putting him in fear; burglary, defining the same to be breaking or entering into the house of another with intent to commit felony; and the crime of larceny of cattle or other goods and chattels, of the value of twenty-five dollars or more, when the same is committed within the frontier States or territories of the contracting parties.

The provisions of the treaty are not to be applied in any manner to any crime of a purely political character, nor shall it embrace the return of fugitive slaves, nor the delivery of criminals who, when the offence was committed, shall have been held, in the place where the offence was committed, in the condition of slaves, the same being expressly forbidden by the constitution of Mexico; nor shall the provisions of the present treaty be applied in any manner to the enumerated crimes committed anterior to the date of the exchange of the ratifications. Neither of the contracting parties shall be bound to deliver up its own citizens. The surrender is to be made by the authority of the Executive of each country, except in the case of crimes committed within the limits of the frontier States or territories, in which case the surrender may be made by the chief civil authority thereof, or of such civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said States or territories; or if, from any cause, the civil authority of such State or territory be suspended, then such surrender may be made by the chief military officer in command of such State or territory. Washington National Intelligencer, June 24, 1862.

Treaties for the surrender of deserters from the military and naval service are not unusual on the continent of Europe. Of this nature is a convention of cartel signed between Russia and Prussia 8th of August, 1857, in renewal of the one of the 20th May, 1844, which had expired, for delivering up the deserters from the active service of their respective armies, as well as the horses and military effects carried off by them, and also individuals who had obtained leave of absence on condition of returning, when called into the active service, and who consequently belong to the reserve. It applies, likewise, to all individuals who, according to the laws of the State which they have quitted, with or without the intention of returning, are subject even to future military service; and to individuals who, having committed crimes or offences in one of the two States, have fled into the territories of the other to avoid the pursuit of justice and the punishment which they have incurred. Martens, par Samwer, Nouveau Recueil, tom. xvi. p^le^ 2^me^, p. 595.

The treaty of extradition between Great Britain and France, of February 18, 1843, applies to murder, — defining it as in the treaty of the latter with the United States, — to an attempt to commit murder, forgery, and fraudulent bankruptcy. Annual Register, 1843, p. 470. Fraudulent bankruptcy, not named in the treaties of extradition made by the United States, is included generally among the crimes provided for in the conventions between European powers. As to political refugees, England has never permitted them to be embraced in such treaties, nor is their expulsion at the demand of their own governments, within the policy of her alien acts. Lord Palmerston declared that "any such demand would be met with a firm and decided refusal. It is," said he, "obvious that it must be so; because no such

is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity, and of no avail to

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measure could be taken by the government of this country, without fresh powers by act of Parliament; and no government could apply for such a power with any chance of success, inasmuch as no alien bill, I believe, either in former periods or in the course of this century, has been passed, ever giving to the government the power of expelling foreigners, except with reference to considerations connected with the internal safety of this country. The British government has never undertaken to provide for the internal security of other countries. It is sufficient for them to have the power to provide for the internal security of their own." Hansard's Parliamentary Debates, 3d series, vol. cxxiv. p. 805, March 1, 1853.

Contrary to the rule in the time of Grotius, (lib. ii. cap. xxi. § 5,) extradition does not now ordinarily apply to political offences. But in 1849 a demand was made by Russia and Austria on Turkey for the delivery up of the Poles and Hungarians who had escaped into the Sultan's dominions, and on his refusal Russia and Austria suspended all diplomatic intercourse with the Porte. Ultimately the two emperors receded from their demands. Annual Register, 1849, p. 342]. Lesur, Annuaire, 1849, p. 570. Appendix, p. 172. The grounds of these pretensions were referred to, and the treaty of Kutschouc-Kaynardgi of 1774, with Russia, and of Belgrade, between the Porte and Austria, examined, in the discussions connected with the affair of Koszta; whose case is mentioned, § 12, Editor's note [74, p. 228, *supra*. See Cong. Doc. H. of R. 33d Cong. 1st Sess. Ex. Doc. 91, pp. 34, 45.

In reference to the refugees here mentioned, Lord Palmerston, in a despatch of October 6, 1849, to the British Ministers at Vienna and St. Petersburg, said: "If there is one rule more than another, that has been observed in modern times by independent States, both great and small, of the civilized world, it is the rule not to deliver up political refugees. The laws of hospitality, the dictates of humanity, the general feelings of mankind, forbid such surrenders; and any independent government which, by its own free will, was to make any such surrender, would be universally and deservedly stigmatized as dishonored, unless," he adds, "a State is bound to extradition by the positive obligations of a treaty; but such treaty engagements are few, if, indeed, any such exist."

Heffter asks: "The principle of extradition once admitted, is a distinction to be made founded on the different nature of the crimes? Regularly not; but an exception has been admitted in favor of political crimes, and at this day the rule is to refuse the extradition of individuals accused exclusively of political crimes. The fear of a disproportionate punishment has caused, without doubt, this derogation from the general rule. In Germany a federal decree of the 18th August, 1836, renders obligatory among all the States of the Confederation the reciprocal extradition of individuals accused of this species of crimes." Heffter, Das europäische Volkerrecht, § 63. See, also, Phillimore, International Law, vol. i. p. 407–432.

Connected with the extradition for political offences, as growing out of the attempt to assassinate the Emperor of the French on the 14th January, 1858, have been discussed, the measures proposed in England to prevent the organization of conspiracies in one country to commit crimes in another, especially against their political chiefs. The French Minister of Foreign Affairs, in a despatch to the Ambassador in London, of the 20th of January, after charging that the then recent attempt, as well as all of the same kind that had preceded it had originated in London, and saying that, while the French government did not complain that its adversaries find

protect him against a prosecution in any other State having jurisdiction of the offence.

§ 15. Piracy under the law of nations.

The judicial power of every State extends to the punishment of certain offences against the law of nations, among which is piracy.

Piracy is defined by the text-writers to be the offence of depredating on the seas without being authorized by any sovereign State, [79 or with commissions from different sovereigns at war with each other.[1]

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refuge on British soil and live there peaceably under the protection of British laws, asks, "Is hospitality due to assassins? Should English legislation seem to favor their designs and their manœuvres? and can it continue to protect persons who place themselves by flagrant acts outside of the pale of universal law and expose themselves to the ban of humanity? The recurrence and the wickedness of these guilty enterprises subject France to a danger against which we are all bound to provide. The government of Her Britannic Majesty can assist us in averting it by giving us a guarantee of security, which no State can refuse to a neighboring State, and which we are authorized in expecting from an ally."

In accordance with these suggestions, a bill was introduced, on the 8th of February, by Lord Palmerston, making it felony, to be punished by penal servitude for life or a term of years, or imprisonment with hard labor, for any person who shall within the United Kingdom conspire with any other person, being within or without the United Kingdom, to commit murder, either within or without Her Majesty's dominions, and that any person within the Kingdom, who shall persuade, instigate, or solicit any other person, being within or without the Kingdom, to commit murder, either within or without Her Majesty's dominions, shall be subjected to like punishment. This bill was opposed, as well on account of its introduction having been caused by what was deemed an offensive dictation of France in the internal legislation of England, as from an unwillingness in any way to interfere with the rights of asylum. It was virtually rejected on the motion for the second reading, which induced the immediate resignation of the Ministry. Annual Register, 1858, pp. 5,] 33], 202. Annuaire des deux mondes, 1857–8, pp. 32, 110, 420.

The application to Sardinia was more effectual; and a law was there passed making conspiracy against the lives of sovereigns a special offence, though the Chambers mitigated the punishment originally proposed in the bill introduced by the Ministers. M. Cavour did not hesitate to sustain the measure, on political grounds, and on the importance of not acting under the circumstances in which Sardinia was placed, in opposition to the views of France. Ibid. p. 216.] — *L.*

[79 By the Constitution of the United States authority is given to Congress "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." Art. 1, § 8. It is said by Mr. Madison that "the provision of the federal articles, on the subject of piracies and felonies, extends no further than to the establishment of courts for the trial of these offences. The definition of piracies might, perhaps, without inconvenience be left to the law of na-

[1] See authorities cited in note to the case of United States *v.* Smith, Wheaton's Rep. vol. v. 157.

The officers and crew of an armed vessel, commissioned against one nation, and depredating upon another, are not liable

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tions; though a legislative definition of them is found in most municipal codes." Federalist, No. xlii. p. 194, ed. 1852.

Unfortunately, in applying the term *piracy* in the codes of different countries, regard has not always been had to the fact whether the offence described is one against the law of nations, and consequently everywhere justiciable, or a crime, for which its nomenclature has been arbitrarily adopted and which is only cognizable before the municipal tribunals having jurisdiction either territorial, actual or implied, or over the person of the offender.

The South American publicist, Bello, says: "There can be no doubt about the competency of the legislative authority of a State to establish laws regulating the mode of proceeding against pirates; nor is it important against whom or in what place an act of piracy has been committed, because it is subject to the jurisdiction of any power whatsoever. But no sovereign has the right of qualifying as such those acts that are not comprehended in the definition of this crime, as generally admitted. A government can declare that this or that offence perpetrated on board of its own vessels is a piratical act. The American Congress declared, in the year 1790, that every crime committed at sea, which if committed on land would be punishable with death, was piracy. Nevertheless, as this law goes beyond the definition of the crime by the law of nations, it would not render legal the jurisdiction of the American tribunals over acts committed under the flag of another nation, which were not strictly piratical." Principios de Derecho Internacional, Parte Segunda, capit. x. § 3, p. 271. The provision here referred to is in the 8th section of the act of April 30, 1790, United States Statutes at Large, vol. i. p. 113. Chancellor Kent says: "It may be considered as enlarging the definition of piracy, so as not only to include every offence which is piracy by the law of nations and the act of Congress of 1819, but other offences which were not piracy, until made so by statute." Commentaries on American Law, vol. i. p. 188. The Supreme Court decided that the crime of robbery committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign State, is not piracy under this act, and is not punishable in the courts of the United States. Wheaton's Rep. vol. iii. p. 610. The United States *v.* Palmer. But they held in a subsequent case "that general piracy, or murder, or robbery, committed in the places described in the 8th section (upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State) by any persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of the act, and is punishable in the courts of the United States. Ib. vol. v. p. 152, United States *v.* Klintock. See, also, Ib. p. 185, United States *v.* Pirates. Ib. p. 412, United States *v.* Holmes. Section nine of the act extends by its language only to citizens of the United States. It provides against citizens committing piracy, or robbery, or any act of hostility, against the United States or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or State, or on pretence of authority from any such person; and declares that such offender shall be adjudged a pirate, felon, and robber, and on being thereof convicted shall suffer death. "This," Blackstone says, in reference to the English statute, 11 & 12 William III. ch. 7, originally passed to meet the case of James the Second's commissions, and from which we have taken it, "though it

to be treated as pirates in thus exceeding their authority. The State by whom the commission is granted, being responsible to

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would be only an act of war in an alien, shall be construed piracy in a subject." Stephens' (Blackstone's) Commentaries, vol. iv. p. 286.

Section five of the act passed March 3, 1819, defined piracy by a reference to the law of nations. United States Statutes at Large, vol. iii. p. 518. But, though the Supreme Court decided that this was a constitutional exercise of the power confided to Congress, (Wheaton's Rep. vol. v. p. 153, United States *v.* Smith), the act, which was a temporary one, was suffered to expire. And the case is now intended to be provided for by the third section of the act of May 15, 1820, which defines as a pirate, and affixes to him the punishment of death, any person, who shall upon the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof. United States Statutes at Large, vol. iii. p. 600.

The principles on which in a civil war, neutral or foreign powers act in reference to the recognition of belligerent rights, including of course the issue of letters of marque and reprisal, have been heretofore discussed. Part I. ch. 2, § 7, Editor's note [16, p. 40. But though equal effect may be given to the *bonâ fide* commissions of actual belligerents, as to those of fully recognized governments, it was held in 1820, by the Supreme Court, in a case already cited (United States *v.* Klintock) that a commission issued by a person calling himself "Brigadier of the Mexican Republic," (a republic whose existence was unknown and unacknowledged), or as "Generalissimo of the Floridas," a province then in possession of Spain, would not authorize armed vessels to make captures at sea. The Court say: "Whether a person acting in good faith under such a commission may or may not be guilty of piracy, — we are all of opinion that the commission can be no justification of the fact stated in this case." The captured vessel was Danish, and the captors put on board Spanish papers which they affected to have found in her, and though this and other frauds might not in themselves have supported the charge of piracy, the Court concludes that "the whole transaction taken together demonstrates that The Norberg was not captured *jure belli*, but seized and carried into Savannah *animo furandi*. It was not a belligerent capture, but a robbery on the high seas."

But in the case of one having a commission from a party to a recognized civil war, no irregularity as to acts done *jure belli* will make him a pirate. He stands in the same position as if he held a commission from an established government, so far at least as regards all the world except the other party to the contest. "His acts may be unlawful, when measured by the law of nations or by treaty stipulations; the individuals concerned in them may be treated as trespassers, and the nation to which they belong may be held responsible by the United States; but the parties concerned are not treated as pirates. It is true that where persons acting under a commission from one of the belligerents make a capture, ostensibly in the right of war, but really with the design of robbery, they will be held guilty of piracy. In the present case, there is not the least reason to believe that the capture was made with any such criminal intent. It would seem to be an infraction of the treaty made in 1831, between the United States and the United Mexican States (of which Texas was then a constituent part) and there may be other reasons for doubting its legality as an act done in the right of war; but that it was really done in that character and no other is very clear. The existence of a civil war between the people of Texas and

other nations for what is done by its commissioned cruisers, has the exclusive jurisdiction to try and punish all offences committed under color of its authority.[1]

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the authorities and people of the other Mexican States, was recognized by the President of the United States at an early day in the month of November last." Opinion of Mr. Butler, May 17, 1836. Opinions of Attorneys General, vol. iii. p. 121.

It is, on the part of the previously established government that, in cases of revolution or rebellion, the greatest difficulties as to the character to be assigned to the privateersmen exist, — whether to treat them like others engaged in the naval or military service of the insurgents, or to regard them as pirates.

"In civil wars," says Martens, "it is not unusual for the authority revolted against to declare pirates the privateersmen of the revolutionary party. Such was the course of Spain at the commencement of the revolution of the United Provinces; and at the beginning of the revolt of the English Colonies in America, Great Britain treated the revolutionists as rebels; but soon afterwards she was compelled to accord to their privateersmen the treatment of legitimate enemies, and to carry on with them regular war. In the war of the French revolution, (1793,) a representation was made to the Court of Denmark that the French privateers could not be considered otherwise than as pirates, for the want of a recognized commission. She did not, however, refuse them the treatment due to legitimate, private armed cruisers. The fear of retaliation compels this moderation, and forces the belligerent powers even more than neutral States to its adoption." Essai concernant les Armateurs, ch. 2, § 11.

It is not understood that any trial took place of persons engaged on the side of the Americans for piracy during the Revolutionary War. But an act was passed, 17 George III. ch. 9, in 1777, reciting that, whereas a rebellion and war have been openly and traitorously levied and carried on in certain of His Majesty's colonies and plantations in America, and "acts of treason and *piracy* have been committed on the high seas and upon the ships and goods of His Majesty's subjects, and many persons have been seized and taken, who are expressly charged or strongly suspected of such treasons and felonies, and many more such persons may be hereafter so seized and taken, and whereas such persons have been or may be brought into this kingdom and into other parts of His Majesty's dominions, and it may be inconvenient in many such cases to proceed forthwith to the trial of such criminals and at the same time of evil example to suffer them to go at large," therefore "all such persons (describing them) may be detained in custody without bail or mainprize, till the 1st of January, 1778, and no judge shall bail or try any such person without an order of the Privy Council, before that time." Pickering's Statutes, vol. xxxi. p. 312. This act was continued annually, by successive reënactments, till the end of the war. Ib. vol. xxxii. pp. 1, 175; vol. xxxiii. pp. 3, 183; vol. xxxiv. p. 1.

Inasmuch as there were few exchanges of prisoners effected in Europe, where the captured privateersmen were generally taken, while a practical system of exchanges through the commanding generals took place in America, it was mainly to this class of persons that this act, (also put in operation towards the close of the war, in the case of Henry Laurens, captured on his way to the Hague, as Minister from the United States,) is understood to have been applied.

The object of the statute is explained, in a report to the Massachusetts Historical

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 17. Rutherforth's Ins. vol. ii. p. 595.

The offence of depredating under commissions from different sovereigns, at war with each other, is clearly piratical, since the

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Society, made by Mr. Curtis, on the 12th of December, 1861, to have been: "1st, That the government intended to reserve and exercise all its sovereign judicial powers of punishment. 2d, That it meant to punish for treason or for piracy, according as the prisoners captured might be amenable to the law of England, from being taken on the land; or from being taken on the sea, cruising against British commerce. 3d, That it was intended to have the trials for such offences take place at the pleasure of the crown; thus holding the prisoners in a position to be dealt with as criminals or as ordinary prisoners of war, as the Executive Government might find expedient." Boston Courier, January 2, 1862.

The President of the United States, while he, in his proclamation of April 19, 1861, inaugurated a blockade of the so-called Confederate States, based on belligerent rights, at the same time declared that any person acting under letters of marque, issued under their authority, would be held amenable to the laws of the Union "for the prevention and punishment of piracy." United States Statutes at Large, &c., 1861, App. p. ii. This action of the American government was thus noticed in a debate in the House of Lords, on the 16th of May, 1861. Lord Derby said: "I apprehend that if there is one thing clearer than another it is that by the law of nations privateering is not piracy; that no enactment on the part of any one nation can make that piracy as regards the subjects of another country which is not piracy by the law of nations, or by the law of that country. The Northern States, therefore, must not be allowed to entertain the opinion, — although it may be right that we should warn British subjects that if they should engage in privateering expeditions they will not be entitled to claim the protection of their government, — that they are at liberty so to strain the law as to convert privateering into piracy, and visit it with death. The punishment under such circumstances of persons entitled to Her Majesty's protection would not be viewed with indifference, but would receive the most serious consideration by this country. It is right, on the one hand, that the people of this country should be warned of the peril of engaging in privateering undertakings; but it is essentially necessary, on the other, that the Northern States should not be induced to rely upon our forbearance with regard to a violation of the law of nations by visiting privateering with a penalty which is not attached to it by that law. It is said that the Northern States treat the Southern Confederation, not as having the rights of belligerents, but as rebels, whose acts will be visited with all the penalties of high treason, including capital punishment. But that is not a doctrine we admit; because we have declared that the Southern States are entitled to rights of belligerents. The Northern States, on the one hand, cannot be entitled to claim the rights of belligerents for themselves, and on the other, to treat the Southern States, not as belligerents, but as rebels. These are the two points upon which it is most desirable that a clear understanding should be come to between Her Majesty's ministers and the government of the United States: first, that we cannot recognize any except a really effective blockade such as the United States may be able to enforce; and, secondly, that we cannot recognize the doctrine that by any proclamation or any enactment the Northern States have power as against the Southern Confederation to treat privateering as piracy, and to visit it with death.

"Lord Brougham heartily wished that all privateering were piracy by the law of nations; but, unhappily, it was not. His opinion upon this point had been misunder-

authority conferred by one is repugnant to the other; but it has been doubted how far it may be lawful to cruise under commis-

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stood. What he said was, that privateering, undertaken by the subjects of one country against the trade of another country with which their own was at peace, amounted to piracy. Privateering, however much it might be to be reprehended, was undoubtedly, in the case of recognized belligerents, not piracy according to the law of nations, as that law was at present understood and administered; but, if any persons, subjects of this country, fitted out a vessel against another country with which we were at peace, that in itself constituted a piratical act, and he was clearly of opinion that the persons so acting would have only themselves to blame if after full warning they entered upon that course.

"Lord Chelmsford said he wished to bring the opinion to which his noble and learned friend had given expression to a test. The Confederate States of America were admitted by Her Majesty's government to be entitled to exercise the rights of a belligerent power. That being so, he should wish to know from his noble and learned friend whether he meant to contend that if an English ship were commissioned by those States and fitted out as a privateer against the Federal government, her crew would under such circumstances be guilty of piracy? British subjects so engaged would, no doubt, be answerable to the laws of their own country, but it was perfectly clear that, in accordance with the principles of international law, they would not be liable to be treated as pirates. That warning should be given to English seamen by means of the proclamation was, of course, a most useful and necessary step, and if after that warning they would engage in such expeditions as those to which he was referring, they must, of course, take the consequences of their conduct. If, he might add, the Southern Confederacy had not been recognized by us as a belligerent power, any Englishman aiding them by fitting out a privateer against the Federal government would no doubt be guilty of piracy. The question was one which arose after the abdication of James II., when he had been expelled from Ireland, when he had not a foot of territory there, and when, therefore, he was merely a sovereign claiming a right *de jure*. James II. at that time commissioned certain persons to fit out privateers against the commerce of this country, and the question having come on before the Lords of the Privy Council, they desired to have with respect to it the opinion of learned civilians. Several civilians had in consequence attended before the Council, and a report of the proceedings in the case was given by Dr. Tyndal, who was one of its members. According to that report Sir Thomas Pinfold had asserted that the persons to whom the inquiry related were not pirates, and for the following very strange reason: that a pirate must be regarded as *hostis humani generis;* but that those persons were not enemies to all mankind, and were therefore not pirates. Whereupon one of the Lords of the Council asked whether there could have been such a thing as a pirate if no person could come within that category who was not actually at war with all mankind. To that question it appeared Sir Thomas Pinfold did not reply, but contented himself with repeating what he had said before. The learned civilian was then asked whether, supposing any of their Majesties' subjects, by virtue of a commission from the late king, should by force seize the goods of their fellow-subjects by land, they would stand excused of being guilty at least of robbery: and if not, why they should stand excused of piracy? To that question also the learned civilian made no answer, and for the very good reason, as their lordships would at once perceive, that there was no good answer to be given; for it was perfectly clear the persons in

sions from different sovereigns allied against a common enemy. The better opinion, however, seems to be, that although it might

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question were guilty of piracy. He was, he might add, of opinion that it was equally manifest that in the case assumed by his learned and noble friend, piracy could not fairly be said to exist; and, as the point was one upon which it was desirable no misapprehension should prevail, he had deemed it to be his duty to state the opinion which he held on the subject. (See Phillimore on International Law, vol. i. p. 399–406, for extracts from "An Essay concerning the Law of Nations and the Rights of Sovereigns, by Matthew Tyndal, LL. D.")

"The Lord Chancellor said, his noble friend the President of the Council had laid down the law on the point at issue with perfect correctness. If, after the publishing of the present proclamation, any English subject were to enter into the service of either of the belligerents on the other side of the Atlantic, there could be no doubt that the person so acting would be liable to be punished for a violation of the laws of his own country, and would have no right to claim her protection to shield him from any consequences which might arise. There could, however, at the same time, be no doubt that he ought not to be regarded as a pirate for acting under a commission from a State admitted to be entitled to the exercise of belligerent rights, and carrying on what might be called a *justum bellum*. Anybody dealing with a man under those circumstances as a pirate and putting him to death would, he contended, be guilty of murder.

"Lord Kingsdown said he supposed the Federal government deemed itself justified in publishing the extravagant order in reference to privateering which it had issued, inasmuch as America had insisted upon maintaining the right of resorting to that mode of warfare when it had been abandoned by the Great Powers of Europe. In the present case, the issue of the order was, no doubt, based on the ground that the Federal government was dealing with rebels who might be hung as persons guilty of treason to the State of which they were subjects. This was a matter for their own consideration; but he could not help thinking that to act upon such a view would be to have recourse to a piece of barbarity which would raise an outcry throughout the whole civilized world. He trusted, therefore, the order in question was a mere *brutum fulmen*, upon which it was not intended to act. Be that, however, as it might, the case assumed a different aspect when looked on with reference to the position of English subjects. This country had recognized, not as an independent power, but as a body possessing the rights of a belligerent, the Confederation of the Southern States. Therefore they were treated as having power to issue a regular authority for privateering; but the principle as against British subjects established by the proclamation was that, if they chose to engage in privateering, and so act in violation of the orders of their own government, they should not have the right to call upon the government to interfere for their protection.

"Lord Brougham trusted that all persons would take notice of the warning given in the proclamation, that in the event of interfering in the difference prevailing in America they must run the risk of whatever measures might be adopted by the Americans on one side or the other, just as in the case which occurred thirty years ago, two English subjects were tried and hanged for piratical interference on the land, and not on the sea, and not one step was taken to protect or avenge them." Parliamentary Debates.

The case referred to by Lord Brougham arose in 1818, during the Seminole war, when two Englishmen, (Arbuthnot and Ambrister) were convicted by a court-martial

not amount to the crime of piracy, still it would be irregular and illegal, because the two co-belligerents may have adopted dif-

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of having excited the Indians to commit hostilities and assassinations, supplied them with munitions of war and led them against the United States. Lesur, Annuaire, 1818, p. 327. See, further, Part IV. ch. 2, § 3, Editor's note, *infra*.

Privateersmen, acting under commissions from the President of the Confederate States, were brought into New York and Philadelphia and indicted for piracy. They were tried in October, 1861, in the United States Circuit Courts, sitting in those places. In both courts, though the indictments included other counts, the cases went to the jury on the 3d section of the act of 1820, which, as has been stated, was intended to apply to *piracy*, as a substitute for the 5th section of the act of 1819, which defined it by a reference to the law of nations. The statute, it was maintained, embraces also cases of robbery committed on board of an American vessel, though they might not come within the definition of piracy by the law of nations. The presiding judge at New York, admitted "that if it were necessary, on the part of the government, to bring the crime charged in the present case against the prisoners within the definition of robbery and piracy, as known to the common law of nations, there would be great difficulty in doing so, perhaps upon the counts, certainly upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only, the United States, which falls far short of the spirit and intent that are said to constitute essential elements of the crime. But the robbery charged in this case is that which the act of Congress prescribes as a crime, and may be denominated a statute offence as contradistinguished from that known to the law of nations. The act declares the person a pirate, punishable by death, who commits the crime of robbery upon the high seas, against any ship or vessel, &c.; and the interpretation given to these words applies the crime to the case of depredation upon an American vessel, or property, on the high seas, under circumstances that would constitute robbery if the offence was committed on land." Trial of Officers, &c., of Savannah, p. 371, Judge Nelson's Charge. As to the defence based on the privateer's commission, both courts held that they could only look to the declarations of the executive and legislative departments for the political relations of the new confederacy — and they did not imply from the exercise of belligerent rights by the Federal government any renunciation or waiver of its municipal rights, as sovereign, towards the inhabitants of the seceded States. Ib. p. 373. Trial of William Smith, for piracy, p. 96.

In Philadelphia four individuals were convicted, but never sentenced; while in New York the jury could not agree. The arrests led to retaliatory action, on the part of the Confederate States. They selected a correspondent number of persons from among the United States officers, who had been made prisoners, and whose treatment, as well as ultimate fate, was to correspond with that of the privateersmen. On 31st of January, 1862, an order was issued by the Secretary of State, to the marshals, directing the transfer of all prisoners charged with piracy, including those who had been convicted at Philadelphia, to a military prison for the purpose, it was understood, of exchanging them as prisoners of war. The character in which they had been confined only appears from the clause of the order, excluding its application "to offenders against the laws for preventing the slave-trade."

Lord Russell, in acknowledging, January 24, 1862, to Lord Lyons, the receipt of a copy of Judge Daly's published letter on the question whether the Southern privateersmen can be regarded as pirates, and expressing the satisfaction of Her Majesty's government that "the pretension had been so successfully combated," adds: "There

ferent rules of conduct respecting neutrals, or may be separately bound by engagements unknown to the party.[1] [80]

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can be no doubt that men embarked on board of a man-of-war or privateer, having a commission, or of which the commander has a commission from the so-called President Davis, should be treated in the same way as officers and soldiers similarly commissioned for operations on land. Your Lordship will observe to Mr. Seward that an insurrection extending over nine States in space, and ten months in duration, can only be considered as a civil war, and that persons taken prisoners on either side should be regarded as prisoners of war. Reason, humanity, and the practice of nations, require that this should be the case." Parliamentary Papers, 1862. North America, No. 1. Correspondence relating to the Civil War in the United States, &c. p. 137.] — *L.*

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 17, p. 180; Duponceau's Transl. Valin, Commentaire sur l'Ord. de la Marine, tom. ii. p. 236. "The law," says Sir L. Jenkins, "distinguishes between a pirate who is a highwayman, and sets up for robbing, either having no commission at all or else hath two or three, and a lawful man-of-war that exceeds his commission." Works, vol. ii. p. 714.

[80] Hautefeuille, Droits des Nations neutres, tit. iii. ch. 2, § 3, tom. i. p. 190, 2me ed., says, that unless there are express treaties to the contrary, the belligerent cannot refuse the treatment of legitimate cruisers to neutral subjects, who have letters of marque from the enemy. It is otherwise with respect to the privateersman who has commissions from two sovereigns. In this case the captain and officers are treated as pirates, even although the letters of marque are issued by two princes allied in making a common war. He rejects the distinction, on that point, of the Chevalier Abreu, Tratado de las Presas maritimas, and cites, in support of his view, Martens and Massé. The latter expresses himself in these terms: "If the two sovereigns are allies, a double commission is useless, since the cruiser has not more rights with two than with one; he cannot hoist two flags, have two sovereigns, and this double commission would render it impossible for him to conform to the opposite and contradictory instructions which they might contain, and to the rule generally recognized, according to which the judge of the captor is the judge of the prize." Massé, Droit Commercial, liv. ii. tit. 1, ch. 2, sect. 1, § ii. tom. i. p. 172.

"As to taking commissions from two friendly sovereigns, it is included in the generality of the terms in which many laws prohibit the taking of two commissions at a time. Where there is no law on the subject, this last question becomes more doubtful. In my opinion, however, an abuse which is not without inconveniences, as well for the sovereign of the privateersman as for the neutral powers, should nowhere be tolerated. The privateersman is bound to follow the instructions of the sovereign from whom he receives the commission. It is into his ports that the prizes are, if possible, to be taken in order to be condemned. How can he satisfy those obligations to two sovereigns? The vexations of neutral powers, the treaties with which he ought to respect, are increased if he can choose of different commissions the one most advantageous for him to act under. The complaints which may arise from such a course may be readily foreseen." Martens, Essai sur les Armateurs, ch. 2, § 14, p. 59.

The act, passed 3d of March, 1847, declaring it piracy for any subject or a citizen of a foreign State to make war upon the United States or cruise against their vessels or property, contrary to the provisions of treaties existing with the State, of which they are subjects or citizens, is an extension of the crime of piracy, as known to the law of nations. United States Statutes at Large, vol. ix. p. 175. The treaties in

Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and pun-

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question, so far as they may make citizens of the United States justiciable before foreign tribunals, in a case not piracy under the law of nations, would seem to be obnoxious to the same constitutional objections, as were interposed by President Monroe, to mixed tribunals under the slave-trade conventions. This provision, however, in the act of Congress, is in accordance with the treaty of 1778, between France and the United States, Ib. vol. viii. p. 24; of 1782, of the latter with the United Netherlands, Ib. p. 44; with Sweden of 1783, Ib. p. 74; 1816, p. 240; 1827, p. 354; with Prussia of 1785, Ib. p. 94; of 1799, p. 172; 1828, p. 384; of 1794, with Great Britain, Ib. p. 127; with Spain of 1795, Ib. pp. 144, 262; with Colombia, 1824, Ib. p. 316; of 1828, with Brazil, Ib. p. 396; with Chile of 1832, Ib. 439; with Guatemala of 1849, Ib. vol. x. p. 884; with Peru of 1851, Ib. p. 941. All these treaties, some of which have expired, besides prohibiting the citizens of either party from taking commissions for privateers to cruise against the other, declare in terms that they shall be treated as *pirates*. The government of the United States, in 1854, expressed themselves adverse to entering into any new stipulations of this nature. Mr. Marcy to Mr. Buchanan, 18th of April, 1854. 33d Cong. 1st Sess. H. of R. Ex. Doc. No. 103.

According to Riquelme; "by the 42d article of the treaty of 30th of April, 1725, between Spain and Austria, it was agreed that whoever took letters of marque and reprisal from any government not his own should be treated as a pirate, and by the 5th article of the treaty concluded with the Netherlands in 1714, and by the 14th article of the celebrated treaty of 1795 with the United States, it was agreed that whoever took commissions or letters of marque from another State, which was at war with either of the contracting parties, should be considered in the same character of pirates." Riquelme refers also to the privateer ordinance of Spain of 1801, "which establishes (ley 4º, tit. 8º, lib. 6º, de la Novisima Recopilacion) that every vessel shall be considered as a pirate which raises a false flag, or raises no flag, or fights under another flag than its true one, as well as any Spanish vessel which is armed *en course* without the license of government, or receives without its permission the commission of another State, even although it be an ally of Spain. These rules of the positive law of Spain," he says, "we find extremely severe; because sailing without a commission or with a false one does not necessarily involve a violation of the maritime law of nations, or produce an obstacle to the free navigation of the seas. Besides, the taking of a commission for privateering from a foreign State, though its object be making prizes by incurring the risks of war, cannot be esteemed a proof of high morality, still it is very far removed from the crime of piracy." Elementos de Derecho Público Internacional, tom. i. p. 240.

The declaration of Paris, of the 16th of April, 1856, "that privateering is and remains abolished," is only a pledge, on the part of the States adhering to it, not to issue commissions for that purpose, and does not of itself create any new offence against the law of nations; while the admission of the Congress, made at the suggestion of the Russian plenipotentiaries, that it would not be obligatory on the signers of the "Declaration" to maintain the principle of the abolition of privateering against those which did not accede to it, (Protocol, No. 23, 14th April, 1856), received a practical construction in the course adopted by England and France, and other countries, in their declarations with regard to the pending contest in America. See Part IV. ch. 2, § 10, Editor's note, *infra*.] — *L.*

ishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals.[1]

Distinction between piracy by the law of nations, and piracy under the 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.[2]

Slave-trade, whether prohibited by the law of nations.

The African slave-trade, though prohibited by the municipal laws of most nations, and declared to be piracy by the statutes of Great Britain and the United States, and, since the treaty of 1841, with Great Britain, by Austria, Prussia, and Russia, is not such by the general

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[1] "Every man, by the usage of our European nations, is *justiciable* in the place where the crime is committed; so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they may be taken." Sir L. Jenkins's Works, vol. ii. p. 714.

[2] Wheaton's Rep. vol. v. pp. 144, 184. United States *v.* Klintock; United States *v.* Pirates.

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.[1][81]

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[1] Dodson's Adm. Rep. vol. ii. p. 210. Le Louis. Wheaton's Rep. vol. x. p. 66. La Jeune Eugenie.

[81] That the right of visitation and search cannot exist, in time of peace, independent of treaty, is established as well by institutional writers as by the practice of nations.

Mr. Wheaton, writing as Minister at Berlin, to the Secretary of State, July 6, 1843, says: "The right claimed (by the English) comes to this, — a right to seize and send in for adjudication, before the court of the captor's country, subject to the payment of costs and damages in case of seizure without reasonable cause. I do not know what Lord Aberdeen and Sir Robert Peel's admiralty lawyers may have told them; but I defy them to show a single passage of any institutional writer on public law, or the judgment of any court by which that law is administered, either in Europe or America, which will justify the exercise of such a right on the high seas in time of peace."

Among the French writers of established reputation who have alluded to the British pretensions are Hautefeuille, Ortolan, Massé, and De Cussy. Hautefeuille distinguishes between *visite*, which by other French commentators is deemed equivalent to the English *visitation* and *search*, and *recherche*, (search,) which he treats under a distinct head, as we shall have occasion more fully to show, when we come to discuss the subject as applicable to war. (See Part IV. ch. 3, § 29, *infra*.)

He says that the right of visit (even restricted as it is by him, in war) cannot exist in peace, being a power conceded to the belligerents for the exercise of belligerent rights. The special treaties, which grant the reciprocal right in time of peace, go beyond what he deems even the belligerent claim, and accord a right of *search*. He considers the treaty with France, of 1845, an illustration of the right of *visit*, as he defines it, while those of 1831 and 1833 were instances of the right of *search*. It can hardly be necessary to mention, that all conventions of this character are earnestly opposed by him as containing (even that of 1845) flagrant violations of the principles of international law. "In time of peace," he says, "the flag of a ship is the sign of its nationality, not merely *primâ facie*, but absolutely, for all foreign ships. The cruisers of the nation to whom the flag belongs have exclusive jurisdiction over it, including the power of verification and inquiry (*enquête*). The only exception is in case of piracy. As to the words, 'the slave-trade and other unlawful commerce,' of which the treaty of 1845 speaks, they are without meaning. The slave-trade is not an unlawful commerce on the part of a Frenchman, except so far as French laws make it unlawful. It is only so with respect to France. In time of peace there is not any unlawful commerce as regards foreign States, unless the individual or the vessel that is carrying on the trade is within the custom-house limits, upon the territory and under the jurisdiction of the foreign State. This principle is absolute, and admits of no exception." *Visit*, in time of peace, has only been invented, he remarks, by England, since 1815, to injure the navigation of other countries, and is an outrage on the national dignity and independence. Droits des Nations neutres, tit. xi. ch. 1, § 2, tom. iii. p. 471–487. Ib. § 3, tom. iii. p. 92, 2me édit.

Massé declares that, "whatever may be the object of *visit*, in time of peace, it is always an act of police, which cannot be exercised by one nation towards another,

The African slave-trade, [82] once considered not only a lawful but desirable branch of commerce, a participation in which was

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because it implies, on the part of the visitor, a sovereignty, incompatible with the reciprocal independence of nations. Furthermore, two nations cannot advantageously grant one another, by special conventions, the reciprocal right of visit in time of peace. As such conventions imply an abandonment of the sovereignty, which is, in its very essence, inalienable, and incapable of being ceded, the two nations which have mutually given up their rights can only have made a temporary abandonment of them, which no lapse of time can render definitive." Droit Commercial, liv. ii., tit. 1, ch. 2, sect. 2, § v. tom. i. p. 291.

Ortolan agrees with all the authors on international law, and especially with the American publicist, Wheaton, that "the right of visitation and search cannot exist in peace, except by special treaty." He likewise says that it is an international usage very often practised, for ships that meet at sea to hoist their flag to show their nationality, and to interchange salutations. Speaking of this usage, he had said, in his first edition, "that there existed in favor of ships of war, in reference to merchantmen, a right of inquiry as to the flag (*droit d'enquête du pavillon.*) By this expression, which is probably new, the word right (*droit*) should not be taken in its most extended sense. But when this right is exercised by a ship of war in reference to a foreign merchantman, it does not precisely mean a right of compulsion, and the correspondent obligation is only a moral obligation." Diplomatie de la Mer, tom. i. p. 258–262, 2me ed.

De Cussy also says, "The right of visit, as recognized and tolerated by the usage of nations, does not exist in time of peace. *Le droit de visite* is exclusively a belligerent right." "The extension of the exercise of the right of visitation and search, in time of peace, if the great maritime States (acting under the influence of a sentiment of humanity and equity which does honor to the sovereigns who signed the treaties concluded with a view to the abolition and extinction of the slave-trade) continue to show themselves too easy in the adoption of the measures considered the most efficacious by England — the extension, we say, of the right of visitation and search, in time of peace, will be the commencement of a system for the dominion of the seas, by means of the abuses to which visitation and search would give rise, by confounding, intentionally, all the distinctions of times and circumstances, of peace and war, and all the rights applicable to the two different situations, the one regular and the other forced and temporary." Droit Maritime, tom. ii. p. 385.] — *L.*

[82] The treaty of Paris, by one of the separate articles of which France engaged to unite her efforts with Great Britain, at a future congress, to cause all the powers of Christendom to proclaim the abolition of the slave-trade, was signed on the 30th of May, 1814. On the 6th of August, in advance of the Congress of Vienna, Lord Castlereagh instructed the Duke of Wellington, then ambassador to Paris, that "a second regulation, highly important to prevail on France to accede to, is, a reciprocal permission to our respective cruisers, within certain latitudes, to visit the merchant ships of the other powers, and if found with slaves on board, in contravention of the law of their particular State, to carry or send them in for adjudication." The Duke of Wellington accordingly addressed the Prince of Benevento (Talleyrand) on the subject; but he writes, on the 5th of November, in reference to the proposition, "that it was so disagreeable to the government, and that (he) had seen in different publications that it was likely to be so much so to the nation, that there was no chance of succeeding in getting it adopted."

made the object of wars, negotiations, and treaties between different European States, is now denounced as an odious crime,

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Nor was England more fortunate in her attempt to obtain the coöperation of Portugal, so long her dependent ally. As we learn from a protocol of a special conference at Vienna on the 28th of January, 1815, Lord Castlereagh having suggested, as the surest mode of putting an end to the traffic, the *exercise* of a *police* against those vessels that should engage in the trade, Prince Talleyrand asked the British plenipotentiary to define the meaning of the term. Lord Castlereagh assured him that he meant such a *police* as every government exercised by virtue of its own sovereignty, or of special treaties with other powers. Thereupon Prince Talleyrand and the Count Palmella (Portuguese Minister) said that they did not recognize the exercise of any maritime police, except that which each power exercises for itself, over its own vessels (*qu'ils n'admettoient en fait de police maritime que celle que chaque puissance exerce sur ses propres bâtimens*).

The only general result of these negotiations was a declaration, bearing date 8th of February, 1815, of adherence by the congress to the additional article of the treaty of Paris between England and France, denouncing the trade as "*repugnant to the principles of humanity and of universal morality*," but leaving the period for its abolition a subject of negotiation between the several powers. Flassan — Histoire du Congrès de Vienne, tom. iii. p. 286.

The treaty of September, 1817, with Spain, and the operation of which was extended in 1822 and in 1835, inaugurated, though the trade was still partially allowed till 1820, the general system of reciprocal search, which had been yielded by Portugal the preceding July, as to the trade interdicted by her north of the equator.

It was soon after the Spanish convention was concluded (Dec. 15, 1817), that Lord Stowell (Sir William Scott), without adverting to the previous adjudications, delivered his judgment, referred to in the text, in the case of The Louis, captured 11th March, 1816, and condemned, at Sierra Leone, because the brig, being engaged in the slave-trade, contrary to the laws of France and the law of nations, could derive no protection from the French, or any other flag, and because she had resisted the British cruiser, and *piratically* killed eight of her men, and had resisted *search*.

Lord Stowell decided that no British act of Parliament, or commission founded on it, if inconsistent with the law of nations, can affect the rights or interests of foreigners; that the right of visitation and search on the high seas does not exist in peace, that trading in slaves is not piracy nor a *crime* by the universal law of nations. He says, referring to the declaration at the Congress of Vienna, that, "great as the reverence due to such authorities may be, they cannot be admitted to have the force of overruling the established course of the general law of nations."

The principles settled in The Louis were reaffirmed by Lord Stowell, in 1824, in the case of The San Juan Nepomuceno, captured in December, 1817, and consequently after the treaty, and condemned at Sierra Leone. Haggard's Admiralty Reports, vol. i. p. 267.

The English government, which had, in July, 1816, announced by a circular to its naval commanders, that the right of search, being a belligerent right, had ceased with the war, again attempted in vain, in 1818, to procure its concession from France. In May of that year, a treaty of that nature was concluded with the Netherlands, and further treaties were made with this power in 1822, 1823, and 1837. At the Congress of Aix-la-Chapelle, in November, the subject was brought anew to the consideration of the great powers; but Austria, Russia, and Prussia then refused either

by the almost universal consent of nations. This branch of commerce was, in the first instance, successively prohibited by

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to allow the reciprocal right of search, applicable to all nations which had prohibited the slave-trade, or to proclaim the traffic piracy under the law of nations. As at Vienna, the congress confined itself to a general declaration respecting the odious character of the commerce.

Nor was more effected at Verona in 1822. The French government explicitly rejected both the propositions, — to make the trade piracy, on which point they never yielded, and to allow a right of search. As to the latter point, Mr. Chateaubriand declared his government could never consent, and that any attempt to exercise it between the French and English would be attended with the most fatal consequences. Indeed, the government of the Restoration seemed fully aware that the offer of reciprocity was entirely illusory, and that the system could only operate for the aggrandizement of England. Wheaton's History of the Law of Nations, p. 614–624, 689.

The treaty of Ghent of 1814, by which peace was restored between the United States and Great Britain, pledged both parties to use their best endeavors for the abolition of the slave-trade. But to propositions, made to our government a short time before the meeting at Aix-la-Chapelle, of the same character as those submitted to the congress, Mr. Adams, Secretary of State, under date of November 2, 1818, replied: "That the admission of a right in the officers of foreign ships of war to enter and search the vessels of the United States, in time of peace, under any circumstances whatever, would meet with universal repugnance in the public opinion of the country, that there would be no prospect of a ratification by advice and consent of the Senate to any stipulation of that nature." Mr. Adams to Messrs. Gallatin and Rush. American State Papers. Foreign Relations, vol. v. p. 73, fol. ed.

But the same popular abhorrence of the slave-trade, which elsewhere favored the British scheme of a maritime police, was scarcely less efficient in its behalf in the United States. Even those who were intrusted with the management of our public concerns seem to have forgotten the lessons which dear-bought experience had so recently taught them.

In January, 1818, and before any communication was made by Lord Castlereagh to Mr. Rush, the subject of a concert with foreign nations in reference to the slave-trade, had been introduced into the Senate by Mr. Burrill of Rhode Island. Benton's Abridged Debates, vol. vi. p. 12.

By a law of May the 15th, 1820, the slave-trade was made piracy, and punishable, on conviction before a circuit court of the United States, by death. United States Statutes at Large, vol. iii. p. 600. The object of passing the act would seem to have been not to apply to an offence cognizable in our own courts only, a term applicable to a crime everywhere justiciable, and which might therefore give rise to constant mistakes; but it was adopted, on the expectation that the slave-trade would be made piracy by the law of nations, and thereby preclude all questions as to the right of search.

Resolutions were passed in the House of Representatives in 1821, 1822, and 1823, by which the President was requested to enter into arrangements with other powers for the effectual abolition of the African slave-trade, and on the last occasion a clause was appended proposing its denunciation as piracy under the law of nations. The vote, in 1823, was nearly unanimous, though an amendment giving an *express* assent to a qualified right of search was rejected.

Under these circumstances, Mr. Rush was instructed to propose to England an ar-

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

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rangement which resulted in a convention, signed on the 13th of March, 1824. This treaty, while it conceded a mutual right of search within certain limits, substituted for the mixed tribunals objected to by us as being inconsistent with our Constitution, a provision that the captured vessels should be sent before the tribunals of their own country. England had been required, as a preliminary to any convention, to pass a statute, making, as we had done, the slave-trade piracy. Cong. Doc. 18th Cong. 2d Sess. Doc. 2. The Earl of Harrowby said in the House of Lords, that, "unless the law passes, the convention cannot be carried into effect; but the bill and treaty are independent, and so they are in America. Whether the treaty is ratified or not, the slave-trade will be piracy by the laws of both countries." Hansard's Parliamentary Debates, N. S. vol. xi. p. 1. The American law remains unchanged, the offence continuing capital; but by an act of the British Parliament, passed in 1837, 7 Wm. IV. & 1 Vict. ch. 91, punishment of death for piracy is abolished in all cases, except when committed under circumstances, or attended by acts calculated to endanger life. Annual Register, 1837, p. 229]. Stephens's (Blackstone's) Comment. on Laws of England, vol. iv. p. 287. Lawrence on Visitation and Search, 19–29, 75–78.

President Monroe, in his message of the 21st of May, 1824, in relation to the convention, (the ratification of which, though the treaty was assented to by England as originally proposed by us, failed in the Senate,) said that conventions for a mutual right of search had been resisted by the Executive, on two grounds: one, that the constitution of mixed tribunals was incompatible with our Constitution; and the other, that the concession of the right of search in time of peace, for an offence not piratical, would be repugnant to the feelings of the nation. But, by making the crime piracy, the right of search attaches to the crime, and which, when adopted by all nations, will be common to all. In the mean time, the obvious course seemed to be, to carry into effect with every power such treaty as may be made by each in succession. In negotiating the treaty in question with the British government, it was made an indispensable condition, that the trade should be made piratical by act of Parliament, as it had been by act of Congress; but, instead of subjecting the persons detected in the slave-trade to trial by the courts of the captors, as would be the case if such trade was piracy by the law of nations, it was stipulated that, until that event, they should be tried by the courts of their own country only. Cong. Doc. 18th Cong. 2d Sess. British and Foreign State Papers, 1824–5, p. 850. Mr. Adams had on a former occasion instructed the American plenipotentiaries, "You will add (in your communication to the British plenipotentiaries) that by the Constitution of the United States it is provided the judicial power of the United States shall be vested in a Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. It provides that the judges of these courts shall hold their offices during good behavior, and that they shall be removable by impeachment and conviction of crimes or misdemeanors. There may be some doubt whether the power of the government of the United States is competent to institute a court for carrying into execution their penal statutes beyond the territories of the United States — a court consisting partly of foreign judges not amenable to impeachment for corruption, and deciding upon the Statutes of the United States without appeal." Mr. Adams to Messrs. Gallatin and Rush, Nov. 2, 1818. American State Papers, fol. ed., *in loc. cit.*] — *L.*

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. 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 23d September, 1817, and the 22d 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 22d May, 1833, between France and Great Britain, to which nearly all the maritime powers of Europe have 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, [[83] be-

[[83] Circumstances, at that time, seemed particularly to favor the British attempt to render her navy as efficient for maritime supremacy in peace as in war. Austria, Russia, Prussia, all of which, as well as France (already bound by the treaties of 1831 and 1833), had so strenuously opposed at Vienna and the subsequent Congresses of Aix-la-Chapelle and Verona, any general crusade against the slave-trade, now yielded to the diplomacy of England. On 20th of December, 1841, notwithstanding the irritation growing out of the Syrian and Egyptian question, and the isolation in which France was placed by the convention of 15th July, 1840, for regulating the affairs of the East, without her participation, a treaty was signed between them all and Great Britain, whereby, says the Annual Register, "the former powers agreed to adopt the English laws relating to the slave-trade. By these laws the traffic is declared to be piracy, and the five powers mutually conceded to each other the right of search, in the case of all vessels bearing their respective flags." Annual Register, 1841, p. 254].

Two essays, "An Inquiry into the Validity of the British Claim to a Right of Visitation and Search, of American Vessels suspected to be engaged in the African Slave-Trade," by Mr. Wheaton, London, 1842; and "Examen de la Question aujourd'hui pendante entre le Gouvernement des États Unis et celui de la Grande Bretagne, concernant le Droit de Visite," (ascribed to Hon. Lewis Cass, then Minister to France,) Paris, 1842, with the Letter of General Cass to M. Guizot, dated 13th February, 1842, and which was in the nature of a protest against the Quintuple Treaty of 20th December, 1841, are understood to have had no little influence in preventing the ratification of that treaty by the government of France.

The publications referred to received, as it were, an official sanction from Mr. Legaré, on his assuming the seals of the State Department. In his earliest instructions he said: "I avail myself of the first opportunity afforded by our new official relations, to express to you my hearty satisfaction at the part you took, with General Cass, in the discussion of 'the Right of Search,' and the manner you acquitted yourself of it. I read your pamphlet with entire assent. It is due to the civilization of the age, and the power of opinion, even over the most arbitrary governments, that

tween 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 endeavors to promote 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 coöperation, 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 coöperation 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. [84

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every encroachment on the rights of nations should become the subject of immediate censure and denunciation. One great object of permanent missions is to establish a censorship of this kind, and to render by means of it the appeals of the injured to the sympathies of mankind, through diplomatic organs, at once more easy, more direct, and more effective." Mr. Legaré to Mr. Wheaton, June 9, 1843. State Department MS.

[84 According to Phillimore, there were in 1849, twenty-four treaties in force for the suppression of the slave-trade between Great Britain and other civilized powers, including those with the United States and France, ten of which established mixed courts, and the others (with the exception of the two conventions specially mentioned) likewise accorded a mutual right of search, though they required the captured vessel to be handed over to the tribunals of the country under whose flag she had been taken. International Law, vol. i. p. 331. The States stipulating for mixed commissions were the Netherlands, Sweden, Brazil (whose treaty had ex-

Decisions of British and American courts of justice.

This general concert of nations to extinguish the traffic has given rise to the opinion, that though once tolerated, and even protected and encouraged, by the

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pired, as she contended), Spain, Portugal, the Argentine Confederation, and the Republics of Uruguay, of Bolivia, of Chili, and of Ecuador. These courts would seem for some years to have ceased exercising practically any jurisdiction. In fact, by excusing one power after another from the obligation to maintain cruisers, which were in some cases dispensed with in the original treaties, England had obtained almost exclusively the police of the African seas. It is more advantageous to the British officers to make captures under the statute of 1839, by which, as it will appear, the general *surveillance* of the ocean was assumed, — than under the treaties; and as the condemnation then takes place in the Vice-Admiralty courts, without exposing the slave-dealer to personal penalties, the subjects of other countries, whether of those that have treaties with England or not, are not unwilling, when complete success fails them, that the felony should be commuted by a trial in the British court, where loss of property is the worst evil that can await them. Lawrence on Visitation and Search, p. 82.

"The convention of 1845 between England and France is no longer operative. It contained a provision, that if at the end of the tenth year the preceding conventions, of 1831 and 1833, were not reëstablished, they should be considered as abolished. Some time before its expiration, the stipulated number of cruisers, which had been twenty-six, was reduced to twelve. The then actual obligations of France, as regards the right of search and her legislation respecting the slave-trade, were thus stated, in the *Revue des deux Mondes*, for January 1st, 1858.

"It is not generally known, that the treaties respecting the right of visitation and search (*droit de visite*) have ceased to exist. The famous conventions which excited such clamorous divisions in the political world have expired unnoticed. Those of the 30th of November, 1831, and of the 22d of March, 1833, contained no clause limiting their duration; but that of 29th of May, 1845, which was signed after warm parliamentary discussions, and which impliedly abrogated the preceding ones, was only to remain in force ten years. By the terms of the tenth article, which fixes this limit, the negotiations for its extension were to be resumed in the course of the fifth year, that is to say, in 1850. The present government has purposely allowed the period of expiration, of 29th May, 1855, to arrive, without desiring that the question should be again taken up. Now, then, all this exceptional system is at an end, and there is no other international law on this subject except that which results from the great political treaties of 1814 and 1815, which proclaim, in general terms, the abolition of the trade, but leave every people fully at liberty to employ whatever means they think proper to accomplish it. The legislation which has been with us the consequences of these diplomatic acts is to be found entire in the *ordonnance* of January 8, 1817, and in the laws of April 15, 1818, April 25, 1825, and March 4, 1831. It is useless to say that nothing in this legislation authorizes the interference of a foreign power in our proceedings.'" Tom. xiii. p. 96.

Nor were the United States, during the negotiations as to the ratification of the Quintuple Treaty, without a direct interest in the discussions affecting principles for which they were, at the same time, contending. An act was passed in 1839, professedly aimed at Portugal, but which, though repealed in 1842 so far as regards her, is still in force, giving power to any person acting under the authority of the Admiralty or of a Secretary of State, not only to detain for the purpose of examining the

laws of every maritime country, it ought henceforth to be considered as interdicted by the international code of Europe and

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papers, but to seize and capture, the vessels of any nation whatever supposed to be connected with the slave-trade. Indeed, in the debate on the original law, it was admitted that American vessels had already in several instances been seized by British cruisers; but it was contended, by the Earl of Minto (the first Lord of the Admiralty), that no exception had been taken by our government or people to the enforcement by them of our own laws against the slave-trade. And on an important occasion in 1843, Lord Aberdeen stated in the House of Lords, that it was only in February, 1841, that Lord Palmerston gave instructions "to abstain from *capturing* American vessels, not *visiting* or *searching* merely, but *capturing*, American vessels suspected to be slavers." Hansard's Parl. Debates, Third Series, vol. lxviii. p. 659.

In answer to reclamations made by the American Minister in London, for the seizure and detention of vessels belonging to citizens of the United States, Lord Palmerston, under date of August 27, 1841, explicitly claimed a right, and which he avowed the intention of his government to continue to exercise, for British cruisers to examine our vessels, with a view to ascertain by an inspection of papers their nationality; and that they meant that the United States flag should only exempt a vessel from search, when that vessel is provided with the papers entitling her to wear that flag, and proving her to be United States property, and *navigated according to law*.

On Mr. Stevenson's showing that the new pretensions of England, founded on the necessity and expediency of the power, as a means to carry out treaties entered into with other States, were incompatible with the law of nations as expounded in her own courts, Lord Aberdeen replied, October 13, 1841, intimating that Lord Stowell's decisions were no longer authority, but that the change of circumstances, by the happy concurrence of the States of Christendom, in a great object, "not merely justifies, but renders indispensable, the right now claimed and exercised by the British government."

In his note Lord Aberdeen, far from abandoning the claim, says: "It is obvious, therefore, that the utmost caution is necessary in the exercise of the right claimed by Great Britain. While we have recourse to the necessary, and indeed the only, means for detecting imposture, the *practice* will be carefully guarded, and limited to cases of strong suspicion. The undersigned begs to assure Mr. Stevenson that the most precise and positive instructions have been issued to Her Majesty's officers on this subject."

Mr. Stevenson remarks, in his answer of October 21, 1841, that the claim asserted by Lord Palmerston made the commander of every British cruiser the exclusive judge, whether American vessels were "properly provided with papers entitling them to the protection of the flag they wear and proving them to be United States property, and navigating the ocean according to law." In Lord Aberdeen's answer, which was addressed to Mr. Everett under the date of December 20, 1841, he attempted to make the distinction between *visit* and *search*. "The right of search," he said, "is not confined to the verification of the nationality of the vessel, but also extends to the object of the voyage, and the nature of the cargo. The sole purpose of the British cruisers is to ascertain whether the vessels they meet with are really American." As, however, it was not proposed to abandon the claim to detain our vessels, in order that British cruisers might satisfy themselves, by the "inspection of their papers or other proofs," of the genuineness of their character, the distinction was without any practical difference.

America. This opinion first received judicial countenance from the judgment of the Lords of Appeal in Prize Causes, pro-

The transfer of the negotiation to Washington prevented any answer from Mr. Everett; but the attempt to bind us by the acts of other States had already been met by President Tyler, who, in his annual message of December 7, 1841, declared that the "United States cannot consent to interpolations into the maritime code at the mere will and pleasure of other governments," and that "when we are given to understand, as in this instance, by a foreign government, that its treaties with other nations cannot be executed without the establishment and enforcement of new principles of maritime police, to be employed without our consent, we must employ language neither of equivocal import nor susceptible of misconstruction. Whether this government should now enter into treaties containing mutual stipulations upon this subject (the slave-trade), is a question for its mature deliberation. Certain it is, that, if the right to detain American ships on the high seas can be justified on the plea of a necessity for such detention, arising out of the existence of treaties between other nations, the same plea may be extended and enlarged by the new stipulations of new treaties, to which the United States may not be a party."

The provisions respecting the slave-trade in the treaty of Washington, of 1842, were intended to waive the questions, as to which a serious controversy had existed between the United States and Great Britain, in consequence of the latter claiming a right of detaining vessels suspected to be engaged in the slave-trade, for the purpose of ascertaining their nationality. See, with reference to that treaty and the discussions to which it gave rise, Webster's Works, vol. v. p. 142; vol. vi. p. 329; also, Lawrence on Visitation and Search, pp. 38–42, 51–67.

In 1858 discussions between the two countries were renewed in consequence of the system of boarding and searching American vessels, which, at that time, was the more offensive from its being practised on one of the great thoroughfares of the Union, the Gulf of Mexico.

The first note of the American Secretary, General Cass, to the British Minister at Washington, was written on the 4th of May.

In the debates in the Lords on the 17th, and in the House of Commons, of the 18th, of June, it appeared that the government, having taken the opinions of the law-officers of the crown, had determined to yield the doctrine of the right of visit, without insisting on the preliminary adoption of any conventional substitute.

The Earl of Malmesbury had no reason to conceal what he had done since recent events. *He had admitted the international law as laid down by the American Minister for Foreign Affairs, though not, of course, without being fortified by the opinions of the law-officers of the crown.* Mr. Fitzgerald said: "It had become the duty of Her Majesty's government, in consequence of the unfortunate circumstances which had recently transpired, to inquire what were our rights; whether, if we had such rights, we should be prepared to stand by them; and whether, if we had them not, we ought not at once candidly to disclaim them. They had accordingly taken the advice of the law-officers of the crown, whose decided opinion was that by international law we had no right of search, no right of visitation whatever, in time of peace. That being so, he need not say they had thought it would be unbecoming in the British government to delay for one moment the avowal of this conclusion."

In the House of Lords, on the 26th of July, Lord Lyndhurst, after asking for the correspondence with the United States, on the right-of-search question, said that some persons in high positions considered that the proceeding was not justified, and that a most important and valuable right had been sacrificed. "We have surrendered no

nounced in the case of an American vessel, The Amadie, in 1807, the trade having been previously abolished by the munici-

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right at all, for no such right as that contended for ever existed. We have abandoned the assumption of a right, and, in doing so, we have acted justly, prudently, and wisely. I think it is of great importance that this question should be distinctly and finally understood and settled. By no writer on international law has this right ever been asserted. There is no decision of any court of justice having jurisdiction to decide such questions in which that right has ever been admitted. I cannot refer to a better English authority than Lord Stowell. He says: 'I can find no authority that gives the right of interruption to the navigation of States in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals.' Wheaton, the eminent American authority on international law, says: 'It is impossible to show a single passage of any institutional writer on public law, or a judgment of any court by which that law is administered, which will justify the exercise of such a right on the high seas in time of peace, independent of a special compact.' For myself, I have never been able to discover any principle of law or reason upon which such a right could rest. Lord Stowell further says: 'Except by a belligerent power, no such right has ever been claimed, nor can it be exercised without the oppression of interrupting and harassing the real and lawful navigation of other countries; for the right of search, when it exists at all, is universal, and will extend to vessels of all countries.'" Ib. pp. 107, 111, 181.

Nor was it an unfortunate circumstance as regards our reclamations, that the point of international law involved was not abruptly presented to the notice of the British government, and that it had been discussed in a matter, which had no connection with the slave-trade. The case of The Cagliari, arising between Sardinia and Naples, threatening, at least, the peace of the Italian peninsula, and in which England, through the illegal imprisonment of two of her subjects, was incidentally involved, had recently received the attention of the law-officers of the crown. And though there was not an unanimity of opinion on all points arising from the temporary possession of the vessel by Neapolitan rebels, the Attorney-General, basing himself on Lord Stowell's authority, in The Louis, and which was thus prominently brought to view, declared that no suspicion, even of past unlawful conduct, would justify the seizure, in time of peace, on the high seas, by a public armed ship of one country, of a vessel belonging to another.

Nor can the claim of visitation on the high seas be sustained by the practice which has prevailed of exercising an inquiry for fiscal or defensive purposes, in the neighborhood of the coast and beyond the prescribed jurisdictional limits of a nation, such as the hovering laws both of the United States and England authorize. See United States Statutes at Large, vol. i. p. 700. "This," says Lord Stowell, "has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean." And he adds, "A recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied in a manner not very consistent or intelligible with a disclaimer of all right of visitation, was resisted by (the British) government as unlawful, and was finally withdrawn." Dodson's Admiralty Reports, vol. ii. p. 246. The Louis.

That no apprehended inconvenience, on account of the revenue or even public safety, can in time of peace, give a *right* of visitation on the high seas, although near the coasts of a country, if beyond the ordinary maritime jurisdiction, but that such power can only be exercised by the positive or tacit permission of the State to

pal laws of the United States and of Great Britain. The judgment of the court was delivered by Sir William Grant, in the following terms:

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whose subjects the merchantman belongs, is well shown by the eminent civilian, Dr. Twiss, in an opinion which he furnished in 1858 for the guidance of the government of Sardinia.

Having alluded to the American case of The Marianna Flora, (Wheaton's Reports, vol. xi. p. 40,) as establishing the principle that the State which authorizes, by her municipal laws, her cruisers to effect such seizures, incurs a responsibility towards foreign powers in executing such laws, and that if any other State should remonstrate, and resist their application, she must withdraw her claim to enforce them, Doctor Twiss adds: "In ordinary cases, indeed, where a merchant ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* towards the other State with which he is in amity, and to have consequently forfeited any just claim to his protection." As, however, in the case before him, Sardinia did not assent, but claimed a restitution of the vessel taken under her mercantile flag, the king of Naples cannot, he asserts, set up the provisions of his own laws as an answer to a claim made under the law of nations. Lest it might be supposed, that, in this view of the law, a State would be helpless to check or punish outrages on its coasts which do not amount to piracy committed by vessels under the mercantile flag of another State, if such vessels can only escape in time on the high seas, before the cruisers of that State fall in with them; the remedy for such an anomaly, which, he says, is in practice more ideal than real, is found in the *comity of nations*. The privilege of the flag is the privilege of the State; and when there is *mala fides* in the wrongdoers, the State through courtesy waives its privilege, and either permits the State which has been injured to avenge the breach of its laws, through its own tribunals, or will assist it to obtain redress against the wrongdoers before the courts of their own country, if they have in any way made themselves amenable to punishment for a breach of their own laws. Opinion of Dr. Travers Twiss, The Cagliari, Doctors' Commons, March 22, 1858.

It may also be noted, that Dr. Phillimore being likewise called on, on behalf of the Sardinian government, for his opinion, as a jurist, in the case of The Cagliari, cites, as an authority for denying the right of a Sicilian frigate to seize a *bonâ fide* Sardinian vessel on the high seas, Wheaton's "Right of Search." He alludes, at the same time, to the question, as to the right of visitation as distinguished from search, which he says had been formerly much discussed between Great Britain and the United States, but which did not necessarily arise in that case. He not only contends, that, if any offence against the Neapolitan government had been committed by The Cagliari, redress should have been sought by an application to Sardinia, but he also denies the right of seizing on the high seas and treating a foreign vessel as a pirate because, though her nationality is otherwise established, she may not have on board all the papers required by the internal legislation of her own country. Documenti diplomatici communicati al Parlamento nazionale dal presidente del Consiglio dei ministri relativi alla vertenza col governo di Napoli per la cattura del Cagliari. Lawrence on Visitation and Search, pp. 73, 74, 80, 105.

When abandoning the claim of right, Great Britain asked that there should be some arrangement among the maritime States as to how far their officers might go to verify the nature of the flag.

"This ship must be considered as being employed, at the time of capture, in carrying slaves from the coast of Africa to a

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A memorandum of a *projet* suggested by France was delivered, with a verbal note, by her Minister at Washington, to the Secretary of State, 26th of December, 1858. Mr. Cass, in his reply of the 25th of January, 1859, which he states had been delayed in the expectation of receiving a similar proposition from England, says: "France, like the United States, recognizes no right of search or visit upon the high seas, except in time of war. France, like the United States, holds, in the language of your memorandum, that 'an armed vessel cannot visit, detain, arrest, or seize any but such merchant vessel as it ascertains to belong to the same nation to which the armed vessel itself belongs.' France, like the United States, holds, further, that while cases exist of a fraudulent assumption of a flag, the verification of such a case must be made at the peril of the party making it, or, in the words of your memorandum, 'under all circumstances, it is well understood that the armed vessel that may determine to board a foreign merchant vessel does so, in every instance, at its own risk or peril, and stands responsible for all the consequences which may follow the act.' I do not understand that the French government desires to limit this responsibility, or to change, in any way, that rule of international law by which, in time of peace, an honest merchantman is protected on the ocean from any visit, detention, or search whatever. To determine in advance precisely what circumstances may be regarded as a sufficient warrant for doubting the nationality of a merchant ship, appears to me to be quite impossible; and every case may, perhaps, be safely left to be determined by itself." For these reasons Mr. Cass concludes that if the precautionary instructions, given by the different governments most interested in the subject to their naval commanders, were interchanged, a sufficient degree of uniformity might be attained without any special agreement upon a detailed plan. Count Walewski instructed M. de Sartiges, April 13, 1859, to declare to General Cass that the doctrine which he lays down is really that which the government of the Emperor maintains on its part, and that it does not understand in a sense different from that in which they are understood by the American Cabinet those rules which it has proposed for the exercise of the power of inquiring into a flag, and to the adoption of which, by way of temporary instructions to the cruisers of both nations, the British government has just consented.

The *projet* was also submitted, on the part of Great Britain, by Lord Napier, to General Cass, February 3, 1859, and Lord Lyons, in a note of May 9, 1859, to Mr. Cass, referring to the instructions given by France and England to their naval commanders, invites the government of the United States to adopt identically the same. Mr. Cass in reply, under the date of the 12th of May, says: "The responsibility of each government for its respective officers is very much limited by the comparatively small number of cases in which the detention of a merchant vessel can, under any circumstances, occur. The instructions submitted by Lord Napier seem very properly calculated to limit it still further." Before closing his note, Mr. Cass adverts to a passage in the British instructions, which, he says, he does not fully understand. It is the one in which allusion is made to the right of Her Majesty's officers, "to seize and detain vessels engaged in the slave-trade, when not entitled to the protection of any national flag." He suggests that the language may possibly be understood as embracing those vessels which are induced, after capture, to throw their papers overboard. A reference to previous correspondence would show that a comprehensive system of compounding felony had been adopted, for years, on the part of British officers, to

Spanish colony. We think that this was evidently the original plan and purpose of the voyage, notwithstanding the pretence

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protect Americans engaged in the slave-trade from amenability to their own cruisers, by encouraging them to throw their papers overboard, and be taken without any evidence of their nationality. "The reason assigned," General Cass had remarked, in his note to Lord Napier of April 10, 1858, "for this procedure is said to be that the punishment of this offence by the laws of the United States being death, persons found committing it under the American flag, if they cannot escape, prefer to be captured by British cruisers, with the chance of impunity, or, at any rate, of a less penalty than capital punishment. The crew is landed on the nearest part of the coast, while the vessel is sent to an admiralty court for condemnation; and the proceeds, or a considerable portion of them, are distributed as prize-money, and an allowance made for each of the captured slaves; and such slaves, it is understood, are transported, under prescribed regulations defining their condition, to the British tropical possessions in America."

And in a note of July 18, 1859, to the Ministers of France and England, General Cass sends the instructions given by the Secretary of the Navy to the commander of the American squadron on the coast of Africa. Documents accompanying President's Message, 1859-60.

A summary of the American instructions had been prepared for this note; but its insertion is rendered unnecessary, by a change in the policy of the American government, in entering into a treaty, on the 7th of April, 1862, with Great Britain for reciprocal visitation and search in time of peace. This treaty, which was negotiated at Washington by Mr. Seward and Lord Lyons, stipulates that the ships of the respective navies of the two powers, which shall be provided with special instructions for that purpose, may visit such merchant vessels of the two nations as may, upon reasonable grounds, be suspected of being engaged in the African slave-trade, or of having been fitted out for that purpose, or of having, during the voyage on which they are met by the said cruisers, been engaged in the African slave-trade, contrary to the provisions of this treaty; and that such cruisers may detain and send, or carry away, such vessels, in order that they may be brought to trial.

But the right of search is to be exercised by vessels-of-war authorized expressly for that object and only as regards merchant vessels; and it shall not be exercised by a vessel-of-war of either contracting party within the limits of a settlement or port, nor within the territorial waters of the other party.

Whenever a merchant vessel is searched by a ship-of-war, the commander of the said ship shall, in the act of so doing, exhibit to the commander of the merchant vessel the special instructions by which he is duly authorized to search, and shall deliver to such commander a certificate, declaring that the only object of the search is to ascertain whether the vessel is employed in the African slave-trade, or is fitted up for the said trade.

If it appears from the search that the papers of the vessel are in regular order, and that it is employed on lawful objects, the officer shall enter in the log-book of the vessel that the search has been made in pursuance of the aforesaid special instructions; and the vessel shall be left at liberty to pursue its voyage.

The reciprocal right of search and detention is to be exercised only within the distance of two hundred miles from the coast of Africa, and to the southward of the thirty-second parallel of north latitude, and within thirty leagues from the coast of the island of Cuba.

set up to veil the true intention. The claimant, however, who is an American, complains of the capture, and demands from us

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The ships of the two navies employed to prevent the African slave-trade are to be furnished with copies of this treaty and of the instructions for cruisers and the regulations for the mixed courts annexed thereto. The names of the ships furnished with special instructions are to be communicated to the other party.

If at any time the commander of a cruiser of either of the two nations shall suspect that any merchant vessel under the escort or convoy of any ship or ships of war of the other nation carries negroes on board, or has been engaged in the African slave-trade, or is fitted out for the purpose thereof, the commander of the cruiser shall communicate his suspicions to the commander of the convoy, who, accompanied by the commander of the cruiser, shall proceed to the search of the suspected vessel; and in case the suspicions appear well founded, according to the tenor of this treaty, then the said vessel shall be conducted or sent to one of the places where the mixed courts of justice are stationed, in order that it may there be adjudicated upon.

The two high contracting parties engage mutually to make good any losses which their respective subjects or citizens may incur by an arbitrary and illegal detention of their vessels; it being understood that this indemnity shall be borne by the government whose cruiser shall have been guilty of such arbitrary and illegal detention.

It would seem that the constitutional objections made by President Monroe and his Secretary of State, Mr. Adams, to mixed tribunals, are deemed no longer to exist, as it is provided that, in order to bring to adjudication, with as little delay and inconvenience as possible, the vessels which may be detained according to the tenor of this treaty, there shall be established as soon as may be practicable, three mixed courts of justice, formed by an equal number of individuals of the two nations named for this purpose by their respective governments.

The courts shall judge the causes submitted to them according to the provisions of the present treaty, and according to the regulations and instructions which are annexed to it, and which are considered an integral part thereof; and there shall be no appeal from their decision.

If the commander of any of the ships duly commissioned for the purposes of the treaty shall deviate from its stipulations or the annexed instructions, the government wronged may demand reparation; and a punishment proportionate to any wilful transgression is to be inflicted.

It is also provided that every American or British merchant vessel which shall be searched by virtue of the treaty may lawfully be detained, and sent or brought before the mixed courts of justice established in pursuance of the provisions thereof, if in her equipment there shall be found certain things specified in the treaty.

If it be proved that any one or more of these articles is or are on board, or have been on board during the voyage in which the vessel was captured, that fact shall be considered as *prima facie* evidence that the vessel was employed in the African slave-trade; and she shall, in consequence be condemned and declared lawful prize, unless the master or owners shall furnish clear and incontrovertible evidence, proving to the satisfaction of the mixed court of justice that at the time of her detention or capture the vessel was employed in a lawful undertaking, and that such of the different articles above specified as were found on board at the time of detention, or as may have been embarked during the voyage on which she was engaged when captured, were indispensable for the lawful object of her voyage.

the restitution of property, of which, he alleges, that he has been unjustly dispossessed. In all the former cases of this kind which

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And if any one of the articles specified as grounds for the condemnation should be found on board a merchant vessel, or should be proved to have been on board of her during the voyage on which she was captured, no compensation for losses, damages, or expenses consequent upon the detention of such vessel, shall, in any case be granted either to the master, the owner, or any other person interested in the equipment or in the lading, even though she should not be condemned by the mixed court of justice.

If a vessel is condemned by one of the mixed courts of justice, it shall, immediately after its condemnation, be broken up entirely, and shall be sold in separate parts, after having been so broken up, unless either of the two governments should wish to purchase it for the use of its navy, according to the provisions of the treaty.

The captain, master, pilot, and crew of any vessel condemned by the mixed courts of justice, shall be punished according to the laws of the country to which such vessel belongs, as shall also the owner or owners, and the persons interested in her equipment or cargo, unless they prove that they had no participation in the enterprise.

For this purpose, the two high contracting parties agree that, in so far as it may not be attended with grievous expense and inconvenience, the master and crew of any vessel which may be condemned by a sentence of one of the mixed courts of justice, as well as any other persons found on board the vessel, shall be sent and delivered up to the jurisdiction of the nation under whose flag the condemned vessel was sailing at the time of capture; and that the witnesses and proofs necessary to establish the guilt of such master, crew, or other persons, shall also be sent with them

The same course shall be pursued with regard to subjects or citizens of either contracting party who may be found by a cruiser of the other on board a vessel of any third power, or on board a vessel sailing without flag or papers, which may be condemned by any competent court for having engaged in the African slave-trade.

The negroes who are found on board of a vessel condemned by the mixed courts of justice, shall be placed at the disposal of the government whose cruiser has made the capture; they shall be immediately set at liberty and shall remain free, the government to whom they have been delivered guaranteeing their liberty. National Intelligencer, June 10, 1862.

The provisions of this treaty, especially those as to suspicious articles found on board of vessels, are identical with the corresponding provisions of the Quintuple Treaty of 1841, which France refused to ratify. That treaty contemplated no mixed court, but in case of the capture of a merchant vessel of one of the parties by a cruiser of another, the proceedings were to be before the competent tribunals of the place into which it was brought, which had been designated for that purpose by the contracting parties. See Martens, par F. Murhard, Nouveau Recueil, tom. ii. p. 508.

The 4th section of the act of May 15, 1820, (United States Statutes at Large, vol. iii. p. 600,) making the slave-trade piracy, only applies to negroes or mulattoes. As Las Casas, with a view of rescuing from bondage the aboriginal inhabitants of Hispaniola, inaugurated the trade in negroes, so the philanthropists of England and France have attempted to provide for the deficiency of labor occasioned by the abolition of the African slave-trade and the emancipation of the West-India negroes, by importing the natives of Asia, and especially of China, to supply the requisite

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.

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demand. The practical consequences of this traffic, in many respects more repugnant to the principles of humanity than the old slave-trade, have been disclosed in the documents published by Parliament, an examination of which will be found in the Editor's Essay on Visitation and Search, p. 155.

Though not applying to the Coolie trade the same punishment as is attached to the African slave-trade, the United States have, by the act of February 19, 1862, prohibited it to American citizens and to foreigners coming into or residing in the United States, under the penalty of the forfeiture of the vessel, and fine and imprisonment of the parties equipping it and sending it to sea, and have also subjected the owners and masters to a fine and imprisonment, for receiving on board or transporting Coolies, unless there is a certificate of an American consul as to their voluntary emigration. National Intelligencer, February 22, 1862.

For a fuller examination of the subject of this note, the editor would refer to the Spanish treatise of Riquelme, and to Hautefeuille's work so frequently cited. The former of the two last-mentioned authors, alluding to the treaties of 1817 and 1835, with England, says: "The arbitrary treatment to which, by this right of visit the Spanish merchant vessels on the coast of Africa are exposed, united with the other abuses to which the creation of mixed commissions has given rise, has put an end to our commerce in that part of the world; and which will not be restored as long as the blind abolitionist fanaticism of England, and the patient tolerance of other nations, last." Elementos de Derecho Publico Internacional, lib. i. tit. 2, cap. 7°, tom. i. p. 236. The second edition of Droits des Nations Neutres, published after the renunciation by England, in 1858, of the right of visitation, condemns any conventional arrangement that might be proposed, even for the verification of the nationality of the flag in peace, as a concession of the right of police over its flag, which every nation ought to preserve intact. Tom. iii. tit. 11, ch. 2, sect. 3, p. 107. — [L.

"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 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." [1]

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 recognized. 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 Amadie 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

[1] Acton's Admiralty Reports, vol. i. p. 240.

country whose tribunals were called upon to consider it, might subject the vessels employed in that trade to confiscation. The Amadie 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," continued Lord Stowell, "is not for me to inquire. *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 Amadie will bind the conscience of this court to the effect of compelling it to pronounce a sentence of confiscation."[1]

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 Amadie. 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 Admi-

[1] Dodson's Admiralty Reports, vol. i. p. 81.

ralty 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 Amadie 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.[1]

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.

In the case of The Diana, Lord Stowell had sought to distinguish the circumstances of that case from those of The Amadie, so as to raise a distinction between the case of the subjects of a country which had already prohibited the slave-trade, from 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 Amadie, 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

[1] Dodson's Admiralty Reports, vol. i. p. 95.

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.[1]

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

[1] Dodson's Admiralty Reports, vol. ii. p. 210.

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.[1]

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 by Mr. Chief Justice Marshall, in delivering 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 labor, 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 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.

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[1] Barnwell's & Alderson's Reports, vol. iii. p. 353.

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 favor 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 devested 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.[1] [85

§ 16. 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 everything 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.[2]

§ 17. Distinction between the rule of decision and the rule of procedure as affecting cases *in rem*.

A similar rule applies to all civil proceedings *in rem*, respecting 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 prescrip-

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[1] Wheaton's Rep. vol. x. p. 66. The Antelope.

[85] The French adjudications correspond with those of the English and American courts, as to the absence of all jurisdiction over foreign vessels engaged in the slave-trade. Such was the decision of the *Commission des prises* of the Isle of Bourbon, 10th December, 1840, in the case of The Pocha, a Portuguese brig captured both as a pirate and a slaver. On the latter charge, the commission said that, however culpable the acts of the captain and crew might have been, they are not punishable by the French tribunals; "because no convention between France and Portugal authorizes the capture of slave-ships and the punishment of their captains and crews." A similar decision was made on 31st of March, 1847, in the case of The Notre-Dame-de-Grace. It had been decided by the Commission of Prizes of Martinique in the case of The Jean d'Arc against the American schooner Ploughboy, 27th February, 1824, which was taken as a pirate, but which appeared to be a slaver, that, as to the charge of being engaged in the slave-trade, the commission is of opinion that it is not cognizable before the tribunals of the colonies, neither American nor other foreign vessels being, on that account, justiciable by French authorities. De Pistoye et Duverdy, Traité des Prises, tom. i. p. 75.] —*L.*

[2] Vide supra, § 3, p. 116.

tion 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; [86 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.

Succession to personal property *ab intestato*.

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. [87 It is the duty of every gov-

[86 It was decided by the Lords of Appeal in the case of the will of an Englishwoman, who had resided uninterruptedly fifteen years in Paris, but had not been naturalized, nor obtained an authorization to reside there under the 13th article of the Code Civil, that as it had not been executed according to the French law it was void. The authorization is not required by the *jus gentium*. Moore's Privy Council Cases, vol. x. p. 36. Bremer *v.* Freeman. Phillimore's International Law, vol. iv. p. 207.] — *L.*

[87 It was held, in 1855, that letters of administration granted by the Surrogate of New York to a resident there, as the attorney of Count Rossi, the husband of Henrietta Rossi, (Sontag,) described as late of Vienna, Austria, were not sufficient to authorize the payment to such administrator, of the interest of United States stocks standing in her name. "Whether or not Count Rossi is entitled to administer on the estate of his deceased wife, in pretended right of pecuniary interest in that estate, as distinguished from the mere *jus mariti*, depends not only on what may be the general law of Austria in this respect, but also upon sundry facts which can only be legally known to, or, at any rate, duly examined by, the courts of Austria: such as, for example, whether by ante-nuptial contract between the Count and Countess Rossi, or otherwise, there was either community or separation of their estates; and whether or not there was a lawful testament of the Countess Rossi." Besides, granting letters of administration in New York is regulated by statute, and cannot be given to one not a citizen of the United States, unless a resident; and Count Rossi being thus himself incompetent could not delegate any vicarious or representative competency to another. It subsequently appeared that Count Rossi had a double residence, that of Sardinia by birth, public employments, and political rights, and that of Austria by actual residence. His wife's domicile followed his, and so did the domicile of his children; and probably if any conflict of laws existed in the case, the right would have to be determined by the laws of Sardinia, as the political domicile of Count Rossi, of his children, and of the Countess herself. In conformity with these views the Treasury Department directed the payment due on Madame Sontag's stock, not under the letters of administration, but upon the authenticated judicial proceedings in Europe declaring the laws of the place of domicile and the rights of succession to

ernment 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.[1]

Foreign will, how carried into effect in another country.

Though the forms in which a testament of personal property, made in a foreign country, is to be executed, are regulated by the local law, 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.[2]

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 personal property in another State belonging to the succession, without having his authority confirmed by the local tribunal.

§ 18. 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.

Whatever doubts may exist as to the conclusiveness of foreign sentences in respect of facts collaterally involved in the judg-

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the property of Madame Sontag Rossi. Mr. Cushing, March 28, 1855, May 31, 1855. Opinions of Attorneys General, vol. vii. pp. 68, 240.] — *L.*

[1] Kent's Comm. on American Law, 5th ed. vol. ii. pp. 431, 432, and the cases there cited.

[2] Wheaton's Rep. vol. xii. p. 169. Armstrong *v.* Lear. Code Civil, liv. iii. tit. 2, art. 1000.

ment, 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.

Transfer of property under foreign bankrupt proceedings.

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 coördinate 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 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.[1]

The practice of the English Court of Chancery, in assuming jurisdiction incidentally of 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.

But whatever effect may, in general, be attributed to the as-

[1] See Lord Eldon's Observations in Selkrig *v.* Davies, Rose's Cases in Bankruptcy, vol. ii. p. 311. Vesey's Rep. vol. ix. p. 77. Banfield *v.* Solomon.

signment 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.[1] [88

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[1] Kent's Comm. on American Law, vol. ii. pp. 404–408, 5th ed.

[88] "In this country there is some diversity of opinion among the State courts, whether a bankrupt law, in regard to personal property, has an extra-territorial operation. That it has such operation is a doctrine which seems to be well settled in England by numerous decisions.

"It is held in England, that an assignment of personal property under the bankrupt law of a foreign country passes all such property and debts owing in England; that an attachment of such property by an English creditor, with or without notice, after such an assignment, is invalid. And the doctrine is there established, that an assignment under the English bankrupt law transfers the personal effects of the bankrupt in foreign countries. But an attachment by a foreign creditor, not subject to British laws, under the local laws of a foreign country, is held valid. The principle on which this doctrine rests is, that the personal estate is held as situate in that country where the bankrupt has his domicile.

"A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment, when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment.

"But it is an admitted principle in all countries where the common law prevails, whatever views may be entertained with regard to personal property, that real estate can be conveyed only under the territorial law.

"This doctrine has been uniformly recognized by the courts of the United States, and by the courts of the respective States. The form of conveyance adopted by each State for the transfer of real property must be observed. This is a regulation which belongs to the local sovereignty.

"As, under the Constitution, Congress exercised an exclusive jurisdiction over the subject of bankruptcy; the same rule of procedure extended throughout the Union. But the act of Congress could have no extra-territorial effect. Texas was an independent republic at the time of the decree in bankruptcy, and consequently no claim under it, even as regards personal property in that republic, could be made, except on the ground of comity. And on our own principles, this could not be done to the injury of local creditors.

"It is believed that no sovereignty has at any time assumed the power, by legislation or otherwise, to regulate the distribution or conveyance of real estate in a foreign government. There is no pretence that this government, through the agency of a bankrupt law, could subject the real property in Texas, or in any other foreign government, to the payment of debts. This can only be done by the laws of the sovereignty where such property may be situated." Howard's Rep. vol. xi. p. 44. Oakley *v.* Bennett.

§ 19. 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.

The claim of the assignee in bankruptcy under the law of the United States, is preferred to that of a receiver in chancery under a State law, appointed on the application of an individual creditor prior to the bankruptcy, that is to say, to the right of the receiver, in virtue of a lien which he claims upon the property of the debtor, to sue for and recover any part of it, legal or equitable, without the jurisdiction of the State of New York. Howard's Rep. vol. xvii. pp. 322, 330. Booth *v.* Clark.

"A bankrupt must be declared such in his domicile, or at least in the place or country where he has a house of business. When bankruptcy is declared in the domicile, the rule is that all movable or chattel property of the bankrupt, wherever situate, including debts wherever due to him, is brought under the administration; and in most continental countries his immovable property or land also. Land, in the British empire, is not suffered to be administered in a foreign bankruptcy, though chattel property is; but a British bankruptcy is allowed to affect land on the continent, notwithstanding the want of reciprocity in that respect. There are not separate assignees, trustees, curators, or syndics, appointed in each country where any part of the estate may be found, not even as subordinate or assisting to those appointed in the domicile, but those appointed in the domicile collect the estate everywhere, and cause its proceeds to be remitted for distribution at home. In the United States a foreign bankruptcy is not held to preclude the diligence of individual creditors, but they can attach the bankrupt's property as well after as before it; and so also it is between a bankruptcy in one of the States and individual diligence in others. Subject to this exception, the foreign assignees could in theory collect any debts due to their bankrupt, and still unpaid, and take from him the chattel property which might remain in him. But there is a growing tendency to limit the cases in which the title of foreign assignees will be respected by the American courts for any purpose.

"The general rules as they exist in British and American jurisprudence refuse to a foreign bankruptcy any operation upon land. In the United Kingdom formerly, an English bankruptcy could not affect heritable estate in Scotland, nor a Scotch one English real estate. But by the Bankrupt Law Consolidation Act, 1849, § 142, the assignees in an English bankruptcy take the bankrupt's real estate throughout the British dominions as well home as colonial; and a similar extent was given to the operation of Scotch sequestrations by the Bankruptcy (Scotland) Act, 1856, § 102, and to that of Irish proceedings by the Irish Bankrupt and Insolvent Act, 1857, § 268. Except in India, bankruptcies in the British dependencies do not comprise land beyond their respective jurisdictions, but the case has been provided for by a system of concurrent local bankruptcies. No provision has yet been made for bringing British real estate within the operation of a strictly foreign bankruptcy."

The combined effect of the act of 1848, 11 & 12 Vict. c. 21, for consolidating and amending the laws relating to insolvent debtors in India, with the 75th section of the Bankrupt Law Consolidation Act, 1849, was that, on the occurrence of an Indian insolvency, the whole real and personal estate of the debtor throughout the British dominions should vest in the assignees, subject however, as to all the real and personal

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 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

Law of England and America.

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estate in England, as well as all other parts of the British dominions except India, not already administered, to an adjudication of bankruptcy, within a certain time, in England. The bankruptcy act of 1861, 24 & 25 Vic. c. 134, has given to individual creditors a similar power of obtaining an English adjudication, against any person otherwise subject thereto, on the strength of an adjudication of bankruptcy in any of Her Majesty's dominions, colonies, or dependencies. On the same principles, an act of bankruptcy in England or Ireland is made to constitute an act of bankruptcy in Scotland, by section 7 of the act of 1856; while the occurrence of an Indian insolvency or the filing of a petition of insolvency in England or Scotland was made an act of bankruptcy in Ireland by sections 100, 101, of the act of 1857. Westlake on the International Aspects of Bankrupt Laws. Transactions of the National Association for the Promotion of Social Science, 1861, pp. 778, 782.] —*L.*

generally followed; and personal actions must therefore be brought in the tribunals of the place where the defendant has acquired a fixed domicile.

By the law of France, foreigners who have estab- French law. lished their domicile in the country by special license (*autorisation*) of the king, 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: —

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.[1]

A late excellent writer on private international law considers 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 inconsistent with the European law of nations. The Roman law had recognized 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 recognizes the right of foreigners to contract within the territorial limits of another State. This right necessarily draws

[1] Code Civil, arts. 13, 14, 15. Code de Commerce, art. 631. Discussions sur le Code Civil, tom. i. p. 48. Pothier, Procédure Civile, partie i. ch. 1, p. 2. Valin sur l'Ord. de la Marine, tom. i. pp. 113, 253, 254. Pardessus, Droit Commercial, Part. VI. tit. 7, ch. 1, § 1.

after it the authority of the local tribunals to enforce the contracts thus made, whether the suit is brought by foreigners or by citizens.[1]

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. 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 ratable 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 concursûs creditorum*, which is the place of the debtor's domicile.

§ 20. Distinction between the rule of decision and rule of proceeding, 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. [[89] 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

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[1] Fœlix, Droit International Privé, §§ 122, 123.

[[89] Including the statutes of limitations, which are those of the country where the suit is brought, and not those of the *lex loci contractus*. Howard's Rep. vol. ix. p. 407. Townsend *v.* Jamison. See for an examination of the different rule governing on this point on the continent of Europe, as well as for the doctrine in England and Scotland, which is the same as in the United States, — Westlake, Private International Law, §§ 250, 251, 252. Fœlix, Droit International Privé, tom. i. § 100. Also Phillimore on International Law, vol. iv. p. 571.

Savigny says: "According to the true principles, it is not the law of the place where the suit is brought, but the law of the place of the obligation, which determines the time of prescription; and this rule, established for exceptions in general, is more especially adapted to prescriptions, because the different motives on which it is founded are essentially connected with the essence of the obligation itself." Savigny, Droit Romain par Guenoux, tom. viii. ch. 1, § 373, p. 270.] — *L.*

lex domicilii, or the *lex loci contractus*, and whatever belongs to the remedy for enforcing the contract is regulated by the *lex fori*.

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 recognized as forming essential ingredients in the capacity to contract.[1]

[1] Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 2, § 1.

Bankruptcy.

How far bankruptcy ought to be considered as a privilege or 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 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 authorize imprisonment for every description of debts.[1] [90]

The obligation of the contract consists of the will of the parties, expressed as to its terms and conditions.

The interpretation of these depends, of course, upon the *lex*

[1] Bosanquet & Puller's Rep. vol. i. p. 131. Melan *v.* The Duke of Fitz-James.

[90] Arrest of the body in England is now held to depend exclusively on the *lex fori* and not on the *lex loci contractus*. Westlake, § 411. Phillimore, vol. iv. p. 702.] —*L.*

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. 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 control the *lex loci contractus*.[1]

The external form of the contract constitutes an essential part of its obligation.

This must be regulated by the law of the place of 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 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. [91

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*. [92

§ 21. Conclusiveness of foreign

The most eminent public jurists concur in asserting the principle that a final judgment, rendered in a per-

[1] Kent's Comm. on American Law, vol. ii. p. 459, 5th edit. Fœlix, Droit International Privé, § 85.

[91] The modern rule is otherwise. If, for want of a stamp, a contract made in a foreign country is void, it cannot be enforced in England. Westlake, § 176. Phillimore, vol. iv. p. 162. Both cite Bristow v. Sequeville (1850), 5 Exchequer Rep. 275. See, also, Story on Conflict of Laws, § 260, p. 216, note.] — *L.*

[92] See Phillimore, vol. iv. p. 662. Westlake, § 172.] — *L.*

judgments in personal actions.

sonal 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.[1]

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.[2] 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.[3]

Law of England.

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 judicatæ*, 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 evidence 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.[4] [93

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[1] Vattel, liv. ii. ch. vii. §§ 84, 85. Martens, Droit des Gens, §§ 93, 94, 95. Klüber, Droit des Gens, § 59. Deutsche Bundes Recht, § 366.

[2] Kent's Comm. vol. ii. p. 119, 5th edit.

[3] Fœlix, §§ 292-311.

[4] Knapp's Rep. in the Privy Council, vol. i. p. 274, Frankland *v.* McGusty;

[93] A judgment sued on in England must be proved, in the manner pointed out by

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 by the laws of that State where it was obtained; that is, it has the conclusive effect of a domestic judgment.[1] American law.

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.[2] Law of France.

The execution of foreign judgments *in personam* is reciprocally allowed, by the law and usage of the different States of the Germanic Confederation, and 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.[3]

Barnewall & Adolphus's Rep. vol. ii. p. 757, Novelli *v.* Rossi; Ib. vol. iii. p. 951, Becquet *v.* M'Carthy.

[1] Cranch's Rep. vol. vii. pp. 481–484, Mills *v.* Duryee. Wheaton's Rep. vol. iii. p. 234, Hampton *v.* M'Connel.

[2] Code Civil, arts. 2123, 2128. Code de Procédure Civil, art. 546. Pardessus, Droit Commercial, Part. 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.

[3] Fœlix, Droit International Privé, §§ 293–311.

the statute 14 & 15 Vict. c. 99, § 7; and to sustain the action, the examined or authenticated copy must be that of the judgment itself. Westlake, § 375, p. 363. See decisions on the effect of foreign judgments in England, 1830–60. Phillimore, vol. iv. p. 695.] — *L.*

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 recognize 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.[1] [94

In the most recent English decision on this subject, the House of Lords, sitting as a Court of Appeals 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.[2] [95

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[1] Dow's Parliamentary Cases, vol. i. p. 117; Tovey *v.* Lindsay, p. 124. Lolly's case. See Fergusson's Reports of Decisions in the Consistorial Courts of Scotland, *passim*.

[94 Since the act of 20 & 21 Vict. c. 85, which went into operation 1st of January, 1858, the "Court for Divorce and Matrimonial Causes" is authorized for the causes specified in the act to grant a total divorce or dissolution of marriage. Stephens's (Blackstone's) Commentaries on the Laws of England, vol. ii. pp. 250, 288.] — *L.*

[2] Warrender *v.* Warrender, Bligh's Rep. vol. ix. p. 89. S. C., Clark & Finnelly's Rep. vol. ii. p. 488.

[95 See Phillimore, vol. iv. p. 346. The *status* of parties domiciled subjects of and married in America, is not so affected by a sentence pronounced at and founded on a

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 recognized as sufficient by the local law, without regard to the law of that State where the marriage was originally contracted.[1] 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.[2] [[96]

CHAPTER III.

RIGHTS OF EQUALITY.

§ 1. Natural equality of States modified by compact or usage.

THE natural 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 external objects such as rank, titles, and other ceremonial distinctions.

§ 2. Royal honors.

Thus the international law of Europe has attributed to certain States what are called *royal honors*, which are actually enjoyed by every empire or kingdom in Europe, as

rule of law peculiar to Rome, the persons being then resident at Rome and coming subsequently to England, that an English forum would, by reason of such sentence, refuse to entertain questions arising out of the married state of such persons. Moore's P. C. Rep. vol. vii. p. 438. Connelly *v.* Connelly.] — *L.*

[1] Dorsey *v.* Dorsey, Chandler's Law Reporter, vol. i. p. 287.

[2] Kent's Comm. vol. ii. p. 107, 5th edit.

[[96] A foreigner validly divorced in his domicile of origin, cannot contract a new marriage in a country where divorce is abolished. Heffter, Das europäische Völkerrecht, § 37. This would seem to apply in principle only to those countries which had never admitted divorce, deeming the marriage of a divorced person as adulterous, and treating it as Turkish polygamy would be in a Christian country, and not to those which hold that divorce is morally lawful, but that it is inexpedient to provide regular means for obtaining it. The French law of 1816, which abolished divorce, permitted the marriage of persons who had been divorced before its date, though their former consorts still lived. Merlin (Questions de Droit, Divorce, § 13,) contends that a jurisprudence which merely refuses the means of divorce, without condemning the marriage of a divorced person, ought to have been taken to accept the status of a foreigner who has been lawfully divorced in his own country; but the Royal Court of Appeal at Paris, in 1824, held otherwise. Westlake, Private Inter. Law, § 350, p. 332.] — *L.*

the Pope, the grand duchies in Germany, and the Germanic and Swiss Confederations. They were also formerly conceded to the German Empire, and to some of the great republics, such as the United Netherlands and Venice.

These *royal honors* entitle the States by which they are possessed to precedence over all others who 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.[1]

§ 3. Precedence among princes and States enjoying royal honors.

Among the princes who enjoy this rank, the Catholic powers concede the precedency to the Pope, or sovereign pontiff; but Russia and the Protestant States of Europe consider him as Bishop of Rome only, and a sovereign prince in Italy, and such of them as enjoy royal honors refuse him the precedence.

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 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 may be considered questionable.[2]

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 great Republics.

The text-writers commonly assigned to what were called the *great republics*, who were entitled to royal honors, 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 en-

[1] 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. 1, ch. 3, §§ 91, 92. Heffter, Das europäische Völkerrecht, § 28.

[2] Martens, § 152. Klüber, § 95.

titled to royal honors. 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.[1]

Those monarchical sovereigns who are not crowned heads, but who enjoy royal honors, concede the precedence on all occasions to emperors and kings.

Monarchical sovereigns who do not enjoy royal honors yield the precedence to those princes who are entitled to these honors.

Semi-sovereign or dependent States rank below sovereign States.[2]

Semi-sovereign States, and those under the protection or *Suzeraineté* 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 honors.[3]

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

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[1] Treaty of Campo Formio, art. 23, and of Luneville, art. 17, with Austria. Treaties of Basle with Prussia and Spain. Schoell, Histoire des Traités de Paix, tom. i. p. 610, edit. Bruxelles.

[2] Klüber, § 98.

[3] Heffter, Das europäische Völkerrecht, § 28, No. III.

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.[1]

§ 4. Usage of 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.[2]

Another expedient which has frequently been adopted to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing in the order assigned by the *French* alphabet to the respective powers represented by their ministers.[3]

§ 5. Language used in diplomatic intercourse.

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

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[1] Klüber, Acten des Wiener Congresses, tom. viii. pp. 98, 102, 108, 116.

[2] Annexe, xvii. à l'Acte du Congrès de Vienne, art. 7.

[3] Klüber, Uebersicht der diplomatischen Verhandlungen des Wiener Congresses, § 164.

Spain contributed to the general diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, has been 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 Confederation, 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 Germanic Confederation 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.

§ 6. Titles of sovereign princes and States.

All sovereign princes or States may assume whatever titles of dignity they think fit, and may exact from their own subjects these marks of honor. 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.[1] So also 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 1759, 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

[1] Ward's History of the Law of Nations, vol. ii. pp. 245–248. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 1, ch. 2, § 107, note c.

insisted on, and a stipulation entered into by Russia in the form of *Reversales*, that this change of title should make no alteration in the ceremonies observed between the two courts. On the accession of the Empress Catharine II. in 1762, she refused to renew this 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.[1] [97

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[1] Flassan, Histoire de la Diplomatie Française, tom. vi. liv. iii. pp. 328–364.

[97 There is a special protocol, of the Congress of Aix la Chapelle, of the five powers, of the 11th of October, 1818, which states that the conference has been informed of the intention of His Royal Highness . . . to take the title of King. The ministers of the five cabinets declare that having met to consolidate the existing order of things and not to create new combinations, considering besides that the title borne by a sovereign is not a matter of simple etiquette, but attaches itself to essential relations and to important political questions, they are of opinion that in their collective capacity, they cannot pronounce on the application. They separately declare that the demand of His Royal Highness . . . is not justified by any sufficient motive, and that there is nothing that can induce them to accede to it. The cabinets, at the same time, enter into an engagement not to acknowledge for the future any change in the titles of sovereigns, nor in those of the princes of their houses, without their having been previously agreed on.

They maintain what has been decided in this matter to the present time by formal acts. The five cabinets explicitly apply this last reservation to the title of Royal Highness, which they will hereafter admit only for the Chiefs of the Grand Ducal houses, the Elector of Hesse included, and for their presumptive heirs. Heffter, Droit International, par Bergson, § 30, p. 60, note.

Sovereigns are in the habit of addressing each other as *Monsieur mon frère*, and such, on occasion of the elevation of Napoleon III., was the form used by Austria, Prussia, and the other European powers, except Russia. The Czar styled the Emperor *Mon cher ami*, which was supposed to negative Napoleon's claim to be admitted into the fraternity of monarchs. No point was raised by France, and the Russian Ambassador was received in the usual form. Annual Register, 1853, p. 211].

The title of King of Italy, was assumed, in 1861, by the king of Sardinia, in accordance with the vote of his parliament, and was notified to foreign courts by the several Sardinian legations. The English Minister of Foreign Affairs, referring, in a dispatch to the Minister at Turin, to the receipt of the communication, advised him that no new letters of credence were necessary.

The recognition of the new title by Great Britain and France has been noticed as well as, in connection with the action of his parliament, the hesitation of the king of Prussia in that respect. Of the other great powers Russia and Austria still withhold

The title of Emperor, from the historical associations with which it is connected, was formerly considered the most eminent and honorable among all sovereign titles; but it was never regarded by other crowned heads as conferring, except in the single case of the Emperor of Germany, any prerogative or precedence over those princes.

§ 7. 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 is 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 harbor.

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 honors to be rendered by the latter to foreign ships. These

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their assent, as does Spain. Besides England and France, the "King of Italy" had, prior to the commencement of the present year, been acknowledged by the United States and other American States, and by Switzerland, Greece, Turkey, Portugal, Sweden and Norway, Denmark and the Netherlands. Almanach de Gotha, 1862, p. 619.

The Ministers of some of the German powers, at Frankfort, refused to receive from the Minister of Italy near the Diet letters rogatory and other judicial papers, connected with private interests, to be transmitted to their respective States, because the packages had the seal of "the Legation of His Majesty the King of Italy," a title which, Count Cavour said, was the only possible one for his representatives, as it is prescribed to them by a law, which had received the sanction of the constitutional powers of their country. In consequence, the Minister of Foreign Affairs addressed, the 29th of May, to the Minister of Prussia at Turin, who was unofficially charged with the protection of the interests of the subjects of those States of the German Confederation who, from whatever cause, had no diplomatic representative in Italy, to inform him that his sovereign, not being able to remain indifferent to offensive acts evidently aimed at the dignity of his crown, had decided to withdraw his exequatur from the consular agents in Italy, of Bavaria, Wurtenburg, and Mecklenburg. Le Nord, 16 Juin, 1861.] — *L.*

regulations are established either by its own municipal ordinances, or by reciprocal treaties with other maritime powers.[1]

Where the dominion claimed by the State is contested by foreign nations, as in the case of Great Britain in the narrow seas, the maritime honors to be rendered by its flag are 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 honors 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.[2] [98

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[1] 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.

[2] J. H. W. Schlegel, Staats Recht des Königreichs Dänemark, 1 Theil, p. 412. Martens, Nouveau Recueil, tom. viii. p. 73. Ortolan, Diplomatie de la Mer, tom. i. liv. 2, ch. 15.

[98 In what is not to be found in the naval ordinances of their country, commanders of public ships will be regulated by the point of military honor and the sentiment of national dignity. "The ceremonial is no longer a sign of dominion, an occasion for the collision of rival pretensions of supremacy; but an exchange of courtesies, which demands tact, discernment, and, oftentimes, an elevated sentiment of the (*convenances*) proprieties of life." For the controversies growing out of English pretensions in former times in the British seas, as well as for the rules regulating maritime ceremonials at the present day, see the chapter of Ortolan, on that subject referred to in Mr. Wheaton's note. Diplomatie de la Mer, *in loc. cit.* — *L.*

CHAPTER IV.

RIGHTS OF PROPERTY.

§ 1. 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.

§ 2. 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.

§ 3. 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;[1] 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.

§ 4. Prescription.

The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, 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

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[1] Vattel, Droit des Gens, liv. i. ch. 20, §§ 235, 244. Rutherforth's Inst. of Natural Law, vol. ii. ch. 9, § 6. Heffter, Das europäische Völkerrecht, §§ 64, 69, 70.

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 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.[1] [99

§ 5. Conquest and discovery confirmed by compact and the lapse of time.

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 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

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 4. Puffendorf, Jus Naturæ et Gentium, lib. iv. cap. 12. Vattel, Droit des Gens, tom. i. liv. ii. ch. 11. Rutherforth's Inst. of Natural Law, vol. i. ch. 8; vol. ii. ch. 9, §§ 3, 6.

"Sic qui rem suam ab alio teneri scit, nec quicquam contradicit multo tempore, is nisi causa alia manifeste appareat, non videtur id alio fecisse animo, quam quod rem illam in suaram rerum numero esse nollet." Grotius, *in loc. cit.*

[99 This same principle was recognized as the rule, in the suit of Rhode Island against Massachusetts, in reference to the northern boundary of the former State, decided in 1846. The Court said: — "No human transactions are unaffected by time. Its influence is seen over all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which, consequently, fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary." Howard's Rep. vol. iv. p. 639. Rhode Island *v.* Massachusetts.] — *L.*

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.

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.[1]

Dispute between Great Britain and Spain, relating to Nootka Sound.

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

[1] Wheaton's Rep. vol. viii. pp. 571–605. Johnson *v.* M'Intosh.

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.[1]

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 Ooroop, 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

[1] 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.

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 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 shut 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 asserting 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.[1]

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, containing the following stipulations: —

"Art. 1. It is agreed that, in any part of the great ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles: —

"Art. 2. With the view of preventing the rights of navigation and of fishing, exercised upon the great ocean by the citizens and subjects of the high contracting powers, from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the governor or commander; and that, reciprocally, the subjects of Russia shall not resort, without permission, to any establishment of the United States upon the north-west coast.

"Art. 3. It is moreover agreed, that hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the north-west coast of America, nor in any of the islands adjacent, to the *north* of fifty-four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, *south* of the same parallel.

"Art. 4. It is, nevertheless, understood, that, during a term of

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[1] Annual Register, vol. lxiv. pp. 576–584. Correspondence between Mr. Secretary Adams and Mr. Poletica.

ten years, counting from the signature of the present Convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hinderance whatever, the interior seas, gulfs, harbors, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country."

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 the following stipulations: —

"Art. 1. It is agreed that the respective subjects of the high contracting parties shall not be troubled or molested in any part of the ocean commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such part of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following articles: —

"Art. 2. In order to prevent the right of navigating and fishing, exercised upon the ocean by the subjects of the high contracting parties, from becoming the pretext for an illicit commerce, it is agreed that the subjects of His Britannic Majesty shall not land at any place where there may be a Russian establishment, without the permission of the governor or commandant; and, on the other hand, that Russian subjects shall not land without permission, at any British establishment on the north-west coast."

By the 3d and 4th articles it was agreed that "the line of demarcation between the possessions of the high contracting parties upon the coast of the continent and the islands of America to the north-west," should be drawn from the southernmost point of Prince of Wales's Island, in latitude 54 degrees 40 minutes eastward, to the great inlet in the continent called Portland Channel, and along the middle of that inlet to the 56th degree of latitude, whence it should follow the summit of

the mountains bordering the coast, within ten leagues north-westward, to Mount St. Elias, and thence north, in the course of the 141st meridian west from Greenwich, to the Frozen Ocean, "which line shall form the limit between the Russian and the British possessions in the continent of America to the north-west."

"Art. 5. It is, moreover, agreed that no establishment shall be formed by either of the two parties within the limits assigned by the two preceding articles to the possessions of the other. Consequently, British subjects shall not form any establishment, either upon the coast, or upon the border of the continent comprised within the limits of the Russian possessions, as designated in the two preceding articles; and, in like manner, no establishment shall be formed by Russian subjects beyond the said limits.

"Art. 6. It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the interior of the continent, shall forever enjoy the right of navigating freely, and without any hinderance whatever, all the rivers and streams which in their course towards the Pacific Ocean may cross the line of demarcation upon the line of coast described in article 3 of the present convention.

"Art. 7. It is also understood, that, for the space of ten years from the signature of the present Convention, the vessels of the two powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hinderance whatever, all the inland seas, gulfs, havens, and creeks on the coast, mentioned in article 3, for the purpose of fishing and trading with the natives.

"Art. 8. The port of Sitka, or Novo Archangelsk, shall be open to the commerce and vessels of British subjects for the space of ten years, from the date of the exchange of the ratifications of the present Convention. In the event of an extension of this term being granted to any other power, the like extension shall be granted also to Great Britain.

"Art. 9. The above-mentioned liberty of commerce shall not apply to the trade in spirituous liquors, in fire-arms, or other arms, gunpowder or other warlike stores; the high contracting parties reciprocally engaging not to permit the above-mentioned articles to be sold or delivered, in any manner whatever, to the natives of the country.

The 10th and 11th articles contain regulations respecting British or Russian vessels, navigating the Pacific Ocean, and putting into the ports of the respective parties in distress; and for the settlement of all cases of complaint arising under the treaty.[1] [[100]

Expiration of the Convention of 1824 between the United States and Russia.

In the mean time, the period of ten years, established by the 4th article of the Convention between the United States and Russia, during which the vessels of both nations might frequent the bays, creeks, harbors, and other interior waters on the north-western coast of America, had expired. The Russian government had chosen to consider that article as the only limitation of its right to exclude American vessels from all parts of the division of the coast, on which the United States stipulated to form no establishments; disregarding entirely the first article of the Convention, by which all unoccupied places on the north-western coast were declared free and open to the citizens or subjects of both parties — American vessels were consequently prohibited by the Russian authorities from trading on the unoccupied parts of that coast, north of the parallel of 54th degree 40 minutes. The American government protested against this prohibition, and at the same time, proposed to the Russian government to renew the stipulations of the Convention of 1824, for an indefinite period of time.[2]

In the letter of instructions from the Secretary of State, Mr. Forsyth, to the American Minister at Petersburg, it was stated that if the 4th article was to be considered as merely applicable to parts of the coast unoccupied, then it merely provided for the temporary enjoyment of a privilege which existed in perpetuity, under the law of nations, and which had been expressly declared so to exist by a previous article of the Convention. Containing, therefore, no provision not embraced in the preceding article, it would be useless and of no effect. But the rule in regard to the construction of an instrument, of whatever kind, was, that it should be so construed, if possible, as that every part may stand.

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[1] Greenhow, History of Oregon and California, p. 469: Proofs and Illustrations, I. No. 5.

[[100]] Martens, par F. Murhard, Nouveau Supplément, tom. ii. p. 426. In the treaty of commerce, of June 11, 1843, between Great Britain and Russia, it is provided that the Convention of February, 1825, shall govern as to the trade on the north-west coast of America. Parliamentary Papers, 1843.] — *L.*

[2] Greenhow, pp. 343–361.

If the article were construed to include points of the coast already occupied, it then took effect, thus far, as a temporary exception to a perpetual prohibition, and the only consequence of the expiration of the term to which it was limited, would be the immediate and continued operation of the prohibition.

It was still more reasonable to understand it, however, as intended to grant permission to enter interior bays, &c., at the mouths of which there might be establishments, or the shores of which might be, in part, but not wholly, occupied by such establishments, thus providing for a case which would otherwise admit of doubt, as without the 4th article it would be questionable whether the bays, &c., described in it belonged to the first or second article.

In no sense could it be understood as implying an acknowledgment, on the part of the United States, of the right of Russia to the possession of the coast above the latitude of 54 degrees 40 minutes north. It must be taken in connection with the other articles of the Convention, which had, in fact, no reference whatever to the question of the right of possession of the unoccupied part of the coast. In a spirit of compromise, and to prevent future collisions or difficulties, it was agreed that no new establishments should be formed by the respective parties to the north or south of a certain parallel of latitude, after the conclusion of the agreement; but the question of the right of possession beyond the existing establishments, as it subsisted previously to, or at the time of the conclusion of the Convention, was left untouched. The United States, in agreeing not to form new establishments to the north of latitude 54 degrees 40 minutes north, made no acknowledgment of the right of Russia to the territory above that line. If such an admission had been made, Russia, by the same construction of the article, must have acknowledged the right of the United States to the territory south of the designated line. But that Russia did not so understand the article, was conclusively proved by her having entered into a similar agreement in a subsequent treaty (1825) with Great Britain; and having, in fact, acknowledged in that instrument the right of the same territory by Great Britain. The United States could only be considered as acknowledging the right of Russia to acquire, by actual occupation, a just claim to unoccupied lands above the latitude 54 degrees 40 minutes

north; and even this was mere matter of inference, as the Convention of 1824 contains nothing more than a negation of the right of the United States to occupy new points within that limit.

Admitting that this inference was just, and was in contemplation of the parties to the Convention, it would not follow that the United States ever intended to abandon the just right acknowledged by the first article to belong to them under the law of nations, *i. e.* to frequent any part of the unoccupied coasts of North America, for the purpose of fishing or trading with the natives. All that the Convention admitted was an inference of the right of Russia to acquire possession by settlement north of 54 degrees 40 minutes north. Until that actual possession was taken, the first article of the Convention acknowledged the right of the United States to fish and trade as prior to its negotiation. This was not only the just construction, but it was the one both parties were interested in putting upon the instrument, as the benefits were equal and mutual, and the object of the Convention, to avoid converting the exercise of the common right into a dispute about exclusive privilege, was secured by it.

These arguments were not controverted by the Russian cabinet, which, however, declined the proposition for a renewal of the engagements contained in the 4th article; and the matter still rests on the same footing.[1]

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 42d degree and 54th degrees and 40 minutes of north latitude, is 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 Clark, 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

[1] Mr. Forsyth's letter to Mr. Dallas, Nov. 3, 1837. Congress. Documents, Sess. 1838–9, vol. i. p. 36. Greenhow, pp. 361–363.

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 late war between the two countries, and which was restored in virtue of the 1st article of the treaty of Ghent, 1814, stipulating that "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 3d 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 forever." The boundary thus agreed on with Spain was confirmed by the treaty of 1828, between the United States and Mexico, which had, in the mean time, become independent of Spain.

4. Upon the ground of *contiguity*, which should give to the United States a stronger right to those territories than could be advanced by any other power. "If," said Mr. Gallatin, "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 is 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 Meares 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 on 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 pretensions 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 42d 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, 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 coördinate 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."[1]

[1] Congress. Documents, 20th Cong. and 1st Sess. No. 199. Greenhow, Proofs and Illustrations, H.

By the 3d 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 harbors, 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."

In 1827, another Convention was concluded between the two parties, by which it was agreed: —

"Art. 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.

"Art. 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.

"Art. 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." [1]

The notification provided for by the Convention having been

[1] Elliot's American Diplomatic Code, vol. i. pp. 282, 330.

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 Fucas 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. [101

[101 United States Statutes at Large, vol. ix. pp. 109, 869. See for the negotiations of 1846, Lesur, Annuaire 1846, p. 524, Appx. p. 286; for those of 1842–4, Calhoun's Works, vol. v. p. 414; also Mr. Calhoun's Speech in the Senate, March 16, 1846, on the resolutions giving notice of the abrogation of the convention of joint occupancy. Ib. vol. iv. p. 258.

An act was passed August 18, 1856, to authorize protection to be given to citizens of the United States, who may discover deposits of guano. Guano islands discovered by citizens, and not belonging to other countries, may be considered as appertaining to the United States. Provision is made for allowing the discoverers or their assigns, being citizens of the United States, the exclusive right of occupying such islands for the purpose of obtaining guano, at the pleasure of Congress. The introduction of guano from such islands to be regulated as in the coasting trade between different parts of the United States. The United States to be under no obligation to retain these islands after the guano is exhausted. The President is authorized to employ the land and naval forces of the United States to protect the rights of the discoverers; and crimes committed in these islands or in the adjacent waters are to be held as committed on the high seas, on board of a merchant vessel of the United States, and punished accordingly. United States Statutes at Large, vol. xi. p. 119.

The conflicting claims of the Venezuelan government to the Aves Islands, discovered by American citizens in 1854, and occupied by them for the purpose of taking guano, but from which they were expelled by the authority of Venezuela, were, after being the subject of diplomatic discussion, settled by the payment by Venezuela

§ 6. Maritime territorial jurisdiction.

The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same State. [102 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.[1] [103

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to the United States government of a stipulated indemnity for the private claimants. 34th Cong. 3d Sess. Senate, Ex. Doc. No. 25. Ib. 36th Cong. 2d Sess. No. 10.

See for the occupation under this act of Navasa, the title to which was claimed by Hayti, 36th Cong. 1st Sess. Senate, Ex. Doc. No. 37.] — *L.*

[102 For the Right to wrecks, or *droit de naufrage*, see Appendix No. 2, by Mr. Lawrence.] — *L.*

[1] Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. 3, § 10. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. De Dominio Maris, cap. 2. Vattel, liv. 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.

[103 The waters, which wash the shore are not considered part of the neighboring continent, except so far as the authority of the sovereign can reach them and defend them from the shore. De Rayneval, Liberté des Mers, tom. i. p. 212. This would seem to be conclusive against the right of a government to close against foreigners, by a municipal regulation, ports not in its actual possession.

"The authors, unanimous as to the principle of the territorial seas, are far from being agreed as to the extent of the privileged portion. A great many of these publicists have fixed the limit of the maritime dominion at sixty miles, others have carried it to one hundred. Loccenius speaks of two days' journey, a very vague limit, and which leaves the door open to bloody quarrels. Later its extent was greatly reduced. Valin, in proposing to fix it according to the sound of a cannon, or as far as the ball would reach, adopts the opinion then inscribed in many treaties that the maritime dominion extends to two leagues. Sarpi would not fix the extent in an absolute manner, but he made it proportionate to the importance of the nation bordering on the ocean, because, he said, a powerful nation may have need of a much more extensive maritime domain than a feeble one, and this dominion may be established over all that portion of the ocean, of which it can take possession, without injuring other peoples. Other authors have proposed to limit the territorial sea by the extent of the vision, &c. They have all lost sight of the principles, which govern the maritime domain. To fix its limits in a precise manner applicable to all cases, it is sufficient to refer to the principles, which we have explained. The sea is free in an absolute manner, except as to the waters washing the shores, which form part of the domain of the nation bordering on them. The causes of this exception are — 1st, that those portions of the ocean are susceptible of a continuous possession; 2d, that the people, who possess them can exclude others from them; 3d, that they have an interest for their own security, in order to preserve the advantages, which they derive from the territorial sea, to pronounce this exclusion. These causes once recognized, it is easy to estab-

§ 7. 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. [104] The rule of law on this subject is *Terræ dominium finitur, ubi finitur armorum vis;* and since the introduction of fire-arms, that distance has usually been recognized to be

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lish the limits. The maritime dominion stops at the place where continuous possession ceases, where the people who own the shore can no longer exercise power, at the place from whence they cannot exclude strangers, finally at the place where, the presence of foreigners being no longer dangerous for their safety, they have no longer an interest in excluding them. Now, the point at which these three causes which render the sea susceptible of private possession cease, is the same for all. It is the limit of the power which is represented by the instruments of war. All the space, through which projectiles thrown from the shore pass, protected and defended by these war-like instruments, is territorial, and subject to the dominion of the power that controls the shore. The greatest reach of a ball fired from a cannon on the land is, then, really the limit of the territorial sea. The sea-coast does not present one straight and regular line; it is on the contrary almost always intersected by bays, capes, &c. If the maritime domain must always be measured from every one of these points of the shore, great inconveniences would result from it. It has, therefore, been agreed in practice to draw an imaginary line from one promontory to another, and to take this line, as the point of departure for the reach of the cannon. This mode adopted by almost all nations, is only applicable to small bays, and not to gulfs of a great extent, as the Gulf of Gascony, or the Gulf of Lyons, which are in reality great parts of the completely open sea, and of which it is impossible to deny the complete assimilation with the great ocean. Hautefeuille, Droits des nations neutres, 2me edition, tom. i. tit. 1, ch. 3, § 1, p. 89.

According to the publicists, the maritime territory extends as far as its possession can be protected by a cannon-shot from the shore. The distance that a cannon-shot will reach has been increased in a remarkable degree by modern inventions; and, consequently, the sovereignty over the coast may be deemed to be proportionably extended. Le Nord, 11 Juin, 1861.] — *L.*

[104 Coast is properly not the sea, but the land which bounds the sea. It is the limit of the land jurisdiction. This limit, however, varies according to the state of the tide; when the tide is in, and covers the land, it is sea. When the tide is out, it is land as far as low-water mark. Between high and low-water mark it must, therefore, be considered as *divisum imperium*. This principle applies to the limit between the jurisdiction of the admiralty and municipal courts.

"As between nation and nation the territorial right may, by a sort of tacit understanding, be extended to three miles; but that rests upon different principles, namely, that their own subjects shall not be disturbed in their fishing, and particularly in their coasting-trade and communications between place and place during war; they would be exposed to danger if hostilities were allowed to be carried on between belligerents nearer the shore than three miles; but no person ever heard of a land jurisdiction of the body of a country, which extended to three miles from the coast." Haggard's Adm. Rep. vol. iii. pp. 275, 290. The King *v.* Forty-nine Casks of Brandy.] — *L.*

about three miles from the shore.[1] 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 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.[2]

The King's Chambers.

The exclusive territorial jurisdiction of the British crown over the inclosed parts of the sea along the coasts of the island of Great Britain, has immemorially extended to those bays called the *King's Chambers;* that is, portions of the sea cut off by lines drawn from one promontory to another.

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[1] Unde dominium maris proximi non ultra concedimus, quàm e terrâ illi imperari potest, et tamen eò usque; nulla siquidem sit ratio, cur mare, quod in alicujus imperio est et potestate, minus ejusdem esse dicamus, quàm fossam in ejus territorio. . . . . Quare omnino videtur rectius, eò potestatem terræ extendi, quousque tormenta exploduntur, eatenus quippe cùm imperare, tum possidere videmur. Loquor autem de his temporibus, quibus illis machinis utimur: alioquin generaliter dicendum esset, potestatem terræ finiri, ubi finitur armorum vis; etenim hæc, ut diximus, possessionem tuetur." Bynkershoek, de Dominio Maris, cap. 2. Qrtolan, Diplomatie de la Mer, liv. ii. ch. 8.

[2] Robinson's Adm. Rep. vol. v. p. 385, (c.) The Anna.

A similar jurisdiction is also asserted by the United States over the Delaware Bay, and other bays and estuaries forming portions of their territory. It appears from Sir Leoline Jenkins, that both in the reigns of James I. and 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 harbors 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 Act," passed in 1736, (9 Geo. II. cap. 35,) assumes, 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; and both these provisions have been declared, by judicial authority in each country, to be consistent with the law and usage of nations.[1] [[105]

§ 8. Right of fishery.

The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs

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[1] 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's American State Papers, vol. i. p. 75. Dodson's Adm. Reports, vol. ii. p. 245. Le Louis. Cranch's Reports, vol. ii. p. 187. Church *v.* Hubbard. Vattel, Droits des Gens, liv. i. ch. 22, § 281.

[[105]] It has been shown in note [84, § 15, ch. 2d, of this Part, p. 266, *supra*, referring to visitation in time of peace, that no apprehended inconvenience, on account of the revenue, or the public safety, would give a right to a ship of war to stop a merchantman belonging to another country, even near the coast, if beyond the marine league. So far as there is any interference allowed under the "hovering acts" with foreign vessels, it is exclusively through the comity of the power to which the vessels belong. "If the revenue laws or quarantine regulations of a State should be such as to vex and harass unnecessarily foreign commerce, foreign nations will resist their exercise. If on the other hand, they are reasonable and necessary, they will be deferred to *ob reciprocam utilitatem*. In ordinary cases, indeed, when a merchant-ship has been seized on the open seas, by the cruiser of a foreign power, when such ship was approaching the coasts of that power with an intention to carry on illicit trade, the nation, whose mercantile flag has been violated by the seizure, waives in practice its right to redress, those in charge of the offending ship being considered to have acted with *mala fides* and consequently to have forfeited all just claim to the protection of their nation." Twiss, Law of Nations, vol. i. § 181, p. 263.] — *L.*

exclusively to the subjects of the State. The exercise of this right, between France and Great Britain, 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.[1]

By the 1st article of the Convention of 1818, between the United States and Great Britain, reciting, that "whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof to take, dry, and cure fish, on certain coasts, bays, harbors, 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, harbors, 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, harbors, and creeks, of the southern part of the coast of New-

[1] Annales Maritimes et Coloniales, 1839, 1re Partie, p. 861.

foundland, 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 harbors, 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 harbors, 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." [1] [106

[1] Elliot's Diplomatic Code, vol. i. p. 281.

[106] The negotiations of 1818 were conducted by Messrs. Gallatin and Rush, on the part of the United States, and by Mr. Robinson, (afterwards Lord Goderich,) and Mr. Goulburn, on the part of Great Britain.

The point mainly discussed, as regards the fisheries, was, whether the recognition of the American right and liberty to fish on the Banks of Newfoundland and elsewhere, in the third article of the treaty of 1783, was of a permanent character, or liable to be abrogated by war. The British doctrine was that the treaty of 1783, not being reënacted or confirmed by the treaty of Ghent, was annulled by the war of 1812. The United States, while they did not deny the general rule that a war put an end to previous treaties, insisted that that rule was not applicable to the treaty of 1783, which was a treaty of partition, and by which the rights of each party were laid down as primary and fundamental; so much of territory and incidental rights being allotted to the one and so much to the other. The entire instrument implied permanence, and hence all the fishing rights secured under it to the United States were placed upon the same foundation with their independence itself. This matter was finally adjusted on the basis of compromise, as embodied in the treaty cited in the text. Rush's Memoranda of a Residence at the Court of London, pp. 390, 432, 439, 445.

Discussions, as to the interpretation of the provisions respecting the fisheries in the treaty of 1818, go back as far as 1823; and Mr. Forsyth, in instructing Mr. Stevenson, Minister at London, February 20, 1841, states as the point of difference, that the provincial authorities assume a right to exclude American vessels from all their bays, including the Bays of Fundy and Chaleurs, and to prohibit their approach within three miles of a line drawn from headland to headland, while the American fishermen believe that they have a right to take fish anywhere within three miles of land. Certain relaxations in the pretensions of England, with regard to the Bay of

§ 9. Claims to portions of the sea upon the ground of prescription.

Beside those bays, gulfs, straits, mouths of rivers, and estuaries which are inclosed 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, on the

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Fundy, were, in 1845, announced by Lord Aberdeen to Mr. Everett, Minister at London; but the whole subject obtained renewed importance in 1852, on account of a British force being ordered to that coast, to protect the claims of the colonists, and a correspondence, involving the original merits of the controversy, was, during that year, carried on, at London and at Washington. See Cong. Doc. 32d Cong. 1st Sess. Senate Ex. Doc. No. 100. Special Session, 1853, Senate Ex. Doc. No. 3. The decision under the convention of 1853, was in favor of the American construction. The umpire in awarding compensation for a vessel employed in fishing in the Bay of Fundy, which had been captured in 1843 and condemned in a British Vice-Admiralty Court, declared, "that the Bay of Fundy is not a British bay, nor a bay within the meaning of the words, as used in the treaties of 1783 and 1818." Report of Commission, p. 186. This decision accords with Hautefeuille's rule, § 6, Editor's note [103, p. 321, *supra*.

A treaty was concluded at Washington, on 5th of June, 1854, by Mr. Marcy, Secretary of State, and the Earl of Elgin, then Governor-General of British North America, as the British Plenipotentiary, for the final adjustment of these questions, in connection with a free trade between the United States and the adjacent Provinces in articles of their growth and produce and for the navigation of their respective waters.

ART. I. It is agreed by the high contracting parties, that, in addition to the liberty secured to the United States' fishermen by the above-named convention of 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 to take fish of every kind except shell-fish, on the sea-coasts and shores, and in the bays, harbors, and creeks, of Canada, New Brunswick, Nova Scotia, 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 coasts and shores of those colonies, and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with the British fishermen, in the peaceable use of any part of the said coast, in their occupancy for the same purpose. It is understood that the above-mentioned liberty applies solely to the sea fishery; and that the salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, are hereby reserved, exclusively, for British fishermen. And it is further agreed, that in order to prevent or settle any disputes, as to the places to which the reservation of exclusive right to British fishermen, contained in this article, and that of fishermen of the United States, contained in the next succeeding article, apply, each of the high contracting parties, on the application of either to the other, shall, within six months thereafter, appoint a commissioner. The said commissioners, before proceeding to any business, shall make and subscribe a solemn declaration, that they will impartially and carefully decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of

ground of immemorial use. Such, for example, was the sovereignty formerly claimed by the Republic of Venice over the

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fishing, under this and the next succeeding article. The commissioners shall name some third person, to act as arbitrator or umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such person, they shall each name a person, and it shall be determined by lot which of the two persons so named shall be arbitrator or umpire, in cases of difference or disagreement between the commissioners. The person so to be chosen to be arbitrator or umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration, in a form similar to that which shall already have been made and subscribed by the commissioners, which, as well as their declarations, shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of either of the commissioners or the arbitrator, or umpire, or of their or his omitting, declining, or ceasing to act as such commissioner, arbitrator, or umpire, another and different person shall be appointed or named, as aforesaid, to act as such commissioner, arbitrator, or umpire, in the place and stead of the person so originally appointed or named as aforesaid, and shall make and subscribe such declaration as aforesaid. Such commissioners shall proceed to examine the coasts of the North American Provinces and of the United States, embraced within the provisions of the first and second articles of this treaty, and shall designate the places reserved by the said articles from the common right of fishing therein. The decision of the commissioners, and of the arbitrator or umpire, shall be given in writing in each case, and shall be signed by them respectively. The high contracting parties hereby solemnly engage to consider the decision of the commissioners conjointly, or of the arbitrator or umpire, as the case may be, as absolutely final and conclusive in each case decided upon by them or him respectively.

ART. II. It is agreed by the high contracting parties, that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind, except shell-fish, on the eastern sea-coasts and shores of the United States north of the thirty-sixth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, 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. It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

The fifth article provided that the treaty should take effect, as soon as the laws required to carry it into operation shall have been passed by the Imperial Parliament of Great Britain and by the Provincial Parliaments of those of the British North American Colonies which are affected by the treaty, on the one hand, and by the Congress of the United States, on the other — the treaty to remain in force ten years from the date that it may come into operation, and further until the expiration of twelve months after either of the high contracting parties shall give notice to the other of its wish to terminate the same. By the sixth article Newfoundland may be included in the treaty; but if the Imperial Parliament, the Provincial Parliament of Newfoundland, or the Congress of the United States, shall not em-

Adriatic. The maritime supremacy claimed by Great Britain over what are called the Narrow Seas has generally been asserted merely by requiring certain honors 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.[1]

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

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brace Newfoundland, in their laws, to carry this treaty into effect, then this article to be of no effect. United States Statutes at Large, vol. x. p. 1089.

In 1857, a new convention was made between Great Britain and France, respecting the Newfoundland fisheries, but as it, like the convention of 1854 with the United States, was made subject to the assent of the local legislature, which it failed to obtain, it never went into effect. The minister of the colonies, in transmitting this treaty to the Governor of Newfoundland, said: "The French rights on the coast of Newfoundland under the former treaties were the following: The exercise during the summer season of a right of fishery from Cape Ray on the southwest, round the northern point of the island, to Cape St. John on the northeast, comprising, therefore, about half of the coast of the island. And the crown was bound to take the most positive measures for preventing its subjects from interrupting in any manner by their competition (*concurrence*) the fishery of the French during such temporary exercise. For this purpose the crown was bound to move all fixed settlements from the shore." Mr. Labouchere to Governor Darling, Feb. 16, 1857.

An act was passed, March 15, 1862, by the Congress of the United States, authorizing the President to appoint a commissioner to meet a commissioner on the part of Great Britain, and one on the part of France, together to frame measures to protect the fisheries off the coasts of Newfoundland and North America against deterioration or destruction. National Intelligencer.] — *L.*

[1] 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's Hist. Law of Nations, pp. 154–157. Klüber, § 132.

connects, whilst it is shut to all foreign armed ships in time of peace.

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 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 recognized 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.[1] [107]

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 recognized by the treaty concluded at London the 13th July, 1841, between the five great European powers and the Ottoman Porte.

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

[1] Martens, Nouveau Recueil, tom. viii. p. 143.

[107] The 7th article of the treaty of 1830, between the United States and the Ottoman Porte provided that merchant vessels of the United States, in like manner as vessels of the most favored nations, shall have liberty to pass the Canal of the Imperial residence, and go and come in the Black Sea, either laden or in ballast; and they may be laden with the produce, manufactures, and effects of the Ottoman Empire, excepting such as are prohibited, as well as of their own country. U. S. Statutes at Large, vol. viii. p. 409. This treaty has been recently affirmed by a convention made at Constantinople, 22d of February, 1862. See Part I. ch. 1, § 10, Editor's note [6, p. 24.] — *L.*

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.[1] [[108]

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[1] Wheaton's Hist. Law of Nations, pp. 583–585.

[[108]] The treaty of Paris, of March 30, 1856, between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, provides:

ART. X. The convention of the 13th of July, 1841, which maintains the ancient rule of the Ottoman Empire relative to the closing of the Straits of the Bosphorus and of the Dardanelles, has been revised by common consent. The act concluded for that purpose, and in conformity with that principle, between the high contracting parties, is and remains annexed to the present treaty, and shall have the same force and validity as if it formed an integral part thereof.

ART. XI. The Black Sea is neutralized; its waters and its ports, thrown open to the mercantile marine of every nation, are formally and in perpetuity interdicted to the flag of war, either of the powers possessing its coasts, or of any other power, with the exceptions mentioned in Articles XIV. and XIX. of the present treaty.

ART. XII. Free from any impediment, the commerce in the ports and waters of the Black Sea shall be subject only to regulations of health, customs, and police, framed in a spirit favorable to the development of commercial transactions. In order to afford to the commercial and maritime interests of every nation the security which is desired, Russia and the Sublime Porte will admit consuls into their ports situated upon the coast of the Black Sea, in conformity with the principles of international law.

ART. XIII. The Black Sea being neutralized according to the terms of Article XI., the maintenance or establishment upon its coast of military-maritime arsenals becomes alike unnecessary and purposeless; in consequence, His Majesty the Emperor of all the Russias and His Imperial Majesty the Sultan engage not to establish or to maintain upon that coast any military-maritime arsenal.

ART. XIV. Their Majesties the Emperor of all the Russias and the Sultan have concluded a convention for the purpose of settling the force and the number of light vessels necessary for the service of their coasts, which they reserve to themselves to maintain in the Black Sea; that convention is annexed to the present treaty, and shall have the same force and validity as if it formed an integral part thereof. It cannot be either annulled or modified without the assent of the powers signing the present treaty.

ART. XIX. In order to insure the execution of the regulations which shall have

Danish sovereignty over the Sound and the Belts.

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 exer-

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been established by common agreement, in conformity with the principles above declared, each of the contracting powers shall have the right to station, at all times, two light vessels at the mouth of the Danube.

By the convention between the same powers, of the same date, annexed to the treaty, respecting the Straits of the Dardanelles and the Bosphorus :

ART. I. His Majesty the Sultan, on the one part, declares that he is firmly resolved to maintain for the future the principle invariably established as the ancient rule of his empire, and in virtue of which it has at all times been prohibited for the ships of war of foreign powers to enter the Straits of the Dardanelles and the Bosphorus; and that, so long as the Porte is at peace, His Majesty will admit no foreign ships of war into the said straits. And their Majesties the Queen of Great Britain and Ireland, the Emperor of Austria, the Emperor of the French, the King of Prussia, the Emperor of all the Russias, and the King of Sardinia, on the other part, engage to respect this determination of the Sultan, and to conform themselves to the principle above declared.

ART. II. The Sultan reserves to himself, as in past times, to deliver firmans of passage for light vessels under flag of war, which shall be employed, as is usual, in the service of the missions of foreign powers.

ART. III. The same exception applies to the light vessels under flag of war which each of the contracting powers is authorized to station at the mouths of the Danube, in order to secure the execution of the regulations relative to the liberty of that river, and the number of which is not to exceed two for each power.

By another convention, between the Emperor of Russia and the Sultan, also signed the same day and annexed to the general treaty, for limiting the naval force in the Black Sea :

ART. I. The high contracting parties mutually engage not to have in the Black Sea any other vessels of war than those of which the number, the force, and the dimensions are hereinafter stipulated.

ART. II. The high contracting parties reserve to themselves each to maintain in that sea six steam vessels of fifty metres in length at the line of flotation, of a tonnage of 800 tons at the maximum, and four light steam or sailing vessels of a tonnage which shall not exceed 200 tons each. Martens, par Samwer, Nouveau Recueil, tom. xv. pp. 666, 721, 775, 782, 786, 788.

An arrangement similar to the last convention exists between the United States and Great Britain as to their respective naval forces on the Lakes between the United States and Canada. It was concluded in April, 1817. United States Statutes at Large, vol. viii. p. 231.

By a convention between England, France, and Russia, annexed to the general treaty of the 30th of March, 1856, Russia, in order, it is said, to extend to the Baltic Sea the harmony reëstablished between them in the East, declared "that the Aland Islands shall not be fortified, and that no military or naval establishment shall be maintained or created there." Martens, par Samwer, *loc cit.*] — *L.*

cised 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 Scania not having been ceded to Sweden until the treaty of Roeskild, in 1658, confirmed by that of 1660, in 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 light-houses on the coast of Scania. [109] The exclusive right of Denmark was recognized as early as 1368, by a treaty with the Hanseatic republics, and by that of 1490, with Henry VII. of England, which forbids 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 fre-

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[109 For a long time the Swedish nation paid nothing for its own vessels, nor for the merchandise belonging to Swedes and loaded on board of foreign vessels. Denmark esteemed herself very fortunate whilst Sweden abandoned to her this revenue entire, and did not avail herself of the right which her shore and the city of Helsinbourg gave her; but finally, by the treaty of Fredricksburg, concluded in 1720, Sweden renounced every franchise, and became obliged to pay the tolls, like the Dutch and other nations. Girardin, Situation politique de l'Europe, p. 177.

"The seventh section of the 2d article (of the treaty of 14th March, 1857, note [110, p. 335, *infra*,) is intended to secure the maintenance, in an efficient state, of certain lights on the coasts of Norway and Sweden, the government of the latter country having received from Denmark a contribution from the Sound light dues for this purpose, since the cession of Scania to Sweden, which contribution was considerably increased in 1842, in consequence of an engagement contracted by Denmark to Great Britain in 1841. The Danish government being bound by their treaties with Sweden to continue this subvention indefinitely, it has been arranged between them that Denmark shall redeem it on the same terms as it is intended the Sound dues shall be redeemed; and as it was thought expedient by the conference that some engagement should be taken on the subject towards the maritime powers, the stipulation, as it stands in the treaty, was adopted with the approval of the Swedish delegate." Mr. Buchanan, British Minister at Copenhagen, to the Secretary for Foreign Affairs, March 22, 1857. Martens, par Samwer, tom. xvi. part. ii. p. 338.] — *L.*

quenting the ports of Denmark should pay the same duties as formerly.

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 are to be measured as to *privileged* nations. Those *not privileged*, pay according to a more ancient tariff for the specified articles, and one and a quarter per centum on unspecified articles.[1]

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 is to subsist for the term of ten years, has been extended to all other nations *privileged* by treaty.[2] [[110] Convention of 1841.

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[1] Schlegel, Staats-Recht des Königreichs Dänemark, 1 Th. kap. 7, §§ 27–29. Wheaton, Hist. Law of Nations, pp. 158–161.

[2] Scherer, Der Sundzoll, seine Geschichte, sein jetziger Bestand, und seine staatsrechtlich-politische Lösung. Beilage Nr. 8–9.

[110] For a further view of the treaties on this subject, see the *Histoire des Progrès du Droit des Gens*, by Mr. Wheaton, Leipzig edition, 1846, tom. i. p. 211. Mr. Wheaton,

Qu. Whether the Baltic Sea is *mare clausum*?

The Baltic Sea is considered by the maritime powers bordering on its coasts as *mare clausum* against the exercise of hostilities upon its waters by other States,

during his mission to Denmark, from 1827 to 1835, called the attention of his government to the Sound duties, with a view to the relief of American navigation, though as there was an implied recognition of them by the treaty of 1826, which could not be terminated before 1836, nothing could be done respecting them during his residence at Copenhagen. While at Berlin, he examined this question more fully, as well as what related to the duties levied by the Hanoverian government at Stade, on the goods of all nations, except those belonging to Hamburg, passing up the Elbe.

The Sound duties at Elsinore since the report of Mr. Webster, of May 24, 1841, and which was compiled from the despatches of Mr. Wheaton, received the particular consideration of the Department of State. Webster's Works, vol. vi. p. 406. Mr. Buchanan, Secretary of State, in instructing, October 14th, 1848, Mr. Flenniken, Chargé d'Affaires at Copenhagen, tells him that, "under the public law of nations, it cannot be pretended that Denmark has any right to levy duties on vessels passing through the Sound from the North Sea to the Baltic;" for which he cites as authority the language of this work, in reference to straits connecting two seas. He, however, authorized him to offer the Danish government, for the perpetual renunciation of these duties, $250,000, in addition to the continuance of the commercial convention, and which places their navigation in the ports of the United States, as regards all foreign trade, circuitous as well as direct, on an equality with the merchant marine of the country. On the accession of President Pierce, in 1853, instructions were given to the Chargé d'Affaires, commissioned to Copenhagen, to press the matter of the Sound duties to a conclusion; and in reply to his inquiry, whether he might offer to Denmark anything, either in the form of additional commercial advantages or otherwise, as an equivalent for them, he was informed by Secretary Marcy, that the President declined authorizing him to offer to that power any compensation for the granting of that as a favor, which we had demanded as a right. The President, in his annual message of 1854, says that it is admitted that these tolls are sanctioned not by the general principles of the law of nations, but only by special conventions. He proposes to terminate the treaty of 1826, from which, as providing that no higher duties on our vessels and cargoes, passing the Sound, should be paid than on those of the most favored nations, an agreement to submit to the exaction might be implied. Wheaton's MS. Despatches from Copenhagen, April 9, 1830; February 20, 1833; and from Berlin, December 30, 1835; February 14, 1838; March 10, 1841; September 8, 1841; February 25, 1843; June 30, 1844; February 15, 1845; January 21, 1846. Webster's Works, vol. vi. p. 406. United States Statutes at Large, vol. ix. p. 858. Cong. Doc. H. of Rep. 33d Cong. 1st Sess. Ex. Doc. 108. President's Message, December, 1854.

In consequence of a resolution of the Senate, of the 3d of March, 1855, a notice of the termination of the treaty of 1826 at the end of the year, was given, on the 14th of April. This induced the government of Denmark to address, in October 1855, a despatch to all powers interested in the commerce of the Baltic, inviting them to a conference at Copenhagen, in which Denmark hoped that the American government would take part; and stating that, though the Danish government had not entirely renounced a revision of the tariff, it would propose a plan of capitalization, a revision being little likely to be adopted by the governments interested.

whilst the Baltic powers are at peace. This principle was proclaimed in the treaties of armed neutrality in 1780 and 1800,

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Mr. Marcy, in a note of the 2d of November, to the American Representative at Copenhagen, declined to participate in the conference, the United States not feeling themselves obliged either by the law of nations or the terms of any treaty to pay the impost demanded by Denmark, on the ground of right. The President, in his message of December following, states, among the reasons against taking part in the conference as the most conclusive, that, "By the express terms of the proposition, it is contemplated that the consideration of the Sound dues shall be commingled with and made subordinate to a matter wholly extraneous, — the balance of power among the governments of Europe." He adds: "While rejecting this proposition, and insisting on the right of free transit into and from the Baltic, I have expressed to Denmark a willingness, on the part of the United States, to share liberally with other powers in compensating her for any advantages which commerce shall hereafter derive from expenditures made by her for the improvement and safety of the Sound and Belts."

The conference was opened at Copenhagen, on the 4th of January, 1856. The Plenipotentiary of Denmark presented, in the name of his government, a plan of capitalization. On the 9th of May, a protocol was signed by the Plenipotentiaries of Denmark, Russia, Sweden, and Oldenburg. Denmark renounced for the future the taking of the tolls, for an indemnity of thirty-five millions of rix-dollars. The redemption to be agreed to by all the powers interested in the navigation and commerce of the Sound and Belts. All the powers represented to enter into a formal engagement, Denmark reserving to herself the privilege of negotiating with the governments which had not taken part in the conference. On the 14th of March, 1857, a treaty was entered into between Belgium, France, Great Britain, Hanover, Mecklenburg-Schwerin, the Netherlands, Austria, Oldenburg, Prussia, Russia, Sweden, the Hanseatic Towns, and Denmark, concerning the abolition of the Sound dues, with provisions for maintaining the lights, and stipulations as to transit duties, on the canals and railroads, for an indemnity of 30,476,325 thalers; the treaty to go into effect on the 1st of April following. Annual Register 1855, p. 291]. Almanach de Gotha, 1856, p. (54). Ib. 1857, pp. (12,) (16,) (23,) (40). Ib. 1858, p. 830. Martens, par Samwer, Nouveau Recueil, tom. xvi. part. ii. pp. 331, 345.

By a convention, of April 11, 1857, between the United States and Denmark, the navigation of the Sound and Belts is declared free to American vessels; and Denmark stipulates that these passages shall be lighted and buoyed as heretofore, and to make such improvements in them as circumstances may require, without any charges to American vessels and their cargoes, and to maintain the present establishment of pilots, it being optional for American masters to employ them at reasonable rates fixed by the Danish government or to navigate their own vessels. In consideration of these stipulations, the United States agreed to pay to Denmark 717,829 rix-dollars, or $393,011 in the currency of the United States. Any other privileges granted by Denmark to any other nation at the Sound and Belts, or on her coasts and in her harbors, with reference to the transit by land, through Danish territory, of their merchandise, shall be extended to and enjoyed by citizens of the United States, their vessels and property. The convention of April 26, 1826, to become again binding, except as regards the article referring to the Sound dues. United States Statutes at Large, vol. xi. p. 719.

Hautefeuille, maintains that "a nation, even if it possesses the two shores of a

and by the treaty of 1794, between Denmark and Sweden, guaranteeing the tranquillity of that sea. In the Russian declaration

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strait serving as the communication between the great sea and an interior sea, cannot, although the passage is sufficiently narrow to be considered as territorial, if it is not sovereign of all the shores of this sea, and consequently of the sea itself, put any restriction on the free navigation of the strait, impose any condition on it, nor charge it with any tax; for the fact of dictating laws for levying any tolls whatever on the passage is an act of sovereignty, and can only be exercised by the people who possess the sovereign domain." "The principal example cited," he says, "in support of the opinion which I combat, was the impost received by Denmark from the navigation of the Sound. This impost, unjust and contrary to the disposition of the primitive law, existed but in virtue of express and formal treaties; it formed an exception. The Sound tolls have been completely abolished; it is to be remarked that the treaty for their abolition does not appear to consider this toll as the result of a right belonging to Denmark. It stipulates, it is true, for an indemnity to be paid to the Danish government; but this indemnity, paid once for all, appears to refer especially to the obligation imposed on Denmark, as bordering on the Strait, to keep up the light-houses, beacons, and buoys required for the passage. Droits des Nations neutres, tit. 1, ch. 3, sect. 2; tom. i. pp. 97, 101, 2me ed.

An analogous subject, which likewise received Mr. Wheaton's attention, was the duties levied by the Hanoverian government at Stade, or Brunshausen, the origin of which, as founded on a title going back to a grant from the Emperor Conrad in 1038, is historically traced. These duties were not abolished by the Congress of Vienna, or included in the provisions in relation to the rivers of Germany, because they were considered sea and not river tolls. Mr. Wheaton to the President, May 10, 1837; Secretary of State, March 6, 1839; September 8, 1841; February 25, 1843; March 18, 1845, MS. The attention of the American government having been attracted to this subject, in its bearings on the commerce of the United States, by the various communications of Mr. Wheaton, a provision placing American vessels and their cargoes as to tolls on the same footing with Hanoverian was inserted in the treaty of 1846. This treaty also contains a provision for the conditional abolition of the Weser tolls. United States Statutes at Large, vol. ix. pp. 362, 558.

Though, by the treaty of the 22d of July, 1844, between England and Hanover, the duties or tolls on British vessels and cargoes passing up the Elbe were not only, in general, made the same as those specified in the convention of the 13th of April of the same year, between the Elbe bordering States, but as to the articles particularly mentioned in the treaty, the duty was reduced to two thirds of what was fixed by that convention, (Martens, par Murhard, Nouveau Recueil, tom. vii. p. 197,) — yet the existence of the tolls was regarded by Great Britain with great dissatisfaction. As a measure for solving the difficulty, the redemption of them, by the States desiring to be relieved from them, was proposed. In 1858, Hanover had valued them at 5,400,000 thalers, of which two millions and a half would have been charged on the city of Hamburg. This was a capitalization, at twenty-five times the annual receipt. The proposition was refused; and the 2d of June, 1860, the British government submitted another, by the terms of which the average tolls, being estimated at 200,000 thalers, would be capitalized, as in the case of the Sound dues, for fifteen and a half times that sum, and redeemed for 3,100,000 thalers, payable one third by England, one third by Hamburg, and the other third by the other States, whose flag navigates the Elbe. Annuaire des deux mondes, 1860, p. 443. A *projet* of convention, in conform-

of war against Great Britain of 1807, the inviolability of that sea and the reciprocal guarantees of the powers that border upon it

ity with these views, was submitted to a conference of the States interested in the redemption, on the 17th of June, 1861. By it, the stipulations for the suppression of the tolls were made applicable only to the powers who are parties to the convention, or should accede to it; and Hanover reserved the right of regulating by special conventions, which imply neither delay nor visitation, the fiscal and custom regulations to be applied to vessels which belong to powers that have not adhered and will not adhere to the convention. The general treaty was signed at Hanover, on the 22d of June, 1861. Le Nord, 6 Juin, 1861. Ib. 29 Juin, 1861.

A convention was entered into between the United States and Hanover, on 6th of November, 1861, of the same purport with the general one, by which the latter assumes towards the United States to abolish completely and forever the toll hitherto levied on the cargoes of American vessels ascending the Elbe, and passing the mouth of the river called the Schwinge, designated under the name of the Stade or Brunshausen dues; — to levy no toll of any kind, of whatever nature it may be, upon the hulls or cargoes of American vessels ascending or descending the Elbe, in place of those dues, and to provide as heretofore, and to the extent of the existing obligations, for the maintenance of the works that may be necessary for the free navigation of the Elbe; and not to impose, as a compensation for the expenses resulting from the execution of this obligation, upon the American marine, any charge in lieu of the Stade duties. The United States agreed to pay, by way of damage and compensation for the sacrifices imposed upon Hanover by the above stipulations, the sum of 63,353 thalers, Hanoverian currency, being the proportionate quota of the United States in the general table of indemnification for the abolition of these dues. The treaty of 1846, with the exception of the clause relating to the above dues, was continued in force. Washington National Intelligencer, June 19, 1862.

In connection with the Sound dues, and the sea tolls levied at Stade, may be noticed the great inequality which exists, with regard to coast lights, under the respective systems adopted in the United States and Great Britain. As the lights and beacons were not exclusively, indeed were only in a small degree, for the advantage of Danish commerce, or of vessels destined to her ports, the claim of Denmark was infinitely stronger than that under which England levies contributions on the shipping of all countries. So far as we are concerned, the Sound and Stade dues compared with these taxes sink into utter insignificance. Mr. Abbott Lawrence, Minister at London, says, in a note to Viscount Palmerston, December, 31, 1850: — "The light-houses, floating lights, buoys, and beacons, on the whole sea and lake coast and rivers of the United States, were constructed and are maintained by the Federal government; an annual appropriation being made by Congress for these objects. In the year 1848, there were 270 light-houses, 30 floating lights, 1,000 buoys, besides fixed beacons. There are, probably, at this time, including those under construction on the Pacific coast, more than 300 light-houses, with a proportionate number of floating lights and buoys, all of which are given to the use of the world by the United States, without tax or charge. Within the ten years last past, the shipping of the United States has contributed, upon 7,872 vessels, the aggregate tonnage of which was 4,681,925 tons, the enormous sum of £234,000, or over $1,100,000, for the support of the light-house system of the United Kingdom. During the last year, there appears to have been levied on the shipping of the world, for the light-dues in the United

(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 forbear-

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Kingdom, between £500,000 and £600,000. Of this, one fourteenth was paid by citizens of the United States, while British subjects, with a fleet equally large, in the ports of the United States, have not been taxed at all for the maintenance of lights."

The facts were not denied by Lord Palmerston, who, in his answer to Mr. Lawrence, dated February 6, 1851, says: — "The British government has not the power to deal with this matter as it pleases. The various lights, which are established around the coast of the United Kingdom, have been erected and are maintained by various corporate bodies, and these corporate bodies are entitled, by patents and acts of Parliament, to levy certain dues upon shipping, in order to raise the necessary income for paying interest on the capital laid out in the construction of the lights, and for providing the means requisite for defraying the expense of maintaining these lights. Her Majesty's government have no right or power to order these corporate bodies to abstain from levying these dues and these dues could not be made to cease unless the Parliament were to vote such sums as would be necessary to buy up for the public the interest which the private parties concerned have in these lights; nor unless Parliament were, at the same time, to authorize the government to abolish light-dues for the future, and were to charge upon the public revenue the expense of maintaining these lights." He denies, however, that these dues are an infraction of any conventional stipulation. "It is no part of the engagements of the treaty of 1815, that the internal system and local arrangements of the two countries, upon commercial matters, should be the same. But the principle distinctly laid down in the second paragraph of the 1st article of the treaty of 1815 is, that the vessels of each country shall, in the ports of the other, be treated, in regard to duties and charges, in the same manner and on the same footing, as national vessels; and this stipulation is strictly observed in regard to the light-dues which are levied upon American vessels in British ports; for no other or higher duties are levied in those ports upon American vessels than are levied in those ports on vessels belonging to the United Kingdom." Parliamentary Papers, 1851, vol. lvii. No. 85, p. 1.

By the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, the whole subject of light-houses is now regulated while the dues are maintained. The superintendence of those in England, &c., and the adjacent seas and islands, Heligoland and Gibraltar, subject to any power or rights then lawfully exercised over *local* light-houses, is vested in the Trinity House; of those in Scotland in the Commissioners of Northern Light-houses appointed by the act; and in Ireland in the port of Dublin Corporation; and provision is made for fixing such dues in respect to any new light-house, buoy, or beacon, to be paid by the master or owner of every ship which passes the same or derives benefit therefrom, as Her Majesty may deem reasonable. Stephens's (Blackstone's) Commentaries, vol. iii. p. 258.] — *L.*

ance 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 along the whole coast from Dantzic to Lubeck.[1]

§ 10. 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 hardly be considered open at this day. 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 neighboring land in giving a jurisdiction and property of this sort.[2] 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. 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 do-

[1] Annual Register, vol. xlix. State Papers, p. 773.

[2] De Jur. Bell. ac Pac. lib. ii. cap. 3, §§ 8–13.

minion 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. [[111] Father Paul 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.[1] Bynkershoek examined the general question, in the earliest of his published works, with the vigor 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.[2] Puffendorf 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 neighboring 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.[3] The authority of Vattel would be full and explicit to the same purpose, were

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[[111] For an able analysis of Selden's *Mare Clausum*, see De Rayneval — De la Liberté des Mers, tom. ii. pp. 1–108. See also, for an examination of his doctrine, Hautefuille, Droits des Nations neutres, tit. 1, ch. 1, sect. 4, § 2, tom. i. p. 51.] — *L.*

[1] Paolo Sarpi, Del dominio del mare Adriatico e sui reggioni per il *Jus Belli* della Serenissima Rep. di Venezia, *Venet.* 1676, 12°.

[2] De Dominio Maris, Opera Minora, Dissert. V., first published in 1702.

"Nihil addo, quàm sententiæ nostræ hanc conjectionem: Oceanus, quà patet, totus imperio subjici non potest; pars potest, possunt et maria mediterranea, quotquot sunt, omnia. Nullum tamen mare mediterraneum, neque ulla pars Oceani ditione alicujus Principis tenetur, nisi quà in continentis sit imperio. Pronunciamus MARE LIBERUM, quod non possidetur vel universum possideri nequit, CLAUSUM, quod post justam occupationem navi unà pluribusve olim possessum fuit, et si est in fatis, possidebitur posthac; nullum equidem nunc agnoscimus subditum, cùm non sufficiat id affectasse, quin vel aliquando occupasse et possedisse, nisi etiamnum duret possessio, quæ gentium hodie est nullibi; ita libertatem et imperium, quæ haud facile miscentur, unà sede locamus." Ib. cap. vii. ad finem.

[3] De Jure Naturæ et Gentium, lib. iv. cap. 5, § 7.

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 favor of one nation against another.[1]

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.

I. Those things which are 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.

II. 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.[2]

We have already seen that, by the generally approved usage

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[1] 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, Part II. ch. 2, §§ 10, 15, pp. 208, 246.

[2] Ortolan, Règles Internationales et Diplomatie de la Mer, tom. i. pp. 120–126.

of nations, which forms the basis of international law, the maritime territory of every State extends:

1st. To the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same State.

2dly. To the distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State.

3dly. 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.[1]

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, harbors, 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 as having been intended by the Creator for 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

[1] Vide supra, §§ 6-9.

the equal reciprocal rights of all other States to establish similar regulations, in respect to their own waters.[1]

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.[2]

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 posses-

[1] Vide supra, Part II. ch. 2, § 9, p. 188.

[2] Martens, Précis du Droit des Gens Moderne de l'Europe, § 153. "Mais si, loin de s'en emparer, il a une fois reconnu le droit commun des autres peuples d'y venir pêcher, il ne peut plus les en exclure; il a laissé cette pêche dans sa communion primitive, au moins à l'égard de ceux qui sont en possession d'en profiter." Vattel, Droit des Gens, liv. i. c. 28, § 287.

sions 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 regulations 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, recognizing 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 take 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 convention, that the coöperation 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 Porte 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 recognized 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.[1]

§ 11. Rivers forming part of the territory of the State.

The territory of the State includes the lakes, seas, and rivers, entirely inclosed 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 occupany and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river.[2]

§ 12. 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

[1] Wheaton, Hist. Law of Nations, pp. 577–583.

[2] Vattel, Droits 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.

effectually secured by mutual convention regulating the mode of its exercise.[1]

§ 13. 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 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.[2]

§ 14. These rights *imperfect* in their nature.

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.

§ 15. Modification of these rights by compact.

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 favor of the Dutch. [[112] The forcible opening of this navigation by the French on the occupation

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[1] 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. Puffendorff, de Jur. Naturæ et Gentium, lib. iii. cap. 3, §§ 3–6.

[2] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 15. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, § 8. Vattel, Droit des Gens, liv. ii. ch. 9, § 129.

[[112] "The navigation of the Scheldt had been closed to the Austrian Netherlands by the authority of the Spanish government itself. This interdict was cemented by the treaty of Munster between the Austrian Spanish branch and Holland. More than a century afterwards, Joseph II. aiming at plans of maritime commerce, in imitation of the principal powers of Europe, whose attention was directed to it by their particular position, conceived the project of destroying the commerce of Amsterdam to build up that of Antwerp. Negotiations skilfully conducted on the part of France, pecuniary sacrifices which the policy of the

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.[1]

§ 16. 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 favorable as possible to the commerce of all nations.[2]

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 Neckar, the Mayn, 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 3d May, 1815, between Austria and Russia, and of the same

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future condemned, — nothing was spared on our part to avert this blow, which threatened to overturn entirely the maritime system of Holland. A treaty in 1785, between this republic and the Emperor, put an end to the pretensions of Austria to the Scheldt." Girardin, Situation politique de l'Europe, p. 170.] — *L.*

[1] Wheaton, Hist. Law of Nations, pp. 282–284, 552.

[2] Ibid, 498–501.

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.[1] [[113]

[1] Mayer, Corpus Juris Germanici, tom. ii. pp. 224–239, 298. Acte Final, art. 96, 114, 118.

[[113] At a conference of the border States to reduce the tolls on the Rhine, in December, 1860, the suppression of all transit duties within the Zollverein, to take effect from 1st of March, 1861, was decided on. Le Nord, 18 Decembre, 1860.

The free navigation of the Danube had been one of the four points made the basis of the negotiation at the Congress of Paris. The principles of the Vienna treaties were applied to it by the treaty of March 30, 1856, as follows: —

ART. XV. The Act of the Congress of Vienna having established the principles intended to regulate the navigation of rivers which separate or traverse different States, the contracting powers stipulate among themselves that those principles shall in future be equally applied to the Danube and its mouths. They declare that this arrangement henceforth forms a part of the public law of Europe, and take it under their guarantee. 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 of quarantine to be established for the safety of the States separated or traversed by that river shall be so framed as to facilitate as much as possible the passage of vessels. With the exception of such regulations, no obstacle whatever shall be opposed to free navigation.

ART. XVI. With the view to carry out the arrangements of the preceding article, a commission, in which Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey shall each be represented by one delegate, shall be charged to designate and to cause to be executed the works necessary below Isatcha, to clear the mouths of the Danube, as well as the neighboring parts of the sea, from the sands and other impediments which obstruct them, in order to put that part of the river and the said parts of the sea in the best possible state of navigation. In order to cover the expenses of such works, as well as of the establishments intended to secure and to facilitate the navigation at the mouths of the Danube, fixed duties of a suitable rate, settled by a commission by a majority of votes, may be levied, on the express condition that in this respect, as in every other, the flags of all nations shall be treated on the footing of perfect equality.

ART. XVII. A commission shall be established, and shall be composed of delegates of Austria, Bavaria, the Sublime Porte, and Wurtemburg (one of each of those powers), to whom shall be added commissioners from the three Danubian Principalities, whose nomination shall have been approved by the Porte. This commission, which shall be permanent, — 1. Shall prepare regulations of navigation and river police; 2. Shall remove the impediments, of whatever nature they may be, which still prevent the application to the Danube of the arrangements of the treaty of Vienna; 3. Shall order and cause to be executed the necessary works throughout the whole course of the river; 4. Shall, after the dissolution of the European commission, see to maintaining the mouths of the Danube and the neighboring parts of the sea in a navigable state.

§ 17. 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 Nimiguen, 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 the 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

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ART. XVIII. It is understood that the European commission shall have completed its task, and that the river commission shall have finished the works described in the preceding article, under Nos. 1 and 2, within the periods of two years. The signing powers assembled in conference having been informed of that fact shall, after having placed it on record, pronounce the dissolution of the European commission; and from that time the permanent river commission shall enjoy the same powers as those with which the European commission shall have until then been invested. Martens, par Samwer, Nouveau Recueil, tom. xv. pp. 647, 776.

The act of navigation of the Danube was concluded between Austria, Bavaria, the Ottoman Porte and Wurtemburg, in pursuance of the 17th article of the treaty, on the 7th of November, 1857. It recognizes the freedom of navigation for vessels of all nations, which are to be treated in every respect on a footing of perfect equality. Ib. tom. xvi. part. ii. p. 75. The European commission established, under the date of June 27th, and July 25th, 1860, provisional regulations of police for the lower Danube and a tariff of tolls at the mouth of the Soulina, without, however, terminating its labors. Ib. pp. 622, 632.] — *L.*

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.

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.[1]

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

[1] Annual Register for 1826, vol. lxviii. pp. 259–363.

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.[1]

§ 18. 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

[1] Martens, Nouveau Recueil, tom. ix. p. 252.

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 breadth, from its source to the ocean, should be free to the citizens of the United States; and by the 22d 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.

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 favor 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 penetrat-

ing 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 right 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 conveniency 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 us, it would then be an injury, of which we should be entitled to demand redress. The right of 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 our 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 us without their annoyance.[1]

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 breadth. 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.[2] The 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 stipu-

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[1] 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. Puffendorf, lib. iii. cap. 3, §§ 3-6. Wolff's Inst. §§ 310-312. Vattel, liv. i. § 292; liv. ii. §§ 123-139.

[2] Inst. lib. ii. t. 1, §§ 1-5.

lated, 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, which, as the mere shore could not be a safe deposit for her cargo till she could be repaired, 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.[1]

§ 19. Navigation of the St. Lawrence.

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 to 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.

On the part of the United States government, this right is rested 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 respect-

[1] Mr. Jefferson's Instructions to United States Ministers in Spain, March 18, 1792. Waite's State Papers, vol. x. pp. 135–140.

ing 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 labor 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 Neckar, the Mayn, the Moselle, the Maese, 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 recognized 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.[1]

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 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 favor 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

[1] American Paper on the Navigation of the St. Lawrence. Congress. Documents, Session 1827–1828, No. 43, p. 34.

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 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.[1]

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 co-proprietors 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 devel-

[1] British Paper on the Navigation of the St. Lawrence. Session 1827–1828, No. 43, p. 41.

oped 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 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.[1] [[114]

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[1] Mr. Secretary Clay's Letter to Mr. Gallatin, June 19, 1826. Session 1827–1828, No. 43, p. 18.

[[114]] The American and British Papers on the Navigation of the St. Lawrence, first cited in the text, were annexed to the 18th and 24th protocols of the con-

ferences of Mr. Rush and Messrs. Huskisson and Stratford Canning, in 1823–4, and were the subject of a confidential message to the Senate, on the 19th of January, 1825. Cong. Doc. Confidential. 18th Cong. 2d Sess. p. 144. They were not, however, published till after the termination of the subsequent negotiations of Mr. Gallatin, in 1826–7, when they were again printed, with the argument of the United States, in reply, contained in the instructions of Mr. Clay to Mr. Gallatin, also quoted by Mr. Wheaton. Mr. Gallatin said, in reporting the results of his mission: — "The British plenipotentiaries will not entertain any proposition respecting the navigation of the St. Lawrence, founded on the right claimed by the United States to navigate that river to the sea. Although it may prove hereafter expedient to make a temporary agreement, without reference to the right, (which I am not authorized to do,) I am satisfied that, for the present at least, and whilst the intercourse with the British West Indies remains interdicted, it is best to leave that by land or inland navigation with the North American British Provinces to be regulated by the laws of each country respectively. The British government will not, whilst the present state of things continues, throw any impediment in the way of that intercourse, if the United States will permit it to continue." Mr. Gallatin to Mr. Clay, 21st September, 1827. And in a despatch of the 1st of October, 1827, he says: "I am fully satisfied that we may with confidence rely on the obvious interest of Great Britain to remove every restriction on the exportation of American produce through Canada and need not resort to any treaty stipulation short of at least a liberty in perpetuity to navigate the river through its whole extent." MS. Despatches.

The navigation of the continuous waters of the United States and Canada is now provided for in the following articles of the treaty of June 5, 1854, already cited for another purpose, § 8, Editor's note [88, p. 326, *supra*. The third article, — whose operation may be affected at the will of the American government, in case of the suspension of the privilege, stipulated for on the part of Great Britain, in the fourth article, — provides for a reciprocal trade, free of duty, between the United States and the British colonies, in articles of their respective growth and produce, as specified in the schedule thereto annexed.

By Art. IV. it is agreed that the citizens and inhabitants of the United States shall have the right to navigate the river St. Lawrence and the canals in Canada, used as the means of communicating between the great Lakes and the Atlantic Ocean, with their vessels, boats, and crafts, as fully and freely as the subjects of Her Britannic Majesty, subject only to the same tolls and other assessments as now are or may hereafter be exacted of Her Majesty's said subjects; it being understood, however, that the British government retains the right of suspending this privilege on giving due notice thereof to the government of the United States; that if at any time the British government should exercise the said reserved right, the government of the United States shall have the right of suspending, if it think fit, the operation of Article III. of the present treaty, in so far as the province of Canada is affected thereby, for so long as the suspension of the free navigation of the river St. Lawrence or the canals may continue; that British subjects shall have the right freely to navigate Lake Michigan with their vessels, boats, and crafts, so long as the privilege of navigating the river St. Lawrence, secured to American citizens by the above clause of the present article, shall continue; and the government of the United States further engages to urge upon the State governments to secure to the subjects of Her Britannic Majesty the use of the several State canals on terms of equality with the inhabitants of the United States; and that no export duty, or other duty, shall be levied on lumber or timber of any kind cut on that

portion of the American territory in the State of Maine watered by the river St. John and its tributaries, and floated down that river to the sea, when the same is shipped to the United States from the province of New Brunswick. United States Statutes at Large, vol. x. p. 1091.

The Queen of England said in her Speech to Parliament, November 11, 1852: "The wise and enlightened policy of the provisional Director of the Argentine Confederation has already opened to the commerce of the world the great rivers, hitherto closed, which afford an access to the interior of the vast continent of South America." Annual Register, 1852, p. 125]. England and France gave notice to the United States of the proposed negotiations with the government of Buenos Ayres, in order that "we might, if we thought proper, pursue the same course." President Fillmore's Message, Annual Register 1852, p. 202].

Treaties have been negotiated by the United States with Paraguay and the Argentine Confederation, with regard to the navigable rivers within those countries, though we have no claim founded on the ownership of the adjacent territory; and similar negotiations were carried on with Brazil for the navigation of the Amazon. Separate treaties were signed, 10th July, 1853, by the Argentine Confederation with the United States, France, and England, for the free navigation of the Parana and Uruguay, stipulating moreover that, should a war break out between any of the States of the river Plata or its confluents, the navigation of the rivers Parana and Uruguay shall remain free to the merchant flag of all nations, except in munitions of war, with a provision that Brazil, Paraguay, Uruguay, and Bolivia, might become parties to the treaties. Annuaire, &c., 1858–4, App. 945. United States Statutes at Large, vol. x. p. 1002.

President Pierce's Message, at the opening of the 1st Session of the 33d Congress, December 1853, contains the following reference to the navigation of the great rivers of South America:

"Considering the vast regions of this continent, and the number of States which would be made accessible by the free navigation of the river Amazon, particular attention has been given to this subject. Brazil, through whose territories it passes into the ocean, has hitherto persisted in a policy so restrictive, in regard to the use of this river, as to obstruct, and nearly exclude, foreign commercial intercourse with the States which lie upon its tributaries and upper branches. Our minister to that country is instructed to obtain a relaxation of that policy, and to use his efforts to induce the Brazilian government to open to common use, under proper safeguards, this great natural highway for international trade. Several of the South American States are deeply interested in this attempt to secure the free navigation of the Amazon; and it is reasonable to expect their coöperation in the measure. As the advantages of free commercial intercourse among nations are better understood, more liberal views are generally entertained as to the common rights of all to the free use of those means which nature has provided for international communication. To those more liberal and enlightened views, it is hoped that Brazil will conform her policy, and remove all unnecessary restrictions upon the free use of a river which traverses so many States and so large a part of the continent. I am happy to inform you that the Republic of Paraguay and the Argentine Confederation have yielded to the liberal policy still resisted by Brazil, in regard to the navigable rivers within their respective territories. Treaties embracing this subject, among others, have been negotiated with these governments, which will be submitted to the Senate at the present session." Cong. Doc. Senate, 33d Cong. 1 Sess., Ex. Doc. No. 1, p. 7.

Mr. Marcy had previously instructed Mr. Trousedale, Minister at Rio de Janeiro,

September 25, 1853: "It may be that Brazil will at once abandon her untenable pretensions to exclusive ownership and control over the majestic water-highway, which is the link that connects directly the United States with five of the republics of this hemisphere. The Amazon, to the eastern portions of Peru, Bolivia, Ecuador, and New Granada and the southern portions of Venezuela, is not unlike the Mississippi in its relation to the country bordering on its tributaries, and, if successfully navigated, will, it is presumed, develop their resources to a similar extent." Department of State, MS.

In the treaty between the United States and Peru, concluded on the 26th of July, 1851, there are reciprocal stipulations that neither party will grant to other nations any favors, privileges, or immunities that shall not be immediately extended to citizens of the other contracting party, gratuitously, if the concession was gratuitous, or for an equivalent, if the concession was conditional — that the duties on account of tonnage, &c., and other local charges, in the ports of the respective countries, shall be the same for vessels of both parties. There is also a stipulation that citizens of the United States, establishing a line of steam vessels, between the different ports of entry within the Peruvian territories, should have all the privileges and favors enjoyed by any other association or company whatever, and the article concludes with the following provision: "It is furthermore understood between the two high contracting parties that the steam vessels of either shall not be subject in the ports of the other party to any duties of tonnage, harbor, or other similar duties whatsoever than those that are or may be paid by any other association or company." Arts. II. IV. X., United States Statutes at Large, vol. x. pp. 926, 930.

A treaty was concluded on the 23d October, 1851, between Brazil and Peru, to regulate the navigation of the Amazon, the first article of which provides: — Art. 1. The Republic of Peru and His Majesty the Emperor of Brazil, desiring to promote the navigation of the river Amazon and of its tributaries by steam vessels which, by ensuring the exportation of the immense products of those vast regions, may contribute to increase the number of their inhabitants and to civilize the savage tribes, agree that the merchandise, products, and vessels which shall pass from Brazil to Peru and from Peru to Brazil by the frontiers and rivers of the one or other state, shall be exempt from all other duties than those to which the national products are subjected, and with which they shall be placed on the footing of a complete equality. Annuaire des deux mondes, 1852–3. Appendice, p. 934.

That the privileges obtained by Peru accrued to the benefit of the United States and of other nations, having similar treaties with her, was the construction first put on the treaty of 23d October, 1851, by the government of that country. By a decree of 15th of April, 1853, in reference to the opening of the Amazon, it is provided, Art. 1, that in conformity with the treaty between Peru and Brazil of 23d October, 1851, and during the time it is in force, the navigation of the Amazon, as far as the port of Nauta, at the mouth of the Ucayali, is open to the navigation, traffic, and commerce of the vessels and subjects of Brazil. Art. 2. Subjects and citizens of other nations, who have treaties with Peru on the same terms as the most favored nation, are entitled to the same privileges as the Brazilians. Peruvian Decree of 15th April, 1853.

But the Brazilian government having "denied the right of any government through whose territory the Amazon passes to conclude with another, which is not in the same case, any treaty or convention upon its navigation, without the consent of Brazil," the Peruvian government took a different view of its obligations.

The decree of the 4th of January, 1854, was stated to be explanatory of that of the 15th of April, 1853. It declares the rights of Brazil to navigate Peruvian rivers confluent with the Amazon, and also, while recognizing the right of all riparian States

to the navigation of the Amazon, it declares the necessity of arranging with them the general regulations of police and other measures that it may be requisite to adopt. In its third article it says, "If other States pretend that their subjects and vessels should be admitted to the navigation of the Amazon and its confluents belonging to the territory of Peru, because they believe they possess the right to it, in virtue of treaties concluded with the Republic, this government will proceed to the grant or denial of the demands addressed to it, according to the stipulations of existing treaties or in the manner and under the conditions that it may deem most just and convenient."

The Envoy of the United States thus met the argument by which it was attempted to withdraw the concessions as to the Amazon, in the treaty with Brazil, from the operation of previous reciprocity treaties;

"His Excellency states that the United States cannot claim to be put upon the same footing as Brazil in the Peruvian rivers, because the steam company which is now navigating the Amazon has been established with the funds of the two nations, and is a private affair of their own; that the navigation of that river belongs in common to the riparian [*riberenas*] nations, whence it is inferred that Peru, as one of them, cannot concede rights which she alone does not possess; that the fluvial navigation belonging to the riparian nations is an international servitude, emanating from dominion in their respective territories, and from their relative position upon the navigable waters; and, finally, that this servitude being active and passive at the same time, since the parties interested enjoy it because they suffer it, cannot be alienated to a third party by the exclusive will of one participant.

"The Amazon is formed by the confluent streams that flow through the territory of six sovereign nations, five of which are the owners of navigable tributary rivers, whose total course is comprehended within their own territories, until they empty into the central channel owned by Brazil. As each of these five nations contributes with its waters to form the central channel, this latter becomes a public inland highway for each to enter and depart from her dominions. Over the central channel or the Amazon, which flows almost entirely through the territory of Brazil, none of the nations hold exclusive jurisdiction, because neither is the owner of all the waters which form it.

"From the fact of the channel of the Amazon being a public international highway, it is not inferred that its head waters and confluents should also be so, when each flows entirely through the territory of one of the riparian States. Bolivia, for example, owns the whole course of the Marmoré and of the Beni, until their junction with the Itenes, which together form the Madeira; and Peru owns the Ucayali and the Huallaga. The position of both States has always given them a right to the innocent use of the lower Amazon, because they have had original and exclusive jurisdiction over the upper waters, and can follow them down to the ocean.

"The joint ownership in the central channel of the Amazon commences at the point where the confluent streams of one of the riparian nations cross its frontier and flow through the territory of another State. But it cannot be hence inferred that Brazil, as the proprietor of the mouths of the Amazon, has always had the right of transit through the upper waters not within her territory (*agenas*), or what is more extraordinary, that she should have had original dominion and jurisdiction over those waters, when, in reality, the dominion she exercises commences from the places where the foreign rivers enter her territory. To assert the contrary would be to fall into an inversion of unacceptable terms. If, therefore, joint ownership exists among the riparian nations, it begins for Brazil at the frontier of the empire, and not before. This is virtually acknowledged by Peru and Brazil by the terms of the second article of their treaty, wherein it is said that the navigation 'of the Amazon

from its mouth to its bank in Peru, must belong to the respective riparian States.'

"With respect to the parity which his Excellency desires to establish between the servitudes described by the civil law, when treating of the right of way ('via'—'iter') through foreign landed property, and the international right of transit by a common river, the undersigned thinks it superfluous to demonstrate the impossibility of such a parity. It is sufficient for him to indicate that if both cases were identical, none of the riparian States could conclude treaties with a foreign power, opening their rivers to foreign navigation and commerce, without the permission and concert of the other riparian States; so that it would find itself really deprived of one of the attributes inherent to every sovereign nation.

"It being clear, therefore, that Brazilian vessels could not legally navigate the Peruvian rivers prior to the treaty of the 23d October, 1851, the admission of the Brazilian company's steamers into the Peruvian waters of the Amazon has been a concession or favor granted to Brazil, in which the United States must immediately participate, according to the terms of the treaty of the 26th July, 1851." Mr. Clay to the Minister of State in the Department of Foreign Relations. Lima, February 4, 1854.

By a law of the 26th November, 1853, Ecuador declared free, with an entire exemption from all charges or duties on vessels and cargoes, the navigation of the internal rivers of that republic, including its portion of the Amazon. Annuaire des deux mondes, 1853–4, p. 824.

The convention signed in 1853, between the United States and Paraguay, never went into effect, as Paraguay refused to ratify it with the amendments made at Washington by the Senate. Annuaire des deux mondes, 1860, p. 905.

But by the treaty of February 4, 1859, Paraguay conceded to the merchant flag of the citizens of the United States of America the free navigation of the river Paraguay, as far as the dominions of the Empire of Brazil, and of the right side of the Parana, throughout all its course belonging to the republic, subject to police and fiscal regulations of the supreme government of the republic, in conformity with its concessions to the commerce of friendly nations. Treaties of the United States at Large, 1859–60, p. 122.

Liberty of passage by land and navigation by water have been placed, as matters of innocent use, in the same category of imperfect rights. Wildman's International Law, vol. i. p. 64. The importance to the commerce of the world of the intercommunication by the Isthmus of Suez and of Panama has given rise, of late years, to many diplomatic negotiations, having in view the construction of artificial means of communication which, whether by railroads or canals, may not be subject to the interruptions and vicissitudes of war.

In accordance with the course which Mr. Wheaton had adopted, of communicating whatever intelligence he supposed might advance the interests or promote the prosperity of his country, he addressed, at the close of 1845, an elaborate despatch to the Secretary of State, on the importance of re-opening the ancient water communication between Europe and the East Indies by Egypt and the Red Sea, and of opening a new route from the United States and Europe to the East Indies, by a ship-canal between the Atlantic and Pacific, across the Isthmus connecting North and South America; thus avoiding the immense *détours*, around the Cape of Good Hope and Cape Horn, by which the continents of Africa and America are terminated in the southern hemisphere. With the former enterprise he proposed to connect a line of steamers, not only as mail packets and for passengers, but for the conveyance of the finer fabrics and of valuable merchandise from the United States to the

British Channel and German Sea, touching at Cowes or Havre, and proceeding to Bremen or Hamburg, from whence an intercourse was already established towards the East Indies by hydraulic works, parallel with the railroad route between the Adriatic and the German Sea, and forming a continuous communication between the waters falling into the German Ocean and those that emptied into the Black Sea. The obstacles to the navigation of the Danube had been removed, by the treaty of 1840, between Austria and Russia, the advantages of which were accorded to all nations that had the right to navigate the Black Sea; while the common use of the rivers of Germany had been previously stipulated for by the treaty of Vienna, of 1815. It may be remarked that the views above expressed, with regard to the patronage of the government to postal steamers, preceded any action of Congress to the subject; the first appropriation for that object, which was for the Bremen line, having been made June 19, 1846. United States Statutes at Large, vol. ix. p. 19.

The suggestions with reference to the communication by the Isthmus of Panama, besides our author's having the benefit of all the learning on the subject then attainable in Europe, were made on consultation with the venerable Humboldt, who, on all matters connected with this Interoceanic Canal, had, since his travels in Mexico and South America, in the early part of the century, been deemed the highest authority. Mr. Wheaton incorporated in his despatch the last views of the great traveller on the practical accomplishment of a work, the value of which to the United States, at its date, was principally estimated by the saving of 10,000 miles, in the voyage, by Cape Horn and the northwest coast of America, to China; attention being then particularly attracted to the trade of that country, — an increased intercourse with which it was supposed would be effected by the treaty, recently concluded by Mr. Cushing with the Celestial Empire. The immense accessions made to our commercial facilities in the Indian Ocean, including the opening to the trade of the world of the Empire of Japan, have added greatly to the contemplated benefits of the proposed route which, as well as the one through the Isthmus of Suez, it was suggested to put under the common guarantee of all the maritime powers. But, when Mr. Wheaton wrote, even our title to Oregon had not been admitted; the war with Mexico had not yet commenced; much less had California been ceded to us and the foundations laid for States on the Pacific, already rivalling in wealth and commerce the most flourishing of the Atlantic commonwealths. The prosperity of these newly acquired regions was well calculated to divert the attention of the American people from a communication through foreign territory, with guarantees depending on the good faith of maritime and commercial rivals, and the very attempt to form which occasioned serious diplomatic embarrassments, to direct routes across the continent, wholly within our own sovereignty and destined, it is fervently hoped, despite of the temporary vicissitudes of civil war, to bind together with bolts of iron States of the Union, extending over the immense tract, that separates the two oceans.

We have had occasion before to refer to the anomalous position of the semi-independent provinces of the Turkish Empire to the government at Constantinople, and to the greater or less connection existing with it. Part I. ch. 1, § 10. Editor's note [6, p. 22. To Tunis the institutions, which the Sublime Porte has established by treaties, have never been applied, though the exceptional situation of that Regency results from no express acknowledgment of the Sultan. It is a fact contested by no European power, and which Turkey herself does not resist, since she formerly bound herself with France not to seek to change the *status quo;* while, moreover, nearly all the powers of Europe and the United States have treaties with the Bey. Such, however, is not the case as to Egypt. The hatti-cherif of Gulhané was

proclaimed there, in conformity with a special provision of the act of the 25th of May, 1841; and the promulgation of the Hatti-humayoun of 1856 likewise took effect there without difficulty. The same has been the case as to several international conventions concluded by the Sultan; whilst in the hatti-cherif of investiture given to Mahomet-Ali, it is said, "The treaties concluded, or which may be concluded between my government and foreign powers, shall receive a complete execution in the provinces of Egypt." Annuaire des deux mondes, 1856–7, p. 721.

Though it was not understood that the acts of 1840, which established the relations of Egypt with Turkey, absolutely required the hereditary chief of the province to ask the authorization of the Porte to undertake great works of public utility, yet it was made a condition in delivering to M. de Lesseps, the Vice-Roy's firman of the 30th of November, 1854, giving him the exclusive power of constructing a canal across the Isthmus of Suez. Great obstacles were interposed by England to the completion of the grant. And when, in July, 1857, Lord Palmerston was asked in the House of Commons whether the government would use its influence with the Sultan in support of the application of the Vice-Roy of Egypt for the sanction of the Porte, and, if any objections were entertained, he would state the ground of them, he replied:—

"Her Majesty's government certainly cannot undertake to use their influence with the Sultan to induce him to give permission for the construction of this canal, because for the last fifteen years Her Majesty's government have used all the influence they possess at Constantinople and in Egypt to prevent that scheme from being carried into execution. I believe that it is physically impracticable, except at an expense which would be far too great to warrant the expectation of any returns. However, that is not the ground upon which the government have opposed the scheme. But the scheme is one hostile to the interests of this country — opposed to the standing policy of England in regard to the connection of Egypt with Turkey — a policy which has been supported by the war and the treaty of Paris. The obvious political tendency of the undertaking is to render more easy the separation of Egypt from Turkey. It is founded, also, on remote speculations with regard to easier access to our Indian possessions, which I need not more distinctly shadow forth, because they will be obvious to anybody who pays any attention to the subject. I can only express my surprise that M. Ferdinand de Lesseps should have reckoned so much on the credulity of English capitalists as to think that by his progress through the different counties he should succeed in obtaining English money for the promotion of a scheme which is every way so adverse to British interests. That scheme was launched, I believe, about fifteen years ago, as a rival to the railway from Alexandria, by Cairo, to Suez, which, being infinitely more practicable and likely to be more useful, obtained the preëminence." Hansard's Parliamentary Debates, 3d Series, vol. cxlvi. pp. 1043–1075.

The matter was again brought before Parliament in June, 1858, when the views of Lord Palmerston prevailed by a decisive vote. On that occasion, it was stated by the friends of the project, "What is asked is to put an end to the vicious system of arbitrary and gratuitous interference for the purpose of preventing the execution of the canal on grounds which go to place England at issue with all the world. It was originally a question of completion between the railway and canal. The canal was the French, the railway an English scheme." Mr. Gladstone said: "There is not a statesman in Europe who does not denounce the policy of this opposition as unwarrantable and selfish." Ib. vol. cl. pp. 1367, 1836.

M. de Lesseps having obtained large subscriptions for the work, its commencement was inaugurated in April, 1859, without, however, its having received the authorization of the Porte; but the French interests embarked had induced the

French government to direct its representatives at Constantinople and Alexandria to give it every legitimate protection. The Egyptian government declared that it would not, under any pretext, permit the work to proceed without the Sultan's sanction, and England was so successful through her Ambassador at Constantinople as to cause an order arresting it before the 1st of November, 1859, to be made. Ib. 1858–9, p. 734. And it appears from the Parliamentary discussions, June 21, 1861, that, when afterwards vigorous efforts were being made by the Vice-Roy to procure laborers for the work, the opposition of England, on political grounds, still continued. Le Nord, 26 Juin, 1861.

By the treaty of December 12, 1846, New Granada guaranties that the right of way or transit across the Isthmus of Panama, upon any modes of communication that now exist or may hereafter be constructed, shall be open and free to the government and citizens of the United States, and for the transportation of any articles of lawful commerce; that no other tolls or other charges shall be levied or collected upon them or their merchandise passing over any such road or canal than is, under like circumstances, levied upon or collected from the Granadian citizens; that their merchandise thus passing from sea to sea in either direction for the purpose of exportation to any other foreign country, shall not be liable to any import duties, or, having paid such duties, they shall be entitled to drawback on their exportation. Nor shall citizens of the United States be liable to any duties, tolls, or charges of any kind, to which native citizens are not subjected, for thus passing the said Isthmus. The United States guaranty positively and efficaciously to New Granada the perfect neutrality of the Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and in consequence the United States also guaranty, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory. The duration of the treaty was fixed at twenty years from the exchange of ratifications (which was in June, 1848), and to be continued until a notification of twelve months is given by one of the parties. United States Statutes at Large, vol. ix. p. 898.

The treaty of peace between the United States and Mexico, of the 2d of February, 1848, had not only provided for the navigation of the rivers Gila and of the Rio Bravo del Norte, below the southern boundary of New Mexico, to be free and common to vessels and citizens of both countries, but for the free and uninterrupted passage for citizens and vessels of the United States by the Gulf of California and by the river Colorado below its confluence with the Gila to and from their possessions north of the boundary line as defined in the treaty; it being understood that this passage was to be by navigating the Gulf of California and the river Colorado, and not by land, without the express consent of Mexico. It was stipulated that if it should be found to be practicable and advantageous to construct a road, canal or railway which should, in whole or in part, run upon the river Gila, or upon its right or its left bank, within the space of one marine league from either margin of the river, the governments of both republics would form an agreement regarding its construction, in order that it might serve equally for the use and advantage of both countries. Ib. p. 928.

The above provisions were rendered for the most part nugatory by cessions of territory to the United States, having for their object the construction of a railway between the Atlantic and Pacific within their own limits, made by the treaty of December 30, 1853. They were accordingly annulled, and it was stipulated anew by that treaty that the vessels and citizens of the United States shall, in all time, have free and uninterrupted passage through the Gulf of California to and from their possessions

north of the boundary line of the two countries, there being also the same reservation confining the passage to be, as in the former treaty, by navigating the Gulf of California and the river Colorado and not by land. The same provisions, stipulations, and restrictions are to be observed as to the Colorado, so far as the middle of that river is made the common boundary. As to the Rio Bravo del Norte, the former treaty remains in force only so far as regards that river below the initial line provided for in the new treaty.

In other articles it is declared: The Mexican government having on the 5th of February, 1853, authorized the early construction of a plank and railroad across the Isthmus of Tehuantepec, and to secure the stable benefits of said transit-way to the persons and merchandise of the citizens of Mexico and the United States, it is stipulated that neither government will interpose any obstacle to the transit of persons and merchandise of both nations; and at no time shall higher charges be made on the transit of persons and property of citizens of the United States than may be made on the persons and property of other foreign nations, nor shall any interest in said transit-way, nor in the proceeds thereof, be transferred to any foreign government.

Provision is also made for the transportation of the mails in closed bags, and for that of the effects of the United States government and its citizens intended for transit and not for distribution on the Isthmus, free of custom-house or other charges by the Mexican government. It is also stipulated that no passports nor letters of security will be required from persons crossing the Isthmus and not remaining in the country; that when the rail-road shall be completed the Mexican government will open a port of entry, in addition to the port of Vera Cruz, at or near the terminus of said road on the Gulf of Mexico. The two governments are to enter into agreement for the prompt transit of troops and munitions of the United States, which that government may have occasion to send from one part of its territory to another, lying on opposite sides of the continent. The Mexican government having agreed to protect with its whole power the prosecution, preservation, and security of the work, the United States may extend its protection as it shall judge wise to it, when it may feel sanctioned and warranted by the public or international law. Ib. vol. x. p. 1034–1037.

We have already had occasion incidentally to allude, in connection with the Mosquito protectorate, — Part I. ch. 11, § 14. Editor's note [28, p. 70, *supra*, — to the convention between the United States and Great Britain, of the 19th of April, 1850, known as the Clayton-Bulwer treaty, and we shall have hereafter to notice a question of construction which arose under it. See Part III. ch. 2, § 5, *infra*. Its professed object was to set forth and fix by convention the views and intentions of the parties with reference to a ship canal that might be constructed between the Atlantic and Pacific Oceans. It provided that the exclusive control over it should not be obtained or maintained for itself by either power; and they mutually agreed that neither will ever erect or maintain any fortifications commanding the same or in the vicinity thereof, or occupy or fortify or colonize or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have, to or with any State or people, for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying or colonizing Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same; nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection or influence that either may possess, with any State or government through whose territory the said canal may pass, for the purpose of acquiring or holding,

directly or indirectly, for the 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. Vessels of the United States or Great Britain traversing the said canal shall, in case of war between the contracting parties, be exempted from blockade, detention, or capture by either of the belligerents; and this provision shall extend to such a distance from the two ends of the said canal as it may hereafter be found expedient to establish. Other provisions were made for protecting from unjust detention, seizure or any violence whatever, the persons employed in making the canal and their property used for that object; for inducing the States whose territory is traversed thereby to facilitate the construction and for securing two free ports, one at each end. They agree to guarantee the neutrality of the canal when completed, so that it may be forever open and free and the capital invested therein secure. This guarantee may, however, be withdrawn for the causes assigned in the treaty, on six months' notice. The contracting parties invite every State in intercourse with them to enter into similar stipulations with them; and they agree to enter into treaty stipulations with such of the Central American States as they may deem advisable, for the purpose of more effectually carrying out the great design of the convention. They also agree to extend their protection, by treaty stipulations, to any other practicable communication, whether by canal or railway, across the Isthmus, especially to the inter-oceanic communications proposed to be established by the way of Tehuantepec or Panama. Ib. vol. ix. p. 995.

There should have been noticed, in connection with river navigation, the treaty of August 31, 1835, between Portugal and Spain, for the free navigation of the Douro. It among other matters provides for a mixed commission to establish duties of navigation and a system of police, which should be uniform and perfectly equal for the subjects of the two powers. The two powers engage not to grant any exclusive privilege for the transportation, by the Douro, of merchandise or travellers. Portugal engages to take the necessary measures to create in the city of Oporto an *entrepôt* for all the produce and merchandise, which shall come from Spain by the river Douro, in Portuguese or Spanish vessels, destined for foreign commerce or to be introduced by the shore of the Spanish peninsula, — merchandise thus in *dépôt* to pay to Portugal only the moderate duties of *dépôt* now established in the *entrepôts* of Lisbon and Oporto. If any articles in *dépôt* are introduced into Portugal, they are to pay the custom-house duties paid by the most favored nation, and in that case the *depôt* duties are not demandable. Spain engages to declare, as a port of entry, the port of exportation, which shall for the time be selected in the neighborhood of Fregeneda, and the lawful merchandise of commerce, which shall be introduced into this port, shall pay the same duties as in the other ports of Spain. Martens, par F. Murhard, Nouveau Recueil, tom. xiv. p. 97. See further as to the navigable waters, which separate or traverse Holland and Belgium. Part III. ch. 2, § 12, Editor's note, *infra*.] — *L.*

PART THIRD.

INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS.

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INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS.

CHAPTER I.

RIGHTS OF LEGATION.

§ 1. Usage of permanent diplomatic missions.

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. During the Middle Ages they were less distinctly recognized, 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, 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. [[115]

[[115] The question how far unauthorized individuals had a right to address foreign nations in the name of their own country, was discussed in the House of Lords (4th April, 1853,) in reference to a deputation which, in the name of the English nation, had addressed the Emperor of France on the relations of peace and war between the two countries. Lord Campbell contended, on the authority of Mr. Burke in 1791, with regard to a deputation to the Empress of Russia, that "they had been guilty of an offence perhaps against the law of the land, and, at all events, against the law of nations." Annual Register, 1853, p. 11].

In cases of revolution the duties of a minister are not confined to the protection of his own countrymen, but extend to the citizens and subjects of all friendly nations

§ 2. Right to send, and obligation to receive, public ministers.

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 importance of the relations to be maintained between different States by means of diplomatic intercourse.[1]

§ 3. 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 Kainardgi, in 1774, between Russia and the Porte, the provinces of Moldavia and Wallachia, placed under the protection of the former power, have the right of sending chargés d'affaires of the Greek communion to represent them at the court of Constantinople.[2] [116

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left by the political events without a representative. The government of Miramon having, in 1859, revoked the exequatur of the American Consul at Mexico, because the United States had recognized President Juarez, he asked the interposition of the British Minister, for protection from the *de facto* authorities, for the persons and property of Americans. This protection having been withheld, Mr. Cass, in instructing Mr. Dallas, May 12, 1859, to bring to the notice of the British government the course of its minister, says: "In countries in a state of revolution, and during periods of public excitement, it is the practice of modern times for the foreign representatives residing there to interpose by the exertion of their influence for the protection of the citizens of friendly powers exposed to injury or danger and left without any minister of their own country to watch over them. The President would not hesitate to visit with marks of his displeasure any American minister, who should have it in his power to afford protection to the persons or property of citizens of a friendly nation placed in peril by revolutionary commotions, and having no national representative to appeal to, should fail to exert his influence in their behalf." Department of State, MS.] — *L.*

[1] Vattel, Droit des Gens, liv. iv. ch. 5, §§ 55–65.. Rutherforth's Institutes, vol. ii. b. ii. ch. 9, § 20. Martens, Précis du Droit de Gens Moderne de l'Europe, liv. vii. ch. 1, §§ 187-190.

[2] 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, Nos. 3, 4.

[116 The Chargés d'Affaires of Moldavia and Wallachia near the Ottoman Porte, of whom the treaty of Kainardgi speaks, are not properly diplomatic agents, nor do

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 present Germanic Confederation, this right is preserved to all the princes and States composing the federal union. 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 forbidden 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.[1]

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they reside with the diplomatic corps accredited to the Porte. The pachas and governors of the Ottoman provinces had long been in the habit of maintaining near the central administration, that is to say, near the Porte, agents called Kayson Kehagasi (literally agents near the Porte), who served as intermediaries between the central administration and their constituents. As the Hospodars of Moldavia and Wallachia, at the epoch of the peace of Kainardgi, regularly betrayed the Sultan in every political crisis at all serious, and as the Porte then, at its pleasure, made the Kayson Kehagasi responsible for the Hospodars, of whom they were the confidants, the latter retiring in case of necessity to a foreign country, the stipulation in question of the treaty of Kainardgi had only properly for its object to save harmless and preserve the life, in such case, of the Phanariot, invested with the functions of Kayson Kehagasi. Kupfer's Remarks on the "Elements of International Law." Wheaton's MS. Papers.

It was the practice of the Spanish Crown, during the reigns of Charles I. (the Emperor Charles V.,) and his successors of the Austrian dynasty, to delegate to Spanish viceroys, governors, and captains-general the *jus legationis* as well in Europe as in Asia and America; and that delegation was recognized by the public law of Europe. Callières De la manière de négocier, ch. 11, p. 200. The same power was exercised by the viceroys or governors of Portugal in Asia and America, and by those of Austria in the Belgic Netherlands. It is, also, exercised by the great subdivisions of the Turkish empire, such as Egypt, Tripoli, Tunis, Servia, Wallachia, and Moldavia; by the transmarine dependencies of European States, governed by the intervention of a commercial company with political functions, like the French, Dutch, English East and West India Companies; by confederated States, acting in common in many respects, but still retaining each more or less of individuality or independent power, as the Germanic Confederation. Mr. Cushing, Oct. 16, 1855 Opinions of Attorneys General, vol. vii. p. 651.] — *L.*

[1] Heffter, das europäische Völkerrecht, § 200. Merlin, Répertoire, tit. *Ministre publique*, sect. ii. § 5.

§ 4. 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 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 recognize 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.[1] [117]

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[1] Vide suprà, Part I. ch. 2, §§ 7–10, pp. 39–46. Merlin, Répertoire, tit. *Ministre publique*, sect. ii. § 6.

[117] No difficulty in recognizing a government *de facto* can well arise with foreign States when a prince, though claiming to be the sovereign *de jure*, voluntarily renounces all attempt to exercise his rights. It was, however, alleged that it was deference towards the legitimate claimant that induced the Emperor Nicholas of Russia to withhold the fraternal appellation from Napoleon III. on his accession.

In July, 1844, on the death of the Duke d'Angoulème, the Count de Chambord, (Henry V.) addressed a notification to the foreign courts, considering it to be his duty to protest against the change which had been introduced into the legitimate succession of the crown, and declaring that he would never renounce rights, which according to the ancient French laws, he held from his birth. "These rights," he adds, "are connected with great duties, which with the grace of God I shall know how to fulfil. I, however, only wish to exercise them when, in my conviction, Providence shall call me to be truly useful to France. Till that period arrives, my intention is only to take, in the exile in which I am compelled to live, the title of *Comte de Chambord*. It is the one which I adopted on leaving France, and I desire to preserve it in my relations with the courts." Martens, par F. Murhard, Nouveau Recéuil, tom. vii. p. 206. This protest was followed by another in October, 1852, on occasion of the proposed reëstablishment of the Empire, which thus concludes: "I declare to France and to the world, that, faithful to the laws of the kingdom and the traditions of my ancestors, I will religiously preserve, to my last breath, the deposit of the hereditary monarchy of which Providence has intrusted to me the care, and which

For the purpose of avoiding the difficulties which might arise from a formal and positive decision of these questions, diplo-

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is the only port of refuge where France, the object of our love, may, after so many storms, at length find rest and happiness." Annual Register, 1852, p. 261].

In reference to the revolution of 1848, Mr. Buchanan, Secretary of State, wrote to Mr. Rush, at Paris, the 31st of March, 1848: "It was right and proper that the Envoy Extraordinary and Minister Plenipotentiary from the United States should be the first to recognize, so far as his powers extended, the provisional government of the French Republic. In the intercourse with foreign nations the government of the United States has, from its origin, always recognized *de facto* governments. We recognize the right of all nations to create and reform their political institutions according to their own will and pleasure. We do not go behind the existing government to involve ourselves in the question of legitimacy. It is sufficient for us to know that a government exists capable of maintaining itself; and then its recognition, on our part, inevitably follows. This principle of action, resulting from our sacred regard for the independence of nations, has occasioned some strange anomalies in our history. The Pope, the Emperor of Russia, and President Jackson were the only authorities which ever recognized Dom Miguel as King of Portugal." Department of State MS.

In the case of the change in the Constitution of France, which preceded the elevation of the Emperor Napoleon III. the following instructions, of the date of January 12, 1852, were sent, by the Secretary of State, to the Minister at Paris:

"From President Washington's time down to the present it has been a principle, always acknowledged by the United States, that every nation possesses a right to govern itself according to its own will, to change its institutions at discretion, and to transact its business through whatever agents it may think proper to employ. This cardinal point in our own policy has been strongly illustrated by recognizing the many forms of political power which have been successively adopted by France, in the series of revolutions with which that country has been visited. Throughout all these changes, the government of the United States has governed itself in strict conformity to the original principles adopted by Washington, and made known to our diplomatic agents abroad, and to the nations of the world, by Mr. Jefferson's letter to Gouverneur Morris, of the 12th of March, 1793; and if the French people have now, substantially, made another change, we have no choice but to acknowledge that also; and as the diplomatic representative of your country in France, you will act as your predecessors have acted, and conform to what appears to be settled national authority." Mr. Webster to Mr. Rives, Cong. Doc. 1851-2. Senate, vol. iv. Doc. 19. On 17th February, 1853, Mr. Everett, Secretary of State, instructed Mr. Rives: "It is the fundamental law of the American Republic that the will of the people, constitutionally expressed, is the ultimate principle of government; and it seems quite evident that the people of France have, with a near approach to unanimity, desired the restoration of the Empire." Department of State MS.

The Earl of Malmesbury, Secretary of State for Foreign Affairs, on 6th December, 1852, in announcing to the House of Lords that the British government had received an official notification of the accession of Napoleon III. said: "Her Majesty's servants have thought it right, without further hesitation to accept and recognize the new constitution selected by the French people for their own government. It has been our usual policy for a period of twenty-two years, since the revolution of 1830 in Paris, to acknowledge the constitutional doctrine that the people of every country have the right to choose their own sovereign without any foreign interference; and that a

matic 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 honors. [118

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sovereign having been freely chosen by them, that sovereign or ruler, or whatever he may be called, being *de facto* the ruler of that country, should be recognized by the sovereign of this." Annual Register, 1852, p. 165].

In the case of the government attempted to be established by Walker, on his obtaining possession of the capital of Nicaragua, Mr. Marcy instructed, November 8, 1855, Mr. Wheeler, Minister of the United States to that republic: "The knowledge we have of the proceedings does not authorize the President to recognize it as the *de facto* government of Nicaragua; and he cannot hold or permit you to hold in your official character any political intercourse with the persons now claiming to exercise the sovereign authority of that State. The President instructs you to abstain from any official intercourse with the persons now exercising a temporary control over parts of Nicaragua. In such a dubious state of affairs you cannot be expected to act in your official character until you receive instructions from your government; but you will be entitled to all the immunities of a minister, if you do no act to forfeit them. You will remain in the country, and keep your government well advised of the actual condition of affairs there. You will observe great circumspection in your conduct. You cannot retain a right to the privileges of a minister, if you intermeddle with the concerns of any of the parties." Again, he writes, December 8, 1855, disapproving of Mr. Wheeler's recognition of the pretended government: "Considering the means by which the power that now predominates in that State was obtained and the manner in which it is exercised, it can have no just pretension to be regarded as even a *de facto* government. You will, therefore, on the receipt of this despatch, at once cease to have any communication with the assumed rulers of the country." 34th Cong. 1st Sess. H. of Rep., Ex. Doc. No. 103.

In reference to the individual sent to the United States as minister by the government in question, the Attorney General said: "Colonel French is entitled to the diplomatic privilege in a very qualified degree. He is not an accredited minister, but simply a person coming to this country to present himself as such, and not received by reason of its failing to appear that he represents any lawful government. Under such circumstances, any diplomatic privilege accorded to him is of mere transit and of courtesy, and not of full right; and that courtesy will be withdrawn from him as soon as there shall be cause to believe that he is engaged in here, or contemplates, any act not consonant with the laws, the peace and the public, honor of the United States." Mr. Cushing's Opinion, December 24, 1855. Another minister was the next year received from Nicaragua, "it satisfactorily appearing that he represented the government *de facto*, and so far as such exists, the government *de jure*." President Pierce's Message, May 15, 1856. Ib. Senate Ex. Doc. No. 68.] — *L.*

[118 The passage of the text here noted is quoted in the instructions from Earl Russell to Lord Lyons, of the 23d January, 1862, concerning the Commissioners or Ministers, from the "Confederate States," seized on board of The Trent. It is added: "Upon this footing Messrs. Mason and Slidell, who are expressly stated by Mr. Seward to have been sent as pretended Ministers Plenipotentiary to the Courts of St. James and of Paris, must have been sent, and would have been, if at all, received; and the reception of those gentlemen upon this footing could not have been justly regarded, according to the law of nations, as a hostile or unfriendly act towards the United States." Parliamentary Papers, 1862, North America, No. 5, p. 84.

§ 5. Conditional reception of foreign ministers.

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, 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 expressed condition that he shall continue amenable to the local laws and jurisdiction. So, also, one court may absolutely refuse to receive a particular individual as minister from another court, alleging the motives on which such refusal is grounded.[1]

§ 6. 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, and that of Aix-la-Chapelle, 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.

"International law, strictly speaking," says Phillimore, "is not concerned with cases of rebellion. There is no doubt that rebellious subjects are not entitled to the *jus legationis* in their communications with their sovereign; the foundation of the right is wanting. Nevertheless, when rebellion has grown, from the numbers who partake in it, the duration of it, the severity of the struggle, and other causes, into the terrible magnitude of a civil war, the emissaries of both parties have been considered entitled to the privilege of ambassadors, so far as their personal safety is concerned. 'In such a case,' Grotius (lib. ii. ch. 18, § 2,) says, 'one nation is regarded for the time as two nations.' Peace and order, under these circumstances, can only be restored, the shedding of blood can only be stayed, through the medium of negotiation: negotiations must be carried on through negotiators, and negotiators cannot act unless their personal securities be guaranteed. The great revolutions of the world, such as the revolt of the Netherlands and of the British Provinces in North America, could only have been prevented from producing a state of perpetual warfare throughout a greater part of the globe, by a partial application of international law to the divided members of one and the same State." International Law, vol. ii. p. 144.] — *L.*

[1] Bynkershoek, de Foro Competent. Legatorum, cap. 11, § 10. Martens, Manuel Diplomatique, ch. 1, § 6. Merlin, Répertoire, tit. *Ministre publique*, sect. iii. § 5.

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.[1] [[119]

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[1] The *recez* 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 représentatiff.

"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 réglement n'apportera aucune innovation relativement aux représentans du Pape.

"Art. 5. Il sera déterminé dans chaque état un 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.

"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."

The protocol of the Congress of Aix-la-Chapelle of the 21st Nov., 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 parait pas avoir prévu, il est arrêté entres les cinq cours, que les ministres résidens, accrédités auprès d'elles formeront, par rapport à leur rang, une classe intermédiaire entre les ministres du second ordre et les chargés d'affaires."

[[119] All the Catholic powers accord to the Holy See the right of precedence, and manifest to him, as faithful children of the Church, the appropriate honors. Those not Catholic, while contesting the right of precedence, tolerate it in the interests of peace. Thus at the Congress of Vienna, the ministers of the great powers, including Great Britain and Russia, yielded the *pas* to the Pope's nuncios. The relations, which Rome maintains with foreign States, are established on the ordinary diplomatic footing. Heffter, Droit International, par Bergson, § 41, I. II. It having been doubted in England whether, having regard to the several statutes passed against papal encroachments, diplomatic relations could lawfully be established and maintained with the sovereign of the Roman States, it was thought expedient, by 11 and 12 Vict. ch. 108, expressly to authorize Her Majesty to enter into such relations. Stephens's (Blackstone's) Comm. on the Laws of England, vol. ii. p. 496, note. In the course of the passage of the act through Parliament, an amendment was inserted preventing the reception in England of any ecclesiastic as an accredited minister of the Pope. Annual Register, 1843, p. 160]. No diplomatic appointment to Rome has been made in consequence of this act, but the business of Great Britain con-

Ambassadors and other public ministers of the first class are exclusively entitled to what is called the *representative* character,

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tinued to be conducted, while there was a legation at Florence, by a member of that mission.

In most of the countries of Christendom diplomacy is regarded as a distinct pursuit, for which a preliminary education is deemed requisite, and in which promotion, at least in the subordinate ranks, is regulated somewhat after the rules adopted in the military and naval service.

The English diplomatic hierarchy is composed of Ambassadors, Envoys Extraordinary and Ministers Plenipotentiary, Ministers Plenipotentiary, Secretaries of Embassy, Secretaries of Legation, paid Attachés and unpaid Attachés; and in the missions to countries where the diplomatic and consular functions are united, the usual title is that of Chargé d'Affaires and Consul-General.

According to the regulations approved by Lord John Russell, August, 1859, candidates for unpaid attachéships must prove by an examination, that they write English and French quickly and correctly from dictation, understand French so as to make an accurate and good translation of any French paper into English and of any English paper into French, and speak French with tolerable ease and correctness; that they can make an accurate and good translation into English of a paper written in German, Latin, Spanish, or Italian, the language to be at the choice of the candidate; that they can make a clear and correct précis or abstract of any collection of papers placed in their hands; and that they have a general knowledge of geography and of modern history since 1789, especially of the history of the country to which they are about to proceed, as regards its internal constitution and relations to other powers. Persons nominated as unpaid attachés after they have passed their examination and worked for a certain time at the Foreign-office, in order that they may become acquainted with the forms of business as carried on there, will be sent to any post to which the Secretary of State may think it most convenient for the public service to send them. Unpaid will not be promoted to be paid attachés till it is ascertained, by an examination, that they can speak and write the languages of the several countries in which they have resided since their first appointment as unpaid attachés. Candidates, who have previously resided only in France or in the United States, will be required to satisfy the examiners of their proficiency in one other language besides French. They will be required to draw up a report on the general commercial and political relations of the several countries in which they have resided; on the internal polity and the administration and social institutions of such countries, and on the character of their people. They will be required to satisfy the commissioners that they possess such a knowledge of international law as can be acquired from "Wheaton's Elements of International Law," and "Wheaton's History of International Law." The Foreign Office List, 1860, p. 151. All the attachés are hereafter to be paid. Le Nord, 27 Juillet, 1862.

In France, by an Imperial decree of the 17th December, 1853, a diploma of licentiate in law is required of all supernumeraries attached to the department of foreign affairs, and of all unpaid attachés (*attachés libres*) of the embassies and legations abroad. And by another decree of the 18th of August, 1856, the title of paid attaché is abolished, as well as the classification by diplomatic posts of the secretaries of embassy or legation. The secretaries are divided into three classes; and they may be attached, whatever the class to which they belong, indiscriminately, to embassies or legations. No one can be a secretary of the third class unless he has been three years an *attaché* at a diplomatic post, or three years a supernumerary in the

being considered as peculiarly representing the sovereign or State by whom they are delegated, and entitled to the same honors to

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bureaux of the ministry of foreign affairs; nor can any one be named secretary of the second class, who has not for three years discharged the duties of secretary of the third class, or received a salary for three years in the central administration of the department of foreign affairs. No one shall be named secretary of the first class, unless he has been for three years a secretary of the second class, or been during that time précis writer (*rédacteur*) in the bureaux of the ministry.

The ranks are, with the exceptions which appear above as regards secretaries and attachés, the same in the French as in the English service. Neither country has any Ministers Resident, nor has it any Chargés d'Affaires, except as connected with the position of Consul-General, or as a temporary officer during the absence of the ambassador or minister. Annuaire diplomatique, 1860, p. 79.

The royal decree for the organization of the Belgian diplomatic corps is dated 15th October, 1842. The chiefs of missions are divided into three classes: 1st, Envoys Extraordinary and Ministers Plenipotentiary; 2d, Ministers Resident; 3d, Chargés d'Affaires. Counsellors or Secretaries of Legation of the 1st or 2d class are placed in the most important diplomatic posts. Attachés are joined to the different missions, and may be employed at the central administration. Counsellors of Legation are chosen from among the secretaries of the first class, these from the secretaries of the second class, and the last from among the attachés. The secretaries of legation of the first class should have, at least, five years of active service in their grade to pass to that of Counsellor of Legation or Chargé d'Affaires. The secretaries of the second class should have at least three years active service in their grade, to pass to the grade immediately above them. Private individuals, who may be designated as ambassadors or envoys extraordinary on a special mission, remain out of the diplomatic corps, and the particular decrees appointing them will establish their rank.

By a previous royal decree of October 10, 1841, an examination was made a preliminary requisite to obtaining a certificate of qualification as Secretary of Legation. The studies are prescribed, and include History, Statistics and Political Economy, the German or English language, the Law of Nations, (under which head this work is named,) national and foreign Public Law, Elements of the Civil Code, Diplomatic Style and the Commercial Systems of the principal States. Garcia de la Vega, Guide des Agens du Ministère des affaires étrangères de Belgique, pp. 110–114.

In the Netherlands, a diploma of doctor of ancient and modern law must precede an examination in the special studies, among which is included a thorough knowledge of the Dutch and French languages, and at least a superficial knowledge of the English and German. The requisites in Spain for admission into the diplomatic corps as an attaché are similar to those above mentioned, and one modern language, besides French, is required.

In Austria, no one can be admitted to an examination as an attaché in the Department of Foreign Affairs or to a Foreign Imperial Mission, who has not fulfilled the conditions of the law of October 2, 1855, for education in the service of the State, based upon the study of public and municipal law and passing three public examinations, and he must possess, moreover, a knowledge of the French language, besides either Italian or English. Erlass des Ministeriums des Aeussern vom 6 Juni, 1856. Regulations similar to the above exist in the diplomacy of all the countries of Europe. They only accord with the qualifications, which have been generally deemed essential since the treaty of Westphalia. Callières, De la manière de négocier, ch. 4, p. 98.

which their constituent would be entitled, were he personally present. This must, however, be taken in a general sense, as indicating the sort of honors 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.[1]

The right of sending ambassadors is exclusively confined to crowned heads, the great republics, and other States entitled to royal honors.[2]

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.[3]

The United States have never given the title of Ambassador to a diplomatic representative, but the Constitution, in terms, authorizes their appointment and the act of August 18, 1856, "to regulate the diplomatic and consular system of the United States" recognizes them; though no distinction is made between their compensation and that of Envoys Extraordinary and Ministers Plenipotentiary, which, with certain specified exceptions — England, France, Russia, Austria, Prussia, Spain, Italy, Brazils, Mexico, and China — is the same for all countries. Ministers Resident and Commissioners receive seventy-five per cent. of the full amount named for Ambassadors and Envoys Extraordinary and Ministers Plenipotentiary; Chargés d'Affaires fifty per cent. and Secretaries of Legation fifteen per cent. There are regulations as to Interpreters to the missions to China and Turkey, and Assistant Secretaries are provided for the Legations in London and Paris. No authorization is given for the employment of Attachés; but the government is expressly prohibited from allowing them to a legation. United States Statutes at Large, vol. xi. p. 52. There is no preliminary examination as to the qualifications of Secretaries of Legation, nor are they, or even the Ministers, required to understand either the French language or the language of the country to which they are sent. "These places, under our government, have been usually accorded to those who have been prominent in local politics rather than as the results of special attainments;" and though there is no law to that effect, their duration is ordinarily limited to that of the administration that makes them. Mr. Wheaton's career of nearly twenty years (1827–1846) was an exceptional case, but even that was abruptly terminated by a partisan nomination.] — *L.*

[1] 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.

[2] Martens, Précis, &c., liv. vii. ch. 2, § 198. Vide ante, Part II. ch. 3, § 2, p. 295.

[3] Martens, Manuel Diplomatique, ch. 1, § 10.

Ministers of the second class are envoys, envoys extraordinary, ministers plenipotentiary, envoys extraordinary and ministers plenipotentiary, and internuncios of the Pope.[1]

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 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 honors 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. [120] If this observation be applicable as between

[1] Martens, Manuel Diplomatique, ch. 1, § 10.

[120] At an early day after the adoption of the present constitution, the following note was sent by the Secretary of State to the French Minister, in consequence of a letter having been addressed by the latter to the Chief Magistrate, subjoining a detail of his accusations against the Executive, and demanding an explicit declaration that he had never intimated to him an intention to appeal to the people. "I am desired to observe to you that it is not the established course for the diplomatic characters residing here to have any direct correspondence with the President. The Secretary of State is the organ through which their communications should pass. The President does not conceive it to be within the line of propriety or duty, for him to bear evidence against a declaration, which, whether made to him or others is perhaps immaterial; he therefore declines interfering in the case." Mr. Jefferson to Mr. Genet, August 19, 1793.] — *L.*

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.[1] [121]

[1] Pinheiro-Ferreira, Notes to Martens, Précis du Droit des Gens, tom. ii. Notes 12, 14.

[121] A foreign minister accredited to the United States has no right to ask explanations from the President concerning the debates or proceedings of Congress, or any message which he may transmit to either House in the exercise of his constitutional power and duty. In a note to M. de la Rosa, Minister of Mexico, from Mr. Buchanan, Secretary of State, February 15, 1849, it is said: "So far as regards the debates or proceedings of Congress, this is the first occasion on which it has become necessary to address the representative of any foreign government. Not so in relation to the messages of the President to Congress. Mr. Castillo, one of your predecessors, in a note, of the 11th of December, 1835, to Mr. Forsyth, the Secretary of State, called upon him for an explanation of the meaning of a paragraph, relating to Mexico, contained in President Jackson's annual message to Congress, of December, 1835. Mr. Forsyth, in his answer of 16th December, 1835, told Mr. Castillo that "remarks made by the President in a message to Congress are not deemed a proper subject upon which to enter into explanation with the representative of a foreign government. Mr. Livingston, then our Minister to France, on 13th of January, 1835, informed the French Minister of Foreign Affairs that in the message of President Jackson to Congress, of the previous December, there was nothing addressed to the French nation;" and he likened it very properly "to a proceeding well known in the French law — a family council, in which their concerns and interests are discussed, but of which, in our case, the debates were necessarily public." Annual Message of the President, &c., 1849–50. Part I. p. 71.

Mr. Webster, Secretary of State, wrote to the same Mexican Minister, February 21, 1851: "The undersigned flattered himself that after the expression of the sentiments of the government contained in the note of Mr. Buchanan to M. de la Rosa, of 15th February, 1849, M. de la Rosa would have abstained from making a message of the President to either house of Congress a subject of diplomatic representation."

"This department," said Mr. Webster, in a note of December 21, 1850, to Mr. Hülsemann, "has, on former occasions, informed the ministers of foreign powers, that a communication from the President to either house of Congress is regarded as a domestic communication of which, ordinarily, no foreign State has cognizance." Webster's Works, vol. vi. p. 492.

The same views have been taken by Prussia, as to any reference by powers, not members of the confederation, to the deliberations of the Germanic Diet. In answer to complaints from France, her Minister of Foreign Affairs said: "The government of the King is accustomed to consider the deliberations of the Diet as the expres-

In the third class are included ministers, ministers resident, residents, and ministers chargés d'affaires, accredited to sovereigns.[1]

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, or chargés d'affaires *per interim*, substituted in the place of the minister of their respective nations during his absence.[2] [122

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.[3]

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.[4]

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. [123 A minis-

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sion of the national independence of Germany, and consequently as guarantied against all foreign interference (*immixtion*). It would derogate from the dignity of Prussia as a German power, to defend against foreign reproaches the language of its representatives to the Germanic Diet." Confidential Despatch of Baron Manteuffel to the Count Hatzfeldt, at Paris, March 2, 1855.] — *L.*

[1] Martens, Précis, &c., liv. vii. ch. 2, § 194.

[2] Martens, Manuel Diplomatique, ch. 1, § 11.

[122 On occasion of an appeal made by Mr. Hülsemann, Chargé d'Affaires of Austria, to the President, in reference to some proceedings of the Secretary of State, Mr. Webster thus wrote, under date of June 8, 1852, to the American Chargé d'Affaires at Vienna: — "The Chevalier Hülsemann should know that a Chargé d'Affaires, whether regularly commissioned or acting as such without commission, can hold official intercourse only with the Department of State. He had no right even to converse with the President on matters of business, and may consider it a liberal courtesy that he is presented to him at all. Although usually we are not rigid in these matters, yet a marked disregard of ordinary forms implies disrespect to the government itself." Congressional Documents.] — *L.*

[3] Recez du Congrès de Vienne du 19 Mars, 1815, art. 4.

[4] Ibid. art. 6.

[123 It is not unusual, especially as regards the legations to the German States, to commission the same individual as minister to more than one power. But, in 1825,

ter 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.[1] [[124]

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 near the Barbary States are accredited and treated as public ministers.[2]

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an objection was taken to receiving an Envoy Extraordinary and Minister Plenipotentiary from Buenos Ayres to England, because he was also appointed to France. "He did think," Mr. Canning said, "that England was not stickling too much upon ceremony, in saying she must have an entire minister to herself." Hansard's Parl. Deb. 2d series, vol. xiii. p. 1486, July 5, 1825. By the act of August 18, 1856, when a diplomatic officer of the United States receives an added appointment, he is to have half the pay of the added office.] — *L.*

[1] Martens, Précis, &c., liv. vii. ch. 2, §§ 199–204.

[[124] In regard to the State on whose behalf a public minister is sent, he unites in his person two different qualities: he is a public functionary of that State, and he is its mandatory in relation to his diplomatic mission. In this latter quality he acts in the name of his government with the government to which he is accredited.

A public minister differs from a commissioner, who is intrusted by the government with a commission for public affairs in the interior of the State. He differs, moreover, from deputies who are sent by subjects, especially by corporations, to their sovereign or to authorities established in the interior of the State, or under extraordinary circumstances to foreign countries. Finally, he is distinguished from agents charged with the private or the particular affairs of a State or sovereign. Even when invested with the title of Resident or Counsellor of Legation, such an agent cannot pretend to the rights of a political or diplomatic agent, that is to say, either to the prerogatives and immunities or to the ceremonial of public ministers. It does not derogate from the quality or prerogatives of a public minister, intrusted with negotiations with foreign powers, when he is invested with the title of commissioner or commission, of deputy or deputation, as that has sometimes happened in negotiations upon the boundaries of the State, or in the case of plenipotentiaries named together by the Emperor and the Diet for negotiations of peace. Secret or confidential envoys enjoy the same security as public ministers. He who is sent by one government to the government of another State, for public affairs, but without being invested with a title of diplomatic envoy, though the fact of his mission may not be concealed, is not properly a public minister. Klüber, Droit des Gens Moderne de l'Europe, §§ 170, 171, 172. Callières, ch. vi. p. 113. Commissioner, as a permanent diplomatic rank, is not to be found in the official lists of the diplomatic corps of England and France, nor in the Almanach de Gotha, except in the case of functionaries of the United States, who give that title to their resident diplomatic representatives to the Hawaiian Islands and Paraguay, and in connection with that of consul-general, to the newly-appointed ones to Hayti and Liberia. In the act of 1856 commissioners are placed in the same class with ministers resident. § 6, Editor's note [119, p. 383, *supra*.] — *L.*

[2] Bynkershoek, de Foro Competent. Legat. cap. 10, §§ 4–6. Martens, Manuel Diplomatique, ch. 1, § 13. Vattel, liv. ii. ch. 2, § 34. Wicquefort, de l'Ambassadeur, liv. i. § 1, p. 68.

§ 7. Letters of credence.

Every diplomatic agent, in order to be received in that character, and to enjoy the privileges and honors attached to his rank, must be furnished with a letter of credence. In the case of an ambassador, envoy, or minister, of either of the three first 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 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.[1]

§ 8. 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.[2]

§ 9. 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.[3] [125

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[1] Martens, Précis, &c., liv. vii. ch. 3, § 202. Wicquefort, de l'Ambassadeur, liv. i. § 15.

[2] Wicquefort, liv. i. § 16. Martens, Précis, &c., liv. vii. ch. 3, § 204. Manuel Diplomatique, ch. ii. § 17.

[3] Manuel Diplomatique, ch. 2, § 16.

[125] The Minister of Foreign Affairs may refuse to allow a communication to be

§ 10. Passport.

A public minister, proceeding to his destined post in time of peace, requires no other protection than a passport from his own 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.[1] [[126]

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read to him by a foreign minister from his government, unless a copy is to be left with him. Mr. Canning, in a letter to Lord Grenville, at Paris, dated March 4, 1825, says: "The last three mornings have been occupied partly in receiving the three successive communications of Count Lieven, Prince Esterhazy, and Baron Maltzahn, of the high and weighty displeasure of their courts with respect to Spanish America. Lieven led the way on Wednesday. He began to open a long despatch, evidently with the intention of reading it to me. I stopped him, *in limine*, desiring to know if he was authorized to give a copy of it. He said, No; upon which I declined hearing it, unless he would give me his word that no copy would be sent to any other court. He said, he could not undertake to say that it would not be sent to other Russian missions, but that he had no notion that a copy of it would be given to the courts at which they were severally accredited. I answered that I was either to have a copy of a despatch which might be quoted to foreign courts (as former despatches had been) as having been communicated to me and remaining unanswered; or to be able to say that no despatch had been communicated to me at all. 'It was utterly impossible for me,' I said, 'to charge my memory with the expressions of a long despatch once read over to me, or to be able to judge, on one such hearing, whether it did or did not contain expressions which I ought not to pass over without remark. Yet, by the process now proposed, I was responsible to the king and to my colleagues, and ultimately, perhaps, to parliament, for the contents of a paper which might be of the most essentially important character, and of which the text might be quoted hereafter by third parties as bearing a meaning which I did not on the instant attribute to it, and yet which, upon bare recollection, I could not controvert.' Lieven was confounded. He asked me, what he was to do? I said, what he pleased, but I took the exception now before I heard a word of his despatch, because I would not have it thought that the contents of the despatch, whatever they might be, had anything to do with that exception."] — *L.*

[1] Vattel, liv. iv. ch. 7, § 85. Manuel Diplomatique, ch. 2, § 19. Flassan, Histoire de la Diplomatie Française, tom. v. p. 246.

[[126] Besides the passports or safe-conducts mutually granted by belligerents to individuals during war, and which form the subject of Part IV. ch. 2, § 25, *infra*, as a matter of police even during peace, it has been usual for most of the governments of continental Europe, though there have been in some cases recent relaxations of the system, to require verifications as to the names and qualities of foreigners entering their dominions, thereby affording them an opportunity to exclude such as are obnoxious for political or other causes. Hence the use of passports issued by the authorities of the nation to which the traveller or immigrant belongs, and which are usually required to be verified or *visés* by the minister or consul of the country which he proposes to enter. In some States a passport to go abroad is an authorization essential to leaving the country, and the requiring of it serves as a means of detaining such as are charged with crime. The passports are usually granted by the Department of Foreign Affairs; but no one contests the right of ministers of dif-

§ 11. Duties of a public minister, on arriving at his post.

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

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ferent orders, and of Chargés d'Affaires to give passports to the subjects of their nation who desire to return to their country, or who, while abroad, request the renewal of their passports. The minister ought, however, not to give passports to the subjects of the State where he resides, without the consent of its government, nor to foreigners, though in this last case they are sometimes granted and allowed to pass without objection (*s'accorde quelquefois par connivence*). Martens, Précis du droit des gens, liv. iii. ch. 3, § 84; liv. vii. ch. 5, § 219, note *e*.

"As to passports," says Pinheiro Ferreira, "the envoy can only grant them to his fellow-citizens to travel where they wish, and to strangers to go to the country of which he is the representative. Passports are not, what M. Martens appears to regard them, titles of recommendation or of security which are to have the effect of withdrawing the traveller from the legitimate proceedings of the authorities of his own or of foreign countries; they are only certificates of nationality and of the identity of the bearer. There is, then, no occasion to ask whether the envoy can or cannot grant them to the subjects of the country where he resides, or to foreigners, while these passports are not intended for the envoy's country; for as to them only is he competent to give these certificates, and for that purpose he does not require the consent of the local authorities. The passport does not authorize the bearer to quit the country from which he is about to depart, but only to enter the one towards which he is directing his journey." Ib. tom. ii. note 38.

The United States had not, in time of peace, required passports from those entering their country; but they granted them, upon the ground of international courtesy, and as affording evidence to their diplomatic and other agents in foreign countries that the bearers thereof were citizens, and entitled to full protection as such.

By the act of August 18, 1856, § 23, the Secretary of State is authorized to grant and issue passports, and to cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules, as the President shall prescribe for and on behalf of the United States; and no other person shall grant, issue, or verify, any such passport; nor shall any passport be granted or issued to or verified for any other persons than citizens of the United States. United States Statutes at Large, vol. xi. p. 60.

"Only the chief diplomatic representative at the respective legations of the United States is authorized to issue passports to citizens of the United States. Should there be no diplomatic representative in the country, then consuls-general and consuls are authorized to grant them. It is provided in the consular regulations that, whenever a foreign government shall require the *visa* of the passport of any citizen of the United States, it shall be given by the consular officer of the United States at the place where it is demanded, and a fee of one dollar collected in such case; should there be no such officer present at the place where the service is required, or should the foreign government refuse to acknowledge the validity of the consular *visa*, then this service will be rendered by the diplomatic agent of the United States; but he will make no charge therefor, nor for issuing a passport. When an application is made for a passport by a person claiming to be a native citizen of the United States, he must, before it can be granted, make a written declara-

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

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tion to that effect, stating also his age and place of birth, which paper must be filed in the legation; the minister may, however, require such other evidence as he may deem necessary to establish the fact of the applicant's citizenship. If the applicant claim to be a naturalized citizen, he will be required to produce either the original or a certified copy of his certificate of naturalization, or such other evidence as shall be fully satisfactory to the minister; an authenticated copy of which certificate or evidence must be transmitted to the Department of State. When the applicant is accompanied by his wife, children, or servants, or by females under his protection, it will be sufficient to state the names of such persons, and their relationship to or connection with him; as passports can be granted only by the chief diplomatic agent of the United States present at the place of legation, he is alone authorized to sign them." Personal Instructions to the Diplomatic Agents of the United States, p. 12. See, also, Consular Instructions, 1856, § 401. A passport or other paper granted by a consul, certifying that an alien, knowing him or her to be such, is a citizen of the United States, is an offence punishable by a fine not exceeding one thousand dollars, to which the President will always add deprivation of office. Ib. § 413.

Mr. Marcy approved, July 11, 1856, the decision of Mr. Dallas in not giving a passport to a free person of color, because, as he said, "he is not entitled to be considered a citizen of the United States within the meaning of the Constitution." The same course had been uninterruptedly pursued since the organization of the government.

"The impropriety of any of our legations granting passports to foreigners under any circumstances, even with the omission of the clause asserting citizenship, and merely asking for the bearer liberty to pass freely, is obvious; for as the department possesses the faculty of granting passports to *bonâ fide* citizens of the United States only, and as a passport is merely a certificate of citizenship, it follows as a matter of course that no representative of the United States can with propriety give a passport to an alien. Further, if an alien has been domiciled in the United States, or declared his intention to become an American citizen, he is not entitled to a passport declaring him to be a citizen of the United States. Both of these classes of persons, however, may be entitled to some recognition by this government. The most that can be done for them by the legation is to certify to the genuineness of their papers, when presented for attestation and when there can be no reasonable doubt of their being authentic; and to this simple certificate that to the best of the belief of the legation the documents in question are genuine, the European authorities are at liberty to pay such respect as they think proper." Mr. Marcy to Mr. Jackson, Minister of the United States, at Vienna, September 14, 1854. Department of State MS. See further on the subject of passports, as connected with naturalization and expatriation, Appendix No. 1.] — *L.*

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.

§ 12. Audience of the sovereign, or chief magistrate.

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.[1]

§ 13. Diplomatic etiquette.

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, which the diplomatic ceremonial of Europe requires to be rendered and reciprocated, between public ministers resident at the same court.[2]

§ 14. 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

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[1] Martens, Manuel Diplomatique, ch. 4, §§ 33–36.

[2] Manuel Diplomatique, ch. 4, § 37.

person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extraterritoriality has been invented, 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.[1]

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.[2] [[127]

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 1–6. Rutherforth's 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, &c., 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.

[2] Vattel, liv. iv. ch. 7, § 83.

[[127] In 1772, M. d'Aiguillon, the French Minister of Foreign Affairs, refused passports to the Minister of Hesse; and his creditors were authorized to seize his movable effects. In a memoir addressed to the diplomatic corps at the Court of Versailles, it was said that "while it is desirable, in every case, not to derogate from the respect which ought to attach to the public character of a minister, the sovereign to whom he is accredited is authorized to employ that species of coercion which does not interfere with his functions, and which consists in prohibiting the ambassador from leaving the country without paying his debts." Flassan adds: "Such was the jurisprudence adopted on this occasion. This jurisprudence has not, however, been constantly followed, and the complaisance of the Minister of Foreign Affairs, as well as the dignity of the indebted minister, may cause deviations from it." Flassan, Diplomatie Françoise, tom. vi. pp. 91–97. A decree of the *Cour impériale* of Paris, of the 5th of April, 1813, decided that no seizure could take place in the country of the residence of the foreign minister for debts contracted before or during his mission. Heffter, Droit International, par Bergson, § 42, vii.]

A case of homicide having occurred at Washington, in 1856, in the presence of the Dutch Minister, whose testimony was deemed altogether material for the trial,

§ 15. Exceptions to the general rule of exemption from the local jurisdiction.

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, movable effects, and the house in which he resides.[1]

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:

1. This exemption from the jurisdiction of the local tribunals and authorities does not apply to the *contentious* jurisdiction,

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"and inasmuch as he was exempt from the ordinary process to compel the attendance of witnesses," an application was made by the District Attorney, through the Secretary of State, to M. Dubois, to appear and testify. The minister having refused, by the unanimous advice of his colleagues, in a note of the 11th of May, 1856, to the Secretary of State, to appear as a witness, Mr. Marcy instructed, May 15, 1856, Mr. Belmont, Minister of the United States at the Hague, to bring the matter to the attention of the Netherlands government. He says, that "it is not doubted that both by the usage of nations and the laws of the United States, M. Dubois has the legal right to decline to give his testimony; but he is at perfect liberty to exercise this privilege to the extent requested, and by doing so he does not subject himself to the jurisdiction of the country. The circumstances of this case are such as to appeal strongly to the universal sense of justice. In the event of M. Van Hall's suggesting that M. Dubois might give his deposition out of court in the case, you will not omit to state that by our Constitution, in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him, and hence, in order that the testimony should be legal, it must be given before the Court." M. Van Hall, June 9, 1856, in a note to Mr. Belmont, declines authorizing the minister to appear in court. He said that, "availing himself of a prerogative generally conceded to the members of the diplomatic body, and recognized also by the laws of the republic, as adverted to by Mr. Marcy, M. Dubois refused to appear before a court of justice; but being desirous to at once reconcile that prerogative with the requirements of justice, he suggested a middle course of action, and proposed to Mr. Marcy to give his declaration under oath, should he be authorized to that effect by the government of the Netherlands. After taking the King's orders on the subject, I did not hesitate to give such authority to M. Dubois, approving at the same time, and formally, the line of conduct which he pursued on that occasion." M. Dubois addressed a note to Mr. Marcy, on the 21st of June, stating that he was authorized to make his declaration under oath at the Department of State, adding, "it is understood that, on such an occasion, no mention is to be made of a cross-examination, to which I could not subject myself." The declaration was not taken, as the District Attorney stated that it would not be admitted as evidence. — 34th Cong. 3d Sess. Senate, Ex. Doc. No. 21.] — *L.*

[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, §§ 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, &c., liv. vii. ch. 5, §§ 215–227; ch. 9, §§ 234–237. Fœlix, §§ 184–186.

which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law.[1] [128

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. 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.[2] [129

3. If he is at the same time in the service of the power who receives him as a minister, as sometimes happens among the German courts, he continues still subject to the local jurisdiction.[3] [130

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. [131 In all other cases, it

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[1] Bynkershoek, cap. 16, §§ 13-15. Vattel, liv. iv. ch. 8, § 111. Martens, Précis, &c., liv. vii. ch. 5, § 216. Merlin, Répertoire, art. *Ministre Publique*, sect. v. § 4, No. 10.

[128 See § 16, Editor's note, *infra*.] — *L.*

[2] Bynkershoek, cap. 11. Vattel, liv. iv. ch. 8, § 112.

[129 See Soulé's case, § 20, Editor's note, *infra*.] — *L.*

[3] Martens, Manuel Diplomatique, ch. 3, § 23.

[130 The German Diet refuse to receive any citizen of Frankfort as minister of a confederated State, except from the city itself. Klüber, § 186.] — *L.*

[131 In the case of the seizure of the papers of the Swedish Minister at London, Count Gyllenborg, who was placed under guard, in 1717, on occasion of a conspiracy against George I. in favor of the Pretender, which contemplated the invasion of England by 12,000 Swedish troops, under Charles XII., Mahon says: "A foreign minister who conspires against the very government at which he is accredited, has clearly violated the law of nations. He is, therefore, no longer entitled to protection from the law of nations. The privileges bestowed upon him by that law rest on the implied condition that he shall not outstep the bounds of his diplomatic duties; and whenever he does so, it seems impossible to deny that the injured government is justified in acting as its own preservation may require." The publication of the letters confirmed all the charges; and on Stanhope's addressing a circular to the foreign ministers, they none of them expressed any resentment, except the Marquis de Monteleon, Spanish Ambassador, whose government was also supposed to be implicated. The British Resident, Jackson, at Stockholm, was arrested as a matter of reprisal; but, the Regent of France interposing his good offices, and giving an assurance in the name of Charles, that he had never any intention of disturbing the tran-

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 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

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quillity of Great Britain, Gyllenborg was exchanged for Jackson, and returned home. Goertz, the Envoy of Sweden at the Hague, who was the prime mover of the conspiracy, and had been arrested, on the application of England, by the States-General, was also set at liberty. Mahon's England, vol. i. pp. 388–392, Lond. 1836. In 1718, on occasion of a conspiracy instigated by Alberoni, the Spanish Premier, against the Regent of France, "it was determined to adopt the same conduct towards Cellamare, (the Spanish Minister,) as, under precisely similar circumstances, Gyllenborg had received in London; and his person was accordingly put under arrest, and his papers examined; but the ambassador had already had time to conceal or destroy the most private." Ib. vol. i. p. 484.

From the very interesting statement of the Prince Corsini, *Marchese di Lajatico*, it would seem that the whole movement as to the last Tuscan revolution, which induced the departure of the Grand Duke from Florence, was consummated at the palace of the Sardinian legation, where all the principal members of the liberal party were assembled, and where the Marchese di Lajatico went himself from the Pitti Palace, where he had been charged by the sovereign to form a new ministry, to consult them. "*Storia di quattro ore intorno ai fatti del 27 Aprile*, 1859," "It was," Viscount Stratford de Radcliffe declared, in the House of Lords, July, 1859, "no exaggeration to say that if, as appeared from the correspondence, the Sardinian representative at Florence had really taken a leading part in the conspiracy which was the immediate cause of that revolution, he had rendered himself amenable to the laws of the place. If the Grand Duke had preserved the free exercise of his power, it may well be doubted whether the Envoy's diplomatic character would have screened him from punishment." Hansard's Parl. Deb. 3d series, vol. cliv. p. 1289.] — *L.*

State to suffer him to use violence without endeavoring to resist it.[1]

§ 16. 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.[2] [[132]

The municipal laws of some, and the usages of most nations, require an official list of the domestic servants of foreign minis-

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 4. Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 20. Bynkershoek, de Foro Competent. Legat. cap. 17, 18, 19. Vattel, liv. iv. ch. 7, §§ 94–102. Martens, Précis, &c., liv. vii. ch. 5, § 218. Ward's Hist. of the Law of Nations, vol. ii. ch. 17, pp. 291–334. Wheaton's Hist. Law of Nations, pp. 250–254.

[2] Grotius, lib. ii. cap. 18, § 8. Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 120–123. Martens, Précis, &c., liv. vii. ch. 5, § 219; ch. 9, §§ 234–237. Fœlix, § 184, (§ 209, 3me ed.)

[[132] The French code makes no provision for the case of the violation of the rights of ambassadors. One was reported declaring that they were not amenable to the tribunals of France, either for civil or criminal matters; but it was stricken out by the Council of State, at the suggestion of Portalis that whatever regarded ambassadors belonged to the law of nations, and that it had no place in a municipal code. Fœlix, § 219, tom. i. p. 401, 3me ed. See also the same work, § 220 and the following sections, for the provisions of other countries as to the rights of ambassadors.

According to the terms of a decree of the Court of Cassation of the 11th of June, 1852, the immunities and franchises which protect the free exercise of the functions of public ministers in the countries to which they are sent cannot extend to individuals attached to their service by their own will, when their ministers expressly manifest the intention to give them up to ordinary justice. Ibid. tom. i. p. 392, note. The exemption is generally refused to the domestics of a foreign minister, who are subjects of the prince to whom he is accredited. Ib. § 576, tom. ii. p. 290. The Austrian code confines the exemption to the domestics who are the immediate subjects of the State to which the minister belongs. Ib. § 585. By the Prussian code, exemption from criminal arrest applies to ministers accredited to the court, and to other chargés d'affaires of a foreign State, unless in case of special orders given by the sovereign to a tribunal or to an officer of justice. The same disposition is applicable to their wives, and likewise to the persons belonging to a mission accredited to the court, and to the individuals in the service of those persons; the wives, however, of domestics do not enjoy the same prerogative, unless they also are in the service of the minister or chargé d'affaires, or inhabit his hotel. Ib. § 586. Westlake says: "The privilege also extends to the families and suites of ambassadors, but so as that to these it is that of the ambassador. If the ambassador does not claim it for the defendant, the domesticity (statute 7 Anne, ch. 12, § 3) and *bona fides* of the service will be very strictly considered." Private International Law, § 133, p. 116.] — *L.*

ters to be communicated to the secretary or minister of foreign affairs, in order to entitle them to the benefit of this exemption.[1]

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. [[133] 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

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[1] Blackstone's Commentaries, vol. i. ch. 7. LL. of the United States, vol. i. ch. 9, § 26.

[[133] The proposition in the text seems to have been transferred from one elementary treatise to another without due examination. Garden says that at this day simple police offences are ordinarily referred to the envoy for the chastisement of the people of his suite, and that they are brought to him for this purpose, when they are surprised and arrested away from his hotel. Traité de Diplomatie, tom. ii. p. 172. And even the learned civilian, Dr. Twiss, in his recent treatise, not only declares that "a foreign minister is at liberty to exercise criminal and civil jurisdiction over the *personnel* of the embassy if he is so empowered by his own nation," but he adds, "It is customary in civil matters for a foreign minister to be invested with, and to exercise, jurisdiction in all questions which may arise among the members of his *official suite*, or between them and the citizens or subjects of the country to which he is accredited." Law of Nations, vol. i. p. 307.

On this matter we have no doubt the views of Heffter, which accord with our own experience, are correct. Even the limited functions which he would assign to ministers are rather consular than diplomatic. As he remarks: "It is only in Turkey and other non-christian States that the representatives of European powers enjoy a very extended jurisdiction, especially in penal matters. At no court of Christian Europe are foreign ministers invested with the right of deciding upon the disputes among their countrymen or even among those of their suites. Their powers in this respect are confined exclusively to executing the commissions addressed to them, especially those which have for their object the interrogation of the parties or witnesses, in conforming themselves altogether to the prescriptions of the laws of their country. Anciently a certain right of moderate correction over the persons of his suite, who were directly in his employ for wages, was claimed for a minister; but such a power is inconsistent with the institutions of our epoch, and is only met with in exceptional cases." Heffter, Das europäische Völkerrecht, § 216.

"There is no law, (in the United States,) State or Federal, conferring the authority

the State where he resides; as he may renounce any other privilege to which he is entitled by the public law.[1] [[134]

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of celebrating marriages upon either ministers or consuls; and it must therefore be deduced from general considerations and not from positive legislation. With respect to consuls, the question is not only clear upon general principles, but it has been settled so far as it is competent to settle it, by the authority of this department, as may be seen by reference to the 618th section of the Consular Regulations, promulgated November 10, 1856. There is no subsequent legislation which confers the jurisdiction. I consider that the 31st section of the act of Congress passed at its last session, (see Part II. ch. 2, § 7, Editor's note, [64, p. 187, *supra*,) giving certain powers to ministers and consuls of the United States in foreign countries, and which declares that marriages celebrated therein in presence of any consular officer between persons who would be authorized to marry, if residing in the District of Columbia, shall have the same force and effect, and shall be valid to all intents and purposes, as if the said marriage had been solemnized within the United States, provides only for the presence of a consular officer upon such an occasion. And the provision is no doubt a wise one, not only because it furnishes security against fraud, but because it renders more easy the authentication of such marriage in the United States. But that does not withdraw the celebration of such marriage from the authority of the country, nor does it give any power to the consular officer himself to perform the ceremony.

"That part of the same section which declares, that such marriages shall have the same effect as if they had been celebrated in the United States, must, in my opinion, be limited to places and districts over which Congress possesses the power of exclusive jurisdiction, and cannot operate in the respective States.

"The question as to foreign ministers is somewhat different, as, in the consideration of it, it has been maintained that this power is a consequence of the right of exterritoriality. But while this principle of exemption from the jurisdiction of the country, where a foreign minister is accredited, protects his person and his domicile from all interruption, I do not consider that it necessarily carries with it the power to exercise any authority, civil or criminal. I do not consider that an obligation contracted at the residence of the Minister of the United States at Paris, contrary to the laws of France, can become valid when the parties are found in the United States. The utmost extent to which this principle of exterritoriality can properly be carried cannot confer upon a foreign minister an authority not necessarily incident to his official position or which is not granted to him by some law of his own country. It will scarcely be maintained that the laws of each of the States and Territories of the Union are operative in the residences of all our ministers abroad, whatever position may be taken as to the laws of the United States or to any portion of them. If this be so, it is difficult to perceive whence a foreign minister derives the power to celebrate a marriage which shall not only be valid in each of the States, but which shall be free from any doubts as to the rights conferred by it, whatever State legislation may exist on the subject; nor why his interference with marriages stops at their celebration and does not extend to their dissolution, legislation in both cases being equally wanting." Mr. Cass to Mr. Fay, Minister at Berne, November 12, 1860. Department of State MS.] — *L.*

[1] Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 124. Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 20. Klüber, Pt. II. tit. 2, §§ 212–214. Merlin, Répertoire, tit. *Ministre Publique*, sect. vi.

[[134] The last remark of the text as to a public minister (*qu'il peut renoncer à tous les privilèges qu'il est en droit d'attendre du droit public,*) is the subject of an able paper by

§ 17. Exemption of the minister's house and property.

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; but any other real prop-

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M. Villefort, jurisconsulte du ministère des affaires etrangères, à Paris. The exemption from the jurisdiction of the country is one of the most important safeguards of the independence of foreign ministers; and all publicists, in a manner almost absolute, admit that in a personal matter the foreign public minister cannot be brought before the local jurisdiction nor tried by it; but they have very much overlooked the point as to whether he can renounce this privilege, and, if so, to what extent. In civil matters the question presents itself in two forms: 1st. When a diplomatic agent cited before the local tribunal, instead of declining its competency, accepts it and consents to appear as defendant. 2d. When he avails himself of the tribunals to bring a civil action against a subject of the country where he resides. The practical result of the renunciation of the exemption from jurisdiction may be the same in both cases. If the effect of his bringing a suit is only a judgment for the costs or expenses, the question arises how can it be carried into effect, if he refuses to comply with it. It cannot be permitted to any suitor whatever to constitute himself plaintiff, to pursue his demand, and to escape from the consequences of a situation created by himself, when the result is contrary to his expectations. But the character of plaintiff assumed by the minister may necessarily place him in the situation of defendant. Such is the case when the demand is met by a counter claim or cross-suit. The position of the parties is then changed, and the plaintiff will have to bear the consequences belonging to the character of an ordinary defendant. If the defendant replies to the demand of the diplomatic agent, the agent will be obliged to subject himself to the sentence of the same judge. If the diplomatic agent gains his cause, and the adverse party appeals from the sentence, the agent will be obliged to submit to the jurisdiction of the tribunal of appeal. In all these cases the judgment, whatever it may be, if incurred by the diplomatic agent, should be executed. It cannot be executed without the quality with which the agent is invested suffering more or less from it; and the difficulty of tracing the precise limits of its operation sufficiently explains the perplexity of publicists in these matters.

Mr. Wheaton says, that "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." (§ 15, p. 394, *supra*.) Others are inclined to refuse to the diplomatic agent the power of renouncing the exterritoriality. They see in its existence a reason of public order, a right which belongs rather to his prince than to the ambassador, and they say that the latter cannot renounce the right without the consent of his sovereign. Others admit that the minister may bring a suit before the judge of his place of residence, but that the renunciation of the privilege of exemption, which results from his doing so, cannot oblige the agent further than to permit the case to be tried and a judgment pronounced; and that it does not extend to the execution of the sentence, if any inconvenience to the embassy can result from it. This last theory, though vague and liable to an arbitrary application, M. Villefort is disposed to prefer in a matter as to which, he remarks, it may be especially said, that there is nothing absolutely determined.

As among the principles laid down by the publicists, it is held that the diplomatic privilege, in its most general sense, is founded on the dignity of the representa-

erty, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is

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tive character, the immunity exists only for those things and those cases which really interest that character. Thus, publicists have been led to make numerous exceptions to the principle of exemption from jurisdiction, for example as to whatever concerns the immovable property of the minister, the hotel of the embassy excepted, and the movable property which the minister possesses in consequence of commercial operations, or as testamentary executor. In the opinion of the greater part of the publicists, the privilege of public ministers only applies to the property which they possess as ministers and without which they could not exercise their functions. The exception, it is generally admitted, extends to the suite of the ministers, to the secretaries and attachés. The French courts have decided that the attachés of an embassy cannot, more than the chiefs of missions, be sued before the tribunals for the performance of their obligations. (V. Gilbert, Code Civil annoté, sur l'article 3, No. 12. Jugement du tribunal civil de la Seine, du 10 Aout 1855. Arrêt de la Cour impériale de Paris, du 14 Aout, 1857.) The principle of exterritoriality resting on a fiction, that a minister resident in a foreign country is supposed to be actually, with all his movable effects, in the territory of his own sovereign, is not sufficient according to the French laws to explain the principle of exemption from jurisdiction, as the article 14 of the Code Napoleon allows the bringing of a foreigner residing in a foreign country before a French tribunal for engagements contracted to a Frenchman in a foreign country. The true basis of the diplomatic privilege rests on the idea of inviolability attached to the person of an ambassador; and which exterritoriality is one means of consecrating. The inviolability, which protects his person and consequently his functions and the effects of the embassy, belongs to his sovereign, to his nation, whom it interests more than himself. He cannot, then, make a renunciation which attacks that inviolability; but he may waive the exterritoriality in everything that may not be strictly necessary to the exercise of his functions. The law of nations does not allow a diplomatic agent to be brought before the tribunals under pretext of personal obligations, on account of the serious inconveniences for his functions, which might result from it. But those inconveniences are not to be feared when the act, of which he may estimate the consequences in advance, emanates from him. And it is the same, when having it in his power to repel, by virtue solely of his diplomatic character, the attack directed against him, he voluntarily consents to accept the part of a defendant. It seems that all international proprieties are satisfied by making the reservation that the sentence cannot extend to the seizure of the person of the minister and of the objects indispensable to the exercise of his functions.

It may be admitted that the foreign minister, who has brought a suit before the judges of the place of his residence, or who has accepted their jurisdiction by defending a suit brought against him, subjects himself to the following consequences: 1st, If there is a judgment against him for the expenses, he should pay it. 2d. If he gains the suit and the defendant appeals, he must submit to the appellate jurisdiction. 3d. If the defendant answers his suit by a cross-demand, he must submit to the sentence of the same judge. And the execution can operate to the exclusion of his person, on all the effects which he does not possess in quality of minister. Supposing it admitted that the ambassador can renounce his privilege, how are the judicial notices to be served on him is a question. The ordinary officers of justice cannot serve them, on account of the respect for the diplomatic privilege, without ex-

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.[1]

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posing themselves to penalties. In those cases where there is no ground for invoking exemption from jurisdiction, as with respect to claims affecting real estate belonging to the minister, the practice appears to have prevailed in France of causing the judical act to come to the minister through the department of foreign affairs, by depositing it in the office of the *Procureur-impérial*. When the foreign minister formally renounces, of his own will, the privilege of exemption from jurisdiction, the fiction of exterritoriality ceases, and then matters should pursue their ordinary course, it being always understood that the notification shall not affect the inviolability of the person of the minister or the effects of the embassy.

Whether an ambassador or minister can, in criminal matters, renounce his immunity is presented under two hypotheses. All authorities, unless it be the American, M. Villefort says, deny that a foreign minister can, when he finds himself in the position of a defendant and the local authorities propose to prosecute him for a matter falling under the penal law of the country, renounce the immunity which protects him and allow himself to be tried. The offence to the person of the minister, to his character of inviolability, cannot manifest itself more directly, more palpably, than by a criminal proceeding. If the privilege of inviolability has been established, rather for the advantage of the nation, of the sovereign, than for the personal interest of the agent, it cannot depend on the will of the latter to render null this immunity. The situation of defendant, of accused party, in a criminal process, is evidently incompatible with the character of agent of a foreign power; and he cannot, without offence to the dignity of his sovereign, accept voluntarily such a position. The agent being, from the very nature of his functions, in virtue of the tacit convention which is formed between the sovereign who accredits him and the sovereign who receives and recognizes him, exempt from the criminal jurisdiction, the local authority ought, of its own accord, in whatever manner the proceedings may have originated, to abstain from the prosecution. As to flagrant crimes, they may be so enormous and accomplished in so public a manner, that it may not be possible to regard the fiction of exterritoriality; and the conflict which would then arise between the rights of the local authority and the privileges of the law of nations would be most difficult to regulate. With regard to the attempts of which the foreign minister might render himself culpable against the government of the country, the publicists are very much divided as to the treatment which the government can pursue towards the accused minister. Some propose his expulsion, others demand his recall. The truth is that the conduct to be pursued in such circumstances is rather a political matter than one of law.

Another question is whether the public minister can renounce immunity from the jurisdiction, in becoming complainant (*acteur*) in a criminal process, to obtain more surely reparation for the injury which he has received. In France, when a minister has to complain of an attack on his person or his property, nothing prevents his being complainant, so far as to denounce the fact to the judicial authority through the Minister of Foreign Affairs, in order that it may proceed on a fact to originate a prosecution, either criminal, correctional, or of simple police. The attention of the public ministry once awakened, justice will have its ordinary course. Can a foreign minister, with-

[1] Vattel, liv. iv. ch. 8, §§ 113–115. Martens, Précis, &c., liv. vii. ch. 8, § 217. Klüber, Pt. II. tit. 2, ch. 3, § 210. Merlin, sect. v. § iv. No. 6.

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, has been

Discussion between the American and Prussian governments, respecting the

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out the consent of his sovereign, become a civil party before the Court of Assizes, or, which is nearly the same thing, use before the correctional police the right of direct citation recognized by the 64th article of the code of criminal instruction? Can he, divesting himself of his immunity, place himself at the bar, and thereby be subjected to all the consequences which can legally result from a situation thus created and accepted by him. The question is new. Almost all the authors who have written on the exemption of jurisdiction in criminal matters, have looked only to the case of a prosecution directed against the diplomatic agent. Vattel (liv. iv. ch. viii. § 111,) does not admit that a diplomatic agent can, in any way, renounce his privileges in criminal matters, and says that he never ought to be an *acteur* for the prosecution of justice in a criminal cause. If he has been insulted, he lays his complaint before the sovereign, and the public prosecutor should proceed against the guilty party. There is a marked difference between the part of a simple complainant and that of the civil party (*partie civile,*) as recognized by the French code. The complainant is not a party to the prosecution. He remains completely a stranger to the proceeding. The civil party, on the contrary, is not confined to the complaint; he desires to be indemnified; he accuses, and furnishes the proofs of the accusation, debates the elements of the proceedings, becomes the auxiliary of the public ministry, and acts at his own risk and peril. He acts directly in his own interests, is responsible for the expenses of the proceedings and for damages; and, should the accusation be declared calumnious, may be subjected to imprisonment and fine. (*Code pénal,* § 373.) If the immunity belongs to the sovereign, rather than to the minister, we may conclude that the agent has no right to renounce privileges interesting to the dignity of his master, made for his advantage, and that he cannot compromise or destroy them by his imprudence, by his caprice, or by a false view of them.

The immunity, by its very nature protects all those who, forming part of the embassy, derive their title from the chief of the government or his first representative, the Minister of Foreign Affairs, such as the Secretaries; and it cannot depend on the chief of the mission to destroy their privilege. It is said that a public minister may renounce the privilege as far as concerns certain persons of his suite, by which is understood his domestics. At this day, the minister has not the judicial power over the people of his establishment, certainly not unless he has received from his sovereign an express delegation to that effect. In case of an offence committed in the hotel of the ambassador, it escapes absolutely from the jurisdiction of the country. The universal law of nations admits exterritoriality in favor of the ambassador's hotel. It is clear that if the local authority could enter into the hotel of the ambassador and there exercise acts of jurisdiction, there could be no more inviolability. In such a case the exemption from jurisdiction appears complete, and the local authority cannot act, except with the authorization of the ambassador and within the limits of the renunciation which he may make of his privileges. Should the offence have been committed out of the hotel, there is a distinction as to whether the domestic belongs to the nation of the ambassador, or was a subject of the nation where he resides. In the latter case he should be given up to the local jurisdiction. The question would be more difficult if the domestic belonged to a third nation. Finally, if the crime has been committed by a domestic of the ambassador's nation, the exemption covers him, at

exemption of public ministers from the local jurisdiction.

recently discussed between the American and Prussian governments, in a case, the statement of which may serve to illustrate the subject we are treating.

The Prussian Civil Code declares, that "the lessor is entitled, as a security for the rent and other demands arising under the contract, to the rights of a *Pfandgläubiger*, upon the goods brought by the tenant upon the premises, and there remaining at the expiration of the lease."

The same code defines the nature of the right of a creditor whose debt is thus secured. "A real right, as to a thing belonging to another, assigned to any person as security for a debt, and in virtue of which he may demand to be satisfied out of the substance of the thing itself, is called *Unterpfandsrecht*."[4]

Under this law, the proprietor of the house in which the minis-

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least according to the opinion of the great majority of authors; but in the opinion of Villefort, unless there exist grave considerations to the contrary, he ought to renounce this exception and give up the guilty party to the tribunals of the country. Du privilège qui exempte le ministre public de la juridiction locale. Revue critique de législation et de jurisprudence, Février, 1858.

Twiss says, "The limits within which an ambassador may claim the privilege of extra-territoriality, in regard to his own *personal suite* are within the discretion of the ambassador, the privilege in regard to his own personal suite being granted for the convenience of the ambassador himself; but an ambassador cannot waive, at his discretion, the privilege of extra-territoriality in regard to any members of his *official suite*; that is, of any officer of his household appointed by the sovereign himself. The Chief of the State alone may waive the privilege of extra-territorality on behalf of the ambassador and the *personnel* of the embassy. It is not even competent for any of those individuals to waive at their own pleasure the privilege, for it is not their personal privilege, but the privilege of the independent State or Nation which they represent." Law of Nations, vol. i. § 201, p. 307. In a case which arose in the English Common Pleas in 1854, in which the Belgian Secretary of Legation had entered an appearance by an attorney, and subsequently applied to have his name stricken out of the proceedings, on the ground of his privilege as a public minister, the Lord Chief Justice said that a minister has a privilege, at all events, from such suits as ultimately result in the taking of his person or of his goods necessary for his state or comfort, and cannot *in invitum* be compelled to enter into litigation. "But," he added, "it is admitted by all the foreign jurists, that where suits can be founded without attacking the personal liberty or comfort, or interfering with the personal privileges, of the minister, they may proceed." And Mr. Justice Maule said, "I think, on the ground that M. Drouet has appeared in this action, and allowed it to go through certain stages, this application ought to fail." It was held that the privilege is not, in the case of a minister, interfered with or abandoned by the circumstance of trading, as it would be in the case of a servant, under 7 Anne, ch. 12. Phillimore, International Law, vol. ii. p. 203.] — *L.*

[4] Allgemeines Landrecht für die preussischen Staaten, Part. I. tit. 21, § 395, tit. 30, § 1.

ter 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. In thus granting to the proprietor the rights of a creditor whose debt is secured by hypothecation, (*Pfandgläubiger*,) not only in respect to the rent, but as to all other demands arising under the contract, the Prussian Civil Code confers upon him a *real right* as to all the effects of the tenant, which may be found on the premises at the expiration of the lease, by means of which he may retain them, as a security for all his claims derived from the contract.

It was stated, by the American minister, that this decision placed the members of the corps diplomatique, accredited at the Prussian court, on the same footing with the subjects of the country, as to the right which the Prussian code confers upon the lessor of distraining the goods of the tenant, to enforce the performance of the contract. The only reason alleged to justify such an exception to the general principle of exemption was, that the right in question was constituted by the contract itself. It was not pretended that such an exception had been laid down by any writer of authority on the law of nations; and this consideration alone presented a strong objection against its validity, it being notorious that all the exceptions to the principle were carefully enumerated by the most esteemed public jurists. Not only is such an exception not confirmed by them, but it is expressly repelled by these writers. Nor could it be pretended that the practice of a single government, in a single case, was sufficient to create an exception to a principle which all nations regarded as sacred and inviolable.

Doubtless, by the Prussian code, and that of most other nations, the contract of hiring gives to the proprietor the right of seizing, or detaining the goods of the tenant, for the non-payment of rent, or damages incurred by injuries done to the prem-

ises. But the question here was, not what are the rights conferred by the municipal laws of the country upon the proprietor, in respect to the tenant who is a subject of that country; but what are those rights in respect to a foreign minister, whose dwelling is a sacred asylum; whose person and property are entirely exempt from the local jurisdiction; and who can only be compelled to perform his contracts by an appeal to his own government. Here the contract of hiring constitutes, *per se*, the right in question, in this sense only, that the law furnishes to one of the parties a special remedy to compel the other to perform its stipulations. Instead of compelling the lessor to resort to a personal action against the tenant, it gives him a lien upon the goods found on the premises. This lien may be enforced against the subjects of the country, because their goods are subject to its laws and its tribunals of justice; but it cannot be enforced against foreign ministers resident in the country, because they are subject neither to the one nor to the other.

Let us suppose that the contract in question had been a bill of exchange drawn by the minister, not in the character of a merchant, but for defraying his ordinary expenses. The laws of every country, in such a case, entitle the holder of the bill to arrest the person of his debtor, in case of non-payment. It might be said, in the case supposed, that the contract itself gives the right of arresting the person, with the same reason that it was pretended, in the case in question, that it gave the right of seizing the goods of the debtor.

In fact, there was no one privilege of which a public minister might not be deprived, by the same mode of reasoning which was resorted to in order to deprive him of the exemption to which he was entitled as to his personal effects. But to deprive him of this right alone, would be to deprive him of that independence and security which are indispensably necessary to enable him to fulfil the duties he owes to his own government. If a single article of his furniture may be seized, it may all be seized, and the minister, with his family, thus be deprived of the means of subsistence. If the sanctity of his dwelling may be violated for this purpose, it may be violated for any other. If his private property may be taken upon this pretext, the property of his government, and even the archives of the legation, may be taken upon the same pretext.

The exemption of the goods of a public minister from every species of seizure for debt, is laid down by Grotius in the following manner:

"As to what respects the personal effects (*mobilia*) of an ambassador, which are considered as belonging to his person, they are not liable to seizure, neither for the payment nor for security of a debt, either by order of a court of justice, or, as some pretend, by command of the sovereign. This, in my judgment, is the soundest opinion; for an ambassador, in order to enjoy complete security, ought to be exempt from every species of restraint, both as to his person, and as to those things which are necessary for his use. If, then, he has contracted debts, and if, which is usually the case, he has no real property (*immobilia*) in the country, he should be politely requested to pay, and if he refuses, resort must be had to his sovereign." [1]

We here perceive that this great man himself, both as a public minister and public jurist, was decidedly of opinion that the personal property of an ambassador could not be seized, either for the payment or for security of a debt; or, according to the original text,— *Ad solutionem debiti aut pignoris causâ.* Bynkershoek, in his treatise *De Foro competenti Legatorum*, cites with approbation this passage of Grotius.

Bynkershoek himself, in commenting upon the declaratory edict of the States-General of the United Provinces, of 1679, exempting foreign ministers from arrest, and their effects from attachment, for debts contracted in the country, observes: —

"The declaration of the States-General does not materially differ from the opinion of Grotius, which I have quoted in the preceding chapter. To which we may add, that this author states, that the effects of an ambassador cannot be seized, either for payment or for security of a debt, because they are considered as appertaining to his person. Respecting this principle Antoine Mornac reports that, in the year 1608, Henry IV. king of France, pronounced against the legality of a seizure made at Paris, for the non-payment of rent, of the goods of the Venetian ambassador. This decision has been since constantly observed in every country.

"But this may be said to be carrying the privilege too far,

[1] Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. 18, § 9.

since the seizure of the effects of an ambassador is not so much on account of the person as to a right in the thing thus seized; a right of which the proprietor cannot be deprived by the ambassador."

This author had here anticipated the argument of the Prussian government, to which he replies as follows: —

"But far from unduly pressing the principle, by the *effects* which are spoken of in the declaration of 1679 I understood only personal effects, that is to say, those which serve for the use of ambassadors, (*id est ustensilia*,) as I shall point out in that part of this treatise where it will be necessary to speak of their property. It is of these effects that I affirm, that they are not, and never have been, according to the law of nations, considered as in the nature of a pledge, to secure the payment of what is due from an ambassador. I even maintain that it is not lawful to seize them, either in order to institute a suit or to execute a judicial sentence."[1]

In his sixteenth chapter Bynkershoek explains what he means by those effects which serve for the use of ambassadors, that is, *utensilia*. In this chapter he admits that the property, both personal and real, of a public minister, may, *in some cases*, be attached, to compel him to defend a suit commenced by those who might have a claim against him: — "I say the property (*bona*) in general, whether personal or real, unless they appertain to the person of the ambassador and he possess them as ambassador; in a word, all those things without which he may conveniently perform the functions of his office. I except, then, from the number of those goods of the ambassador which may be thus attached, corn, wine, oil, every kind of provisions, furniture, gold, toilette, ornaments, perfumes, drugs, clothing, carpets and tapestry, coaches, horses, mules, and all other things which may be comprised in the terms of the Roman law, *legati instructi et cum instrumento*."

In the following section he explains his doctrine, that certain effects of a public minister may be attached, in order to institute against him a suit, and to compel him to defend it, by showing that it is meant to be limited to the single case where the minister assumes on himself the character of a merchant, in

[1] Bynkershoek, de For. Legat. cap. 9, §§ 9, 10.

which case the goods possessed by him, as such, may be attached for this purpose. "All these things," says he, "ought not, according to my view, to be excepted, unless they are destined for the use of the ambassador and his household. For it is not the same with corn, wine, and oil, for example, which an ambassador may have in his warehouses, for the purposes of trade; nor with horses and mules, which he may keep for the purpose of breeding and selling."

Vattel is equally explicit as to the extent of the privilege in question. The only exception he admits to the general rule is that of a public minister who engages in trade, in which case his personal goods may be attached, to compel him to answer to a suit. To this exception he annexes two conditions, the latter of which was deemed decisive of the present question.

"Let us subjoin two explanations of what has just been said: 1. In case of doubt, the respect which is due to the character of a public minister requires the most favorable interpretation for the benefit of that character. I mean to say that where there is reason to doubt whether an article is really destined to the use of the minister and his household, or whether it belongs to his stock in trade, the question must be determined in favor of the minister; otherwise there might be danger of violating his privilege. 2. When I say that the effects of a minister, which have no connection with his character, and especially those belonging to his stock in trade, may be attached, this must be understood on the supposition that the attachment is not grounded on any matter relating to his concerns as minister; as, for instance, for supplies furnished to his household, for the rent of his hotel, &c." [1]

In reply to these arguments and authorities it was urged, on behalf of the Prussian government, that if, in the present case, any Prussian authority had pretended to exercise a right of jurisdiction, either over the person of the minister or his property, the solution of the question would doubtless appertain to the law of nations, and it must be determined according to the precepts of that law. But the only question in the present case could be, what are the legal rights established by the contract of

[1] Vattel, Droit des Gens, liv. iv. ch. 8, § 114. Mr. Wheaton to Baron de Werther. Note verbale, 15 May, 1839.

hiring, between the proprietor and the tenant. To determine this question, there could be no other rule than the civil law of the country where the contract was made, and where it was to be executed, that is, in the present case, the Civil Code of Prussia.[1]

The controversy having been terminated, as between the parties, by the proprietor of the house restoring the effects which had been detained, on the payment of a reasonable compensation for the injury done to the premises, the Prussian government proposed to submit to the American government the following question:

"If a foreign diplomatic agent, accredited near the government of the United States, enters, of his own accord, and in the prescribed forms, into a contract with an American citizen; and if, under such contract, the laws of the country give to such citizen, in a given case, a *real right*, (*droit réel*,) over personal property (*biens mobiliers*), belonging to such agent: does the American government assume the right of depriving the American citizen of his *real right*, at the simple instance of the diplomatic agent relying upon his extra-territoriality?"

This question was answered on the part of the American government, by assuming the instance contemplated by the Prussian government to be that of an *implied* contract, growing out of the relation of landlord and tenant, by which the former had secured to him, under the municipal laws of the country, a tacit *hypothek* or lien upon the furniture of the latter. It was taken for granted that there was no express hypothecation, still less any giving in *pledge*, which implies a transfer of possession by way of security for a debt.

This distinction was deemed important. There could be no doubt that, in this last case, the pawnee has a complete right, a *real right* as it was called by the Prussian government, or *jus in re*, not in the least affected by diplomatic immunities. And accordingly, this was the course pointed out to creditors by Bynkershoek, who denies them all other means of satisfying themselves out of the minister's personal goods. Of course, these words were used with the proper restriction, which confines them to the *apparatus legationis*, or such as pass under the description, of *legatus instructus et cum instrumento*.

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[1] Baron de Werther to Mr. Wheaton. Note verbale, 19 May, 1839.

With these distinctions and qualifications, the American government had no doubt that the view taken by its minister of this question of privilege was entirely correct. The sense of that government had been clearly expressed in the act of Congress, 1790, which includes the very case of distress for rent, among other legal remedies denied to the creditors of a foreign minister.

That this exemption was not peculiar to the statute law of this country, but was strictly *juris gentium*, appeared from the precedents mentioned by the great public jurist just cited in his treatise *De Foro Legatorum*, the great canon of this branch of public law.[1]

Besides this conclusive authority upon the very point in question, Bynkershoek states the principle (out of Grotius) that the personal goods of a foreign minister cannot be taken by way of distress or pledge, and gives it the sanction of his most emphatic assent.[2] Indeed the whole scope of the treatise referred to, went to establish this very doctrine.

But to consider it on principle. Three several questions would arise upon the inquiry propounded by the Prussian government. 1st. Is the landlord's right, in such a case, a *real right* properly so called? 2d. Admitting it to be so, can it be asserted, consistently with Prussian municipal law, against a foreign minister

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[1] "Qui hæc (bona) considerantur ut personæ accessiones. . . . . Et secundum hæc Mornacius refert ad L. 2, § 3, *de Judic.* Regi Galliarum placuisse, anno 1608, *male pro locario Parisiis Venetæ reipublicæ legati mobilia fuisse retenta; et constanter ita usu est servatum deinceps ubique gentium.* Sed forte dices; id nimium esse, quia ea mobilium detentio non tam fit ex causâ personæ, quàm *jure in re, quod locatori competit in invectis et illatis, quodque jus, lege quæsitum, legatis auferre non possit.* Sed tantum abest, ut nimium dicamus, ut vel bona, quorum meminit d. Edictum anni 1679, non aliter interpretemur, quàm *bona mobilia, id est, utensilia,* &c. Hæc utensilia nego, ex jure gentium, pignori esse, vel unquam fuisse, quin nec capi posse, vel ad ordiendum judicium, vel ad *servandum, quod nobis debetur,* vel ad exsequendam rem judicatam. Et facilè assentior Grotio, si de *utensilibus* accipias, quæ ipse dixit, ea nempe pignoris causâ capi non posse, *nec per judiciorum ordinem, nec manu regiâ,* explosâ sic distinctione, quæ aliis olim, sed sine ratione, placuerat." *De For. Legat.* cap. ix.

Compare the catalogue of the personal goods so privileged, *id.* cap. xvi.

[2] "Bona quoque legati mobilia, et quæ proinde habentur personæ accessio, *pignoris causâ, aut ad solutionem debiti, capi non posse,* nec per judiciorum ordinem, nec, quod quidam volunt, manu regiâ, verius est: nam omnis coactio a legato abesse debet, tam quæ res ei necessarias, quàm quæ personam tangit, quo plena ei sit securitas." Bynkershoek, de For. Legat. cap. viii. Grotius, de Jur. Bel. ac Pac., lib. ii. cap. 18, § 19.

who has not voluntarily parted with his possession, on an express contract, to secure payment of rent or damages? 3d. Supposing the municipal law of Prussia to contemplate the case of a foreign minister, can that law be enforced, in such a case, consistently with the law of nations?

There was, in all systems of jurisprudence, great difficulty in settling the legal category of the landlord's right. Pledge, although not property, is certainly a real right; but a mere lien or hypothek, in which there is no transfer of possession, is not a pledge. In England, and in the United States, the right of landlords was originally a mere lien, reducible by distress into a right of pledge. In Scotland the same right is sometimes called a right of property, and sometimes a mere hypothek, springing out of a tacit contract. Without pretending to determine precisely whether its origin ought to be referred to the one or the other principle, (neither perhaps being fully adequate to account for all its effects,) it is considered by the best writers as a right of hypothek, convertible by a certain legal process into a real right of pledge.

If this be a proper view of the subject, there was surely an end of the question: for the *process* of conversion is as much the exercise of jurisdiction, as the levying an execution; and the public minister is exempt from all jurisdiction whatever.

It was true that all hypothecations, or privileges upon property, are classed by some writers under the head of real rights, but this was by no means conclusive of the case under consideration. In a conflict of rights, this might entitle the privileged creditor to *preference* in the distribution of an inadequate fund; but the question was, how was he to assert that preference? By means of judicial process? If so, he is without remedy against one not subject to the jurisdiction, except by open violence, which, of course, is not classed among rights. Accordingly, privileges, and liens by mere operation of law, are usually considered as matters of *remedy*, not of *right;* as belonging to the *lex fori*, not to the essence of the contract.[1]

It might, therefore, be considered as doubtful, *a priori*, whether, by the Prussian code, the right of the landlord is a real right, to

[1] Story, Conflict of Laws, §§ 423–456, 2d ed.

the effect, at least, of putting it on the footing of property transferred by contract, for that was the argument.

2d. But suppose this to be the usual effect, by operation of law, of the contract between landlord and tenant, does it hold as against one not subject to the law; not amenable to the jurisdiction; not, in legal contemplation, residing within the country of the contract?

By the supposition, it was an *incident* in law of the relation between the landlord and his tenant, and it turns upon an *implied* contract. It was supposed that the tenant agreed to hire the house on the usual conditions; but one of them was, that if he failed to pay the rent, or indemnify for damages done to the premises, the landlord should have a remedy by distress. It was, therefore, inferred that it was not the law, or the judge, but the tenant himself, who had transferred, *quasi contractu*, this interest in his own property. But if this reasoning was correct, why should it not apply in the case of arrest and holding to bail? or in any case of attachment? The consent might as well be implied here, as in favor of a landlord. Indeed, the same implication might as reasonably be extended to all laws whatever, and foreign ministers thus be held universally subject by contract to the municipal jurisdiction. The presumption implied in the contract under the law of the place, and binding on the parties subject to the jurisdiction, is repelled by the immunity and extra-territoriality of the public minister. He that enters into a contract with another knows, or ought to know, his condition. So says Ulpian, (l. 19, pref. D. de R. S.,) and the landlord who lets his house to a foreign minister, waives his remedy under the law from which he knows that minister is exempt.

The American government was therefore inclined, in the absence of any authority to the contrary, to think that the Prussian municipal law, properly interpreted, did not, in fact, authorize any such pretension as that set up by the landlord, in the present instance. But even supposing it did authorize the pretension, it ought no more to derogate from the established law of nations in this case, than in that of personal arrest. The authorities cited above seemed to the American government entirely conclusive as to this point; and it was greatly confirmed in this view of the subject by the act of Congress declaratory of the law

of nations, and by the opinion of other governments. In short, all the reasons on which diplomatic immunities have been asserted, and are now universally allowed, seem just as applicable to the case of liens and hypothecations in favor of landlords, as to remedies of any other kind. Indeed, nothing could afford a better practical illustration of this than the attempt of the landlord in the present case, by means of his pretended lien, to force the minister to pay damages assessed at his discretion, for an injury proved only by his own allegation.[1]

The Prussian government declared, that its opinion upon the point in controversy remained unchanged by the above reasoning, and the authorities adduced in support of it. According to its view, the question was not, whether the lessor had a right to retain a portion of the effects belonging to the lessee, and found on the premises at the expiration of the contract, as security for the damages incurred by its breach; but whether the lessor, by exerting his right of retention, had committed a violation of the privileges of diplomatic agents, or, at least, a punishable act; and if, for this reason, he could be compelled, summarily, and before the competent judge had pronounced upon his claim, to restore the effects thus retained. This last question being resolved negatively, the decision of the first must necessarily be reserved to the competent tribunals.

The privilege of extra-territoriality consists in the right of the diplomatic agent to be exempt from all dependence on the sovereign power of the country, near the government of which he is accredited. It follows, that the State cannot exercise against him any act of jurisdiction whatsoever, and as by a natural consequence of this principle, the tribunals of the country have, in general, no right to take cognizance of controversies in which foreign ministers are concerned, neither are they authorized, in the particular case of a controversy arising out of a contract of hiring, to ordain the seizure of the effects of a public minister.

If, then, the privilege of extra-territoriality regards only the relations which subsist between the diplomatic agent and the sovereign power of the country where he resides, it is also

[1] Mr. Legaré's Despatch to Mr. Wheaton, 9th June, 1843.

evident that a violation of this privilege can only be committed by the public authorities of that country, and not by a private person. The legal relations of the subjects of the country are in no respect *directly* changed by the principle of extra-territoriality; it is only *indirectly* that this principle can operate upon those relations; so that in respect to citizens' controversies, the subject is not entitled to invoke the interposition of the authorities of his own country against the foreign minister upon whom he may have a claim for redress, and if he would commence a suit against him, he must resort to the tribunals of the minister's country. If, on the other hand, the subject can do himself justice, without having recourse to the authorities of his own country, his position in respect to the foreign minister is absolutely the same as if the controversy had arisen with one of his own fellow-citizens.

It was hardly necessary to observe that, in such a case, the party must keep within the limits of what is generally permitted. If he should resort to violence, he would render himself guilty of an infraction of the law, and would be punishable in the same manner as if the adverse party were an inhabitant of the country.

In the controversy now in question, no authority dependent on the Prussian government had participated, either directly or indirectly, in the seizure of the effects of the American minister; the proprietor of the house having retained them by his own proper act, there was then no violation of the privilege of extra-territoriality. There was no proof of any act of violence having been committed by him, and the mere act of retention could not be considered as an unlawful act.

On principle, every proprietor of a house, even where it is let to another person, remains in possession of his property. It follows, that the effects brought on to the premises by the tenant may be considered, in some respects, as in possession of the landlord. It is for this reason that the municipal law of Prussia, as well as that of most other European States, gives to the landlord a lien upon the goods of the tenant, as a security for the payment of the rent. The question how far this right, founded upon the positive law of a particular country, can be exerted against a foreign minister, may be dismissed from consideration; since the act of retention cannot be regarded as an unlawful and punishable act, and, in such a case, it belongs to the tribunals of

justice to pronounce judgment upon the rights which the landlord may have acquired by the retention.[1] [185

§ 18. 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 hotel 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. [136 And though, in general, his

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[1] Baron de Bulow's Letter to Mr. Wheaton, 5th July, 1844.

See an able review of the above controversy by M. Fœlix, the learned editor of the Revue du Droit Français et Étranger, tom. ii. p. 31.

[185 In the case of an attaché to the French legation the opinion of the Attorney-General was, that neither a landlord nor a taverner, under the color of a lien, can forcibly take from an ambassador his chest or trunk, whether it contains his wardrobe or other articles of mere personal convenience, or whether it contains the instructions or the archives of his legation. Neither the law of nations nor the law of Congress knows any difference. While the Secretary of State can take no legal measures, the law furnishes the attaché the most ample protection. Opinions of Attorneys-General, ed. 1852, vol. v. p. 70. Mr. Toucey, Attorney-General, to the Secretary of State, February 13, 1849.] — *L.*

[136 The statement in the text does not accord with what we deem the correct rule on principle, nor with what was the usage in England during the Editor's official residence in that country; even the houses leased for foreign legations being then exempted from taxation. A recent English treatise, ascribed to Hon. Mr. Murray, Minister at Dresden, expressly declares that "the official residence of an ambassador is exempt from all taxes." Embassies and Foreign Courts, ch. 21, p. 320. Twiss says, "A foreign minister is privileged from being called upon to contribute personally to the general taxes of a country; that is, to such taxes as are levied by the government, and which are available for the general purposes of the State, in which the ambassador is not interested. But a foreign minister is not exempt from the payment of local dues which are raised for purposes of local administration, and which are expended on local objects, from which he himself, in common with his neighbors, derives immediate benefit. Thus he is liable to pay local rates assessed upon his hotel or its site for sewerage, lighting, watching and similar objects. This liability has sometimes been disputed, and Klüber holds it to be doubtful whether such rates can be rightfully exacted, if the ambassador is unwilling to pay them. Wheaton considers the ambassador's hotel to be subject to taxation, in common with other real property of the country. A practical difficulty will always be found in levying them, as the person and property of the ambassador are exempt from the jurisdiction of the civil tribunals, which must be appealed to in order to enforce payment in the last resort." Law of Nations, vol. i. § 203, p. 308.] — *L.*

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.[1] [137

§ 19. 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 visitation and search, 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. [128 In time of war, a special arrangement, by means of

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[1] Vattel, liv. iv. ch. 9, §§ 117, 118. Martens, Précis, &c., liv. vii. ch. 5, § 220. Manuel Diplomatique, ch. 3, §§ 30, 31. Merlin, Répertoire, tit. *Ministre Publique*, sect. v. § 5, Nos. 2, 8.

[137] The unstable character of the municipal institutions which have prevailed in Spanish America, since its emancipation, has in those countries not unfrequently, in the interests of humanity, induced foreign agents to appeal to diplomatic rights, long since deemed obsolete in Europe; but which are assimilated to the extra-territorial privileges claimed in non-christian States.

Mr. Clay, Minister of the United States, thus writes, January 30, 1855, to the Minister of Foreign Affairs of Peru, in answer to a note, communicating a decree that "all persons in asylum in foreign legations or vessels should leave them for the Isthmus of Panama:" "As His Excellency the Minister of Foreign Affairs is, without doubt, aware of the rights which this legation possesses under the law of nations from its being entirely extra-territorial, and consequently that the government of Peru has no jurisdiction within its limits; and moreover, that the decrees of a government do not extend to vessels of war lying in foreign ports, — the undersigned presumes that in communicating to him the decree above cited, His Excellency's object was to notify the Peruvian citizens *in asylum* in this legation, that they should prepare to leave the Republic. In other words, that the decree in its application is personal to the refugees themselves, and that His Excellency in communicating it did not intend to affect or in any manner diminish the privileges secured to the undersigned by the law of nations." Department of State MS.] — *L.*

[128] The character of State's messenger cannot be allowed to protect an ordinary traveller during a protracted residence out of his direct route. "State messengers can be regarded as employed in that capacity only on the road between the capital of the country to which they belong and the legation to which they are sent. Ebers openly declared that he was in no manner in the service of the North American States, and made no concealment that a passport as courier, and a despatch for the legation

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.[1] [[139]

§ 20. Public minister passing through the territory of another State than that to which he is accredited.

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.[2] 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,

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at Vienna were given him, only out of friendship and for the purpose of facilitating his journey. The Imperial Ministry of Foreign Affairs cannot but express its regret that the North American State Department, by giving a passport as courier to an individual who was plainly travelling for other purposes, should have given occasion to the reclamations under consideration." Note to Mr. Lippit, Chargé d'Affaires of the United States, September 3, 1854. Department of State MS.] — *L.*

[1] Vattel, liv. iv. ch. 9, § 123. Martens, Précis, &c., liv. vii. ch. 13, § 250, Robinson's Adm. Rep. vol. vi. p. 466. The Caroline.

[[139] This case is distinguished by Sir W. Scott from the carrying, by a neutral, of despatches from the governor of an enemy's colony to the government at home, which is a ground of condemnation. Robinson's Adm. Rep. vol. vi. p. 441. The Atalanta. Vide Part IV. ch. 3, § 25, *infra*.] — *L.*

[2] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 5. Bynkershoek, de Foro Comp. Legat. cap. ix. § 7.

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.[1]

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 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."[2]

He afterwards limits this right of passage to the ambassadors of sovereigns with whom the State through which the attempt to pass is, at the time, in the relations 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 at-

[1] Wicquefort, de l'Ambassadeur, liv. i. § 29, pp. 433–439.
[2] Vattel, Droit des Gens, liv. iv. ch. 7, §§ 84, 85.

tempting to pass through Hanover, was arrested and carried off a prisoner to England.[1] [[140]

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, 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.[2]

This appears to Merlin to be a forced interpretation. "The word *passer* in French, and *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

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[1] Ch. de Martens, Causes Célèbres du Droit des Gens, tom. i. p. 310.

[[140] "This year England obtained, as captives, the two principal promoters of the war, the Mareschal Belle-Isle and his brother. They had been sent in the autumn by the king of France, on a mission to the king of Prussia, but stopping to change horses at Elbingerode, a village of the Electorate of Hanover, were detained by the magistrates. From thence they were conveyed to England and refusing to give their parole in the mode it was required, were confined for security in Windsor Castle. The Emperor complained of their arrest as a breach of the privileges of the Empire; the prisoners themselves claimed the benefit of the cartel of exchange; and the British government was inclined to consider them as prisoners not of war but of state. The question was referred by the king to his three field marshals, Stair, Cobham, and Wade, who, after a due examination of Belle-Isle's papers and commissions, gave it as their opinion that Belle-Isle and his brother were prisoners of war; and they were accordingly released (ransomed) under the cartel, and sent back to France after several months' detention." The noble historian adds; "We must acknowledge that in this transaction the British government appears neither rightful in its claims nor speedy in its justice." Mahon's History of England, vol. iii. ch. 26, p. 306.] — *L.*

[2] Bynkershoek, de For. Legat. cap. ix. Wheaton, Hist. Law of Nations, p. 243.

is, the authors of this very law) caused to be arrested, in 1717, the Baron de Görtz, 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."[1]

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 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.[2] [[141]

[1] Merlin, Répertoire, tit. *Ministre, Publique,* sect. v. § 8, Nos. 4, 12.

[2] Vide supra, Part II. ch. 2, § 9, p. 188.

[[141]] Only the State, to which a public minister is sent, is obliged to secure to him the enjoyment of the protection of the law of nations. (Wicquefort, liv. i. sec. 17). It is nevertheless usual to accord, through courtesy, certain immunities to a foreign

§ 21. 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. Ever 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

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public minister in his passage through the country. Klüber, Droit des Gens, § 170, note (*a*).

A question arose, in 1854, between the United States and France, as to the immunities of a minister passing through the territories of a third power, in the case of Mr. Soulé, Minister at Madrid, who was stopped at Calais in October of that year, on his return to his post from which he had been temporarily absent. The views of the French government are given in a note from the Minister of Foreign Affairs to the American Minister in Paris, with regard to the privilege of transit, which was not denied, as well as respecting the position, in relation to that country, which the envoy to Spain held, he being a native-born subject of France, and a naturalized citizen of the United States. While Mr. Soulé's quality of foreigner, deduced from his expatriation, is recognized as to all other matters, and no exception taken to his title to the Spanish mission, Mr. Drouyn de Lhuys refers to the rule of the law of nations which, he assumes, would have required a special agreement to have enabled him to represent, in his native land, the country of his adoption. "You see, Sir," says he, "that the government of the Emperor has not wished, as you appear to think, to prevent an envoy of the United States crossing the French territory to go to his post to acquit himself of the commission with which he was charged by his government. But, between this simple passage and the sojourn of a foreigner, whose antecedents have awakened, I regret to say, the attention of the authorities invested with the duty of securing the public order of the country, there exists a difference, which the Minister of the Interior had to appreciate. If Mr. Soulé was going immediately and direct to Madrid, the route of France was open to him; if he was about coming to Paris to sojourn there, that privilege was not accorded to him. It was, therefore, necessary to consult him as to his intentions; and it was he who did not give the time for doing this.

"Our laws are precise on the subject of foreigners. The Minister of the Interior causes the rigorous dispositions of them to be executed, when the necessity for it is demonstrated to him; and he then uses a discretionary power which the government of the Emperor has never allowed to be discussed. The quality of foreigner placed Mr. Soulé under the operation of the measure which has been applied to him. You will admit, Sir, that in doing what we have done, the government of the United States, with which His Imperial Majesty's government heartily desires to maintain relations of friendship and esteem, has, in no wise, been attacked in the person of one of its representatives. The Minister of the United States is free, I repeat, to cross France; Mr. Soulé, who has no mission to fulfil near the Emperor, and who, conformably to a doctrine consecrated by the law of nations, would have need, in consequence of his origin, of a special agreement to represent in the country of his birth the country of his adoption, Mr. Soulé, a private individual, comes within the operation of the law, common to all persons, which has been applied to him, and cannot pretend to any privilege." Mr. Drouyn de Lhuys to Mr. Mason, November 1, 1854. Doc. 33 Cong. 2d Sess. Senate, No. 1.] — *L.*

also enjoyed by the public ministers and consuls from the Christian powers in Turkey and the Barbary States. 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.[1] [142

§ 22. 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 law 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 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.[2] [143

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[1] Vattel, liv. iv. ch. 7, § 104. Martens, Précis, &c., liv. vii. ch. 6, §§ 222–226. Klüber, Droit des Gens Moderne de l'Europe, Part. II. tit. ii. ch. 3, §§ 215, 216.

[142] In several of the treaties between the United States and the South American States, there is a special article, providing for the most perfect and entire security of conscience to all the citizens or subjects of either of the contracting parties in the territory of the other and for the burial of those who may die there in the usual burying-grounds or in other decent or suitable places and for the protection of their bodies against violation or disturbance. See *inter al.* Treaty with Brazil, December 12, 1828. Statutes at Large, vol. viii. p. 393; with Central America, December 5, 1825. Ibid. p. 328. In other cases it is stipulated that citizens of the United States shall not be disturbed in the proper exercise of their religion in private houses or in the chapels appropriated for that purpose. See treaty with Venezuela, January 20, 1836. Ib. p. 472.] — *L.*

[2] Wicquefort, de l'Ambassadeur, liv. i. § 5. Bynkershoek, cap. 10. Martens, Précis, &c., liv. iv. ch. 8, § 148. Kent's Comm. on American Law, vol. i. pp. 43–45, 5th edit. Fœlix, Droit International Privé, § 191.

[143] The privileges and immunities of consuls in non-Christian States have been

§ 23. 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: —

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already noticed in connection with the consular jurisdiction. Part II. ch. 2, § 11, Editor's note [74, p. 224, *supra*.

"The consul is not the bearer of letters of credence, but he receives a commission (*lettre de provision*), signed by the Sovereign, authorizing him to discharge the duties of consul in the place where he is to reside: his nomination is not addressed to the Chief of the State; but his appointment is communicated to the government, and its permission is required to enable him to enter upon his functions. This permission is given by a rescript or order termed an *exequatur*, which is to authorize the functionaries of the Home, as distinguished from the Foreign Department of the government, to recognize the official character of the consul." Twiss, Law of Nations, vol. i. p. 318. The *exequatur* is signed by the King or Chief of the State, but is always revocable. Garcia de la Vega, Guide des Agents, p. 288.

The authority to act, which in Christian countries is termed an *exequatur*, in Turkey is called a *barat*. The form of the exequatur varies in different countries. The most usual one, as in France, England, Spain, Sardinia, the United States and Brazil, is that of letters-patent, signed by the Chief of the Executive power, and countersigned by the Minister of Foreign Affairs. In other countries, as in Russia and Denmark, for example, the consul simply receives information that he has been recognized, and that the necessary orders have been given to the authorities of his residence. In Austria *exequatur* is written on the original of the commission, and the Emperor countersigns it, (*y appose son contre-seing.*) De Clercq et De Vallat, Guide des Consulats, liv. iii. ch. 1, sect. 1, § 2, tom. i. p. 114.

The following extracts from an opinion of Attorney-General Cushing, though other portions of it have been already cited, (Part II. ch. 2, § 7, Editor's note [64, p. 183,) are here inserted as elucidating the status of consuls under the law of nations:

"Although consuls are not merely commercial agents, as many authors assert, (Wicquefort, Ambas., liv. i. sec. 5; Bynkersh. de F. Legat, cap. x.; Wildman's Institutes, vol. i. p. 130); and although they undoubtedly have certain of the qualities and some of the rights of a foreign minister (see De Cussy, Réglements Consulaires, sec. 7); still it is undeniable that they do not enjoy the privileges of exterritoriality, according to the rules of public law received in the United States. (Clark *v.* Cretico, 1 Taunton, 106; The Anne, 3 Wheaton, 446; United States *v.* Ravara, 2 Dallas, 297; Viveash *v.* Becker, 3 Maule & Sel. 284; Barbuit's case, Cases Temp. Talbot, 281; Commonwealth *v.* Korsloff, 5 Serg. & R. 545; Durand *v.* Halback, 1 Miles, 46; Davis *v.* Packhard, 7 Peters, 276; S. C. 6 Wend. 327; S. C. 10 Wend. 50; Flynn *v.* Stoughton, 5 Barb. S. C. R. 115; State *v.* De la Font, 2 Nott & McCord, 217; Mannhardt *v.* Soderstrom, 1 Bin. 138; Hall *v.* Young, 3 Pick. 80; Sartori *v.* Hamilton, 1 Green's R. 107.)

"In all the adjudged cases above cited, it is either expressly ruled, or the point presented assumes, that consuls are subject to the local jurisdiction. The same doctrine is recognized in the modern law treatises of most authority, whether in the United States or in Great Britain. Wheaton's Elements, Part III. ch. 1, § 22; Kent's Comm. vol. i. p. 43; Wildman's Inst. vol. i. p. 130; Flynn's Brit. Consuls, ch. 5.

"Notwithstanding the somewhat vague speculations of Vattel and some other continental authors on the question whether consuls are quasi ministers or not, (Vattel, Droit des Géns, l. iv. ch. 8; De Cussy, Réglements Consulaires, sec. 6; Moreüil, Agents Consulaires, p. 348; Borel, Des Consuls, ch. 3,) it is now fully

1. By the expiration of the period fixed for the duration of the mission; or, where the minister is constituted *ad interim* only, by

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established by judicial decisions on the Continent, and by the opinions of the best modern authorities there, that consuls do not enjoy the diplomatic privileges accorded to the ministers of foreign powers; that in their personal affairs they are justiciable by the local tribunals for offences, and subject to the same recourse of execution as other resident foreigners; and that they cannot pretend to the same personal inviolability and exemption from jurisdiction as foreign ministers enjoy by the law of nations. Fœlix, l. ii. tit. 2, ch. 2, § 4; Dalloz, Dic. de Jurispr. tit. *Agents Diplomatiques*, No. 35; Ch. de Martens, Guide Diplomat. § 83.

"In truth, all the obscurity and contradiction as to this point in different authors arise from the fact that consuls do unquestionably enjoy certain privileges of exemption from local political obligation; but still these privileges are limited, and fall very far short of the right of exterritoriality. Massé, Droit Commercial, tom. i. Nos. 438, 439.

"In the United States, consuls have a right, by the Constitution, to the jurisdiction of the federal courts as against those of States. They are privileged from political or military service and from personal taxation. In some cases we have by treaty given to consuls, when they are not proprietors in the country, and do not engage in commerce, a domiciliary and personal immunity beyond what they possess by the general public law; and the extreme point to which these privileges have been carried in any instance may be seen in the Consular Convention of the 23d of February, 1853, between the United States and France." Statutes at Large, p. 992. Mr. Cushing's Opinion, 4th November, 1854. Opinions of Attorneys General, vol. vii. p. 22.

Martens (Le Baron Charles de), in reply to those who, admitting the inconvenience of placing consuls in the same category with a minister, *eo nomine*, with whose functions they might thus be brought in collision, would still accord to them the character of *public ministers*, though with a limited protection of the law of nations, says: "We understand a hierarchy of ranks; a hierarchy of rights is beyond our comprehension. If the consul is a public minister, the privileges of the position confer on him all the prerogatives belonging to it. Among the authors of authority, Moser alone has raised this irrational pretension in favor of consuls. Bynkershoek, Wicquefort, Bouchaud, Vattel, and Klüber reject it; and whilst admitting with great reason that these functionaries have a public character which gives them a right to particular consideration and places them under the special protection of the government which sends them and of the one which receives them, they expressly declare that they cannot pretend to immunity from local jurisdiction nor to exemption from the common burdens, nor to the diplomatic ceremonial. Consuls are essentially commercial agents." Guide Diplomatique, ch. xii. § 72.

Pinheiro Ferreira, in his notes on the Précis du Droit des Gens, of G. F. Martens, contends for considering consuls as diplomatic agents, though of inferior rank to ministers. Note 67. But a more recent commentator of the same author, after stating that Wicquefort only considers them as commercial agents, that Vattel, Martens, and Klüber have refused them the quality of political agents, and that such is also the opinion of Wheaton and Fœlix, says that "though they cannot pretend to the ceremonial of public ministers, several treaties give them the right to put over the door of their hotel the arms of the sovereign whom they represent. Modern authors, also, especially Steck, De Clercq and De Vallat and De

the return of the ordinary minister to his post. In either of these cases a formal recall is unnecessary.

Cussy, recognize in consuls the character of public ministers. According to them, whatever may be their hierarchical rank, whatever their subordination to other agents, whether they speak and act in their own name and on their own responsibility, or by virtue of the express instructions of their chiefs, they are nevertheless invested with a public character. As the official and accredited envoys of their country, they are ministers, and their persons, as well as their domiciles ought to partake of the respect due to their nation. Without going so far as these last authors, it may be affirmed that, in general, consuls and agents for commercial relations, who are assimilated to consuls, and the persons making part of the consulate, enjoy as public ministers inviolability as to their persons but have not the privilege of exterritoriality. They have no right to demand the free exercise of their religion in a country where it is not tolerated; and they are justiciable before the ordinary tribunals of the places of their residence, and are subjected to the same process of execution as other foreigners residing in the State where they are established." Précis du Droit des Gens, par G. F. de Martens, tom. i. p. 388, note par Vergé. For the decisions of municipal tribunals on the immunities of consuls, see Phillimore, International Law, vol. ii. p. 260.

The nearest approach at this time, except in non-Christian countries, to direct diplomatic relations on the part of consuls, is the arrangement made, by an interchange of notes, on the 4th of November, 1845, between the Spanish government and that of England. After stating that though the Consul-General at Havana enjoys the full privilege of claiming protection for British subjects and for all the rights which affect their commercial interests, he cannot take in his communications with the Captain-General of Cuba, the character of the representative of Her Britannic Majesty, at Madrid, to whom alone it belongs, according to diplomatic forms, to communicate with the Minister of State of Her Catholic Majesty in respect to the fulfilment, in general, of the treaties between the two nations; it provides that the Consul-General, besides informing his government of every fact or circumstance contrary to the stipulations, which are binding between England and Spain, *may hereafter bring them directly* to the knowledge of the Captain-General, in order that this authority, being informed of the occurrence, may adopt with respect to it the suitable measures, with the assurance of the fact denounced by the Consul-General being exact. It is, furthermore, provided that the Consul-General shall reply to the consul's communications, either himself or by his secretary, with the courtesy due to the functionary of a friendly and allied nation. Riquelme, Elementos de Derecho público, tom. i. p. 523.

There is a provision in most treaties which stipulate for consuls the privileges accorded to those of the most favored nation that, if they exercise commerce, they shall be subjected to the same laws and usages to which private individuals are subject in the same place in respect to their business. And even where there is no such treaty provision, the same rule, in general, prevails by usage.

The Guide des Consulats, by De Clercq and De Vallat, published under the sanction of the French ministry of foreign affairs, says: "Most of the treaties of commerce concluded within a century contain a clause by virtue of which the consuls are reciprocally to enjoy the privileges and exemptions conceded to those of the most favored nation; but they are almost all silent as to the sense to be given to these words, *privileges* and *exemptions*." The consular convention of 23d of February, 1853, with the United States is cited as among the most explicit made by France. It is, however, added: "These

2. When the object of the mission is fulfilled, as in the case of embassies of mere ceremony; or, where the mission is spe-

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stipulations themselves do not form an absolute right (*droit absolu*), and they are completed and modified by the laws or local usages of every country." According to existing regulations, no French consul can under any circumstances engage in trade; and there is, in general, an essential distinction, as to whether these agents are citizens of the State which names them or of the one which receives them.

"By the French consular system greater privileges are accorded to these officers than by other nations, especially England and the United States. Indeed, by the royal instructions of the 8th of August, 1814, France recognizes in foreign consuls the character of diplomatic agents in this sense, that they are acknowledged by the sovereign, who receives them as officers of the sovereign who sends them, and that their mandate is derived from positive treaties, from the common usage of nations, or the general public law. From this results the right of personal immunity, except in the case of crime, and the exemption from all national and municipal charges, when they do not possess real property and do not engage in commerce.

"Though England attributes to her consuls a public character, and her agents in South America have frequently claimed, amidst the troubles which have so often disturbed those countries, privileges reserved to ambassadors, among others the right of asylum, she does not, however, recognize in the foreign consuls, whom she admits in her ports, any of the immunities or privileges which are granted to her agents in the countries of Christendom. In fact, the English law which makes little or no difference between the foreign consuls who are British subjects, and those who are citizens of the State which has commissioned them, has adopted no regulation on this delicate matter, and abandons to the rule of usage and tolerance everything which concerns the exercise of the consular functions within the extent of the United Kingdom or its colonies. The exceptions to the ordinary law, which have by this means been established, are limited on the one side to the exemption from the income-tax on the salaries, and on the other to a very limited right of police over seamen, deserters or others. As to the Chanceries, they are considered as the office of a public administration; but they are not, therefore, inviolable. A few years ago, the archives of the Consulate-General of France in London were seized on the warrant of a collector of the local taxes, and sold at auction in the public streets, as being bound, according to the terms of the law, to respond to the treasury for the payment of the tax, which the owner of the house in which the Chancery was established had not paid.

"Nor have the United States of America, in the matter of consular privileges, well-established principles; and we deem ourselves authorized to state that, in the absence of stipulations of conventional law, a foreign consul in that country would not be allowed to claim other or more extensive advantages and immunities than those which are usually conceded in England." De Clercq et De Vallat, Guide des Consulats, liv. i. ch. 1, § 4, tom. i. pp. 6–16.

In 1858 a case occurred, as respects a United States consulate in England, not unlike what is stated to have happened to the French consulate. The consular property at Manchester, belonging to the United States — flag, seal, arms, record-books, &c. — were levied on by the sheriff for a private debt of the consul, and were not released till security had been given by a private citizen in the absence of the consul. Mr. Dallas, Minister in London, was instructed to pay the bill and thus save from sale the consular archives. Department of State MS.

On the other hand, the arrest of the British consul at Tahiti, after the French had

cial, and the object of the negotiation is attained or has failed.

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taken possession of the island, in 1843, was declared to be a gross indignity threatening an interruption of the diplomatic intercourse between England and France. It was only settled, after parliamentary discussions and protracted negotiations, by the payment of a pecuniary indemnity. Hansard's Parliamentary Debates, 3d Series, vol. lxxvi. p. 157, July 31, 1844. Martens, par F. Murhard, Nouveau Recueil, tom. vi. p. 74.

In Spain the immunities of the foreign consuls are determined by the royal regulations of 1st of February, 1765, modified by the ordinances of the 8th of May, 1827, 17th July, 1847, and 17th November, 1852. These agents are placed, like all other foreigners, under the protection of the military authority. They cannot be brought before the courts of justice, nor even cited to appear as witnesses; and every declaration which is asked of them must be received at their houses. They are exempt from billeting soldiers, and all personal and municipal charges; but they pay the custom-house duties on the articles which they receive from abroad. Their arms can only be placed in the interior of their houses; and it is only by tolerance, become now almost general, that foreign agents can raise their flag on the national fête days.

In Portugal the consular immunities would seem to be greater than in any other country of Christian Europe.

The Portuguese legislation often grants exemption from the customs and municipal duties (*droits de douanes et d'octroi*) on articles of consumption; and during the troubles growing out of the Miguelist insurrection, the right of inviolability of the house of the consul of Brazil, who had received in it several political refugees, was not for an instant disputed. The English formerly enjoyed privileges in Portugal assimilated to the exterritoriality of the Francs in the Barbary States.

There existed special tribunals, held by judges conservators, in the several ports and cities, chosen by the British residents and confirmed by the British government, to whom was referred the decision of all cases brought before them by British subjects. These special tribunals, though recognized and confirmed by the treaty of Rio Janeiro, of 19th February, 1810, (Martens, par F. Murhard, Nouveau Supplement, tom. ii. p. 158,) were renounced as to Brazil, by treaty of August 17, 1827, (Lesur, Annuaire, 1827, Appendix, 158,) as being contrary to the constitution of the Empire, which abolished all special jurisdictions, and finally as to Portugal, by treaty of July 3, 1842. Martens, par F. Murhard, Nouveau Recueil, tom. iii. p. 338.

In Austria the foreign consuls are subjected to the local jurisdiction as well in civil as in criminal matters, and, aside from their official functions, are justiciable, like every other individual, by the ordinary tribunals.

In Russia the consular immunities and prerogatives are not established by the law, but consuls are exempt from any personal service and impost. They have some custom-house exemptions by courtesy; and Russian subjects who have the title of consuls of foreign nations, are exempt, by virtue of the ukase of 30 (18th) October, 1839, from municipal functions.

In Prussia foreign consuls, who are not citizens of the country, are exempt from military billetings, direct contributions, and all personal service. They are subjected to the civil jurisdiction of the country; but in criminal matters, after an investigation, if there is occasion to proceed further, they are sent back to their government, to be tried according to the laws of their own country. This is only done in the cases where the country of the consul admits reciprocity in favor of Prussian consuls.

3. By the recall of the minister.
4. By the decease or abdication of his own sovereign, [[144] or

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[*] In Denmark the foreign consuls who are neither subjects nor merchants, are by virtue of the royal order of the 25th of April, 1821, exempt from every personal charge or contribution. In every other case, like all other strangers, they are subject to the ordinary law.

In the Netherlands, whose legislation in this respect Belgium retains, the ordinance of the 5th of June, 1822, also distinguishes among the foreigners invested with the title of consul, those who are exclusively functionaries and those who are, at the same time, merchants. It does not grant immunity to the latter, and only recognizes in the former the right of having their arms on their houses, of raising their flag, and of exemption from military billetings, from the service of the national guard, from personal imposts, and from all public and municipal charges, on condition of reciprocity in favor of the Dutch or Belgian consuls. De Clercq et de Vallat, *loc. cit.*

Foreign consuls in the United States are not altogether exempt from the jurisdiction of the country, even as to matters connected with their public duties. Thus, a consul who should deliver to the master or commander of any foreign vessel the register and other ship's papers deposited with him according to the act, without his producing a clearance in due form from the collector of the port, shall, upon conviction

[144] Lord John Russell wrote to the Chevalier Fortunato, February 20th, 1861: "The news which has been received in this country of the capitulation of the fortress of Gaeta, and of the departure of His Majesty the King, Francis II., and of the Queen his wife, obliges me to inform you that, in the actual condition of affairs, you can no longer be accredited as the representative of the King of the Two Sicilies at this court. I will not on this occasion give expression to vain regrets respecting the catastrophe, which has happened, in the kingdom of the Two Sicilies, to the dynasty of the Bourbons. The English government had for a long time foreseen it and it had often warned not only the king, Frances II., but also his immediate predecessor, of the dangers which they incurred in following the policy in which they were embarked. But, I cannot close my official despatch, without praying you to accept the assurance of my personal esteem, to which the manner in which you have conducted all the affairs of which you had to treat with me gives you so just a title." Le Nord, 16 Mars, 1861.

We have elsewhere referred to the recognition of the "Kingdom of Italy" by several of the powers of Europe. Part II. ch. 3, § 6, Editor's note [97, p. 300. With Russia the diplomatic relations had been interrupted since the adoption of the Neapolitan Revolution by Sardinia, in October, 1860; and consequently no regular notification could be made at St. Petersburg of the assumption of the new titles of Victor Emanuel. The official journal of France, (July 10, 1862.) stated, "The acknowledgment of the kingdom of Italy by Russia is an accomplished fact. The government of the Emperor has undertaken to make known to the Cabinet of Turin, that the Emperor Alexander is prepared to receive an envoy from the King of Italy, and to reëstablish diplomatic relations between the two courts." Moniteur Universel. The Minister of Foreign Affairs at Turin, in bringing this matter the next day to the notice of the Chamber of Deputies, added: "There has been no rupture between Italy and Prussia, the negotiations have, therefore, been direct between them. A telegraphic despatch from our Representative at Berlin announces to us to-day the acknowledgment of our Kingdom by Prussia." Le Nord, 13 Juillet, 1862.] — *L.*

the sovereign to whom he is accredited. [145] In either of these cases, it is necessary that his letters of credence should be re-

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before the Supreme Court of the United States be fined in a sum not less than five hundred dollars nor more than one thousand dollars. Statutes at Large, vol. iii. p. 362.

In the United States, if the foreign consul being a subject of the government he represents or of some other foreign government, engage in commerce, he will not be subject to be enrolled in the militia, nor be competent to serve as a juror; but his condition is not a privilege as a consul, but a disability as an alien.

By article 1, § 9 of the Constitution, no person holding any office of profit or trust under the United States, can, without consent of Congress, accept any office from any foreign power. Consequently, no federal functionary can act as consul for a foreign State; but the disqualification from federal office is the only effect of an American citizen accepting such an appointment, unless it be to give him the right of being sued exclusively in the United States courts. Whether the provision of the Constitution on that subject refers to consuls who are citizens of the United States, is a point to which Mr. Cushing thinks that the attention of the federal courts has not been called, notwithstanding they took jurisdiction in a case, because the party was a consul, though a citizen of the United States. Peters's Reports, vol. vii. p. 276, Davis *v.* Packard.

American citizens, who are foreign consuls in the United States, are not exempted from service in the militia either by the Constitution or by act of Congress, nor is there anything to exempt such persons from service on juries, though by the local laws of some of the States, through a misapprehension of the position of the consuls, under the law of nations, they may be so exempted. Mr. Cushing, November 3, 1856. Opinions of Attorneys General, vol. viii. p. 16.

In deciding in the State courts of New York that a consul of a foreign government residing in the United States is not liable to be sued in the State courts; his exemption, it was said, is not a personal privilege, nor the privilege of his government, and it cannot be waived by his appearing in an action in the State courts and pleading to the merits. The exemption exists by virtue of the Judiciary Act of 1789, ch. 20, § 9, (Statutes at Large, vol. i. p. 77,) and is not founded upon the law of

[145] According to the public law of the monarchies of Europe, the authority of ministers, and perhaps of international commissioners, expires on the death, deposition, or abdication of the Prince; but not so as between the American Republics, in which the executive power is permanent and continuous, without regard to the governing person; and there is no interruption of the authority or renewal of the credentials of their public ministers on a change of President for whatever cause, provided such President continues to represent and exercise the appointing power of the government. In the United States it is clear that commissions do not expire merely by the death or other change in the person of the President. Nor has it been customary to receive or to require new credentials of ministers, at every new election of the Supreme Executive Chief of the American Republic. In fact, while in monarchical States, it is the custom to notify to friendly governments all personal changes affecting the tenure or succession of the Chief of the State, not only deaths but births, and to give new credentials to ministers on the death or other equivalent change of the monarch on either side, no such practice obtains in regard to the executive changes in the authority of constitutional republics. Mr. Cushing, October 29, 1855. Opinions of Attorneys General, vol. vii. p. 590.] — *L.*

newed; which, in the former instance, is sometimes done in the letter of notification written by the successor of the deceased

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nations or treaty. The fact that the consul is impleaded with a citizen upon a joint contract will not give jurisdiction to the State courts. It may be alleged as error in fact, after judgment, that the defendant was a consul of a foreign government; and whenever the fact appears that the court have no jurisdiction it will stop the proceedings in a cause at any stage of its progress. Selden's (New York Appeals,) Reports, vol. iii. p. 576, Valarino against Thompson.

As United States consuls, excepting in Mahometan or other non-Christian States, are not invested with diplomatic powers, they are not entitled to communicate directly, unless under special circumstances, with the government of the country in which they reside. They are forbidden by act of Congress, and in some cases by treaty, to exercise diplomatic functions, or hold any correspondence with the government to which they shall be appointed or with any other government, when there shall be in such country any officer authorized to perform diplomatic functions, or in any case except authorized by the President; but provision is made for compensation, in case of their so acting in the absence of the regular diplomatic officer. Statutes at Large, vol. xi. p. 56. Regulations for United States Consular Officers, p. 19. In the countries where there is no diplomatic agent, it may become the duty and is perhaps the right of the consul to place himself in direct communication with the political authority; but that does not give him diplomatic privileges. If the United States see fit, in any case, to confer the function of chargé d'affaires on their consul, that is, to superimpose the office of minister on that of consul, then he has a double political capacity, and though invested with diplomatic privileges, he becomes so invested as chargé d'affaires and not as consul. Mr. Cushing, July 14, 1855. Opinions of Attorneys General, vol. vii. p. 345.

In "the personal instructions to the diplomatic agents of the United States," it is said: "Consuls are always to be regarded as under the direction of the minister or chargé d'affaires of the United States in the country where they respectively reside, and in the transaction of their official duties, they can only address the government of that country through such officer. Diplomatic agents will maintain such correspondence with the consuls of the United States in the countries to which they are accredited, as they may deem conducive to the public interest; and in case a vacancy should require the appointment of a person to perform temporarily the duties of a consulate, such appointment may be made by the minister or chargé d'affaires, with the consent of the foreign government, and in conformity with the laws and consular regulations of the United States, immediate notice thereof being given to this department." p. 10.

Since the act of March 1, 1855, (Statutes at Large, vol. x. p. 620,) which was modified and reënacted August 18, 1856, (Ib. vol. xi. p. 52,) salaries have been provided for the consuls-general, consuls, or commercial agents of the United States at the different places designated in two schedules of these acts. The officers included in one of the schedules are prohibited from engaging in business, and in the case of those named in both schedules, the fees are to be accounted for to the United States. The consular officers not embraced in the above schedules, are entitled, as a compensation for their services, to such fees as they may collect according to the provisions of the act. Ib. 1861, p. 285.

The only provision as to consuls in the treaty of commerce with France of 1778 was: "The two contracting parties grant mutually the liberty of having each in the ports of the other, consuls, vice-consuls, agents, and commissioners, whose functions shall be regulated by a particular agreement." Statutes at Large, vol. viii. p. 28.

sovereign to the prince at whose court the minister resides. In the latter case, he is provided with new letters of credence; but

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The convention of 1800 gave permission to appoint commercial agents, (that being then their title in France to avoid confounding these officers with the political hierarchy of the Republic, over which the "first consul" presided.) They were to enjoy "the rights and prerogatives of the similar agents of the most favored nations." Ibid. p. 182.

The convention of the 23d of February, 1853, between the United States and France, provides for the issue of the necessary exequatur, reserving a right to the government that furnishes it to withdraw it "on a statement of the reasons for which it has thought proper to do so." The consuls-general, consuls, vice-consuls, or consular agents, as well as the consular pupils, are to enjoy in the two countries "the privileges usually accorded to their offices; such as personal immunity, except in the case of crime; exemption from military billetings, from service in the militia or the national guard, and other duties of the same nature; and from all direct and personal taxation, whether federal, state, or municipal; and they are moreover to enjoy all the other privileges, exemptions, and immunities which may at any future time be granted to the agents of the same rank, of the most favored nation. If they are citizens of the country in which they reside, if they are or become owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts and with the reservation of the treatment granted to commercial agents, to the same jurisdiction, as other citizens of the country who are owners of property or merchants. It is provided that,

"They shall never be compelled to appear as witnesses before the courts. When any declaration for judicial purposes, or deposition, is to be received from them, in the administration of justice, they shall be invited, in writing, to appear in court; and, if unable to do so, their testimony shall be requested in writing, or be taken orally at their dwellings."

A difficulty arose in 1854, under this provision of this treaty. The question grew out of investigations connected with an expedition of Count Raousset-Boulbon, against Sonora, and on which occasion the testimony of Mr. Dillon, the French Consul at San Francisco, was deemed necessary. The latter interposing the consular convention and refusing to appear, Judge Hoffman, of the United States Court, caused him to be arrested and brought before him; whereupon, he pulled down the consular flag and suspended his functions. He was not subpœnaed on the part of the United States, but of the defendant, and the judge discharged him on a reargument of the case.

There was a real, inherent embarrassment in this matter, arising from an apparent conflict of the convention with the Constitution of the United States, the 6th amendment of which gives to defendants in criminal prosecutions the right of compulsory process for witnesses. This was not applicable to persons then exempt. "As the law of nations stood, when the Constitution went into effect, ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the Constitution referred to did not give the defendant in criminal prosecutions the right to compel their attendance in court. But what was the case in this respect as to consuls? They had not the diplomatic privileges. After the adoption of the Constitution, the defendant, in a criminal prosecution, had the right of compulsory process to bring into court, as a witness, any foreign consul whatever. This could not be taken away by treaty." Mr. Marcy, Secretary of State, to Mr. Mason, Minister in Paris, September 11, 1854. And in a subsequent despatch, (October 23, 1854,) Mr. Marcy

where there is reason to believe that the mission will be suspended for a short time only, a negotiation already commenced

says that his construction is sustained by the Attorney-General and all the members of the Cabinet.

After the subject had been referred to in the President's Message of December 1854, and been discussed in repeated communications between the two governments, in which a modification of the treaty had been proposed, to adapt it to the provisions of the Constitution, the matter was finally settled by the interchange of notes between Mr. Mason and Count Walewski, of the 3d and 7th of August, 1855, in accordance with a despatch of Mr. Marcy, of the 18th of January. Instructions were to be sent to the French consuls in the United States to attend and testify according to the treaty, and, unless in cases of actual inability, there was to be no refusal thereafter; a French ship of war, to be despatched to San Francisco, was to be saluted; after which the consul was to rehoist the consular flag and resume the full discharge of his functions. He was not to act so as to appear to consider the salute to himself, nor to rehoist the flag till after the salute. Department of State MS. Annuaire des deux mondes, 1853–4, p. 762. Ib. 1854–5, p. 732.

From a case decided by the Court of Appeal of Aix in 1843, it would seem that the privilege, of which the consul at San Francisco attempted to avail himself, would be as inconvenient in the administration of French as of American law. The judgment recites that even if diplomatic agents are independent of the sovereign authority of the country in which they exercise their ministerial functions, this privilege is not applicable to consuls; that the latter are only commercial agents; that if the laws of police and of the public security are obligatory in general on all those who inhabit the French territory, it follows that the foreigner, who is even accidentally within this territory must concur, as far as is within his power, to facilitate the exercise of criminal justice; that "though the diplomatic convention of which the consul of . . . avails himself, in order to dispense with his coming before the court to give testimony, was without inconvenience at the time that it was made, when the criminal procedure was secret, it is inapplicable at the present time, when, according to the public law which now governs us, the debates are public and the witnesses are obliged to depose before the jury." The judgment then proceeds to declare that "as the consul is a foreigner, as he is ignorant of the economy and mechanism of the criminal procedure in France, and has acted in good faith, in his refusal, the court will not impose a fine on him." Martens, Guide Diplomatique, tom. i. ch. 12, § 79, p. 298. Ed. 1851.

The convention further stipulates: "The consular offices and dwellings shall be inviolable. The local authorities shall not invade them under any pretext. In no case shall they examine or seize the papers there deposited. In no case shall those offices or dwellings be used as places of asylum."

The consuls-general and consuls are authorized to name vice-consuls or consular agents indiscriminately from Americans, Frenchmen, or citizens of other countries, whose nomination shall be submitted to the approval of their respective governments, and who shall be provided with a certificate by the consul naming them. Statutes at Large, vol. x. p. 992.

In the treaties between the United States and Great Britain, there is no other provision respecting consuls than that contained in the 4th article of the Commercial Convention of 1815, which merely stipulates that it shall be free to each party to appoint consuls, to reside, for the protection of trade, in the dominions

may be continued with the same minister confidentially *sub spe rati.*

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of the other; and requires that, before any one acts, he shall be approved and admitted by the government to which he is sent. In case of illegal or improper conduct, the consul is to be punished according to law, if the laws will reach the case, or be sent back; the offended government assigning to the other the reasons for the same. Statutes at Large, vol. viii. p. 230.

The treaty of 1794 contained substantially all the provisions of the above article, and declared furthermore, that "the said consuls shall enjoy those liberties and rights which belong to them by reason of their function." Ib. p. 125.

The power of sending back consuls was exercised for a violation of the American neutrality law in 1856. See § 23, Editor's note, *infra.*

In the treaty of the United States with the Netherlands of 1782, the stipulation as to consuls is, "whose functions shall be regulated by particular agreement, whenever either party chooses to make such appointments." Ib. p. 44. In that of 1839, the terms are, they "shall continue to enjoy all privileges, protection, and assistance as may be usual and necessary for the duly exercising of their functions." Ib. p. 524. The consular convention for the Netherland colonies, January 22, 1855, declares that the consuls, &c., are subject to the laws, both civil and criminal, of the country in which they reside, with such exceptions as the convention itself establishes; and it provides that they shall not be invested with any diplomatic character, and that, when a request is to be addressed to the Netherland government, it must be through the medium of the diplomatic agent at the Hague; but the consul may, in case of urgency, apply to the governor of the colony, stating the reason why the request cannot be addressed to the subordinate authorities. Ib. vol. x. p. 1154.

The treaty of 1785 with Prussia contains the same clause as that of 1782 with the Netherlands, with this addition: "But if any such consuls shall exercise commerce, they shall be submitted to the same laws and usages to which the private individuals of their nation are submitted in the same place." Ib. p. 98. Those of 1799 and 1828, substitute for the stipulation for a "particular agreement" a provision for the enjoyment of "the same privileges and powers as those of the most favored nation;" and they retain the exception of the first treaty as to those who engage in commerce. Ib. pp. 176, 382.

In the treaty with Spain of 1795, (Ib. p. 150,) the provision for consular privileges and powers is that of "the most favored nation." The same stipulation is to be found in the treaty with Denmark of 1826, (Ib. p. 342,) with Austria of 1829, (Ib. p. 400,) and of 1848, (Ib. vol. ix. p. 946,) with the usual exception as to those in commerce. That with Russia of 1832, (Ib. p. 448,) has likewise the commercial clause, as is the case with the treaty of 1838 with Sardinia, (Ib. p. 518,) and with Hanover of 1840, (Ib. p. 556,) with Mecklenburg Schwerin, of 1847, (Ib. vol. ix. p. 916,) with the Two Sicilies of 1845, (Ib. p. 838). In the subsequent convention of 1855, it was further provided, that "whenever either of the two contracting parties shall select for a consular agent a citizen or subject of the other, such consular agent shall continue to be regarded, notwithstanding his quality of foreign consul, as a citizen or a subject of the nation to which he belongs, and consequently shall be submitted to the laws and regulations to which natives are subjected. This obligation, however, shall not be so construed as to embarrass his consular functions, nor to affect the inviolability of the archives." Ib. vol. xi. p. 650. The treaty of 1858 with Belgium provides, that the consuls of the two countries shall reciprocally "continue to enjoy all the privi-

5. When the minister, on account of any violation of the law of nations, or any important incident in the course of his negoti-

leges, protection, and assistance usually granted to them, and which may be necessary for the proper discharge of their functions." Treaties of the United States, 1859–60, p. 95.

In all the above mentioned treaties no reference has been made to the inviolability of either the person of the consul or of the archives, except in the commercial convention with France and incidentally in the last treaty with the Two Sicilies.

The treaty with Sweden of 1783, provides for consuls whose "functions" it is said, as in other treaties of the period, "shall be regulated by a particular agreement." Ib. p. 74. The treaties of 1816 and 1827, substitute for this a provision for the enjoyment of "all the protection and assistance necessary for the due discharge of their functions." They also incorporate the clause of our treaty with England as to punishing the consuls or sending them away, adding thereto, "It is nevertheless understood that the archives and documents relative to the affairs of the consulate shall be protected from all examination, and shall be carefully preserved, being placed under the seal of the court, and of the authority of the place where he (the consul) shall have resided." Ib. pp. 236, 352. The consular article in the treaty of 1837, with Greece, is the same in substance as that in the Swedish treaty, as well with regard to the archives as in other respects. Ib. p. 504. In the treaty with Portugal of 1840, in which the provision is that of "the most favored nation," there are the clauses as to the effect of engaging in commerce and as to the punishment and sending away of consuls for offences against the laws; but it is added: "The archives and papers of the consulates shall be respected inviolably; and under no pretext whatever shall any magistrate seize or in any way interfere with them." Ib. p. 564.

The treaty of 1828 with Brazil, (Ib. p. 396,) and of 1831 with Mexico, adopt the rule of the most favored nation; but the latter treaty also contained an article providing for a consular convention which should declare specially the powers and immunities of the consuls and vice-consuls of the respective parties. (Ib. p. 424.)

By the treaty of 1824 with Colombia, besides the "most favored nation" clause, and the stipulation for a future consular convention, it was agreed "that the consuls, their secretaries, officers, and persons attached to the service of the consuls, they not being citizens of the country in which the consul resides, shall be exempt from all public service, and from all kind of taxes, imposts, and contributions, except those which they shall be obliged to pay on account of commerce or their property, to which the citizens and inhabitants, native and foreign, of the country in which they reside are subject, being in everything besides subject to the laws of the respective States. The archives and papers of the consulates shall be respected inviolably, and under no pretext whatever, shall any magistrate seize or in any way interfere with them." Ib. p. 318. The treaty with Central America of 1825, Ib. p. 336, with Chili of 1832, Ib. p. 440, with Venezuela of 1836, Ib. p. 480, with Peru-Bolivia of 1836, Ib. p. 494, with Guatemala of 1849, Ib. vol. x. p. 886, with San Salvador of 1850, Ib. p. 897, with Peru of 1851, Ib. p. 944, have the same provision. In the treaty with Costa Rica of 1852, the stipulation is, the enjoyment according to the strictest reciprocity of the privileges, exemptions and immunities, accorded to the consuls of the most favored nation. Ib. p. 922. The treaty with the Argentine Confederation of 1853, besides the same stipulation for reciprocal privileges, exemptions, and immunities, has a clause, as in the treaty with Colombia, for the inviolability of the archives and papers of the consulates. Ib. p. 1010. The terms of the treaty of 1859 with Paraguay are "what-

ation, assumes on himself the responsibility of declaring his mission terminated.

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ever privileges, exemptions, or immunities that are or may be granted to the consuls of any other power whatever." Treaties of the United States, 1859–60, p. 127.

The provision in the treaty of 1846 with New Granada is the same as in the one with Colombia. Statutes at Large, vol. ix. p. 896. By the consular convention of 1850, it is declared that the consuls have no diplomatic character or immunities; but the archives of the consulate shall be inviolable, and cannot be seized by any functionary of the country in which they may be. In all that exclusively concerns the exercise of their functions they shall be independent of the State in whose territory they reside. If not natives of the country, they, their chancellors and secretaries, shall be exempt from all public service, and from contributions personal and extraordinary. Whenever the presence of consuls may be required in courts or offices of justice, they shall be summoned in writing. They shall be allowed to hoist the flag on their dwellings, and place over their doors the coat-of-arms of the nation in whose service they may be; but this shall not import a right of asylum, nor put the house or its inhabitants beyond the authority of the magistrates who may think proper to search them. And their persons and dwellings shall be subject to the laws and authorities of the country, in all cases in which they have not received a special exemption by the convention, in the same manner as the other inhabitants. Ib. vol. x. p. 905.

As in the case of the diplomatic, so in the consular service of most European States, there is a permanently organized corps. In England, according to a rule, approved by the Earl of Clarendon, then Secretary of State for Foreign Affairs, January 1, 1856, all persons selected for consular appointments, must satisfy the civil service commissioners that, among other qualifications, they can write and speak French correctly and fluently; that they have a sufficient knowledge of the current language, as far as commerce is concerned, of the port at which they are appointed to reside, to enable them to communicate directly with the authorities and natives of the place, and that they have a sufficient knowledge of British mercantile and commercial law to enable them to deal with questions arising between British ship-owners, ship-masters and seamen. Moreover, they are required, after having passed their examinations, to attend for three months in the Foreign Office, in order that they may become acquainted with the forms of business as carried on there. Foreign-Office List, 1860, p. 151.

In France, there is a complete classification of the consular corps, which is composed of consuls general, consuls of the first and second class, and consular pupils. The chancellors (who are also attached to diplomatic missions) and the dragomans are not part of the consular corps. The consuls general are chosen from the consuls of the first class, the first secretaries of embassy or legation, and the higher class of *employés* in the department of foreign affairs. The consuls of the first class are taken from among those of the second class, the chiefs of bureau and précis writers (*rédacteurs*) in the ministry of foreign affairs, the secretaries of legation and the second secretaries of embassy. The consuls of the second class are appointed from the consular pupils, the principal clerks in the ministry of foreign affairs, the secretaries of legation of the third class, the consular agents or vice-consuls named by Imperial decree, the chancellors of legation or of the consulate and the dragomans. No one can be named a consular pupil if he is not a licentiate in law or a bachelor in physical science, and between twenty and twenty-five years of age; and he is not admissible till after he has established by an examination, before a special commission named by the ministry of foreign affairs, that he possesses one or more foreign languages, and a knowledge of the law of nations, political economy, and commercial statistics, and has answered

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. [146

orally a series of questions relative to consular administration. Annuaire Diplomatique, 1860, pp. 86, 88. In Russia, consulates are included, under the name of diplomatic employments, and for them, in common with embassies and legations, a special examination is required. Annuaire Diplomatique de Russie, 1861, p. 51.

In the United States, the only attempt to establish a regular consular corps was by a section in the Diplomatic and Consular Act of 1856, (Statutes at Large, vol. xi. p. 55,) which authorized the appointment by the President of a limited number of salaried pupils, to be assigned to such consulates and to such duties as he might think proper; and provided that, before the appointment of any such pupil should be made, satisfactory evidence, by examination or otherwise, should be furnished of his qualifications and fitness for the office, to the Secretary of State, and by him laid before the President. This section was, however, repealed, without ever having been in operation, by the act of February 7, 1857. Ib. p. 160.] — *L.*

[146 In the case of M. Genet, the Minister of the French Republic, Mr. Jefferson, Secretary of State, wrote to Mr. Morris, Minister in Paris, August 16, 1793, instructing him to ask his recall. It was stated that M. Genet, even before the presentation of his credentials, had undertaken to issue commissions to privateers to commit hostilities on nations at peace with the United States, and that he subsequently asserted a right to arm vessels in our ports, and to enlist our citizens, and did actually fit out vessels and send them to sea, in defiance of the government; while he proposed to appeal to Congress as to the powers of the President, to whose opinions he applied the most opprobrious terms. Wait's American State Papers, vol. i. p. 137. The President announced to Congress, January 20, 1794, that M. Genet's conduct had been unequivocally disapproved, and that the strongest assurances had been given that his recall should be expedited without delay. Ib. p. 490.

In terminating the mission of Mr. Jackson, Minister from Great Britain, in consequence of his having reiterated the assertion that the arrangement made, in April, 1809, with his predecessor, Mr. Erskine, for reparation in the case of the attack on the American frigate Chesapeake by a British ship-of-war, (which had been followed by the President's Proclamation of July 2, 1807, requiring the removal of British armed vessels from United States ports and waters,) and for the withdrawal of the orders in council of January and November, 1807, was concluded with the full knowledge, on the part of the United States, of the restriction on his authority to make it, he was informed, November 8, 1809, by Mr. Smith, Secretary of State, that no further communication would be received from him, and that the necessity of that determination would without delay be made known to his government. In an instruction to Mr. Pinkney, at London, November 23, 1809, Mr. Smith says: "The objection was, that a knowledge of this *restriction* of the authority of Mr. Erskine was imputed to this government, and the repetition of the imputation even after it had been peremptorily disclaimed. This was so gross an attack on the honor and veracity of this government as to forbid all further communications from him." Ib. vol. vii. 283, 295. The course of the President was formally sanctioned by Congress by a resolution of January 12, 1810. Statutes at Large, vol. ii. p. 613. See, also, Part III. ch. 2, § 5. Editor's note, *infra*.

Sir Henry Bulwer was dismissed, in May 1848, by the Spanish government, in consequence of his sending to the Duke de Sotomayor an unofficial note of Lord Palmerston, recommending him to advise his government "to adopt a legal and con-

7. By a change in the diplomatic rank of the minister.

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.[1]

§ 24. Letter of recall.

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.

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

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stitutional system," and otherwise reflecting on the internal administration of the country. In the letter dismissing him, the Duke de Sotomayor said: "Your conduct in the execution of your important mission has been reprobated by public opinion in England, censured by the British press, and condemned in the British parliament. Her Catholic Majesty's government cannot defend it, when that of Her Britannic Majesty cannot do so." "Her Catholic Majesty has resolved to put an end to all these fatal contingencies, by transmitting to you your passport and requesting you, within the term of forty eight hours, or sooner if possible, to quit this capital." Annual Register, 1848, p. 312]. Diplomatic relations between the two countries were not renewed till August 1850. Ib. 1850, p. 277].

In 1849, an exciting diplomatic correspondence took place between Mr. Clayton, Secretary of State, and M. Poussin, Minister Plenipotentiary of France, named by the provisional government. Though this occurrence occasioned some delay in the reception of the letters of credence of the American minister, Mr. Rives, the French government disavowed and recalled its minister. Lesur, Annuaire, 1849, p. 665.

In 1856, in consequence of the complicity, as understood and maintained by the American government, of the British minister, Mr. Crampton, and of the consuls at New York, Philadelphia, and Cincinnati, with reference to the arrangements made for the enlistment of persons resident in the United States to serve in the British army in the Crimea, in violation of the neutrality law of the United States, as construed by the American government, the President determined to send to Mr. Crampton his passport, and to revoke the *exequatur* of the three consuls. Annual Register, 1856, p. 277]; 34th Cong. 1st Sess. H. R. Ex. Doc. No. 107. Mr. Marcy, in writing to Mr. Dallas at London, June 16, 1856, says, that the United States had suffered a grievous wrong in the enlistment affair. They could not have kept Mr. Crampton, who was the chief director of the whole recruitment scheme, without justifying his conduct; they did not ask for his punishment but to be relieved of his presence. Department of State MS.] — *L.*

[1] Martens, Manuel Diplomatique, ch. 7, § 59; ch. 2, § 15. Précis, &c., liv. vii. ch. 9, § 239. Vattel, liv. iv. ch. 9, § 126.

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.*

Although in strictness the personal privileges of the minister expire with the termination of his mission by death, the custom of 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 is 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.[1] [147

[1] Martens, Précis, &c., liv. vii. ch. 10, §§ 240–245. Manuel Diplomatique, ch. 7, §§ 60–65.

[147 So important is it regarded to preserve, without interruption, the diplomatic

intercourse between nations, which are mutually represented by ministers, that upon the death of a minister, the Secretary of Legation becomes, by established usage, *ipso facto*, chargé d'affaires, until his government is advised of, and provides for the event. 19th Cong. 2d Sess. Ex. Doc. 78, H. R. Mr. Clay, Secretary of State, 31st January, 1827.

A difficulty, to which American ministers are peculiarly exposed in European courts, where rules as to the presentation to the sovereign necessarily unknown to the usages of Washington prevail, has recently been brought to the notice of the government by the Minister of the United States at Paris — a court at which the Imperial courtesy had long been abused by the failure of our diplomatic agents to assume the appropriate responsibility in meeting the applications made to them. The intrusion of personal pretensions to the prejudice of national interests is thus happily rebuked in the instructions of February 3, 1862, from Mr. Seward to Mr. Dayton. The Secretary of State says: "I very freely confess to the opinions, first, that an audience or presentation of any but diplomatic persons at court is to be regarded not in any degree as a right of the person received; but as a courtesy extended to him. Secondly, that the Imperial court is perfectly at liberty to define and prescribe the qualifications, conditions, and terms on which strangers shall be admitted into its society. Thirdly, if American citizens request you to present their wishes for admission at court, you can only present them by complying with the terms and conditions prescribed. Fourthly, referring to the questions which have actually arisen, I think you can properly in all cases give the occupation or profession of any person whose wishes you present. You cannot, indeed, undertake to assign the social position of each person, for that would be to discriminate, or to seem to discriminate, by European rules, between persons who, being all alike citizens, may justly claim to be equals in social position at home, and therefore equals in the consideration of this government itself, when they are abroad. It seems to me, however, that in many cases there are circumstances belonging to the persons you propose to present which may be properly stated, such as official position held by individuals at the time, or even at some previous time — distinctions arising from personal merit, such as scientific, military, or literary, or of a political character, and distinctions as founders of scientific, literary, or humane institutions. But even when these suggestions are made in compliance with the rules of the court, it is not to be claimed as a matter of right, or even as a matter of national comity, that the presentations or audiences shall, therefore, be granted. I have dwelt upon the subject longer than was due to any importance that it can claim. It is peculiarly uncomfortable at this moment to find American citizens leaving their country a prey to faction and civil war, disturbing the court of a friendly power and embarrassing our representative there with questions of personal interest and pretension.

"Let the Emperor and Empress of France receive when they will, and as many or few as they will, and let all others as well as those who are admitted, turn their attention to the question how they can serve their country abroad, and if they find no better way to do it than by making their attendance in the saloons of the Tuileries, let them return home, to a country that now, for the first time, and not for a long time, needs the active efforts of every one of its loyal children to save itself from destruction.

"Finally, above all things, have no question with the government of France on this subject. Rather introduce nobody, however justly distinguished, than let a question of fashion or ceremony appear in the records of the important period in which we are acting for the highest interests of our country and of humanity."] — *L.*

CHAPTER II.

RIGHTS OF NEGOTIATION AND TREATIES.

§ 1. Faculty of contracting by treaty, how limited or modified.

THE power of negotiating and contracting public treaties between nation and nation exists in full vigor 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.

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 retain the power of concluding treaties of alliance and commerce, not inconsistent with the fundamental laws of the Confederation.[1]

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 intrusted with the exercise of this sovereign power.

§ 2. Form of treaty.

No particular form of words is essential to the conclusion and validity of a binding compact between nations. 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 be-

[1] See Part I. ch. 2, §§ 23–24, pp. 76–105.

tween them.[148] 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 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.[1]

§ 3. 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 licenses 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.[2]

§ 4. Sponsions.

Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions*. These conventions must be confirmed by express or tacit ratification. The

[148] The preliminaries of Villafranca, terminating the war of Italy in 1859, were concluded by the Emperors of the French and of Austria, without the intervention of any ministers. Annuaire des deux mondes, 1858–9, pp. xlvi. 978.]

[1] 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; and Gaius, in the recently discovered fragments of his Institutes, speaking of the supposition of a treaty of peace concluded in the simple form of a mere *pactio*, says: "Dicitur uno casu hoc verbo (Spondesne? Spondeo) peregrinum quoque obligari posse, velut si Imperator noster Principem alicujus peregrini populi de pace ita interroget PACEM FUTURAM SPONDES? vel ipse eodem modo, interrogetur: quod nimium subtiliter dictum est, quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed jure belli res vindicatur." Comm. iii. § 94.

[2] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, §§ 6-8. Vattel, Droit des Gens, liv. ii. ch. 14, § 207.

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.[1]

§ 5. Full power and ratification.

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.*

Grotius, and after him Puffendorf, 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, according 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.[2]

This opinion of the earlier public jurists, founded upon the

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[1] 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. Rutherforth's Inst. b. ii. ch. 9, § 21.

[2] "Et in generali præpositione accidere potest ut nos obliget qui præpositus est, agendo contra voluntatem nostram sibi soli significatam: quia hi distincti sunt actus volendi: unus quo nos obligamus ratum habituros quicquid ille in tali negotiorum genere fecerit; alter, quo illum nobis obligamus, ut non agat nisi ex præscripto, sibi non aliis cognito. Quod notandum est ad ea quæ legati promittunt pro regibus ex vi instrumenti procuratorii, excedendo arcana mandata. Grotius, de Jur. Bel. ac Pac. lib. ii. cap. xi. § 12. Puffendorf, de Jur. Naturæ et Gent. lib. iii. cap. ix. § 2.

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 that clearness and practical precision which distinguish the writings of that great public jurist. In the second book of his *Quæstiones Juris Publici*, (cap. vii.) 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 powers. 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, (*de Jure Belli*, lib. iii. cap. xiv.) 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.[1] 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 position of Wicquefort, (*L'Ambassadeur et ses Fonctions*, liv. ii. § 15,) condemning the conduct of those princes who had refused to ratify

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[1] "Sed rarum est, quod publica mandata sint specialia; rarius, quod arcanum mandatum publico sit contrarium; rarissimum verò, quod legatus arcanum posterius spernat, et ex publico priori rem agat." Bynkershoek, Quæst. Jur. Pub. lib. ii. cap. vii.

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.[1] 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.[2]

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

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[1] "Sed quod olim obtinuit, nunc non obtinet, ut mores gentium sæpe solent mutari, nam postquam ratihabitionum usus invaluit, inter gentes tantum non omnes receptum est, ne fœdera et pacta, a legatis inita, valerent, nisi ea probaverint principes, quorum res agitur. Ipse Wicquefort (eodem opere, l. 1, sect. 16,) necessitatem ratihabitionum satis agnoscit hisce verbis: Que les pouvoirs, quelques amples et absolus qu'ils soient, aient toujours quelque relation aux ordres secrets qu'on leur donne, qui peuvent être changés et altérés, et qui le sont souvent, selon les conjonctures et les révolutions des affaires." Ibid.

[2] "Non tamen negaverim, si legatus publicum mandatum, quod forte speciale est, vel arcanum, quod semper est speciale, examussim sequutus, fœdera et pacta ineat, justi principis esse ea probare, et, nisi probaverit, malæ fidei reum esse, simulque legatum ludibrio; sin autem mandatum excesserit, vel fœderibus et pactis nova quædam sint inserta, de quibus nihil mandatum erat, optimo jure poterit princeps vel differe ratihabitionem, vel plane negare. Secundum hæc damnaverim vel probaverim negatas ratihabitiones, de quibus prolixè agit Wicquefort, (L. ii. sect. 15). In singulis causis, quas ipse ibi recenset, ego nolim judex sedere, nam plurimum facti habent, quod me latet, et forte ipsum latuit. Non immeritò autem nunc gentibus placuit ratihabitio, cùm mandata publica, ut modo dicebam, vix unquam sint specialia, et arcana legatus in scriniis suis servare solent, neque adeo de his quicquam rescire possint, quibuscum actum est." Ibid.

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 procuration *cum libera*. If this procuration 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, 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 honorably 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." [1]

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.[2] [[149]

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[1] Vattel, Droit des Gens, liv. ii. ch. 12, § 156.

[2] 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

[[149] There were other treaties and truces between Justinian and Cosroes, besides the one referred to in our author's note, viz., in 540, 551, and 556. By the treaty made in 540, it was agreed that Cosroes should receive for that time only five thousand pounds of gold, and that, for the future, the Romans should give him, every year, five hundred; that there should be no more acts of hostility, and that,

The reason on which this practice is founded is clearly explained by a veteran diplomate 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." [1]

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 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, in-

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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. Wurm, die Ratification von Staatsverträgen, deutsche vierteljahrs-Schrift, Nr. 29.

[1] Adair, Mission to the Court of Vienna, p. 54.

as soon as their ambassadors should have given him hostages for securing the execution of these engagements, he would return home with all his troops; and, moreover, that the articles of peace should be ratified by the ambassadors, who should come, for that purpose, on the part of Justinian. Notwithstanding this agreement, Cosroes exercised some acts of hostility before the ratification of the treaty by Justinian; but when he received the letter by which the emperor approved what had been concluded by his ambassadors, he gave up the hostages and prepared to depart. As he, however, on his way, levied a contribution on the city of Daras, Justinian, when informed of it, retracted his ratification of the treaty, which Cosroes had just violated, and thus peace was broken almost as soon as concluded. Dumont, Corps Diplomatique, Supplément, tom. i. p. 178, Barbeyrac, Histoire, &c., art. clxxxviii.] — *L.*

ferred, as we have seen, by the earlier public jurists, from the analogies of private law in respect to the obligation of contracts, concluded by procuration, 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 sponsion, 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 sponsion, has given rise to serious disputes." [1]

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." [150

[1] Klüber, Droit des Gens Moderne de l'Europe, § 142.

[150] A case of disavowal of an agreement, which was not intended to assume the form of a treaty, is to be found in the negotiations between the United States and Great Britain, which preceded the war of 1812, to produce which it in no small degree contributed. Mr. Canning in a despatch, dated the 23d of January, 1809, to Mr. Erskine at Washington, stated that, inferring from the reports made to him by that minister, founded on his conversations with leading members of the cabinet, it appeared, first, that the American government were prepared in the event of the withdrawal by Great Britain of her orders in council of January and November, 1807, to withdraw

But he very correctly adds, that "the positive law of nations, considering the necessity of giving to negotiators very extensive

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contemporaneously the interdiction of its harbors to ships-of-war and all non-intercourse and non-importation acts, so far as respects Great Britain, leaving them in force with respect to France; secondly, to renounce, during the war, the pretension of carrying on, in time of war, all trade with the enemy's colonies, from which the United States were excluded in peace, a stipulation which Mr. Canning deemed of the utmost importance; and thirdly, to secure the operation of the embargo, Great Britain was to be considered at liberty to capture all such American vessels as should be found attempting to trade with France and the powers adopting and acting under the French decrees.

On those conditions England would consent to withdraw the above-mentioned orders in council, so far as respects America. The first and second conditions were deemed to be suggestions made to Mr. Erskine by persons in authority in America; and as to the third, Mr. Canning said, it was the opinion of Mr. Pinkney, the American Minister in London, that there would be no indisposition, on the part of his government, to the enforcement of it by the naval power of Great Britain. Mr. Erskine was at liberty to communicate the dispatch *in extenso* to the American Secretary of State. He was instructed that, on receiving through him a distinct and official recognition of these three conditions, a minister would be sent to America to consign them to a regular and formal treaty. He was moreover authorized, should the American government be desirous of acting upon the agreement before it was reduced to regular form (either by the immediate repeal of the embargo and the other acts in question, or by engaging to repeal them on a particular day,) to assure the American government of His Majesty's readiness to meet such disposition. On the receipt in London of an official note containing an engagement for the adoption by the American government of the three conditions, His Majesty would be prepared, on the faith of such engagement, reciprocally to recall the orders in council without waiting for the conclusion of the treaty, and Mr. Erskine was authorized, in the circumstances described, to take such reciprocal engagement on His Majesty's behalf.

Mr. Erskine wrote to Mr. Smith, then Secretary of State, on April 17, 1809, saying that considering the act passed by Congress on the 1st of March, usually termed the Non-Intercourse Act, to have produced a state of equality in the relations of the two belligerent powers, he offered an honorable reparation for the aggression that had been committed on the United States frigate Chesapeake, and which had been an additional cause of embarrassment in the relations of the two countries. This proposition having been accepted the same day by the United States, Mr. Erskine addressed, April 18, 1809, a note to Mr. Smith, in which he says:—

"The favorable change in the relations of His Majesty with the United States, which has been produced by the act (usually termed the Non-Intercourse Act) passed in the last session of Congress, was also anticipated by His Majesty, and has encouraged a further hope that a reconsideration of the existing differences might lead to their satisfactory adjustment. On these grounds and expectations I am instructed to communicate to the American government His Majesty's determination of sending to the United States an envoy invested with full powers, to conclude a treaty on all the points of the relations between the two countries. In the mean time, with a view to contribute to the attainment of so desirable an object, His Majesty would be willing to withdraw his orders in council of January and November,

full powers, has required a special ratification so as not to expose the State to the irreparable injury which the inadvertence or bad

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1807, so far as respects the United States, in the persuasion that the President would issue a proclamation for the renewal of the intercourse with Great Britain; and that whatever difference of opinion should arise in the interpretation of the terms of such an agreement will be removed in the present negotiation." To this the Secretary of State replied in a note of the same date. After declaring to Mr. Erskine that the President will meet in a disposition correspondent to that of His Majesty his determination to send a special envoy to the United States, he says: "I am authorized to assure you that, in case His Britannic Majesty should in the mean time withdraw his order in council of January and November, 1807, so far as respects the United States, the President will not fail to issue a proclamation, by virtue of the authority and for the purposes specified in the 11th section of the statute called the Non-Intercourse Act."

Thereupon, on the next day, (19th,) Mr. Erskine writes to Mr. Smith, that in consequence of the acceptance by the President, as stated in Mr. Smith's letter of the 18th, of the proposal made by him in his letter of the same day for the renewal of the intercourse between the respective countries, he is authorized to declare that His Majesty's orders in council of January and November, 1807, will have been withdrawn, so far as respects the United States, on the 10th of June next; and the Secretary of State on his part assures the British Minister that a proclamation will be issued, so that the trade of the United States with Great Britain may become the same day renewed. The despatch of Mr. Canning was not communicated to the American government, the minister acting on what he supposed to be its import, and the United States having no reason to question his authority.

The President, in his message at the opening of Congress, May 23, 1809, referred with great satisfaction to the renewal of the commercial intercourse with Great Britain, and stated that the arrangement with Mr. Erskine had been made the basis of communications to the French government. It was, however, disavowed by the British government, even as regarded the proposed reparation for the Chesapeake affair, and the trade, that had been opened by the President's proclamation, was again placed under the operation of the acts of Congress which had been suspended. Both governments took measures to prevent, as far as possible, any inconvenience or detriment to the merchants who had acted on the supposed validity of the agreement.

Mr. Canning in communicating, on 27th of May, 1809, to Mr. Pinkney, the British order in council for that purpose, added: "Having had the honor to read to you *in extenso* the instructions with which Mr. Erskine was furnished, it is not necessary for me to enter into any explanation of those points in which Mr. Erskine has acted not only not in conformity, but in direct contradiction to them. I forbear equally with troubling you with any comment on the manner in which Mr. Erskine's communications have been received by the American government, or upon the terms and spirit of Mr. Smith's share of the correspondence. Such observations will be communicated more properly through the minister whom His Majesty has directed to proceed to America; not on any special mission (which Mr. Erskine was not authorized to promise, except upon conditions not one of which he has obtained), but as the successor of Mr. Erskine, whom His Majesty has not lost a moment in recalling."

In his message of November 29, 1809, President Madison says: "Whatever pleas may be urged for a disavowal of engagements formed by diplomatic functionaries, in cases where by the terms of the engagement a mutual ratification is reserved; or

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." [1]

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.*" [2]

This observation of Martens appears to be founded on a misapprehension of the meaning of Klüber, into which we had ourselves inadvertently fallen, in the first edition of this work. 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

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where notice at the time may have been given of a departure from instructions; or in extraordinary cases essentially violating the principles of equity; a disavowal could not have been apprehended in a case where no such notice or violation existed; where no such ratification was reserved; and more especially, where, as is now in proof, an engagement, to be executed without any such ratification was contemplated by the instructions given, and where it had, with good faith, been carried into immediate execution on the part of the United States." Parliamentary Papers relating to America, June 2, 1809, pp. 2-4. Wait's American State Papers, vol. vii. pp. 222, 230.

The abrupt termination of the mission of Mr. Erskine's successor, Mr. Jackson, has been noticed under another head, Part III. ch. 1, § 23, Editor's note, [145, p. 437, *supra.*] — *L.*

[1] Martens, Précis, &c., § 48.

[2] Martens, 3d edit., note *f.*

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 honorably 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. [151] 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

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[151] In 1841, the King of the Netherlands refused to ratify a treaty made by his plenipotentiaries, after a protracted negotiation, for the annexation of Luxembourg to the Customs' Union; assigning as a reason the representations made to him, by his subjects of the Grand Duchy, of the injurious effects the convention was likely to have on their local commercial interests. This explanation was not satisfactory to the Prussian cabinet, which considered the treaty as morally binding on the king of Holland, in his capacity of Grand Duke of Luxembourg. Mr. Wheaton's MS. Despatches. The French government refusing, on account of the opposition of the Chambers, to ratify the Quintuple Treaty, of 1841, for the suppression of the slave-trade, M. Guizot contended that a ratification was not a mere formality but a serious right; and that no treaty was completely concluded till it had been ratified, and that if between the conclusion and ratification of the treaty grave events occurred, which changed the relations of the two powers and the circumstances under which the treaty had been made, it was a matter of right to refuse the ratification. Moniteur, 1 Février, 1848. Ortolan adds that this doctrine is founded in reason. Diplomatie de la Mer, t. i. p. 94. Several cases of the refusal to ratify treaties are mentioned by Klüber, § 142, note *d*.

In the above cases, the authority which gave the instructions to treat was identical with that which was competent to ratify; and the obligation of the Executive is not to be confounded with his position in those countries where, as in the United States, the internal Constitution requires for a ratification the concurrence of another department of the government. But, as was understood, in consequence of the rejection by the Senate of the Slave-trade Convention of March 13, 1824, which was concluded in the very terms proposed by the American government, Great Britain insisted that the ratification of the conventions, made in 1826–7, should be exchanged at London, so that the king, in ratifying them, should be previously assured of the ratification of the United States. Mr. Gallatin to Mr. Clay, November 11, 1826. MS. Despatches. — *L.*

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.

Every treaty is binding on the contracting parties from the date of its signature, unless it contain an express stipulation to the contrary. The exchange of ratifications has a retroactive effect, confirming the treaty from its date.[1] [152]

The recent interference 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 con-

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[1] Martens, Precis, &c., § 48. Essai concernant les Armateurs, &c., § 48. Klüber, Droit des Gens Moderne de l'Europe, § 48. Heffter, das europäische Völkerrecht, § 87.

[152] When territory is ceded, the national character continues for commercial purposes till actual delivery; but between the time of signing the treaty and the actual delivery of the territory, the sovereignty of the ceding power ceases, except for strictly municipal purposes, or for such an exercise of it as is necessary to preserve and enforce the sanctions of its social condition. This rule applies to treaties signed by plenipotentiaries having full powers to make the cession, and which have afterwards been ratified, and not to those entered into and signed conditionally, *sub spe rati*, by a minister not furnished with orders to execute it absolutely. Howard's Rep. vol. ix. pp. 280–293, Davis *v.* The Police Jury of Concordia. But as respects performance of the conditions of a grant by a private grantee, the date of a treaty is the time of its final ratification. Peters's Rep. vol. vi. p. 691, United States *v.* Arredondo. Where there is no express stipulation on the subject, a capture made after the signature of a treaty of peace and before its ratification is void. De Pistoye et Duverdy, Traité des Prises maritimes, tom. i. p. 147. See, also, Part IV. ch. 4, § 5, *infra.*] — *L.*

tracting 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 Austria, Great Britain, 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."

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.[1] [153

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[1] Murhard, Nouveau Recueil Général, tom. i. p. 163.

[153] It is presumed that there is a constitutional impediment to such an arrangement when the United States are a party, as the Senate must concur in every treaty or international convention, though the President is sometimes authorized by law to act in anticipation of the ratification, as in the case of the negotiations ending in the acquisition of Louisiana, for which two millions of dollars had been appropriated, the plenipotentiaries being instructed to provide for the repayment of the advance in the event of the refusal of the United States to ratify the convention. Mr. Madison, Secretary of State, to Messrs. Livingston and Monroe, March 2, 1803. By act of March 3, 1847, the sum of three millions of dollars was appropriated to enable the President to conclude a treaty of peace, limits, and boundaries, with Mexico, to be used by him in the event that the said treaty, when signed by the authorized agents of the two governments, and duly ratified by Mexico, shall call for the expenditure of the same or any part thereof. Statutes at Large, vol. ix. p. 174.

On occasion of the treaty concluded by Mr. Wheaton with Hanover, it was proposed to declare by a protocol, signed at the same time with the exchange of ratifications, that, though the treaty had been concluded in English and French, in case of any disagreement as to its interpretation, the French copy should be deemed the original. It was, however, the opinion of Mr. Wheaton, in which the Secretary of State concurred, that no such declaration could be entered into without submitting

§ 6. The treaty-making power dependent on the municipal constitution.

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

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the treaty anew to the Senate. Mr. Wheaton to Secretary of State, 8th July, 1840. Department of State MS.

On the exchange of the ratifications of the treaty of peace between the United States and Mexico, a protocol of the conference between the commissioners, embodying their opinion as to the operation of certain amendments of the Senate to the original treaty, was signed at Queretaro, on the 20th of May, 1848. President Polk, in communicating it to the House of Representatives, on the 8th of February, 1849, says, that the commissioners were sent to Mexico to procure the ratification of the treaty, as amended by the Senate, and it had been approved by the Congress, without modification or amendment before the reception of the commissioners. The President did not send the memorandum of the conferences, called a protocol, to Congress, when he communicated to them the treaty on the 6th of July, 1848, because it was not regarded as in any way material, and had the protocol varied the treaty as amended by the Senate, it would have had no binding effect. Congressional Globe, 1848-9, p. 486.

In exchanging the ratifications of the treaty between the United States and Great Britain, in relation to an interoceanic communication, the British plenipotentiary subjoined the following explanatory declaration: — "In proceeding to the exchange of the ratifications of the convention, signed at Washington on the 19th of April, 1850, between Her Britannic Majesty and the United States of America, relative to the establishment of a communication, by ship-canal, between the Atlantic and Pacific Oceans, the undersigned, Her Britannic Majesty's plenipotentiary, has received Her Majesty's instructions to declare that Her Majesty does not understand the engagements of that convention to apply to Her Majesty's settlement at Honduras, or to its dependencies. Her Majesty's ratification of the said convention is exchanged under the explicit declaration above mentioned. Done at Washington, the 29th day of June, 1850. H. L. BULWER."

It appears from the printed documents, that Mr. Clayton filed, on 5th of July, 1850, a memorandum in the Department of State, stating that he had received the above declaration on the day of its date; that he wrote, in reply, on 4th of July, a note acknowledging that he had understood that British Honduras was not embraced in the treaty of 19th of April, but, at the same time, declining to affirm or deny the British title; and that, after signing the note of 4th of July, which he delivered to Sir Henry Bulwer, they immediately proceeded to exchange the ratifications of the treaty. Cong. Doc. 32d Cong. 2d Sess. Senate Ex. Doc. No. 12, January 4, 1853.

This point was thus presented by Mr. C. F. Adams, Minister of the United States in London, to the Earl Russell, August 23, 1861, in declining to attach a declaration to the proposed convention of maritime law: "By the terms of the Constitution, every treaty negotiated by the President of the United States must, before it is rati-

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. [154

"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, (l. 19, D. de div. R. J. 50, 17.) 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.

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fied, be submitted to the consideration of the Senate. The question immediately arises, what is to be done with a declaration like that which his Lordship proposes to make. Is it a part of the treaty, or is it not? If it be, then is the undersigned exceeding his instructions in signing it; for the paper made no part of the project which he was directed to propose; and in case he should sign it, the addition must be submitted to the Senate for its advice and consent, together with the paper itself. If it be not, what advantage can the party making the declaration expect from it in modifying the construction of the project, when the Senate have never had it before them for their approval? It either changes the treaty or it does not. If it does, then the question arises, why did not the undersigned procure it to be incorporated into it? On the other hand, if it do not, why did he connive at the appearance of a desire to do it without effecting the object." Papers relating to Foreign Affairs accompanying the President's Message, 1861, p. 123.] — *L.*

[154 In the case of the indemnity agreed to be paid by Venezuela to American citizens expelled from the Aves island, (Part II. ch. 4, § 5, Editor's note [101, p. 319, *supra*), it was held: "It is not necessary to submit to the Senate, for its formal approval, conventions providing for the adjustment of private claims, unless such a course is indicated in the convention itself. But the want of such ratification, on the part of this government, does not prevent recourse to that formality at any future period, should it be deemed expedient; nor does it in any respect, weaken or invalidate the binding effect of the convention upon Venezuela. Indeed, the good faith of that republic having been pledged to the provisions of the convention, by the ratification of the proper authorities, there would be no more hesitation on the part of this government to enforce its stipulations, should it become necessary, than if the instrument had been ratified by the United States as well as Venezuela." 36th Cong. 2d Sess. Senate Ex. Doc. No. 10, p. 472. Mr. Cass to Mr. Sanford, October 22, 1859.] — *L.*

§ 7. Auxiliary legislative measures, how far necessary to the validity of a treaty.

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 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.[1]

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.[2] 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

[1] 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's Comm. on American Law, vol. i. p. 164, 5th ed.

[2] Lord Mahon's History of England from the Peace of Utrecht, vol. i. p. 24.

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.[1] [155

§ 8. Freedom of consent, how far necessary to the validity of treaties.

By the general *principles* of private jurisprudence, recognized 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,

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[1] Kent's Comm. vol. i. p. 285, 5th ed.

[155] A treaty is, in its nature, a contract between two nations, not a legislative act, and does not, generally, effect of itself the object to be accomplished, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, the Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court. Peters's Rep. vol. ii. p. 314, Foster et al. *v.* Neilson. Ibid. vol. vi. p. 735, United States *v.* Arredondo.

This subject has been frequently discussed, in connection with the Constitution of the United States, as to the treaty-making power of the President and Senate, and the legislative authority of Congress. It especially came under the consideration of the House of Representatives in 1796, on the bill making appropriations to carry into effect the treaty of 1794 with Great Britain; when President Washington sent a message to the House denying their right to call for the papers connected with the negotiation, and the act was passed, notwithstanding such refusal, by a majority of two votes. In 1816, after the Commercial Convention with England, the question was, whether it was necessary to pass a bill to make our revenue laws conform to the treaty stipulations, or whether the treaty itself operated, *proprio vigore*. In that case, a declaratory act was passed. United States Statutes at Large, vol. iii. p. 354. This point was also examined during the session of 1853–4, in the case of the appropriations required for the convention, then recently entered into by the President and Senate, with Mexico. The conclusion on all these occasions would seem to have been, that as the President and Senate are, by the Constitution, fully authorized to enter into treaties, whenever the aid of Congress is required to carry out its provisions, if the treaty be within the constitutional limits, free from fraud, and not destructive of any of the great rights or interests of the country, then there is a moral obligation to grant the aid required. When a treaty comes before the House of Representatives, they are not to proceed in the discussion and examination of it as an act of ordinary legislation. Such a construction would, in effect, repeal the constitutional provision respecting treaties, and nullify the whole power of the government in its intercourse with foreign nations. Congress. Globe, 1853–4. Appendix, p. 1020. These views were ably vindicated by Mr. Pinkney, in the case of the British Convention of 1815; and his argument has been preserved in Mr. Wheaton's Life of Pinkney, pp. 517–549.

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 noto-

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Public treaties, which concern the subjects and their individual relations, have the same authority as the laws of the State, if they have been regularly contracted and published. Heffter, par Bergson, § 94. It thus appears that, in this respect, the Constitution of the United States is only declaratory of the rule of the law of nations. A treaty constitutionally concluded and ratified abrogates whatever law of any one of the States that may be inconsistent therewith. A treaty, assuming it to be made conformably to the Constitution in substance and form, has the effect, under the general doctrine that "leges posteriores priores contrarias abrogant," of repealing all pre-ëxisting federal law in conflict with it, whether unwritten, as law of nations, or written, as legislative statutes. Mr. Cushing, February 16, 1854. Opinions of Attorneys General, vol. vi. p. 291.

What authority is required to declare a treaty no longer operative in the United States? It was by an act of Congress that the treaties with France, which it was declared had been repeatedly violated by the French government, were abrogated July 7, 1798. United States Statutes at Large, vol. i. p. 578; and the convention, for the joint occupation with Great Britain of the north-west coast of America, was, in accordance with a right reserved in it, abrogated in like manner by a resolution, which passed both Houses and was approved by the President, 27th of April, 1846. Ib. vol. ix. p. 109. But, in 1855, a resolution was passed by the Senate alone, under which the President gave notice to Denmark, by virtue of a clause similar to the one in the British treaty, that, in consequence of the question that had arisen respecting the Sound Dues, the Commercial Convention of 1826 would be terminated at the end of the year. At the ensuing session of the Senate, Mr. Sumner, of Massachusetts, offered a resolution to the effect that the action of both Houses, as in the case of an ordinary act of Congress, was necessary to make the notice effective. The subject was referred to the committee on foreign affairs, who reported adversely to Mr. Sumner's views; and no further action was taken in the matter. Cong. Globe, 1855–6, pp. 528, 599, 1173.

That the omission of Congress to pass an appropriation act would be no answer to a foreign government for the non-fulfilment of treaty stipulations, is to be deduced from the ground taken by the United States with France, when the legislative power of the latter State refused to vote the moneys required by the convention of 1831, by which indemnities were provided for spoliations on American commerce. The subject was brought to the notice of Congress by President Jackson, in his Annual Message, in December, 1834; with a recommendation that a law should be passed authorizing reprisals upon French property, in case provision should not be made for the payment of the debt at the next session of the French Chambers. Annual Register, 1834, p. 361. Referring to this controversy, Mr. Wheaton said: — "Neither government has anything to do with the auxiliary legislative measures necessary, on the part of the other State, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfil it proceeds from the omission of one or other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature; but it might have been on the part of the judicial department. The Court of Cassation might have refused to render some judgment necessary to give

riety 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 enormous lesion, form a sufficient reason for refusing to execute the treaty.[1]

§ 9. Transitory conventions perpetual in their nature.

General compacts between nations may be divided into what are called *transitory conventions*, and *treaties* properly so termed. 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 favor of one nation within the territory of another.[2]

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

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effect to the treaty. The King cannot compel the Chambers, neither can he compel the Courts; but the nation is not the less responsible for the breach of faith thus arising out of the discordant action of the internal machinery of its constitution." Letter from Mr. Wheaton to Mr. Butler, then Attorney-General of the United States, Copenhagen, 20th January, 1835.] — *L.*

[1] 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.

[2] Vattel, Droit des Gens, liv. ii. ch. 12, § 192. Martens, Précis, &c., liv. ii. ch. 2, § 58.

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 devested by supervening hostilities. [[156] 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. 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, *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

[156] In the case of the provision, as to the descent of lands, in the treaty of 1800 with France, which was limited by an additional article to eight years, it was held by the Supreme Court of the United States, that a right once vested does not require for its preservation the continued existence of the power by which it was acquired. If a treaty or any other law has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right. The terms of this instrument leave no doubt on the subject. Its whole effect is immediate. The instant the descent is cast, the right of the party becomes as complete as it can afterwards be made. The treaty had its full effect the instant a right was acquired under it: it had nothing further to perform; and its expiration or continuance afterwards was unimportant. Wheaton's Rep. vol. ii. p. 277, Chirac *v.* Chirac.] — *L.*

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.[1] [157

Controversy between the American and British governments respecting the rights of fishery on the coasts of the British dominions in North America.

By the 3d 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

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[1] Wheaton's Rep. vol. viii. p. 464. The Society for the Propagation of the Gospel in Foreign Parts *v.* The Town of New Haven. 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, Russell & Milne's Rep. vol. i. p. 663.

[157] The question raised before the Master of the Rolls (Sutton *v.* Sutton) was whether by the 9th article of the treaty of November 19, 1794, American citizens who held lands in Great Britain at that time, are at all times to be considered, as regards those lands, not as aliens, but as native subjects of the crown of Great Britain. Sir John Leach, in pronouncing judgment, said: "The privileges of natives being reciprocally given not only to the actual possessors of the lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty, that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace." "The principle involved in the permanency of this treaty would seem to be, that the treaty was in substance a recognition of a title to lands on the part of the actual possessors of those lands and their heirs, and that it would be inconsistent with such a recognition for the possessors at any time to be regarded as aliens in respect to those lands." Twiss, Law of Nations, vol. i. p. 356. Phillimore, International Law, vol. iii. p. 671.] — *L.*

America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them shall be settled, it shall not be 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."

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.

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 preëminently 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 neighboring 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 conquest 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, recognizing 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 recognized by Great Britain.

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.[1]

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 3d 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

[1] Mr. J. Q. Adams to Lord Bathurst, Sept. 25, 1815. American State Papers, fol. edit. 1834, vol. iv. p. 352.

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 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, and 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, recognized 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 recognized by the other powers of Europe, and by herself in her consent to enter into the provisional articles of 1782. In the 3d 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 recognized, 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 recognized independence; and the word *liberty* to what they were to enjoy as concessions strictly dependent on the treaty itself.[1]

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 candor 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 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."

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[1] Earl Bathurst to Mr. J. Q. Adams, Oct. 30, 1815. American State Papers, fol. edit. 1834, vol. iv. p. 354.

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.[1]

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

[1] Mr. J. Q. Adams to Lord Castlereagh, Jan. 22, 1816. American State Papers, fol. edit. 1834, vol. iv. p. 356.

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.[1]

§ 10. Treaties, the operation of which cease in certain cases.

Treaties, properly so called, or *fœdera*, are those of friendship and alliance, commerce, and navigation, which, even if perpetual in terms, expire of course: —

1. In case either of the contracting parties loses its existence as an independent State. [[158]

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. [[159]

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[1] Vide supra, Part II. ch. iv. § 8, p. 823.

[[158] The dissolution of Poland in 1795 is given by Martens as an example. Droit des Gens, § 58, note *a*.] — *L.*

[[159] The treaties not concluded in view of a particular constitution do not cease to be obligatory when it is changed. This principle was acknowledged by France herself by the decree of the National Assembly, of the 17th of November, 1793, on the report of Robespierre, in reference to the treaties with the United States and the Swiss Cantons. Martens, Recueil de Traités, tom. vi. p. 446. The question was raised, in April, 1793, in the cabinet of President Washington, as to the treaties of alliance and of commerce of 1778 with France, on occasion of the reception of a new minister, after the overthrow of the monarchy and the decree of a republic. The decision was the more important as the change in the French constitution had been followed by a declaration of war by France herself, who was previously at war with Austria and Prussia, against England and Holland. The Secretary of State (Mr. Jefferson) and the Attorney-General were of opinion that no cause existed for departing, in the present instance, from the usual mode of acting on such occasions. The revolution in France, they conceived, had produced no change in the relations between the two nations; nor was there anything in the alteration of government, or in the character of the war, which could impair the right of France to demand, or weaken the duty of the United States faithfully to comply with the engagements which had been solemnly formed.

The Secretary of the Treasury (Mr. Hamilton) and the Secretary of War held a different opinion. Admitting in its fullest latitude the right of a nation to change its political institutions according to its own will, they denied its right to involve other nations, absolutely and unconditionally, in the consequences of the changes which it might think proper to make. They maintained the right of a nation to absolve itself from the obligations even of *real* treaties, when such a change of circumstances takes place in the internal situation of the other contracting party, as so essentially to alter the existing state of things, that it may with good faith be pronounced to render a continuance of the connection which results from them disadvantageous or danger-

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.[1]

3. In case of war between the contracting parties; unless such stipulations as are 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 contingency meant to be provided for, and that it must remain in full force until mutually agreed to be rescinded.[2] [[160]

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ous. They appeared to doubt whether the present possessors of power ought to be considered as having acquired it with the real consent of France, or as having seized it by violence — whether the existing system could be considered as permanent or merely temporary. They were therefore of opinion, not that the treaties should be annulled or absolutely suspended, but that the United States should reserve, for future consideration and discussion, the question whether the operation of those treaties ought not to be deemed provisionally and temporarily suspended. Marshall's Life of Washington, vol. ii. p. 255.] — *L.*

[1] Vide ante, Part I. ch. 2, § 11, p. 50.

[2] Vattel, liv. iii. ch. 10, § 175. Kent's Comm. on American Law, vol. i. p. 175. 5th ed.

[[160] Besides the stipulations very generally introduced into treaties, for the removal of persons and property, and against the sequestration of debts in the event of war, even the treaties of the United States with the Barbary Powers contain provisions only applicable to a state of hostilities. Thus those of 1787 and 1836 with Morocco, (Statutes at Large, vol. viii. pp. 102, 485,) that of 1805 with Tripoli, (Ib. p. 201,) and those of 1815 and 1816, (Ib. pp. 226, 246,) with Algiers, provide that in such a case the prisoners captured by either party shall not be made slaves, but that they shall be exchanged.

In the treaty of February 2, 1848, with Mexico, there are numerous rules to be ob-

4. Treaties expire by their own limitation, unless revived by express agreement, or when their stipulations are fulfilled by the

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served in the event of the breaking out of war. Merchants are allowed time to settle their affairs; provision is made as to the treatment of the inhabitants in case of the entrance of the armies of either nation into the territories of the other, for the immunity of private property and respect for churches and establishments for literary, charitable, and beneficent purposes. There are minute details as to the treatment of prisoners; and in the conclusion of the article "it is declared that neither the pretence that war dissolves all treaties nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided, and during which its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations." Ib. vol. ix. p. 939–941.

Mr. Marcy, in a despatch to Mr. Mason, Minister at Paris, December 8, 1856, in reference to the mode of formalizing the assent of different nations to the proposed principles of maritime law, said: "What you state is undoubtedly true to some extent, that war abrogates treaty obligations between belligerents; but almost every treaty has some stipulations in regard to the conduct of the parties towards each other in a state of war. Those stipulations are not abrogated or impaired by the occurrence of war. A 'declaration' would not, therefore, as you suggest, on that account be preferable to a treaty. The stipulations of the proposed treaty would relate wholly to a state of hostilities, and war between the parties would not affect them. A treaty to regulate the action of the parties in a state of war or in case of war between either party and a third power, could not be fairly regarded as a less solemn and binding compact than a declaration of a few powers assented to by others." Department of State MS.

It would appear from a recent debate in the House of Lords, (February 7, 1862,) that so far from the "declaration" of Paris being deemed of a higher nature than a treaty, it was questioned whether in consequence of the absence of the Queen's ratification it was of any international obligation whatever. Lord Derby said: "Undoubtedly it is true that the agreement of the congress has not, up to the present moment, the binding force of a treaty; nor has it been ratified by the sovereign. It does not alter the real state of international law; but I hold that all the powers whose representatives signed this paper, and who have not since disavowed it, are morally bound to the liabilities and obligations imposed upon them at the time."

As between nations, especially belligerent nations, who, by having gone to war, have already exhausted the last remedy, it is difficult to imagine any other than a moral sanction. Though the existence of war negatives the idea of further physical coercion, it can scarcely be doubted that, as between the parties to treaties made with special reference to a state of hostilities, they are as obligatory as armistices concluded during the war itself, or those rules universally recognized, as to sparing the lives of prisoners, and respecting a flag of truce, are deemed by the civilized world at large. Even these restraints on belligerents, it is true, may be disregarded by nations that would set the opinion of mankind at defiance and place themselves out of the pale of civilization.

Nor in communicating the "declaration of Paris" to the United States and other governments was it ever intimated that it was liable to be impeached by any of the signers on account of the absence of the formal ratification of a sovereign, whose sanction must necessarily have depended on the constitutional responsibility of the

respective parties, or when a total change of circumstances renders them no longer obligatory. [161]

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ministers under whose authority the agreement was entered into. It is, however, of little importance how this technical point is disposed of, if the British doctrine, sufficiently refuted, it is believed, in our author's text, but which was revived in a debate of the 11th of March, 1862, in the House of Commons by a member of the cabinet, be sustained. "You may," said Sir George Cornwall Lewis, "make a compact that in time of war you will respect the neutral flag. For instance we have now a compact with France and other continental powers that we will act on the principle that the neutral flag covers the enemy's property, so that if we were to seize American goods under the French flag we should be guilty of a violation of engagement with France. But war puts an end to all treaties and engagements in the nature of a treaty. Therefore, if we had unfortunately found ourselves involved in hostilities with the United States, and if we had previously had a treaty with the United States recognizing the principle that belligerents were to spare one another's mercantile marine, the very act of war would have put an end to that treaty; and it would have been in the discretion of either power whether or no they would act on that principle. It is an absurdity to suppose that if we were at war with France or Russia 'the declaration of Paris' would have any binding effect upon us, except in regard to our honor." And again he remarked by way of explanation: "This is so important a point that I should be sorry if any misunderstanding arose. What I meant to say, and what I believe I did say, was that I conceived 'the declaration of Paris' to be binding as between this country and neutrals during the existence of war, and to be equally binding with a treaty though it was only a declaration; but that if we were at war with any of the parties to that declaration, then, like other treaties, it would cease to have a binding effect as regards that belligerent."

It is gratifying to know that the views here expressed are not entertained by the highest English authorities on international law. One of the most distinguished among them, commenting, in a note to the editor of these annotations, on the doctrine reasserted by Sir G. Cornwall Lewis, and which he says had formerly brought such discredit on England, concludes by inquiring, "If a war had taken place between England and America a few months since, and you had held the 10th article of the treaty of 1794 repealed by the war of 1812, where would our investments have been?" Nor did the statement of the minister meet a unanimous assent in the House of Commons. Among others who opposed it, at the adjourned debate, was Mr. Bright: "The Secretary of War had made a speech, which he had heard with great surprise and regret. What was it that the jurist Wheaton said on the question as to the fate of treaties in time of war? He said that when treaties were made to provide for war, it would be against every principle of just interpretation to hold them extinguished by war. So Dr. Phillimore said, (International Law, vol. iii. p. 602,) that the general maxim that war abrogates treaties, must be subject to limitation in one case, namely, the case of treaties which provide for the breaking out of war between the contracting parties. But what was done at Paris in 1856 was not an ordinary treaty, but the general concurrence of the civilized nations of Europe, enacting a new law which should be admitted and accepted in all future time — an agreement which, he undertook to say, if the government ever attempted to break, they would call down upon themselves the condemnation of every intelligent man in every intelligent country of the globe." House of Commons, March 17, 1862. Macqueen, Law of War and Neutrality, p. 67.] — *L.*

[161] As to the implied revocation of treaties. In pronouncing judgment on the

§ 11. 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, of which we have given an account in another work.[1]

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cases growing out of the blockade of the coast of Courland in 1854, Dr. Lushington said: "The main, and indeed the only question which has been substantially raised for my decision is, whether the Danish and Swedish treaties (the former of 1670 and the latter of 1661) have been as to particular articles revoked by the convention of 1801. If one written statement is to be revoked or altered by another, there are only two means by which such effect can be wrought: by direct revocation or by necessary implication. Direct revocation is not alleged. To constitute revocation by implication the inference must be free from doubt; it must be proved that the provisions contained in the latter instrument are such as to be wholly irreconcilable with those of the former; that the two cannot reasonably coexist together. The presumption is against such a revocation, because if the contracting parties intend to alter a subsisting article, they would naturally so express themselves; they would use revocatory terms." Dean, Law of Blockade, p. 139.] — *L.*

[1] Wheaton, Hist. Law of Nations, pp. 435–445, 538–551.

§ 12. Treaties of guaranty.

The convention of guaranty 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 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 accessary obligation.[1] [[162]

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[1] Vattel, Droit des Gens, liv. ii. ch. 16, §§ 235–239. Klüber, Droit des Gens Moderne de l'Europe, Part. II. tit. 2, sect. 1, ch. 2, §§ 157, 158. Martens, Précis, &c. § 63.

[[162] The guarantee treaties obligatory on Great Britain, and which, of course, included all general European arrangements of this character, were in 1859 as follows:

1st. Those concluded by her, in connection with Austria, France, Prussia, and Russia, on the 19th of April, 1839, with Belgium and the Netherlands, declaring the union between the two countries, by virtue of the treaty of Vienna, of May 31, 1815, dissolved. The act of accession on the part of the Germanic Confederation to the territorial arrangements concerning the Grand Duchy of Luxembourg, is of the same date. Among other provisions, these treaties render the dispositions of the Congress of Vienna applicable to the rivers and navigable waters, which separate or traverse the two States; and there are special stipulations as to the Scheldt, (the surveillance of which is placed under a mixed commission,) as well as for the continued use of the canals in common, and for keeping open the commercial communications by land with Germany. See Part II. ch. 1, § 11, p. 132. Ib. ch. 4, § 16, p. 349.

2d. The convention of May 7, 1832, between Great Britain, France, and Russia, and Bavaria, (including the supplementary article of April 30, 1833,) for carrying out the treaty of July 6, 1827, establishing the independence and hereditary sovereignty of Greece; and the protocol of the 3d of February, 1830, of the plenipotentiaries of Great Britain, France, and Russia, which stipulated that each of the three courts should retain the power secured to it by art. 6 of the last treaty, of guaranteeing the whole of these arrangements. See Ib. ch. 1, § 9, p. 126.

3d. The treaty signed at Paris, May 26, 1857, between Great Britain, Austria, France, Prussia, Russia, and Switzerland, respecting Neuchatel and Valengin, by which the King of Prussia renounced the sovereign rights assigned to him over these territories by the 23d article of the treaty of Vienna, of June 9, 1815. See Part I. ch. 2, § 25, Editor's note [44, p. 111.

4th. The treaties of alliance between England and Portugal, extending from the treaty of London of June 16, 1373, in which the parties stipulate to "assist, maintain and uphold each other mutually by sea and by land, against all men that may live or die, and against their lands, realms and dominions," to the treaty of Vienna of January 22, 1815, and including the treaty of Windsor of May 9, 1386, of London of

The guaranty may be stipulated by a third power not a party to the principal treaty, by one of the contracting parties in favor

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January 29, 1642, as well as the treaties of Westminster of July 20, 1654, and of Whitehall of April 28, 1660. These two last were concluded with the Commonwealth; but all treaties since 1641 were declared ratified and confirmed by the treaty of June 23, 1661, with Charles II. The States-General were parties with Great Britain to the treaty of Lisbon of May 16, 1703. See also Part II. ch. 1, § 8, p. 124, *supra*, and § 15, p. 484, *infra*.

5th. By the 17th article of the treaty of Vienna, of June 9, 1815, Austria, Russia, Great Britain, and France guarantee to Prussia the possession of the countries, which had been assigned to her out of the territories of the King of Saxony.

6th. The 92d article of the above treaty of Vienna guarantees the neutrality of Chablais and Faucigny, in Savoy, as part of the neutrality of Switzerland; and the 7th article of the treaty of March 1816, between Sardinia and the Swiss Confederation, is declared to be an integral part of the arrangements agreed upon between Great Britain, Austria, Prussia, and Russia, by the 48th article of the *recez* or treaty signed at Frankfort, July 20, 1819. These stipulations, in connection with recent occurrences materially affecting the subject in question, are noticed, Part IV. ch. 3, § 4, which treats further of the neutralization of the Swiss Confederation.

7th. By the treaty of November 17, 1855, concluded during the Crimean war, Great Britain and France, in consequence of the King of Sweden and Norway stipulating not to cede to, nor to exchange with Russia, nor to permit her to occupy, any part of his territory, nor any right of pasturage, or fishery, or any other right on the territories or coasts of Sweden and Norway, engage to furnish sufficient naval and military forces, in coöperation, to resist the pretensions of Russia.

8th. The declaration of the eight powers, of the 20th of March, 1815, acknowledges the integrity of the Nineteen Cantons, as they existed at the period of the convention of December 29, 1813, uniting with them the Valois, Geneva, and Neuchatel, as three new Cantons, and settling matters in dispute among the Cantons. The act of accession of the Swiss Confederation is of the 27th of May, 1815. The 3d article of the treaty of November 20, 1815, extends the neutrality of Switzerland to the territory from the north of and including Ugine to the south of the Lake Annecy; and the act of the 20th of November, 1815, is one of acknowledgment and guarantee of the perpetual neutrality of Switzerland. See further, as before, Part IV. ch. 3, § 4.

9th. The treaty of Paris, of March 30, 1856, between Great Britain, Austria, France, Prussia, Russia, and Sardinia, and Turkey, with the convention of the same date, between the same powers, respecting the Straits of the Dardanelles and the Bosphorus, and the convention between Russia and Turkey limiting their respective naval forces in the Black Sea; the treaty of April 15, 1856, to which Great Britain, Austria, and France were alone parties, guaranteeing the independence and integrity of the Ottoman Empire; and the convention of August 19, 1858, between the parties to the treaty of March 30, 1856, for the organization of the Principalities of Moldavia and Wallachia, have been noted under several preceding heads. See Part I. ch. 1, § 10, Editor's note [6, p. 22. Ib. ch. 2, § 13, Editor's note [24, p. 62. Part II. ch. 4, §§ 9, 16, Editor's notes [108, 113, pp. 330, 349.

10th. The convention of April 19, 1850, between the United States and Great Britain for the guarantee and protection of a ship-canal between the Atlantic and

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 prom-

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Pacific, has been mentioned in connection with other interoceanic communications. Part II. ch. 4, § 19, Editor's note [114, p. 370.

11th. Of a similar character with the last convention, is the additional article of the treaty of August 27, 1856, between Great Britain and Honduras, by which the former, in consideration of the concessions therein contained, recognizes the rights of sovereignty and property of Honduras in and over the line of the proposed "Honduras Interoceanic Railway," and guarantees positively and efficaciously the entire neutrality of the same, so long as Great Britain shall enjoy the conceded privileges, and engages, in conjunction with Honduras, to protect the same from interruption, seizure, or unjust confiscation. Papers presented to the House of Lords, 1859.

At the commencement of the Italian war of 1859, there were several treaties of mutual guarantee between Austria, whose Italian possessions were recognized by the 93d article of the treaty of Vienna, and the other States of the Peninsula. By the one of June 12, 1815, with the Two Sicilies, the two parties agree to employ the whole of their respective forces, if necessary, in case of hostilities, and not to conclude a peace or truce, but in conjunction with each other and by a secret article, "His Sicilian Majesty engages to govern his Italian dominions according to the ancient monarchical establishments, and not to admit any innovations irreconcilable with the principles adopted by His Imperial Majesty in the government of his Italian States."

The permanent object of the treaty of June 12, 1815, with Tuscany, is declared to be "to provide as well for the internal tranquillity of Italy, as for external security." "They reciprocally guarantee to each other in the most ample manner all the States which they possess in Italy;" and in case they should find themselves in a war for the defence of Italy, they agree not to make any truce or peace without having first come to a mutual agreement. By a treaty of December 24, 1847, with Modena, the two parties engage, in case of attack from without, to lend each other help and assistance with all the means in their power. The right of marching imperial troops on Modenese territory, and occupying the fortresses by Austria, is conceded. It is, moreover, provided, "should circumstances occur in the interior of the States of Modena, which might lead to the belief that tranquillity and legal order are likely to be disturbed, when such turbulent movements shall have risen to the height of an insurrection, to repress which the means at the disposal of the government should not be sufficient, the Emperor of Austria promises, as soon as he shall have been informed of such disturbances, to lend every military assistance necessary for the maintenance and reëstablishment of tranquillity and legal order." Modena promises not to conclude any military convention whatever with another power, without the previous consent of Austria. The treaty between Austria and Parma, dated February 17, 1848, is the same in all respects as that concluded by the former with Modena. Papers presented to the House of Commons, March 25, 1859.] — *L.*

ised. 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 favor 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 recognized by all the text-writers.[1]

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 endeavors to obtain a performance of the promise from him who has made it.[2]

§ 13. 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 coöperate 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.

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[1] Vattel, liv. ii. ch. 16, § 238. Flassan, Histoire de la Diplomatie Française, tom. vii. p. 195.

[2] Vattel, § 239.

§ 14. Distinction between general alliance and treaties of limited succor and subsidy.

General alliances are to be distinguished from treaties of limited succor and subsidy. Where one State stipulates to furnish to another a limited succor 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 succor, 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, have long been the accustomed relations of the confederated Cantons of Switzerland with the other European powers.[1] [[163]

§ 15. *Casus fœderis* of a defensive alliance.

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 succors in time of war, that the stipulation is applicable only to a

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[1] Vattel, Droit des Gens, liv. iii. ch. 6, §§ 79–82.

[[163]] The 11th article of the 1st chapter of the Federal Constitution for the Swiss Confederation, of the 12th of September, 1848, forbids the conclusion of military capitulations. (*Il ne peut être conclu de capitulations militaires.*) Texte officiel de la Constitution fédérale Suisse et des xxv. constitutions cantonales, p. 3.

There was much excitement, in 1859, during the war of Italy, on account of the appellation of *Swiss regiments*, which continued to be given to the foreign troops that served at Rome and Naples, and imprecations were vehement, especially after the massacres of Perugia, against a republican government that sold to despots the blood of its citizens. This induced a protest from the Federal Council against the denomination of *Swiss* applied, even by the Piedmontese government, to these troops. The capitulations when they existed, only permitted the voluntary enrolment of men not within the requirements of the federal army, that is to say, who were less than twenty and more than thirty years of age. The authorization for them no longer exists, and a new law forbids the recruiting in Switzerland for foreign service. The mercenaries at Rome had not been the subjects of a capitulation, and were from various nations. On the Federal Council requiring that the *foreign regiments* at Rome and Naples should be so called, and not *Swiss regiments*, and on the flag of the Helvetic Convention being taken from those at Naples, where there were 14,000 Swiss, a revolt, resulting in their entire disbandment, took place; and on the 30th of July, 1859, a proclamation by the Federal Council of the federal law, forbidding Swiss citizens to take military service abroad without the authorization of the council, was issued. Annuaire des deux mondes, 1858–9, pp. 162, 299. Almanach de Gotha, 1861, p. (8).] — *L.*

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 favor of our confederate, and of the justice of his quarrel.[1]

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.

Alliance between Great Britain and Holland.

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 succor 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 all their forces, to bring the common enemy to a reasonable accommodation.

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[1] 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.

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 succors; and if the danger should be such as to require a greater force, the other ally should be obliged to augment his succors, 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 guarantee to Europe only. The succors 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.

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 succors: —

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 guarantees.

To the first of these objections it was irresistibly replied by the elder Lord Liverpool, that although the treaties which contained these guarantees 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 guarantee, 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 guarantees 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 guarantees 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 endeavors 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 guarantee 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 forever united." [1]

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 guarantee, and to extinguish that 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 guarantee, 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 guarantees 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 guarantees.

"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

[1] Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations. By Charles, Earl of Liverpool. 1st ed. 1757.

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 guarantee did exist, and demanded the succors which were stipulated. I need not produce the memorials of their ministers to prove this; history sufficiently informs us that France acknowledged the claim, granted the succors, 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 favor 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." [1]

Alliance between Great Britain and Portugal.

The nature and extent of the obligations contracted by treaties of defensive alliance and guarantee, 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.[2] [164] 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 Alfonzo 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 succor 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

[1] Liverpool's Discourse, p. 86.

[2] Vide ante, Part II. ch. 1, § 8, p. 124.

[164] See, also, Editor's note [162, p. 476.

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 guarantees 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 is guaranteed to the lawful heir of the House of Braganza, and the British government promises never to recognize 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 guarantee against every hostile attack, conformably to the treaties already subsisting between them, the stipulations of which shall remain in full force, 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 22d 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 guarantee, 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."

Such was the nature of the compacts of alliance and guarantee 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 al-

though, in general, an alliance for defence and guarantee 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 military stores; if, at the same time, his authority were treated as an 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 favored 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 succor, 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, 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 succor 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 succor 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.[1] Fraud neither gives nor takes away any right. Had France, in the year 1715, assembled squadrons in her harbors 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 succor which the States-General were bound to furnish, by their treaties of alliance and guarantee 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 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

[1] Vattel's reasoning is still more conclusive in a case of guarantee: — "Si l'alliance défensive porte une guarantie de toutes les terres que l'allié possède actuellement, le *casus fœderis* se déploie toutes les fois que ces terres sont envahies *ou menacées d'invasion.*" Liv. iii. ch. 6, § 91.

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.[1] [165

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[1] "Dans une alliance défensive le *casus fœderis* n'existe pas tout de suite dès que notre allié est attaqué. Il faut voir encore s'il n'a point donné à son ennemi un juste sujet de lui faire la guerre. S'il est dans le tort, il faut l'engager à donner une satisfaction raisonnable." Vattel, liv. iii. ch. 6, § 90.

[165] The following are the articles in relation to guaranty, in the treaty of alliance of February 6, 1778, between the United States and France, out of which many grave questions subsequently arose:

Art. XI. The two parties guarantee mutually from the present time and forever against all other powers, to wit: The United States to his Most Christian Majesty, the present possessions of the crown of France in America, as well as those which it may acquire by the future treaty of peace. And his Most Christian Majesty guarantees on his part to the United States, their liberty, sovereignty, and independence, absolute and unlimited as well in matters of government as commerce, and also their possessions, and the additions or conquests, that their confederation may obtain during the war, from any of the dominions now, or heretofore possessed by Great Britain in North America, conformable to the 5th and 6th articles above written, the whole as their possessions shall be fixed and assured to the said States, at the moment of the cessation of their present war with England.

Art. XII. In order to fix more precisely the sense and application of the preceding article, the contracting parties declare, that in case of a rupture between France and England, the reciprocal guarantee declared in the said article, shall have its full force and effect the moment such war shall break out; and if such rupture shall not take place, the mutual obligations of the said guarantee shall not commence until the moment of the cessation of the present war, between the United States and England, shall have ascertained their possessions.

The 5th article, above referred to, stipulated that if the United States should think fit to attempt the reduction of the British power remaining in the northern parts of America, or the islands of Bermudas, those countries or islands in case of success, shall be confederated with or dependent upon the said United States. By Art. VI. France renounced forever the possession of the islands of Bermudas, as well as of any part of the Continent of North America, which before the treaty of Paris of 1763, or in virtue of that treaty, were acknowledged to belong to the crown of Great Britain or to the United States, heretofore called British Colonies, or which are at this time or have lately been under the power of the king and crown of Great Britain. Art. VII. provided, "If his Most Christian Majesty shall think proper to attack any of the islands situated in the Gulf of Mexico or near that Gulf, which are at present under the power of Great Britain, all the said islands in case of success, shall appertain to the crown of France."

Though the articles for reciprocal guaranty were in terms perpetual, the alliance is declared to be based on the treaty of amity and commerce of the same date, for the purpose of strengthening "those engagements and of rendering them useful to the safety and tranquillity of the two parties, particularly in case Great Britain in resentment of that connection and of the good correspondence which is the object of the said treaty, should break the peace with France, either by direct hostilities or by hindering her commerce and navigation in a manner contrary to the rights of nations and the peace subsisting between the two crowns; His Majesty and the United

§ 16. Hostages for the execution of treaties.

The execution of a treaty is sometimes secured by *hostages* given by one party to the other. The most recent and remarkable example of this practice oc-

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States having resolved in that case to join their counsels and efforts against the enterprises of their common enemy." In case war should break out between France and Great Britain, it is said, "during the continuance of the present war between the United States and England," the two parties shall make common cause and aid each other mutually with their good offices, their counsels, and their forces, according to the exigence of conjunctures, as becomes good and faithful allies. "The essential and direct end of the present defensive alliance is to maintain effectually the liberty, sovereignty, and independence, absolute and unlimited, of the said United States, as well in matters of government as of commerce." Each of the parties, on its own part, was to make all efforts in its power, in the manner it might deem most proper against their common enemy, to attain the end proposed. And they agree in case either of them should form any particular enterprise in which the concurrence of the other might be desired, to act in concert; and in that case they were to regulate by a particular convention the quantity and kind of succor to be furnished, and the time and manner of its being brought into action, as well as the advantages which were to be its compensation. Statutes at Large, vol. viii. pp. 6–10.

This treaty, as well as the provisions of the treaty of commerce, which gave (Art. 17) to French ships of war and privateers the right to carry their prizes into American ports, a privilege not to be extended to the enemies of France, and which granted (Art. 19) to her vessels of war a right to victual and repair in our ports, but which our government did not regard as exclusive, (see Part IV. ch. 3, § 6,) caused much embarrassment to the United States, when the change of government took place on the execution of Louis XVI., and France anticipated England, by declaring war against her. Ib. p. 12.

We have already referred (§ 10, Editor's note [159, p. 471, *supra*,) to the opposing views of the two parties in the Cabinet on the effect of the change in the French Constitution, on existing treaties. In stating his opinion, the Secretary of State said: "I consider the people who constitute a society or nation, as the source of all authority in that nation, as free to transact their common concerns by any agents they think proper, to change these agents individually, or the organization of them in form or function, whenever they please. Consequently the treaties between the United States and France were not treaties between the United States and Louis Capet, but between the two nations of America and France; and the nations remaining in existence, though both of them have since changed their forms of government, the treaties are not annulled by these changes." Mr. Jefferson combatted the passage from Vattel, (liv. ii. ch. 12, § 197,) on which the Secretary of the Treasury had based his argument for the abrogation of the treaties. After admitting that "an ally remains an ally of the State, notwithstanding the change of government, either by a nation deposing its king, or a people of a republic driving out its magistrates and acknowledging an usurper," the author had added: "If, however, this change renders the alliance *useless*, *dangerous*, or *disagreeable* to the other, it may renounce it; for it may say with truth that it would not have allied itself with this nation if it had been under the present form of its government." Mr. Jefferson showed that Vattel in this phrase was not sustained by other writers on the law of nations, particularly Grotius, Puffendorf, and Wolf, nor with the general tenor of his own work; nor, had it been true, would it have been applicable. "Who," he asks, "is the American who

curred at the peace of Aix-la-Chapelle, in 1748; where the restitution of Cape Breton, in North America, by Great Britain to

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can say with truth, that he could not have allied himself with France if she had been a republic, or that a republic of any form would be as *disagreeable* as her ancient despotism?" He concluded that "the treaties are still binding, notwithstanding the change of government in France; that no part of them but the clause of guarantee holds out danger even at a distance; and consequently that a liberation from no other part could be proposed in any case; that if that clause may ever bring *danger*, it is neither extreme nor imminent, nor even probable; that the authority for renouncing a treaty when useless or disgreeable, is either misunderstood or in opposition to itself, to all other writers, and to every moral feeling; that were it not so, those treaties are in fact neither useless nor disagreeable."—Tucker's Life of Jefferson, vol. i. pp. 414, 421.

Mr. Hamilton, after assuming that the guarantee applied only to a defensive war, in order to show that that was not the character of the one in which France was engaged, cites from Burlamaqui: "We must say, that generally the first who takes up arms, whether justly or unjustly, commences an offensive war." Hamilton's Works, vol. iv. pp. 366, 382. Answers to questions proposed by the President, April, 1793. Even the proposition is stated in a qualified manner, as applying *en général;* while from what follows it is apparent that Burlamaqui means to give a definition, referring to the military operations of a war, and not affecting, in any sense, its political or moral merits. He adds: "Those who regard the words *offensive war* as an odious term, always implying something unjust, and who consider a *defensive war* as inseparable from justice, confuse all ideas and embarrass a matter of itself sufficiently clear." Principes du Droit politique, Part IV. ch. 3, § 5, p. 802. The correct view, and which accords with our text, is thus given by Klüber: "The war is *defensive* (*bellum defensivum*) on the side of the party which only desires to defend its rights, in order to obtain security or reparation; *offensive*, on the contrary, (*bellum offensivum*,) on the side of the party which attempts to violate the rights of another. This denomination is the same, whether one or other of the belligerents has commenced the hostilities; for the war is not the less defensive, if the party attacks by virtue of the right of prevention, this right being one of pure defense." Droit des Gens, Part II. tit 2. sect. 2, ch. 1, § 236. See, also, to the same effect, Halleck, International Law, p. 329.

It would seem, at this day, somewhat extraordinary that the establishment of a republic in France should be deemed a sufficient ground for the abrogation of our treaties, especially as they had for their avowed object the founding of republican institutions here; while, as is stated by Mr. Wheaton in the text, "it would show more than an 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."

The causes which led to the wars of the French Revolution are well explained in another work of our author, (History of the Law of Nations, pp. 344–372,) from which it will appear that the object of the coalitions of the great European powers against France was a restoration, contrary to the will of the nation, of the old order of things; and that the declarations of war, on her part, only anticipated the action of her enemies.

A proclamation was issued by the President, April 22, 1793, declaring that, "whereas it appears that a state of war exists between Austria, Prussia, Sardinia,

France, was secured by several British peers sent as hostages to Paris.[1]

Great Britain, and the United Netherlands, on the one part, and France on the other, the duty and interests of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial towards the belligerent powers." Wait's American State Papers, vol. i. p. 44.

As to the question of guarantee — "The President decided that a minister should be received on the same terms as formerly, and that the obligations of the treaties ought to remain in full force, leaving the subject of guarantee for future consideration, aided by a better knowledge of the condition and prospects of France." Sparks, Writings of Washington, vol. i. p. 486.

Before the proclamation of neutrality reached Europe there was a direct violation of the principle of the treaty of commerce, in an order for the capture of enemy's goods in neutral vessels, (decree of May 9th, 1793,) and which, though at first suspended as to American vessels, (decree of May 23, and July 1, 1793,) was again put in operation as to them, (July 27, 1793). Wait's American State Papers, vol. vii. p. 150. Nor did the decree of the 17th of November, 1793, to which we have alluded, (§ 10, Editor's note [159, p. 471,) put an end to the complaints of its infraction. On the occasion of the conclusion of the treaty of 1794, between the United States and England, commonly called Jay's Treaty, the Minister of Foreign Affairs informed, in February, 1796, Mr. Monroe, the American Minister at Paris, that since its ratification the Directory regarded the alliance at an end. Pitkin's History of the United States, vol. ii. p. 480. Monroe's View, p. 310. And a note of July 7, 1796, announced that France no longer considered herself bound by the provisions of her treaty with respect to the neutrality of the flag. By a decree of the 2d July, 1796, it had been ordered that "all neutral or allied powers shall, without delay, be notified, that the flag of the French republic will treat neutral vessels, either as to confiscation, searches, or capture, in the same manner as they shall suffer the English to treat them." Cong. Doc., 19th Cong. 1st Sess., Senate, 102, pp. 143, 149. See, also, Part IV. ch. 3, § 23, Editor's note, *infra*.

By an act of Congress, of July 7, 1798, the French treaties were declared void; those treaties, the preamble set forth, having been "repeatedly violated on the part of the French government, and the just claims of the United States for reparation of the injuries so committed having been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations repelled with indignity." Statutes at Large, vol. i. p. 578.

The convention of September 30, 1800, which after actual hostilities terminated the previous differences between the two countries, contained the following as the 2d article: "The Ministers Plenipotentiary of the two parties not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the convention of 14th of November, 1788, nor upon the indemnities mutually due or claimed; the parties will negotiate further on these subjects at a convenient time, and until they may have agreed upon these points, the said treaties and convention shall have no operation."

The Senate of the United States in ratifying the convention, did it with a proviso that "the second article be expunged;" and the First Consul, on the part of France, consented to consider it ratified, "provided that by this retrenchment the two States renounce the respective pretensions, which are the object of the said article." The convention thus ratified having been again submitted by the President to the Senate,

[1] Vattel, liv. ii. ch. 16, §§ 245–261.

§ 17. Interpretation 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 Rutherforth, as containing the most complete view of this important subject.[1] [166

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they resolved that they considered it as duly ratified, and returned it to the President for the usual promulgation. Ib. vol. viii. pp. 178, 194.

Thus, so far as regards the two countries, the question of the guarantee was put at rest, without any agreement as to the nature and extent of its application. Those points have, however, been since repeatedly agitated in the Congress of the United States, in consequence of a supposed equitable claim of those parties whose reclamations on France were renounced, as they maintain, as an equivalent for the release by her of the guarantee of her French West-India possessions. See Part IV ch. 4, § 3, Editor's note, *infra*.

As to the *casus fœderis* of an alliance being only applicable to a *just* war, as there is no common tribunal among nations, it is obvious that the recognition of such a principle might give a pretext, in all cases, for a party to refuse at its pleasure conformity with its treaty obligations. But the term just war (*bellum justum*) is frequently used as corresponding with a regular war, without regard to its merits. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 8, § 1. See, also, Part IV. ch. 1, § 6.] — *L.*

[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 16. Vattel, liv. ii. ch. 17. Rutherforth's Inst. b. ii. ch. 7.

[166 The treaty for the cession of Louisiana to the United States not only contained a stipulation placing the vessels of France and Spain laden with the productions of their respective countries, for a limited period upon the same footing as those of the United States in the ports of Louisiana, but provided that the vessels of France should be forever thereafter treated in those ports, on the footing of "the most favored nation." Under this clause France contended that her vessels were entitled to be admitted in the ports of Louisiana on the same footing as those of Great Britain which, by virtue of the Reciprocity Treaty of July 3, 1815, were admitted into the ports of the United States, including those of Louisiana, upon the payment of the same duties as those of the United States; nor did she ever cease to oppose reclamations based on this treaty to claims, on our part, for spoliations on American commerce subsequent to the mutual renunciations contained in the treaty of September 30, 1800. The indemnity convention, of July 4, 1831, so far recognized the French pretensions, as to base the abandonment of them on a stipulation limiting the duty imposed in the United States on French wines to a fixed amount. Statutes at Large, vol. viii. p. 432.

Mr. Adams, in his first note to the French Minister, — meeting his demand that orders might be issued to such effect that in future the 8th article of the treaty of

§ 18. Mediation.

Negotiations are sometimes conducted under the mediation of a third power, spontaneously tendering

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1803 between France and the United States may receive its entire execution, and that the advantages granted to Great Britain in all the ports of the United States may be secured to France in those of Louisiana, — replied, that he was instructed to say, "that the vessels of France are treated in the ports of Louisiana upon the footing of 'the most favored nation,' and that neither the English nor any other foreign nation enjoys gratuitous advantage there which is not equally enjoyed by France. But English vessels, by virtue of a conditional compact, are admitted into the ports of the United States, including those of Louisiana, upon payment of the same duties as the vessels of the United States. The condition upon which they enjoy this advantage is, that the vessels of the United States shall be admitted into the ports of Great Britain, upon payment of the same duties as are there paid by British vessels." Mr. Adams further stated that any other construction of the article would be inconsistent with the provision of the Constitution of the United States, that, "all duties, imposts, and excises shall be uniform throughout the United States; and that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." Consequently, if France could have claimed *forever* advantages in the ports of Louisiana, which could be denied to her in the other ports of the United States, it would have been impossible to carry out the article of the treaty of the cession of Louisiana which declares, that "its inhabitants shall be incorporated into the Union of the United States, and be admitted as soon as possible, according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." M. Hyde de Neuville to Mr. Adams, December 15, 1817. Mr. Adams to M. Hyde de Neuville, December 23, 1817. Cong. Doc., 18th Cong. 2d Sess., No. 91, pp. 7, 8.

Mr. Wheaton, in the instructions received with his commission as Envoy Extraordinary and Minister Plenipotentiary at Berlin, empowering him to conclude a treaty with the Zollverein, was not authorized to stipulate for a preference in the ports of the United States of the productions of the German States, over similar articles imported from other countries, as an equivalent for the diminution of the duties or charges on tobacco; but if any such proposition was made, he was to transmit it to his government. Mr. Forsyth to Mr. Wheaton, June 1, 1837. His earlier instructions were opposed to any preference, even for a full equivalent, to the productions of Germany, lest we might thereby be embarrassed with those nations with which we had treaties of reciprocity; and the Secretary referred to the difficulties which had in consequence of such a provision grown out of the convention for the purchase of Louisiana. It was, he said, to get rid of obligations which might be deemed to contravene the Constitution of the United States, which requires all duties to be uniform throughout the Union, that the preference accorded to French wines was inserted in the treaty of 1831. Same to Same, March 14, 1836, Department of State MS.

To avoid similar difficulties it has become usual for the United States, when employing the clause "of the most favored nation," to add, "who shall enjoy the same freely, if the concession was freely made, or upon the same conditions, if the concession was conditional;" (see, *inter al.*, treaty with Mexico, of April 5, 1831, Ib. p. 410,) or, as in the treaty of Austria of August 27, 1829, "freely, where it is freely granted to such other nation or, on yielding the same compensation, when the grant is conditional." Ib. p. 400. The same or similar terms are to be found in the very latest treaties of commerce. See treaty with Paraguay, February 4, 1859. Treaties at Large, 1859–60, p. 123.] — *L.*

its good offices for this 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.[1] [167

[1] Klüber, Droit des Gens Moderne de l'Europe, Part II. tit. 2, § 1; ch. 2, § 160.

[167] There is a distinction between the case of *good offices* and of *mediator*. The demand of good offices or their acceptance does not confer the right of mediator. Klüber, *loc. cit.* The offer of Russia to mediate between the United States and Great Britain, in the war of 1812, was at once accepted by the former; and in order to avoid delays incident to the distance of the parties, plenipotentiaries were commissioned to conclude a treaty of peace with persons clothed with like power on the part of Great Britain. Wait's State Papers, vol. ix. p. 223. President Madison's Message, May 25, 1813. The refusal of Great Britain, at that time in the closest alliance with Russia, can only be accounted for by the supposed accordance between the United States and Russia in questions of maritime law. Sir James Mackintosh considered the rejection of the proffered mediation, whereby hostilities were unnecessarily prolonged, the less justifiable, as "a mediator is a common friend, who counsels both parties with a weight proportioned to their belief in his integrity and their respect for his power. But he is not an arbitrator, to whose decision they submit their differences, and whose award is binding on them." Hansard's Parliamentary Debates, vol. xxx. p. 526, April 11, 1815.

The kindly offices of the Emperor Alexander, both as an arbitrator and mediator, were subsequently invoked in a case growing out of the treaty of peace of 1814. That instrument had provided for a reference to a friendly sovereign or state, in case of the disagreement of the commissioners in settling the boundary between the United States and Great Britain, which had remained unadjusted since the war of the Revolution; but the case, which was first presented for reference, regarded the construction to be given to the article which prohibited the carrying away from the territory to be restored "of any slaves or other private property." And though the terms of the treaty of Ghent (slaves being there substituted for "negroes," as used in the same connection, in the seventh article of the treaty of 1783, Statutes at Large, vol. viii. p. 83,) sufficiently indicate the character attached by the negotiators to persons of African descent as private property, the question before the arbiter was one of grammatical construction. It was whether the prohibition was confined to those slaves who had been originally captured there, or whether it extended to all who were, from whatever cause, in the territory, to be restored at the end of the war.

In the discussions, however, leading to the reference, as well as before the arbiter, the principle was maintained by the United States that the "emancipation of ene-

§ 19. Diplomatic history.

The art of negotiation seems, from its very nature, hardly capable of being reduced to a systematic sci-

my's slaves is not among the acts of legitimate warfare." Mr. Adams to Mr. Rush, at London, July 7, 1820. And in the instructions, from the same Secretary of State to Mr. Middleton, at St. Petersburg, October 18, 1820, it is said: "The British have broadly asserted the right of emancipating slaves — private property — as a legitimate right of war. No such right is acknowledged as a law of war by writers who admit any limitation. The right of putting to death all prisoners in cold blood, and without special cause, might as well be pretended to be a law of war, or the right to use poisoned weapons, or to assassinate." MS. Papers of J. Q. Adams, cited in "Law Reporter," June, 1862, p. 485. The clause to which the decision related, was: "All territory, places, and possessions whatsoever, taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any destruction or carrying away any of the artillery or other public property *originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty*, or any slaves or other private property."

"The Emperor is of opinion," — the award, which was dated 22d April, 1822, said, — "that the United States are entitled to a just indemnification from Great Britain, for all private property carried away by the British forces; and, as the question regards slaves more especially, for all such slaves as were carried away by the British forces from the places and territories of which restitution was stipulated by the treaty in quitting the said places and territories. That the United States are entitled to consider as having been so carried away all such slaves as may have been transported from the above-mentioned territories on board British vessels within the waters of the said territories, and who for this reason have not been restored.

"But that if there should be any American slaves who were carried away from territories of which the first article of the treaty of Ghent has not stipulated the restitution to the United States, the United States are not to claim an indemnification for the said slaves." The British Ambassador thereupon stated that he understood that, in virtue of this decision, "His Britannic Majesty is not bound to indemnify the United States for any slaves who, coming from places which have never been occupied by his troops, voluntarily joined the British forces, either in consequence of the encouragement which His Majesty's officers have offered them, or to free themselves from the power of their masters — these slaves not having been carried away from places of which the article stipulates the restitution." In answer to this, Count Nesselrode declared that he was charged to communicate to the Minister of the United States that "the Emperor having, by the mutual consent of the two plenipotentiaries, given an opinion, founded solely upon the sense which results from the text of the article in dispute, does not think himself called upon to decide here any question relative to what the laws of war permit or forbid to the belligerents; but always faithful to the grammatical construction of the first article of the treaty of Ghent, His Imperial Majesty declares, a second time, that it appears to him according to this interpretation, 'That in quitting the places and territories of which the treaty of Ghent stipulates the restitution to the United States, His Britannic Majesty's forces had no right to carry away from these same places and territories, absolutely, any slave, by whatever means he had fallen or come into their power. But, that if, during the war, American slaves had been carried away by the English forces, from other places than those of which the treaty of Ghent stipulates the resti-

ence. It depends essentially on personal character and qualities, united with a knowledge of the world and experience in busi-

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tution, upon the territory or on board British vessels, Great Britain should not be bound to indemnify the United States for the loss of these slaves, by whatever means they might have fallen or come into the power of her officers.' "

In rendering his award, "the Emperor declares besides that he is ready to exercise the office of mediator, which has been conferred upon him beforehand by the two States, in the negotiations which must ensue between them in consequence of the award which they have demanded." Russia accordingly was a party to a convention entered into between the United States and Great Britain, July 12, 1822, in order to provide the mode of ascertaining and determining the value of slaves and of other private property, carried away in contravention of the treaty of Ghent. Martens, Nouveau Recueil, tom. vi. p. 66. Statutes at Large, vol. viii. p. 282.

Difficulties having arisen in the carrying the convention of 1822 into effect, a direct convention was concluded between Great Britain and the United States, November 13, 1826, by which a gross sum ($1,204,960) was paid by the former and received by the latter, as a full and final liquidation of all claims whatsoever arising under the decision of the Emperor of Russia; the final adjustment of the claims and the distribution of the sums paid by Great Britain, to be made in such manner as the United States should determine. Ib. p. 344.

The commissioners, under the treaty of Ghent, having failed to agree on the north-eastern boundary of the United States, and a convention having been made, September 29, 1827, to refer, in accordance with the treaty, the points in dispute to some friendly sovereign or state, who should be invited to investigate and make a decision upon such points of difference, the first choice of the United States was the Emperor of Russia.

In the instructions, given on that occasion, to the diplomatic representative of the United States in London, it is said: — "If the late Emperor of Russia was still living and on the throne, there would have been a great repugnance against a second application to him, to act as arbitrator between the parties, after he had once assumed the trouble of officiating in that character. But that objection does not apply to the Emperor Nicholas, who may possibly regard as a compliment the manifestation of the same high confidence in him which was entertained for his illustrious brother. It is probable, therefore, that he may accept the office. No well-grounded objection, on the part of Great Britain, can be anticipated. If, as now appears to us at this distance to be highly probable from recent information, hostilities have been commenced with Turkey, the fact of Great Britain and Russia being allies in the prosecution of that war might render somewhat doubtful the expediency of our agreeing to the choice of the Emperor Nicholas as an arbiter. But, whilst that fact ought to prevent any objection to him on the part of Great Britain, it does not shake the confidence which the President would have in the impartiality and uprightness of his decision if he should consent to serve." Mr. Clay to Mr. W. B. Lawrence, 20th February, 1828. In an instruction based on a despatch from the American Chargé d'Affaires, stating objections, that he had derived from interviews with the Russian Ambassador and which subsequent events fully sustained, to the King of the Netherlands, on account of the comparatively dependent relation in which he stood to England, even before the division of his kingdom, and asking permission to substitute the King of Prussia as our third choice, the Secretary says: "We are very desirous to learn whether you have come to an agreement for the designation of a sovereign arbitrator. I have

ness. These talents may be strengthened by the study of history, and especially the history of diplomatic negotiations; but the

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nothing to add to former instructions on that subject. It is most desirable that the Emperor of Russia should be agreed upon. And the King of Denmark would be our second choice. The President weighed all the considerations you have suggested, respecting the King of the Netherlands. They did not seem to him to overrule the confidence which he has in the intelligence and personal character of that monarch. As to the King of Prussia, the circumstance of our having no representative near him, was not without its influence on the omission of his name." The Same to the Same, 17th May, 1828.

The course pursued by England, then the ostensible ally of Russia in the affairs of Greece, was the same as that adopted by her on occasion of the proposed mediation during the war between her and the United States; though, in 1828, there was, from the events consequent on the battle of Navarino, and the special objects attributed to Russia in her separate contest with Turkey, less reason than in 1813, when the greatest part of Europe was united by the presence of a common danger from the colossal power of Napoleon, to suppose a cordial feeling between the two powers having permanent causes of jealousy in the East.

The despatches to the Secretary of State, written during the pendency of the question as to the umpire, allude to the political relations of the period which bore on the selection of the arbiter. "Prince Lieven, (to whom, owing to the very friendly relations existing between our governments, and the many confidential communications for which I was indebted to him, I had assumed the responsibility, as heretofore stated, of reading your instructions expressing the President's confidence in the uprightness and impartiality of His Imperial Majesty,) told me, a few days since, that he had been desirous of seeing me in order to ascertain the truth of a report, which he had heard from several members of Parliament supposed to be in the confidence of the government, that I had actually agreed with Lord Dudley on Russia, as the power to which the arbitration of the boundary question was to be submitted. Prince Lieven, on learning the delay which has attended the decision of the British government, immediately ascribed it to the same cause which has been intimated — the present state of the relations of this country with foreign powers, particularly Russia and France. He implied that though the cabinets of St. Petersburg and London were friends, they had not altogether agreed as to the mode of conducting affairs in the East; and he presumed that this government felt a disinclination to evince any want of confidence in the Emperor, while at the same time it might not be willing to make him the arbiter. The state of things in France might also oppose an obstacle, as Lord Dudley could not know what power we might select. Not only on account of the affairs of the East, but from the unsettled state of the ministry of that country, there might be an indisposition to confide to it a question which involved many details, and which would probably be protracted through several administrations. At the same time, towards France as towards Russia, England would be desirous to act with the greatest delicacy." The Same to the Same, May 6, 1828. In another despatch, it is said: "Russia has always, in my view of the case, been out of the question; and after the choice of another State had actually been made, I was clearly given by Lord Aberdeen to understand that, though the political relations of England with the Emperor Nicholas had not changed since the alliance was entered into with respect to Greece, there would have been, in no event, a disposition to submit the umpirage to that monarch." The Same to the Same, June 22, 1828.

want of them can hardly be supplied by any knowledge derived merely from books. One of the earliest works of this kind is

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The King of Denmark was, after our first choice, the sovereign to whom the United States, in preference to all others, desired to submit the controversy, though the American reclamations on her had not then been adjusted; nor can it be doubted that the superior fitness of our minister at Copenhagen, who was then Mr. Wheaton, was among the motives for placing Denmark second on the list. A recollection of the unprovoked violation of the law of nations by Great Britain towards Denmark, in 1801 and 1807, by the bombardment of her capital and the seizure of her fleet in times of peace, when her only crime was the maintenance of an impartial neutrality, might not unnaturally have created an apprehension of an unfavorable bias, on the part of His Danish Majesty; and it was not more practicable for the American negotiator to obtain the assent of England to his second than to his first selection.

The abortive result of the nomination of the King of the Netherlands has been noticed elsewhere. (Part I. ch. 1, § 13, Editor's note [51, p. 133, *supra*.) And as the award, which did not profess to follow the submission, but merely recommended a conventional line, was not accepted by the United States, there was no occasion for the umpire acting as mediator in the conclusion of a convention. Nor was the controversy ever terminated, in strict accordance with the provisions of the treaty of 1814. It was only brought to an end in 1842, and by a treaty which substituted a conventional line, though differing from that proposed by the King of the Netherlands, for the delineation of the boundary of 1783. Statutes at Large, vol. viii. p. 573.

In reference to the difficulties growing out of the omission of the French government to provide for the indemnities stipulated to be paid to the United States, under the convention of July 4, 1831, and for which President Jackson proposed that resort should be had to reprisals, (Part IV. ch. 1, § 2, Editor's note,) the King of England, in his speech at the opening of Parliament, February 14, 1836, said: "Desirous on all occasions to use my friendly endeavors to remove causes of disagreement between other powers, I have offered my mediation, in order to compose the difference which has arisen between France and the United States. This offer has been accepted by the King of the French; the answer of the President of the United States has not yet been received." The offer of mediation, on the part of the British government, was readily accepted by the United States, under a protest against the right of France or any foreign power to demand explanations respecting the language which the President might use in his message. The matter was, however, satisfactorily adjusted, without the intervention of a third party, by a compliance on the part of France with the provisions of the treaty; while a declaration in the subsequent annual message of the President was deemed an adequate reparation for the language of a previous one, which had induced the recall of the French Minister from Washington. Annual Register, 1836, pp. 1], 327], 440].

In the case of the United States and Mexico, Great Britain, before the war of 1847, had made an unofficial tender of her friendly offices, which, however, neither party had been willing to accept. Hansard's Parliamentary Debates, 3d Series, vol. xciii. p. 382, June 11, 1847.

The cases of interposition, referred to in the first part of these Elements, were those generally of a forcible mediation, where the great powers of Europe sitting, as it were, as an international council, or some of them, intervened to carry into effect an arrangement proposed by themselves, and as to which little or no option was left

that commonly called *Le Parfait Ambassadeur*, originally published in Spanish by Don Antonio de Vera, long time ambassa-

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with the parties directly interested. Notwithstanding the declaration, in the 22d protocol of the Congress of Paris, recommending recourse to the good offices of a friendly power before appealing to arms, the Italian war of 1859 was not only undertaken without any attempt at mediation, but insuperable obstacles were opposed by Austria to the convening of a congress by which hostilities might have been averted.

Though there are examples to the contrary, as in the acceptance, in 1847, by the Queen of Portugal of the offer of the British government to mediate between her and the insurgents, and the proffer by the four powers to the junta of certain conditions in the Queen's name, which it refused to accept, (Part II. ch. 1, § 16, Editor's note [58, p. 140, *supra*,) an objection exists to the introduction of third parties in civil wars, except in cases where the internal constitution may be guaranteed by foreign powers — itself a derogation from the perfect independence of the State. The very fact of the negotiations incident to the mediation implies the separate existence of each of the belligerents, which the ancient government will ordinarily not admit till it is prepared for the full recognition of the insurgent party.

As to the pending contest in the United States, Lord Lyons wrote, April 28, 1861, to Lord John Russell, in reference to a proposal from the Governor of Maryland that he should be called upon to mediate between the parties, and which he says was unhesitatingly rejected by Mr. Seward: "I am convinced that no good effect could be produced at this moment by any offer on the part of the representatives of European powers to mediate between the North and the South." Parliamentary Papers, 1862. North America, No. 1, — Civil War in the United States, p. 25.

But the uniformly friendly relations which have existed between Russia and the United States seemed, in the view of the Emperor, to justify an effort to maintain "the Union as an element essential to the universal political equilibrium, and as constituting a nation to which all Russia has pledged the most friendly interest." Prince Gortschakoff, in a despatch of July 10, 1861, to M. De Stoeckl, said: "The struggle which unhappily has just arisen can neither be indefinitely prolonged nor lead to the total destruction of one of the parties. Sooner or later it will be necessary to come to some settlement, whatsoever it may be, which may cause the divergent interests now actually in conflict to coexist. The American nation would, then, give a proof of high political wisdom in seeking in common such a settlement before a useless effusion of blood, a barren squandering of strength and of public riches, and acts of violence and reciprocal reprisals shall have come to deepen an abyss between the two parties to the confederation, to end definitively in their mutual exhaustion and in the ruin, perhaps irreparable, of their commercial and political power. Our august master cannot resign himself to admit such deplorable anticipations. His Imperial Majesty still places his confidence in that practical good sense of the citizens of the Union who appreciate so judiciously their true interests. His Majesty is happy to believe that the members of the federal government and the influential men of the two parties will seize all occasions and will unite all their efforts to calm the effervescence of the passions. There are no interests so divergent that it may not be possible to reconcile them, by laboring to that end with zeal and perseverance in a spirit of justice and moderation. If, within the limit of your friendly relations, your language and your councils may contribute to this result, you will respond to the

dor of Spain at Venice, who died in 1658. It was subsequently published by the author in Latin, and different translations appeared in Italian and French. Wicquefort's book, published in 1679, under the title of *L'Ambassadeur et ses Fonctions*, although its principal object is to treat of the rights of legation, contains much valuable information upon the art of negotiation. Callières, one of the French plenipotentiaries at the treaty of Ryswick, published, in 1716, a work entitled *De la manière de négocier avec les Souverains*, which obtained considerable reputation. The Abbé Mably also attempted to treat this subject systematically, in an essay entitled *Principes des Négotiations*, which is commonly prefixed as an introduction to his *Droit Publique de l'Europe*, in the various editions of the works of that author. A catalogue of the different histories which have appeared of particular negotiations would be almost interminable; but nearly all that is valuable in them will be found collected in the excellent work of M. Flassan, entitled *L'Histoire de la Diplomatie Française.* The late Count de Ségur's compilation from the papers of Favier, one of the principal secret agents employed in the double diplomacy of Louis XV., entitled *Politique de tous les Cabinets de l'Europe pendant les Règnes de Louis XV. et de Louis XVI.*, with the notes of the able and experienced editor, is a work which also throws great light upon the history of French diplomacy. A history of treaties, from the earliest times to the

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intentions of His Majesty the Emperor in devoting to this the personal influence which you may have been able to acquire during your long residence at Washington, and the consideration which belongs to your character as the representative of a sovereign animated by the most friendly sentiments towards the American Union. We are not called upon to express ourselves in this contest. The preceding considerations have no other object than to attest the lively solicitude of the Emperor in the presence of the dangers which menace the American Union, and the sincere wishes which His Majesty entertains for the maintenance of that great work, so laboriously raised, which appeared so rich in the future. It is in this sense that I desire you to express yourself, as well to the members of the general government as to influential persons whom you may meet, giving them the assurance that in every event the American nation may count upon the most cordial sympathy on the part of our august master during the important crisis which it is passing through at present." Mr. Seward in acknowledging in courteous terms, September 7, 1861, the communication of the preceding instructions, gave no encouragement that the friendly offices of the Emperor would be invited. He said: "M. De Stoeckl will express to his government the satisfaction with which the President regards this new guarantee of a friendship between the two countries, which had its beginning with the national existence of the United States." Papers relating to Foreign Affairs, 1861-2, p. 292.] —*L.*

Emperor Charlemagne, collected from the ancient Latin and Greek authors, and from other monuments of antiquity, was published by Barbeyrac, in 1739.[1] It had been preceded by the immense collection of Dumont, embracing all the public treaties of Europe, from the age of Charlemagne to the commencement of the eighteenth century.[2] The best collections of the more modern European treaties are those published at different periods by Professor Martens, of Göttingen, including the most important public acts upon which the present conventional law of Europe is founded. To these may be added Koch's *Histoire abregée des Traités de Paix depuis la Paix de Westphalie*, continued by Schöell. A complete collection of the proceedings of the Congress of Vienna has also been published in German, by Klüber.[3]

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[1] Histoire des Anciens Traités, par Barbeyrac, forming the 1st vol. of Dumont's Supplément au Corps Diplomatique.

[2] Corps Universel Diplomatique du Droit des Gens, &c., 8 tomes, fol. Amsterd. 1726–1731. Supplément au Corps Universel Diplomatique, 5 tomes, fol. 1739.

[3] Acten des Wiener Congresses in den Jahren 1814 und 1815; von J. L. Klüber: Erlangen, 1815 und 1816. 6 bde. 8vo.

PART FOURTH.

INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE RELATIONS.

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CHAPTER I.

COMMENCEMENT OF WAR, AND ITS IMMEDIATE EFFECTS.

§ 1. 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.

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.

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.

4. By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury.[1]

§ 2. Reprisals.

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. They are *positive*, when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.[2]

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 are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation.[3]

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 in due form to all that feel themselves grieved;" which form is specially pointed out, and directed to be observed in the statute.

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[1] Vattel, liv. ii. ch. 18. Klüber, Droit des Gens Moderne de l'Europe, § 234.
[2] Klüber, § 234, note (c).
[3] Bynkershoek, Quæst. Jur. Pub. lib. i. Duponceau's Transl. p. 182, note.

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 almost entirely fallen into disuse.[1] [168

[1] Vattel, Droit des Gens, liv. ii. ch. 18, §§ 342-346. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 24. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. viii. ch. 2, § 260. Martens, Essai concernant les Armateurs, § 4.

[168] The act of July 7, 1798, annulling the treaties with France, was followed by an act of July 9, 1798, which, without any formal declaration of war, not only authorized the President to instruct the commanders of public armed vessels of the United States to capture any French armed vessel, such captured vessel with her apparel, guns, and appurtenances, with the goods and effects on board the same, being French property, to be brought into the United States, and proceeded against and condemned as forfeited; but the President was authorized to grant special commissions to private armed vessels which should have the same license and authority. Statutes at Large, vol. i. p. 578.

The act of February 6, 1802, having premised that the Regency of Tripoli had commenced a predatory warfare against the United States, the President was authorized to instruct the commanders of public armed vessels to subdue, seize, and make prize of all vessels, goods, and effects, belonging to the Bey of Tripoli or to his subjects, to be sent into port, proceeded against, and distributed according to law; and the President was authorized to grant special commissions to the owners of private armed vessels, who should have the like power. Ib. vol. ii. p. 129.

By the act of June 18, 1812, declaring war to exist between Great Britain and the United States, the President, besides being authorized to use the whole land and naval force of the United States to carry the same into effect, was also empowered to issue to private armed vessels of the United States commissions or letters of marque and general reprisal against the vessels, goods, and effects of the government of Great Britain and Ireland and the subjects thereof. Ib. 755.

The act of March 3, 1815, having premised that the Dey of Algiers had commenced a predatory warfare against the United States, gave to the President the same authority as in the preceding case of Tripoli, to instruct the commanders of public armed vessels, and to grant commissions to the owners of private armed vessels, to subdue, seize, and make prize of all vessels, goods, and effects of or belonging to the Dey of Algiers or to his subjects. Ib. vol. iii. p. 230.

There were no reprisals authorized in terms by the United States in the war with Mexico, which was declared by the law of May 13, 1846, to exist by the act of the Republic of Mexico. Ib. vol. ix. p. 9. Mexican property found at sea was of course subject to capture by our ships of war; but no commissions were granted to privateers.

Mr. Wheaton has referred (Part I. ch. 2, § 11, iv. p. 57) to the successful demand, against the restored governments, for indemnifications for spoliations on our commerce, in cases where the wrong was inflicted by rulers who had temporarily superseded the legitimate sovereign; and his own negotiations with Denmark, (Part IV. ch. 3, § 32,) are another illustration of the perseverance with which the claims of their merchants were sustained by successive administrations of the American government.

In the case of the neglect of the French Chambers to make the proper appropriations for the indemnity agreed to be paid to the United States, by the treaty of

§ 3. Effect of reprisals.

Any of these acts of reprisal, or resort to forcible means of redress between nations, may assume the

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July 4, 1831, (Statutes at Large, p. 430), which was itself a recognition of the principle that authorizes a nation to demand compensation for spoliations on the property of its citizens, whatever change may occur in the government of the country that inflicts the injury, President Jackson, in his message to Congress of December, 1834, said: "It is a well-settled principle of the international code, that where one nation owes another a liquidated debt, which it refuses or neglects to pay, the aggrieved party may seize on property belonging to the other, its citizens, or subjects, sufficient to pay the debt, without giving just cause of war. I recommend that a law be passed, authorizing reprisals upon French property, in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers." Annual Register, 1834, p. 361.

The abstract right to the interposition of government, on the part of citizens, who have suffered by acts of foreign powers without any coöperation of their own, is more clear and imperative than that of others who have voluntarily staked their property on the good faith of a foreign government.

But it is in the power of a State in a treaty of indemnity, to provide for cases of contract, where the interference of the government had been solicited by the claimants themselves, and their claims had, at their own desire, been made a subject of negotiation. In such a case, to assert that a government is not competent to compound for them on terms as favorable as it can, consistently with its duties to the rest of its own nation, secure, is a doctrine believed to be without warrant, either in the law or usages of nations. Mr. Adams, Secretary of State, to the Florida Commissioners, March 8, 1822. British and Foreign State Papers, 1821–2. p. 918.

Mr. Marcy instructed Mr. Clay, Minister of the United States at Lima, May 24, 1855, that he was not authorized to make a demand for a breach of contract without special authority. "The reason for this," he says, "is obvious. It does not comport with the dignity of any government to make a demand upon another which would not ultimately, on its face, warrant a resort to force for the purpose of compelling a compliance with it." Department of State MS.

As to the interference of the British government in support of claims against foreign States, it is entirely a matter of discretion and by no means a question of international right, whether they should or should not make them the subject of diplomatic negotiation. Lord Palmerston to the British Representatives in Foreign States, January, 1848. Phillimore, International Law, vol. ii. p. 9.

The Spanish government gave notice, December 1822, to their functionaries abroad, that the British government, having claimed indemnity for captures made from 1804 to that time and for other damages to British property, had caused to sail from the ports of England various ships of war destined for the coasts of Terra Firma and Porto Rico, with orders to detain Spanish vessels to the amount of the debt which the English government had to claim. It was added that His Majesty hoped to terminate, in a just and amicable manner, an affair so nearly affecting the interests of the subjects of both nations, but that this important notice was issued to prevent the injury that might accrue during the interval which must necessarily elapse. British and Foreign State Papers, 1821–2, p. 897. A convention for the adjustment of these claims was signed at Madrid, March 12, 1823. Annual Register, 1823, p. 148 *. They mainly grew out of seizures, made by the Spanish government for violations of its colonial system by British vessels, during the Spanish

character of war in case adequate satisfaction is refused by the offending State. "Reprisals," says Vattel, "are used between

American wars, or in other words in attempting to subject to municipal regulations ports not in its occupation.

In 1840, reprisals were made by England, by the capture of several Neapolitan vessels, and an embargo was laid on all their vessels at Malta, on account of a grant of monopoly, for the sulphur produced and worked in Sicily, contrary, it was alleged, to the commercial treaty between England and Naples of 1816. The difficulty was settled by the mediation of France. Phillimore, International Law, vol. iii. p. 27.

In 1847, a motion was made in the House of Commons for reprisals, on account of unpaid Spanish bonds. It was conceded that such a course would be justified by the principles of international law, but it was resisted on the ground of expediency. In 1850, reprisals, which afterwards became the subject of parliamentary discussion and of complaint by France, were resorted to by England on account of the claims for property, alleged to have been destroyed at Athens by a mob, aided by Greek soldiers and gendarmes, belonging to one Pacifico, a British subject, from being a native of Gibraltar. "The real question of international law in this case," says Phillimore, "was whether the state of the Greek tribunals was such, as to warrant the English foreign minister in insisting upon M. Pacifico's demand being satisfied by the Greek government, before that person had exhausted the remedies which, it must be presumed, are afforded by the ordinary legal tribunals of every civilized State. That M. Pacifico had not applied to the Greek courts of law for redress, appears to be an admitted fact." Though Greece was compelled to accept the conditions of England, the commissioners appointed to examine the claim awarded only £150 instead of £21,295 1*s* 4*d*., which was demanded. Phillimore, as to the point whether the state of the courts rendered it a mockery to expect justice at their hands, adds: "The international jurist is bound to say that the evidence produced does not appear to be 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." Ib. p. 29.

The last letters of special reprisals in France were given by Louis XVI. in 1778, to the merchants of Bourdeaux, whose vessels had been illegally captured by the English. The text of them may be found in Ortolan, Diplomatie de la Mer, tom. i. p. 463, 2me ed. They were for the last time applied for, in 1826, under Charles X. against the Regency of Algiers, by one Rougemont; and being refused *par la voie gracieuse*, he applied to the Council of State, who decided that they were not a subject for demand *par la voie contentieuse*. De Pistoye et Duverdy. Traité des Prises, tom. i. p. 91.

The reclamations on Mexico by England, Spain, and France, assuming as they did, the form of a tripartite convention, seemed to pass beyond the ordinary case of reprisals for tortious spoliations and violated contracts; and we, therefore, referred to them (Part II. ch. 1, § 16, Editor's note [53, p. 156, *supra*,) in connection with other cases of intervention. It would seem that while the two first-named powers adhered to the ostensible object of the treaty, — indemnity for the past and security for the future, — France, whose pecuniary claims were the least considerable, attached primary importance to the incidental results to be derived from a reorganization of the political institutions of the country. At a conference of the three powers at Orizaba, the 9th of April, 1862, the Spanish and English commissioners declared that, in refusing to negotiate with the government of Juarez, in resuming hostilities, in marching on Mexico, in protecting Almonte, (the avowed advocate of the establishment of

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 to 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." [1]

§ 4. 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* by which it is done, that it was done *hostili animo;* and it is to be considered

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monarchy in the person of the Archduke Maximilian of Austria,) France passed the limits which the convention of London assigned to the common action of the three parties. General Prim (Count de Reuss) and Sir Charles Wyke withdrew from all further coöperation. Earl Russell approved, in a note remarkable for its laconic and sententious coolness, the interpretation given by them to the convention of London; and France remained alone in Mexico, with all the embarrassments and all the expenses of an expedition commenced by the three powers. Révue des deux mondes, 1er Juin, 1862, p. 744. Ib. 1er Aout, 1862, p. 756.] — *L.*

[1] Vattel, Droit des Gens, liv. ii. ch. 18, § 342.

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." [1] [169]

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[1] Robinson's Adm. Rep. vol. v. p. 246, The Boedes Lust.

[169] It is proper to distinguish between an embargo, in anticipation of war, imposed by a State on foreign vessels in its ports, and a civil embargo on its own vessels or others, in furtherance of its national or municipal policy. "An embargo is sometimes a simple act of internal security ordered by a government to facilitate measures of police." Heffter, Das europäische Völkerrecht, § 112. In England this power, in time of peace, is of such a nature as only to be exercised by Parliament; and when, in apprehension of impending famine in 1766, an embargo was imposed by an Order in Council, on all vessels laden with corn, the act of indemnity of 7 Geo. III. c. 7, was deemed necessary. Stephens's (Blackstone's) Com. vol. ii. p. 519. "The embargo laid by Congress, in 1807, by the special recommendation of President Jefferson, was avowedly recommended as a measure of safety for our vessels, our seamen, and our merchandise, from the then threatening dangers from the belligerents of Europe; and it was explicitly stated 'to be a measure of precaution called for by the occasion' and 'neither hostile in its character, nor as justifying, or inciting or leading to hostility with any nation whatever.' It was in no sense, then, a war measure." Story's Comm. on the Constitution, vol. iii. § 1284.

Among the measures provided by the convention of 22d of October, 1832, between England and France to compel the execution of the treaty of the 15th of November, 1831, for the separation of Holland and Belgium, (the three other powers, Russia, Austria, and Prussia, refusing to concur in coercive measures,) was an embargo on all the Dutch vessels in the ports of France and England. Lésur, Annuaire, 1832, p. 219. App. p. 48.

The imposition of embargoes, at the breaking out of hostilities, on vessels that entered a country in the course of trade, was not practised by any of the belligerents in the war, ending with the treaty of Paris, of 30th of March, 1856. Such a proceeding has always been condemned by publicists as inconsistent with good faith and justice. Hautefeuille says, that it is contrary to the prescriptions of the primitive law and the duties of nations. It is an act of hostility committed in full peace, and it is also at variance with the conventional law of nations. Almost all the treaties between the maritime and continental powers provide, in case of a rupture for a delay, greater or less, for the subjects of the other nation to withdraw their property. The pretext of reprisals is of no avail, as they, as in the case of a complete war, should be preceded by a declaration. He still more earnestly condemns the claim of belligerents, termed *angaria* or *jus angariæ*, to seize the vessels of neutrals in their ports, in order to employ them for their hostile purposes, paying a freight fixed in advance; though he admits that there is not a unanimity among authors on that subject, and that Azuni (Droit maritime de l'Europe, tom. i. ch. 3, art. 5, §§ 1, 2, p. 293,) considers it a prerogative of the supreme power which nations enjoy in their own territory. Droits des Nations Neutres, tom. iii. tit. xiv. pp. 416–431.

Heffter says, "The movable effects of neutrals in the territories of one of the belligerents or on the high seas cannot be seized by him to be applied to his own wants, except in case of urgent necessity (*jus angariæ*). Belligerents, always inclined to abuse the force which they possess, have conceived the idea of the employment of

§ 5. Right of making war, in whom vested.

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

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neutral vessels in their maritime expeditions. *Angarie* was practised especially under Louis XIV. who considered it as one of the prerogatives of sovereignty. In the modern treaties this pretended right has been suppressed entirely, or only accorded for a complete indemnity. The same thing may be said of the pretended right of preëmption claimed by one of the belligerents as to neutral merchandise destined to the ports of his adversary." Das europaïsche Völkerrecht, § 150.

"*Angarie* is distinguished from an *arrêt de prince*, (which corresponds in peace to *angarie* in time of war,) and especially from an embargo. Nevertheless, it is on the part of the sovereign who has recourse to it, less the exercise of a right than the abuse of the power of which he disposes in the places within his dominion. That a sovereign may impose on his subjects forced services of every description (*prestations et corvées*) necessary for the public safety, that he may *impress* their ships, as in some places sailors are *impressed*, may be conceived. But that such measures should reach neutral vessels, interrupt their commerce and defeat their voyages, it is not so easy to admit. Usage may have so far authorized the practice, that States, which would be free from such forced service, (*prestation*,) may deem it necessary to stipulate in their treaties of peace or commerce that they shall not be subjected to it as regards one another. It would then be an institution of the conventional law of nations; but I do not believe that any claim can be found for it in the primitive law of nations." Massé, Droit Commercial, liv. ii. tit. 1, ch. 2, sec. 2, § vi. tom. i. p. 310. See, also, Phillimore, International Law, vol. iii. p. 41. Such a provision as is referred to by Massé, was in the treaty of 1785 between the United States and Prussia, the 16th article of which declared, "that the subjects or citizens of each of the contracting parties, their vessels and effects, shall not be liable to any embargo or detention on the part of the other, for any military expedition or other public or private purpose whatsoever." Statutes at Large, vol. viii. p. 92. But the clause was modified by the 16th article of the treaty of 1799, continued in force by the 12th article of the treaty of 1828. The present stipulation is, that "in times of war, or in cases of urgent necessity, when either of the contracting parties shall be obliged to lay a general embargo, either in all its ports or in certain particular places, the vessels of the other party shall be subject to this measure, upon the same footing as those of the most favored nations, but without having any right to claim the exemption in their favor stipulated in the 16th article of the former treaty of 1785. But on the other hand, the proprietors of the vessels which shall have been detained, whether for some military expedition or for what other use soever, shall obtain from the government that shall have employed them, an equitable indemnity, as well for the freight as for the loss occasioned by the delay." Ib. pp. 170, 384. The treaty of January 20, 1830, between the United States and Venezuela, which is the same as those with other Spanish American States, provides that the citizens of neither of the contracting parties shall be liable to any embargo, nor be detained with their vessels, cargoes, merchandise, or effects, for any military expedition, nor for any public or private purpose whatever, without allowing to those interested a sufficient indemnification. Statutes at Large, vol. viii. p. 470.] — *L.*

delegated to its inferior authorities in remote possessions, or even to a commercial corporation — such, for example, as the British East India Company — exercising, under the authority of the State, sovereign rights in respect to foreign nations.[1] [170]

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[1] Vattel, liv. iii. ch. 1, § 4. Martens, Précis, &c., liv. viii. ch. 2, §§ 260, 264.

[170] Among the enumerated powers of the Congress of the United States are those to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Constitution of the United States, art. 1, § 8.

In the second article of the Constitution is this provision: "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." Ib. art. 2, § 2.

It was stated by the Court, in a case in admiralty, soon after the commencement of the present difficulties, that, "in the war with Mexico, declared by Congress to *exist* by the act of Mexico, (see 9 Statutes at Large, p. 9,) the Supreme Court have maintained, in two cases, that the President, *without any act of Congress*, as commander-in-chief of the army and navy, could exert the belligerent right of levying contributions on the enemy to annoy and weaken him. In the case of Fleming et al. *v.* Page, (9 Howard, 615,) the present Chief Justice says: 'As commander-in-chief, he is authorized to direct the movements of the naval and military forces, placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.' Again, at page 616: 'The person who acted in the character of collector, in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the President in his character of commander-in-chief. The custom-house was established in an enemy's country as one of the weapons of war. It was established, not for the purpose of giving the people of Tamaulipas the benefit of commerce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and the burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country.'

"The other case is Cross et al. *v.* Harrison, (16 Howard, 189, 190.) Judge Wayne, in delivering the opinion of the Supreme Court, says: 'Indeed, from the letter of the Secretary of State, and from that of the Secretary of the Treasury, we cannot doubt that the action of the military governor of California was recognized as allowable and lawful by Mr. Polk and his Cabinet. We think it was a rightful and correct recognition under all the circumstances; and when we say rightful we mean that it was constitutional, although Congress has not passed an act to extend the collection of tonnage and import duties to the ports of California. California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterwards the United States had military possession of all the Upper California. Early in 1847 the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports

§ 6. Public or solemn war.

A contest by force between independent sovereign States is called a public war. If it is declared in form,

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and tonnage as military contributions for the support of the government and of the army, which had the conquest in possession. No one can doubt that these orders of the President, and the action of our army and navy commanders in California, in conformity with them, were according to the law of arms.'"

On the same occasion it was held that "*war declared* by Congress is not the only war within the contemplation of the Constitution. In clause 15, article 1, section 8, among the legislative powers is this, 'to provide for calling forth the militia to *execute the laws* of the Union, suppress insurrections, and repel invasions;' and the legislature, in execution of this power, passed the act of 1795 (1 Statutes at Large, 424,) vesting in the President, under the terms set forth in the statute, discretionary power over the militia in the cases enumerated in this 15th clause of section 8, article 1. The *status* of foreign nations whose provinces or dependencies are in revolution, foreign invasion of our own country, and insurrection at home, are political questions, determinable by the executive branch of our government.

"In cases of invasion by a foreign power or insurrection at home, in which cases, under the act of 1795, the President may call out the militia, the Supreme Court, in the case of Martin *v.* Mott, (12 Wheaton, 29, 30,) (which referred to an invasion,) says it is exclusively with the President to decide whether the exigencies provided for have arisen. These, also, are political questions, determinable by the Executive alone; and the courts follow that branch of the government." Law Reporter, July, 1861, p. 148. District Court for District of Columbia, The Tropic Wind. Judge Dunlop's Opinion.

Among those who conceive that the provisions of the federal convention, in reference to persons and property, may be suspended by a state of insurrection or civil war, such as now exists in the United States, there is a difference of opinion as to whether the extraordinary power, which such suspension implies, is vested, as a war power, in the President alone, or whether it requires the authorization of Congress. In the Senate of the United States, Mr. Cowan, of Pennsylvania, said: "Cases may arise where the laws are inadequate to the preservation of the order and peace of society; not because they are not severe enough, but because they cannot be executed. That is the case now in eleven States of the Union, and the question is, what is the remedy? Since the laws are silent, the courts destroyed, and the will of the nation disregarded, how does the Constitution meet the emergency? Does it meet it, and effectually? I answer unhesitatingly it does, and as promptly as any other system of government in the world; and since the law is of no avail it resorts to force, military force — in other words, war; and those who resist are treated by this method the same as though they were alien enemies.

"Then, who shall make this war and determine how it shall be carried on? Shall it be Congress, the President, or the Judges? Some think the power is in Congress, because the Constitution confers upon that branch the power to declare war; but the power to declare war is not the power to make war, but simply the right to declare when the necessity for war had come. And it might just as well have been left to the Supreme Court to decide that question; and if it had, surely nobody would have contended that that Court would have been the war-making power." (Such, it may be noted, was the rule in the cases of insurrection under the act of May 2, 1792, which made the certificate of an associate justice or district judge an essential preliminary to the President's calling out the militia. Part I. ch. 2, § 24, Editor's note [41, p. 101.)

or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive

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"The Constitution declares that the President shall be the commander-in-chief of the army and navy, or, in other words, the force of the nation is put into his hands, investing him with the war-making power; and he must wield it until all resistance has ceased or till peace is made. He is the commander directing and controlling it as he pleases, and only restrained, in its exercise, so far by Congress in that he must depend upon them to foot his bills and authorize his levies. He organizes the forces, appoints the officers, directs their operations, and is responsible for the failure or success of the campaigns; and it makes no difference whether the enemies who resist him are alien enemies or disaffected citizens in revolt; he conducts the war upon the same principles in both cases. Indeed, these principles are now so well settled and agreed upon by the civilized nations of the world, that they have become part of a great general code called the 'Laws of Nations,' and which are obligatory upon all belligerents everywhere. In the conduct of the civil war now waging in this country, the President is guided and controlled by these laws, nor has the Congress any power whatever to alter or change them, and bind him by so doing against his consent." Cong. Globe, 1861–2, p. 1052, March 4, 1862.

On the other hand, Mr. Sumner, of Massachusetts, said: "In circumscribing the peace powers with constitutional checks, the framers of the Constitution declared that in the administration of the peace powers, all should be able to invoke the Constitution as a constant safeguard. But in bestowing upon the government war powers without limitation, they embodied in the Constitution all the rights of war, as completely as if those rights had all been set down and enumerated.

"But there are Senators who claim these vast war powers for the President, and deny them to Congress. The President, it is said, as commander-in-chief, may seize, confiscate, and liberate under the rights of war; but Congress cannot direct these things to be done. Where is the limitation upon Congress? Read the text of the Constitution, and you will find its powers as vast as all the requirements of war. There is nothing which may be done anywhere under the rights of war, which may not be done by Congress. I do not mean to question the powers of the President in his sphere, or of any military commander within his department. But I claim for Congress all that belongs to any government in the exercise of the rights of war. I mean for *an act of Congress*, passed according to the requirements of the Constitution by both Houses, and approved by the President. It seems strange to claim for the President alone, in the exercise of his single will, war powers which are denied to the President in association with Congress. Surely, if he can wield these powers alone, he can wield them in association with Congress; nor will their efficacy be impaired when it is known that they proceed from this associate will, rather than from his single will alone. The government of the United States appears most completely in an act of Congress. Therefore war is declared, armies are raised, rules concerning captures are made, and all articles of war regulating the conduct of war are established by act of Congress. It is by act of Congress that the war powers are at all put in motion. When once put in motion, the President must execute them. But he is only the instrument of Congress, under the Constitution of the United States.

"It is true the President is commander-in-chief; but it is for Congress to make all laws necessary and proper for carrying into execution his powers; so that, according to the very words of the Constitution, his powers depend upon Congress, which may limit or enlarge them at its own pleasure. Thus, whether you regard Congress

law of nations makes no distinction, in this respect, between a just and an unjust war. A war in form, or duly commenced, is

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or regard the President, you will find that Congress is the arbiter and regulator of the war powers." Ib. p. 2964, June 27, 1862.

The only question between the parties to the preceding discussions would seem to have been, whether the undefined power consequent on the suspension of the Constitution, was vested in Congress or whether it rested exclusively with the Executive.

We have hitherto had occasion to show the extent to which it is maintained by the present administration that this authority belongs to the President, by referring to the opinion of Attorney-General Bates, as well as to the announcement of Secretary Seward to Lord Lyons, that "he (the President) constitutionally exercises the right of suspending the writ of habeas corpus whenever and wheresoever, and in whatsoever extent the public safety, endangered by treason or invasion in arms, in his judgment requires." (Part I. ch. 2, § 24, Editor's note, [41, p. 100.)

It was maintained by those Senators who contended against the doctrine, that the Constitution of the United States, as regards the citizens wherever residing, was suspended in case of war or insurrection; that the power to proclaim martial law, asserted for the President, could only be rendered legitimate in the seceded States, and that it was so there, in consequence of regarding the territory as that of a belligerent, and applying to the opposite party in the civil war the same rules as govern in the case of public enemies. It could have no existence in loyal States.

Mr. Collamore, of Vermont, said: "As I read and understand the Constitution, citizens of the United States cannot be subject to court-martial or law-martial, unless they be members of the navy or army of the United States, or militia in actual service; that is, all persons must be subject to trial by the ordinary process of law and by jury on indictment in the State where the offence is committed, unless they be persons in the navy or army of the United States. The international law-writers hold that a civil war is to be managed and conducted upon the same rules as a war between belligerents generally. Under that view it seemed to me we could never get along but by declaring this rebellion a civil war. At the last session of Congress a law was passed authorizing the President of the United States to declare certain States, under certain circumstances, in a state of insurrection, and we then proceeded to deal with those States thus declared to be in a state of insurrection in the same manner that we deal with foreign nations when at war with them." Congressional Globe, 1861-2, p. 411, January 20, 1862.

Mr. Bayard, of Delaware, declared: "I know of no power, executive or legislative, to establish martial law within the United States. The honorable Senator [Mr. Cowan], tells you he admits that the President has no right as an executive power to suspend the writ of habeas corpus. He admits that there is a law which the President cannot suspend; but while he admits that, he says at the same time that the power exists in the Executive of the United States, — I suppose as commander-in-chief of the army, — to seize upon any rebel, whether he finds that rebel in a State in which the laws are existent, and in which courts are open, or in a State in which the laws are suspended by civil war. He makes no distinction.

"It is not merely a question whether the courts are open. Both the laws and the Constitution of the United States are suspended over that portion of the territory of the United States which is in the possession of an enemy, whether it be a foreign or domestic enemy; and, therefore, as the laws are suspended, it may be within the reach of the military power there, where no laws exist, just as it would be if you

to be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties is equally permitted to the other.[1]

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were invading a foreign country. But I deny, unless you mean to abrogate entirely the Constitution of the United States, that such a principle can apply to any portion of the territory of the United States in which the laws are not suspended in consequence of its being in possession of either a domestic or a foreign enemy, or in consequence of the courts not being open for the redress of personal grievances. The doctrine, if true, comes to this: that we are living under simply a military government; that, because war exists, — it matters not, or what purpose, whether that war is domestic or foreign, — that, therefore, a government of will on the part of the Executive is to be substituted in place of a government of laws. I admit no such doctrine." Ib. p. 518, January 28, 1862.

It may be mentioned in this connection, that the subject of the suspension of the habeas corpus in the United States has been, on two different occasions, before Congress; the first time, during the Presidency of Jefferson, in 1807, in consequence of the alleged conspiracy of the late Vice-President, Aaron Burr. An act to suspend the habeas corpus for three months unanimously passed the Senate on the 23d of January of that year, but was rejected in the House of Representatives, with almost equal unanimity, on the 26th of the same month. Tucker's Life of Jefferson, vol. ii. p. 218. Benton, Debates of Congress, vol. iii. pp. 490, 504. The parties, who had been arrested at New Orleans, by General Wilkinson, and sent to Washington, as implicated in the conspiracy, were committed on the charge of treason by the Circuit Court, but were discharged by the Supreme Court on habeas corpus. It was said by Chief Justice Marshall, in giving the opinion of the Court: "If at any time the public safety should require the suspension of the powers vested by this act (Judiciary Act of 1789), in the courts of the United States, it is for the legislature to say so. That question depends on political considerations on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws." Cranch's Reports, vol. iv. p. 75. *Ex parte* Bollman. It is, perhaps, due to those who sustain the Executive view, to state an objection of a distinguished jurist to the authority of this case. "There was nothing," he maintains, "before the Chief Justice to raise the distinction between Congress and the President; nor between the privilege of the writ as descriptive of a personal right, and the writ itself as authorized by law; nor between the operations of the Constitution itself and the operation of a law of Congress." Binney, Habeas Corpus under the Constitution, p. 38. Halleck, while admitting that the commentators on the Constitution, with whom Story is to be included, (Comm. vol. iii. § 1336,) have regarded this power to be in the legislature alone, says: "If the previous action of Congress be necessary, in each particular case, to render such suspension valid, it is evident that there can scarcely ever be a valid suspension of this writ, for 'the public necessity' will almost always have passed before any legislative action can be had in the premises. It would, therefore, seem more consonant with the principles of legal interpretation, and with the nature of the case, to regard this clause in the Constitution as a limitation of the general power existing in *the government*, rather than as conferring or delegating that power to any particular branch of the government; and, consequently, that this power does not belong *exclusively* to Congress, but may also be exercised by the Executive, subject always to his liability to impeach-

[1] Vattel, Droit des Gens, liv. iii. ch. 12. Rutherforth, Inst. b. ii. ch. 9, § 15.

§ 7. Perfect or imperfect war.

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

ment by Congress." International Law, p. 377. It may, perhaps, — if the language of the Constitution is not conclusive, — be admissible to inquire whether a system, like that practically existing in England, of acting, in extraordinary cases, on executive responsibility, looking to a bill of indemnity from Parliament, or the course pointed out by the Constitution of France, vesting the power of declaring a state of siege (*état de siège*) provisionally in the Emperor, "subject to a reference to the Senate with the least possible delay," with a law defining its operation, would not best conciliate promptness of action with security against undefined power.

The other occasion in which the subject of habeas corpus came before Congress was during the existing civil war. But, though a resolution was introduced in the Senate, on the 10th of July, 1861, declaring legal and valid, — in connection with various proclamations and acts to meet the exigencies of the insurrection, — orders given during the recess of Congress, by the President to military commanders, to suspend the writ of habeas corpus, no final action was taken, either at that or at the regular session of 1861-2, on any subject connected with that writ or with martial law. The act of August 6, 1861, § 3, only extended to the approval and legalization of the acts, proclamations, and orders after the 4th of March, 1861, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States. Cong. Globe, 1861, pp. 40, 452. Statutes at Large, 1861, p. 326.

There has been no opportunity, since the claim by the President in the present civil war to suspend the writ of habeas corpus, for the Supreme Court of the United States to review the decision in the case of Bollman. But before Congress could act on the President's proceedings, the opinion in that case was reiterated and affirmed by the present Chief Justice, and a direct issue made between the judiciary and executive, in consequence of the refusal of a military commander to produce a prisoner in his custody, in obedience to a writ issued by the Chief Justice. In concluding his judgment, Taney says: "The documents before me show that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has by force of arms thrust aside the judicial authorities and officers, to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted military government in its place, to be administered and executed by military officers. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. And yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed, he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without even a hearing before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him. I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer, who has incurred this grave responsibility, may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall therefore order all the proceedings in

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.[1]

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this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation, to 'take care that the laws be faithfully executed;' to determine what measures he will take to cause the civil process of the United States to be respected and enforced." Law Reporter, June, 1861, p. 89. *Ex parte* Merryman.

That the military authority cannot, in consequence of the existence of a foreign war, suspend the writ of habeas corpus, was held in a case which arose during the war of 1812. The Supreme Court of New York, over which Chief Justice, afterwards Chancellor, Kent presided, directed an attachment to issue against the commanding officer of the United States forces at Sackett's Harbor, for an evasive return to a writ directing him to produce the body of a person held in his custody. It seems that he had been delivered to the Provost Marshal, charged with an act of high treason against the government of the United States, alleged to have been committed within the territory of Great Britain. The Chief Justice, in conclusion, says: "If ever a case called for the most prompt interposition of the court to enforce obedience to its process, this is one. A military commander is here assuming criminal jurisdiction over a private citizen, is holding him in the closest confinement, and contemning the civil authority of the State." Johnson's Rep. vol. x. p. 332, Matter of Stacy. See, also, Martin's Louisiana Reports, vol. iii. p. 531, Johnson *v.* Duncan.

"How intimate the relation is, or may be, between the proclamation of martial law and the suspension of the writ of habeas corpus," said Mr. Cushing, in 1857, in a case arising in one of the territories, "is evinced by the particular facts of the case before me, — it appearing, as well by the report of the Governor as by that of the Chief Justice, that the very object for which martial law was proclaimed, was to prevent the use of the writ in behalf of certain persons held in confinement by the military authority, on the charge of treasonable intercourse with hostile Indians. That, however, is but one of the consequences of martial law, and by no means the largest or gravest of those consequences, since, according to every definition of martial law, it suspends, for the time being, all the laws of the land and substitutes in their place no law, that is, the mere will of the military commander.

"When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact rather than the legal creation of that fact. In a beleaguered city, for instance, the state of siege lawfully exists, because the city is beleaguered; and the proclamation of martial law, in such case, is but notice and authentication of a fact, — that civil authority has become suspended, of itself, by the force of circumstances, and that by the same force of circumstances the military power has devolved upon it, without having authoritatively assumed the supreme control of affairs, in the care of the public safety and conservation. Such, it would seem, is the true explanation of the proclamation of martial law at New Orleans by General Jackson." Opinions of Attorneys General, vol. viii. p. 373.

[1] Such were the limited hostilities authorized by the United States against France in 1798. Dallas's Rep. vol. ii. p. 21; vol. iv. p. 37.

A civil war between the different members of the same society is what Grotius calls a *mixed* war; it is, according to him, *public*

The common-law authorities and commentators are singularly wanting as to the definition of martial law, and they even confound it with military law or the rules and articles of war for the government of the land and naval forces. The Duke of Wellington, when declaring that "martial law was neither more nor less than the will of the general who commands the army," referred to his own administration of it in a foreign country where, he said, he governed strictly according to the laws of that country; and he governed with so much moderation that the judges sat in the courts of law conducting their judicial business and administering the law under his direction. Hansard's Parl. Deb. 3d series, vol. cxv. p. 880, April 1, 1851.

Without going back to Magna Charta, or to the circumstances that induced the famous act of 31 Charles II. ch. 2, (see Hallam's Constitutional History of England, vol. iii. ch. 18, p. 236,) when, for whatever cause the ordinary administration of justice has been arrested in any part of Great Britain, recourse has been had to Parliament, either to authorize martial law in advance or to indemnify ministers for the responsibility assumed in suspending the writ of habeas corpus. The act of 57 Geo. III. ch. 3, for the case of an apprehended insurrection in the metropolis and in many other parts of Great Britain, the indemnifying act of 58 Geo. III. ch. 6, and the act of the 3 and 4 Geo. IV. ch. 4, designed for the suppression of local disturbances in Ireland, are cited by Mr. Gushing as examples of enactments to give constitutional existence to the fact of martial law. "These examples show," he says, "that in the opinion of the statesmen of that country, the general fact of the existence of martial law and its incident, the suspension of the writ of habeas corpus, alike require the exercise of the power of the supreme legislative authority." Opinions of Attorneys General, *loc. cit.* See, also, Stephen's (Blackstone's) Comm. vol. i. p. 147.

So far as regards the exceptional condition of things growing out of the suspension of the ordinary administration of justice, either by war or invasion, it would seem that there exists in the States of the continent of Europe a greater security for personal rights than in the United States or England, where, the ordinary guarantees once removed, everything is left to the mere will of the executive government. The *état de siège*, which corresponds with the suspension of the habeas corpus or with martial law, is regulated by a permanent law. It is defined to be, in France, "a measure of public security, which temporarily suspends the empire of the ordinary laws in one or more cities, in a province, in an entire country, and then considers them to be subject to the laws of war." Before 1789, no legislative provision had defined what should be understood by a state of siege, though it had often occurred. The law of the 10th of July, 1791, provided for the case of defence against foreign invasion, that of the 10th of Fructidor, year v., extended its provisions to the case of internal insurrection. This law has only since been modified by the imperial decree of December 24, 1811, and the law of the 9–11th of August, 1849, which now regulates the whole matter. Bouillet, Dictionaire des Sciences, &c., p. 622.

By the 12th article of the Constitution, of the 14th of January, 1852, modified by the Senatus Consulte of the 7–10th of November, 1852, reëstablishing the imperial dignity, "the Emperor has the right to declare a state of siege (*état de siège*) in one or more departments, subject to a reference to the Senate with the least possible delay, (*sauf à en référer au Sénat dans le plus bref délai.*) The consequences of a state of siege are regulated by law." Tripier, Code Politique, p. 389. The law applicable to this article is, as above stated, that of the 9–11th of August, 1849. It provided that the state of siege can only be declared in case of imminent peril for the internal or

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

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external security; and that the National Assembly can alone declare it, except that the President of the Republic may declare it during the prorogation of the Assembly, subject, in grave cases, to immediately convening the Assembly. The declaration of a state of siege indicates the communes, arrondissements, and departments to which it applies and to which it shall be extended. In particular cases, the governors of colonies, and commandants of military posts and places, may declare a state of siege, but they are to render an immediate report; and if the government does not think proper to raise the siege, a proposition must be made without delay to the legislature to maintain it.

In case of the declaration of a state of siege, the powers, with which the civil authority was invested for the maintenance of order and police, pass entirely to the military authority. The civil authority continues, nevertheless, to exercise those powers of which the military authority has not divested it. The powers, with which the military tribunals and military authority are invested by a state of siege, are expressly defined; and it is provided, that "the citizens continue, notwithstanding the state of siege, to exercise all the rights guaranteed by the Constitution, the enjoyment of which is not suspended by virtue of the preceding articles." Ib. pp. 367, 376. It has been decided by the Court of Cassation that the law of the 9–11th of August, 1849, upon the state of siege, in deferring to military tribunals, in the cases for which it provides, the crimes and offences committed by citizens in the military service, in nowise restricts the right of persons, not in the military service, who may have been condemned by them, to appeal to the Court of Cassation against their judgments, for want of jurisdiction, (*se pourvoir en cassation pour cause d'incompétence ou d'excès de pouvoir.*) De Villeneuve et Gilbert, Jurisprudence du XIX. siècle, tom. i. p. 506.

The Constitution of Belgium, — which is inferior to none in Europe as to the guarantees of individual liberty and private rights, — expressly provides that the king has no other power than those which the Constitution, and the laws passed in accordance with the Constitution, give him; and it declares, that the Constitution cannot be suspended in whole or in part. Code Civil Belge, §§ 7, 8, 10, 12, 78, 130.

By the *statuto* of Charles Albert, — now the organic law of Italy, — while the king makes the decrees and regulations necessary for the execution of the laws, he is prohibited from suspending them or dispensing with the observance of them. Art. 6. And in the war of 1859, when it was requisite for the very existence of Sardinia that the executive government should be invested with extraordinary authority, his minister, Cavour, asked of the Chambers full powers for the king, including the right of suspending the liberty of the press, and individual liberty, and, in doing so, he added that the institutions of the country would remain intact, and that the question was only with regard to a momentary suspension. Annuaire des deux mondes, 1858–9, p. 197. Statuto, art. 26, 27, 28.

The Spanish Constitution, as modified in 1857, provides, —

"Tit. 1. Art. 7. No Spaniard shall be detained, nor taken, nor removed, from his house, nor shall his house be entered except in the cases and in the form which the laws prescribe.

"Art. 8. If the security of the State should require, under extraordinary circumstances, the temporary suspension in all the monarchy, or in a part of it, of the

parties to all the rights of war as against each other, and even as respects neutral nations.[1] [171

provision in the preceding article, the suspension shall be determined by a law." Cos-Gayon, Diccionario de Derecho Administrativo Español, p. 860.

But, whatever may be the inference to be deduced either from constitutional or international law, or from the usages of European governments, as to the legitimate depository of the power of suspending the writ of habeas corpus, the virtual abrogation of the judiciary in cases affecting individual liberty, and the establishment, as *matter of fact*, in the United States, by the Executive alone, of martial law, — not merely in the insurrectionary districts or in cases of military occupancy, but throughout the entire Union, and not temporarily, but as an institution as permanent as the insurrection on which it professes to be based, and capable on the same principle of being revived in all cases of foreign as well as civil war, — are placed beyond question by the President's proclamation of September 24, 1862. It was issued two days after the proclamation for the emancipation of the slaves in the insurgent States; for which see § 5, ch. 2, of this Part, Editor's note. The proclamation respecting martial law is as follows: —

"Whereas, It has become necessary to call into service, not only volunteers, but also portions of the militia of the States by draft, in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection, Now therefore, be it ordered, that during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practices affording aid and comfort to the rebels, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commission.

"Second. That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be imprisoned in any fort, camp or arsenal, military prisons, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission."

To give effect to this measure, a national police was instituted, and a Provost Marshal-General, by an order of the War Department of September 26, 1862, appointed at Washington, with one or more Provost Marshals in each State, whose duty it is made, besides arresting all military deserters and sending them to the nearest military commander or military post, to arrest, upon the warrant of the Judge Advocate-General, all disloyal persons subject to arrest under the orders of the War Department; to inquire into and report treasonable practices; to detect spies of the enemy, and perform such other duties as may be enjoined upon them by the War Department, and report all their proceedings promptly to the Provost Marshal-General.

To enable those special Provost Marshals to perform their duties efficiently, they are authorized to call on any available military force within their respective districts, or else to employ the assistance of citizens, constables, sheriffs, or police-officers, so far as may be necessary, under such regulations as may be prescribed by the Provost Marshal-General, with the approval of the Secretary of War, or of the War Department. Public Journals.] — *L.*

[1] Vide ante, Part I. ch. 2, §§ 7–10, pp. 39–46.

[171] Publicists distinguish between popular commotion (*émotion populaire*) or

§ 8. 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

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tumultuous assemblage, which may be directed against the magistrates or merely against individuals; sedition, (*sédition*,) applying to a formal disobedience particularly directed against the magistrates or other depositories of public authority; and insurrection, (*soulèvement*,) which extends to great numbers in a city or province, so that even the sovereign is no longer obeyed; and *civil war*. Popular commotion, sedition, and insurrection are all State crimes, even though arising from just causes of complaint; every violent measure being interdicted in civil society. These cases are always supposed to be susceptible of being suppressed by the sovereign; and it is usual, in doing so, to grant an amnesty in all but exceptional cases.

A *civil war* is when a party arises in a State which no longer obeys the sovereign, and is sufficiently strong to make head against him, or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms. Usage applies the term civil war to every war between members of the same political society. If it is between a part of the citizens on the one side, and the sovereign and those who obey him on the other, it is sufficient that the malcontents have some reason to take up arms, in order that the disturbances should be called *civil war*, and not *rebellion*. The prince never fails to call rebels all his subjects who openly resist him; but when the latter become sufficiently strong to make head against him, to compel him to carry on war regularly against them, he must be contented with the term *civil war*. Civil war breaks the bonds of society and of the government; it gives rise in a nation to two independent parties, who acknowledge no common judge. They are in the position of two nations who engage in disputes, and, not being able to reconcile them, have recourse to arms. The common laws of war are in civil wars to be observed on both sides. The same reasons which make them obligatory between foreign States, render them more necessary in the unhappy circumstances where two exasperated parties are destroying their common country. If the sovereign considers himself authorized to hang prisoners as rebels, the opposite party will have recourse to reprisals; if he does not religiously observe the capitulations and all the conventions made with his enemies, they will not trust to his word; if he burns and devastates, they will do the same: war will become cruel, terrible, and always more destructive to the nation. When the sovereign has conquered the opposite party, and obliged it to demand peace, he may except from the amnesty the authors of the troubles, the chiefs of the party, cause them to be judged according to the laws, and punish them if found guilty. When a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the State is dissolved, and the war betwixt the two parties, in every respect, is the same as that of a public war between two different nations. The obligation of observing the common law of war is, therefore, absolutely indispensable to both parties, and the same which the law of nature obliges all nations to observe between State and State. Vattel, Droit des Gens, liv. iii. ch. 18, §§ 290–295.

Riquelme says, "When a part of a State takes up arms against the government, if it is sufficiently strong to resist its action, and to constitute two parties of equally balanced forces, the existence of civil war is thenceforward determined. If the conspirators against the government have not the means of assuming this position, their movement does not pass beyond a rebellion. As true civil war breaks the bonds of society, by dividing it in fact into two independent societies, it is for this consid-

the middle of the seventeenth century. The latest example of this kind was the declaration of war by France against Spain, at

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eration that we treat of it in international law, since each party forming as it were a separate nation, both should be regarded as subject to the laws of war. This subjection to the law of nations is the more necessary in civil wars, since these, by nourishing more hatreds and resentments than foreign wars, require more the corrective of the law of nations in order to moderate their ravages.

"When civil wars do not terminate by the permanent division of the State, but by the triumph of one of the parties, or by the friendly agreement of both, this termination, instead of being confirmed by a treaty of peace, should be guaranteed by an amnesty. Amnesty signifies a complete oblivion of the past, rendering the political and social condition of the vanquished equal to that of the conqueror. When an amnesty is published, it is not lawful for any judicial or political authority to proceed for any acts which would not have merited punishment if the cause of those who are admitted to the amnesty had triumphed. Ordinary crimes, of course, are not included in the amnesty." Elementos de Derecho público, cap. xiv. tom. i. p. 172.

Bello says: "When a faction is formed in a State, which takes up arms against the sovereign, in order to wrest from him the supreme power, or impose conditions on him; or when a republic is divided into two parties which mutually treat each other as enemies, — this war is called *civil war*, which means war between fellow-citizens. Civil wars frequently commence by popular tumults, which in nowise concern foreign nations; but when one faction or party obtains dominion over an extensive territory, gives laws to it, establishes a government in it, administers justice, and, in a word, exercises acts of sovereignty, — it is a person in the law of nations; and however so much one of the two parties gives to the other the title of rebel or tyrant, the foreign powers which desire to maintain their neutrality ought to consider both as two States, independent as respects one another and other States, and who recognize no judge of their differences.

"When a sovereign has conquered the party opposed to him, and obliged it to demand peace, it is customary to concede to it a general amnesty, excepting from it the authors and chiefs, whom he may punish according to the laws. Monarchs have too often violated the promises of oblivion and clemency, of which they availed themselves to terminate a civil war, and there has not been wanting legislation, which expressly sanctions the infidelity, regarding as null every compact or capitulation between the sovereign and his rebel subjects; but in the present day no civilized government would dare to profess such a principle." Principios de Derecho internacional, cap. x. p. 267.

That conciliatory, and not vindictive, measures are demanded by considerations of policy not less than of humanity, in civil war, is strongly maintained by Olmeda. Derecho público de la Guerra, lib. i. cap. 3, tom. ii. p. 20.

Such are the views of modern writers. Grotius, also, denies the right of a sovereign to dispense with keeping his word with deserters or rebels after treating with them, on the pretext of the punishment, which might rightfully be inflicted on them. Good faith, he says, should be maintained even with slaves. De Jur. Bel. ac Pac. lib. iii. cap. 19, § 6. On the other hand, Balthazar Ayala, who was Judge-Advocate of the Spanish army in the Netherlands, under the Prince of Parma, writing in 1581, declares that neither rebels nor pirates are to be considered as public enemies; that they are not entitled to the rights of war in respect to captures and postliminy. Property taken by them is not lost to the original owners. But things taken from them become the

Brussels, in 1635, by heralds at arms, according to the forms observed during the middle age. The present usage is to publish

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property of the captors, as if taken from a public enemy. Compacts with rebels he decides to be absolutely void, as well as those made with tyrants; by which term he means usurpers, since he had before enforced the duty of passive obedience to lawful princes, however cruel and oppressive their conduct. Compacts which a people in rebellion unjustly extort from their prince, he says, are not binding. Wheaton's History of the Law of Nations, p. 43.

The position of the most loyal individuals in case of civil war, where the government is temporarily overturned, is far from being free from embarrassment. And these difficulties are greatly increased in a complex system, like a confederacy or union of States, when the local government, which is brought through the ordinary administration of justice in direct contact with the people, is at variance with the paramount national or federal authority, and all the inhabitants, in consequence of their mere residence in an insurrectionary district, are placed out of the pale of the protection of the general government, and their property made liable to condemnation as that of an enemy.

It has been held in England that the statute of treason applies to a king *de facto* and not *de jure;* "that a usurper that has got possession of the throne is a king within the meaning of the statute, as there is a temporary allegiance due to him for his administration of the government and temporary protection of the public; and therefore treasons committed against Henry VI. were punished under Edward IV., though all the line of Lancaster had been previously declared usurpers by act of Parliament. But the most rightful heir of the crown, or king *de jure*, and not *de facto*, who hath never had plenary possession of the throne — as was the case of the House of York during the reigns of the line of Lancaster — is not a king, against whom treason may be committed. And Hale (1 P. C. 104) carries the point of possession so far, that he holds that a king out of possession, is so far from having any right to our allegiance by any other title which he may set up against the king in being that we are bound by the duty of our allegiance to resist him. The true distinction seems to be that the statute of Henry VII. does by no means *command* any opposition to a king *de jure*, but *excuses* the obedience paid to a king *de facto*. When, therefore, an usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance; otherwise under an usurpation no man would be safe, if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience." Stephen's (Blackstone's) Commentaries on the Law of England, vol. iv. p. 221.

"The statute of Henry VII., in effect, declared the constitutional principle to be, — that allegiance to a king *de facto* protects the subject from future question; it was brought into operation at the critical period of the revolution, when it was made the justification of the acceptance of William III. as king, by many who found difficulty in getting over the divine right of James II." Rowland, Manual of the English Constitution, p. 162.

The English law, in its application to the seizin of real estate, furnishes a very convenient rule, by which to determine the existence of civil war and its consequences.

"When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as

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.[1]

§ 9. Enemy's property found in the territory

As no declaration, or other notice to the enemy, of the existence of war, is necessary, in order to legalize hostilities, and as the property of the enemy is, in gen-

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it were shut up, *et silent inter leges arma*, then it is said to be time of war." Coke, Commentary on Littleton. Lib. iii. cap. 6, § 412, p. [249, *b.*]

Not only are private individuals exempt from penalties for acquiescing in a government *de facto*, which exercises undisputed sway, and when all protection is withdrawn, from necessity or otherwise, by the previous government; but it is obvious that some police regulations and the administration of justice in every country, even during a revolutionary struggle, are essential to prevent anarchy and its attendant consequences. As Grotius said: "The acts of sovereignty which a usurper exercises, even before he has acquired an established right by long possession or convention, and while his possessory title is unjust, may be obligatory not in virtue of his right, — for he has none, — but because there is every reason to suppose that the legitimate sovereign, whether people, king, or senate, would prefer that the usurper should be temporarily obeyed, than that the administration of the laws and justice should be interrupted, and the State exposed to all the disorders of anarchy." De Jur. Bel. ac Pac. lib. i. cap. 4, § 15. No exception was ever taken by the most scrupulous loyalist to the acceptance by Sir Matthew Hale of a seat on Cromwell's bench of judges; nor did it operate as a disqualification for his holding the same position on the return of Charles II. No change, it is believed, has taken place in the judicial hierarchy of France, since the tumultuous days of the first revolution, in consequence of her repeated dynastic and other constitutional revolutions. And in reference to the implied obligation of the conquered party in the case supposed, it is said by the most recent American author on international law, and who combines the highest attainments of a publicist with the first military rank, that "although there is a broad and obvious distinction between an insurrection of a conquered city or province against the conqueror, and a revolution against an established government, yet it will be found on examination that both rest upon the same general principle — the relation of protection and allegiance, or the reciprocity of right and obligation." Halleck, International Law, p. 792.] — *L.*

[1] Grotius, de Jur. Bel. ac Pac. lib. i. cap. 3, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2. Rutherforth's Inst. b. ii. ch. 9, § 10. Vattel, Droit des Gens, liv. iii. ch. 4, §§ 51–56. Klüber, Droit des Gens Moderne de l'Europe, §§ 238, 239.

eral, 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.

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?

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. 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 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. Against the ancient examples cited by him, there is the negative usage of the subsequent period of nearly a century and a half previously to the wars of the French Revolution. 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 honor; 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."[1]

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 sequestrated, in order to prevent their being remitted to the enemy. As 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

[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 16. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2, 7. Letters of Camilus, by A. Hamilton, No. 20.

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.

favor: 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 rigor. 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 neither detain those subjects of the enemy who were within his dominions at the time of the declaration, nor their effects. They came into this 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."[1]

It appears, then, to be the modern rule of international usage, 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 be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus en-

[1] Vattel, Droit des Gens, liv. ii. ch. 18, § 344; liv. iii. ch. 4, § 63; ch. 5, §§ 73–77.

forced, it cannot be considered as an inflexible, though an established rule. "The rule," as it has been beautifully 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." [1] [[172]

§ 10. 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

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[1] Mr. Chief Justice Marshall, in Brown *v.* The United States, Cranch's Rep. vol. viii. p. 110.

[[172] Earl Russell incorporates the paragraph of the text here noted, in a dispatch of December 6, 1861, to the British consul at Richmond, in reference to the act of the Confederate Congress of August 21, 1861, confiscating the property of whatever nature, except public stocks and securities, held by an alien enemy, and which is made to apply to all persons having a domicile in the States with which the government of the Confederate States is at war, no matter whether they be citizens or not of such government. He adds: "The observations of Wheaton which I have cited apply to the existence of an ordinary state of war between two independent and foreign nations. But in the present case they apply with still more force against the exercise of the right in question; for the present is a case of civil war between the different parts of one confederation, during whose union the subjects of foreign States were invited and induced to settle indiscriminately in its various States, without any ground for contemplating such a disruption as has now occurred. No notice has been given to them, nor time allowed, which would enable them to prepare for such an emergency, or to separate their affairs from those of the citizens of either belligerent; and though technically they are liable to be considered enemies by one or other of the belligerents, as the case may be, it is impossible to treat them as such without gross injustice and a breach of that faith to which every State of the American Union was originally a party." Lord Russell had previously said, that "whatever may have been the abstract rule of the law of nations on this point in former times, the instances of its application in the manner contemplated by the act of the Confederate Congress, in modern and more civilized times, are so rare, and have been so generally condemned, that it may also be said to have become obsolete." Parliamentary Papers, 1862, Correspondence relating to Civil War in the United States, p. 108.] — *L.*

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."[1] 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."

§ 11. Droits of Admiralty.

The ancient law of England seems thus to have surpassed in liberality its modern practice. In the recent maritime wars commenced by that country, it has been the constant usage to seize and condemn as droits of admiralty the property of the enemy found in its ports at the breaking out of hostilities; and this practice does not appear to have been influenced 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."[2] [173]

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[1] Robinson's Adm. Rep. vol. i. p. 64, The Santa Cruz.

[2] Chitty's Law of Nations, ch. 3, p. 80.

[173] When war breaks out between two maritime powers, the principle is, that the merchant vessels of one of them that are in the ports of the other cannot be considered as prizes, and that they have the privilege of leaving those ports to return to their own country; this principle is consecrated by a great number of treaties, several of which have even fixed the delay during which they may enjoy this immunity. It is true that, in practice, the belligerents rarely respect this law, and that often the first act of the war is to seize all the vessels become enemy's vessels, that are in the ports of the belligerent, which came there upon the faith of treaties and of peace;

Seizure of enemy's property found within the territorial limits of the belligerent State, on the declaration of war.

During the war between the United States and Great Britain, which commenced in 1812, it was determined by the 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

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but this violation of the public faith, unfortunately too frequent, does not destroy the law, the undisputed and the indisputable law. The reason which dictated this principle for vessels in a port become enemy's at the moment of the declaration of war, has caused it to be extended to those vessels which, being on their voyages, at the same time, are met by cruisers on the ocean. A sufficient delay is granted to them to put themselves in a place of safety. In this respect there is no doubt as to the law, but it must be admitted as to this second point, as well as to the first, that it is very rarely respected. It, however, exists, and facts to the contrary cannot annul it. All the authors admit the rule in both cases. Among the treaties which Hautefeuille adduces as an evidence of the conventional law of nations on this point, are those concluded between France and England and France and Holland, at Utrecht, and which, confirmed by all subsequent treaties down to the period of the French Revolution, are treated as declaratory of permanent principles. At the same time, the frequent infraction of the rule by Great Britain, including the capture of the French fishing-vessels on the Banks of Newfoundland, in 1779, before a declaration of war, with her constant practice of seizing, as *droits* of admiralty, all vessels of the adverse belligerent, in her ports at the breaking out of hostilities, is adverted to. The same rule M. Hautefeuille also applies to the case of neutrals, who may have contraband articles on board, or who have sailed in ignorance of the war, without the papers required during a war to establish their nationality. Droits des Nations Neutres, tit. xiii. ch. 1, sect. ii. § 2, tom. iv. p. 267; tom. iii. pp. 278–281, 2me edit.

Another French authority considers, with Vattel, the immunity, at the commencement of the war, of individuals from being made prisoners, and of vessels from being confiscated in the enemy's territory, to stand on an equal footing. "Thus, the sovereign who declares war, or against whom it is declared, cannot retain as prisoners the subjects of the enemy who are in his State at the moment of the declaration more than he can their movable effects." Massé, Droit Commercial, liv. ii. tit. i. ch. 2, sect. i. § 1, tom. i. p. 140. "As we have seen, a belligerent State cannot retain in its ports the enemy's vessels which are there at the moment of the declaration of war. There should be a delay accorded to them, to enable them to leave the ports." Ib. § 2. To the same effect is Azuni, Droit Maritime de l'Europe, ch. 4, art. 1, § 7, tom. ii. p. 287.

The English text-writers, to the time of the Russian war, continued to maintain the existence of the right to seize, according to their former usage, on the authority of the crown, and without any express act of Parliament to sanction it, enemy's property, which had come within their control on the faith of a different state of political relations. One of them specially invokes as authorities for this position Chancellor Kent, (Kent's Commentaries, vol. i. p. 59,) and the decision of the Supreme Court of the United States, in Brown *v.* The United States, (Cranch's Rep. vol. viii. p. 110,) which is, indeed, the case quoted at length in the text, as well as the one to which Chancellor Kent also refers. Manning's Commentaries on

law of Congress declaring war was not such an act. That declaration did not, by its own operation, so vest the property of

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the Law of Nations, p. 127. As to the case from Cranch's Reports, Mr. Manning omits to notice the fact that the sentence of the Court below, condemning the property, was annulled and reversed by the Supreme Court, and that it was decided, that, owing to the distribution of powers under our Constitution, to render effective the belligerent right to seize enemy's property found in the United States at the commencement of the war, an express act of Congress, which had never been passed, was requisite, and that its confiscation was not a consequence of the declaration of war, without further legislation.

Among other modifications of the course adopted by England, during the wars consequent on the French Revolution, by which her former practice was altered to conform to that proclaimed by France, and which, in this particular, was similar to that pursued by Turkey and Russia, may be noticed the orders issued by the two great maritime allies, in reference not only to the vessels belonging to their enemy's subjects, which were in their ports at the declaration of the war, but to all other Russian vessels, which had left their own country before they were apprised of the hostilities, and had not reached their destination. The British Order in Council, of the 29th of March, protected a Russian vessel, which left a Russian port, before the time fixed in the order, though it may have taken its cargo on board since the date of the order. De Pistoye et Duverdy, Traité des Prises Maritimes, tom. i. p. 132. English Court of Admiralty, 15th of August, 1854, The Argos.

The Paris Moniteur, of March 28, 1854, contained a declaration of the preceding day, issued in accordance with England, by whose government an Order in Council, to the same effect, was promulgated, bearing date the 29th of March: —

By this order, six weeks from the date were granted to Russian ships of commerce to quit the ports of France. Those Russian ships which were not actually in French ports, or which might have left the ports of Russia previously to the declaration of war, might enter into the French ports, and remain there for the completion of their cargoes until the 9th of May, inclusive. Those vessels which should be captured by French cruisers after having left the Russian ports, were to be released if they could establish, by the ships' papers, that they were proceeding direct to the place of destination, and had not yet arrived there.

The Moniteur also announced that the subjects of Russia might continue their residence in France, under the protection which the law provides for foreigners, the only condition being that they respect those laws. The Russian declaration of the 7th (19th) April, 1854, promised protection, so far as their persons and property were concerned, to all British and French subjects without exception (to whatever trade or profession they might belong,) who, quietly attending to their business, observed the established laws of the country and refrained from all acts forbidden by them. Hosack, Rights of Neutrals, p. 113, App.

Further indulgencies in connection with the recognition of neutral rights, were granted by both governments, to the effect of the Orders in Council, of the 15th of April, which were officially communicated by the British Minister to the American Secretary of State, on the 9th of May.

One of these orders, after referring to the Order of Her Majesty in Council, of the 29th of March, in which it was, among other things, ordered "that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forth-

the enemy in the government, as to support judicial proceedings for its seizure and confiscation. It vested only a right to confis-

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with to depart without molestation; and that any such vessel, if met with by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded;" further ordered "that any Russian merchant vessel which, prior to the 15th day of May, 1854, shall have sailed from any port of Russia situated either in or upon the shores or coasts of the Baltic Sea or of the White Sea, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such last-mentioned port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded." London Gazette, 18th of April, 1854. Cong. Doc. 33d Cong. 1 Sess. H. R., No. 103, p. 5. Mr. Crampton to Mr. Marcy, 9th of May, 1854.

Similar orders were issued by the French government, but it was subsequently explained that the relaxation was restricted to Russian vessels destined to and leaving English or French ports, and was not intended to apply to those leaving neutral ports. Annuaire, &c., 1853–4, App. p. 913, Circulaire du Ministre de la Marine. The other Order in Council of the 15th of April, and which allowed trade in neutral vessels by British subjects to enemy's ports, is, as well as the Russian declaration, permitting imports by English and French subjects, more fully discussed in Editor's note to § 13, p. 553, *infra*.

On occasion of the declaration of war by the Ottoman Porte against Russia, in October, 1853, and which preceded, several months, the hostilities of England and France with the latter power, a notice was issued by the Russian government to the effect that, as the Ottoman Porte had not imposed an embargo on Russian ships in its ports, and had promised to grant them sufficient delay to repair to their destination, and also not to oppose the free passage of the ships of friendly nations through the Straits to the Black Sea, the Russian government, on its part, grants liberty to the Turkish vessels in its ports to return to their destination till the 10th (22d) of November, and that, even after that date, Turkish vessels loaded on neutral account, if met at sea, might proceed to the port of destination with their cargoes, in case their papers proved that they were loaded before the time mentioned. The notice in other respects conforms the action of the Russian government to that of Turkey, authorizing the capture and condemnation of neutral goods found in enemy's vessels, and allowing entire freedom of commerce to neutral vessels. Ib. App. p. 926. Avis du Ministre des Finances dans le Journal de St. Petersbourg, le 25 Octobre, (6 Novembre) 1853.

But after the declarations of war by England and France against Russia, the Russian Minister of Finance published a notice in the Gazette du Commerce, on 19th of April, 1854, allowing English and French vessels six weeks from the 25th of April to take on board their cargoes and sail from Russian ports in the Black Sea, the Sea of Azof, and the Baltic, and six weeks, from the opening of navigation, to leave the ports of the White Sea. The notice also declared that enemy's property in neutral bottoms would be regarded as inviolable, and might be imported, in them, into Russia, and that the property of neutral powers on board of enemy's ships would not be subject to confiscation, except articles contraband of war, the carrying of which would render even a neutral vessel a good prize. It was further provided that English and French vessels if met at sea, after the time limited, might continue their voyages, if their papers showed that their cargoes had been taken on board before

cate, the assertion of which depended on the will of the sovereign power.

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the expiration of the prescribed period. Ib. App. p. 928. Hosack, Rights of Neutrals, p. 57, App. 112. In the notice sent on the 23d of May, 1859, by Count Cavour to the American Minister at Turin, Mr. Daniel, and which recognized for the then pending war the Paris declaration of maritime law, of April 16, 1856, it is stated that Austrian subjects now in the Royal State may continue their residence, until their conduct gives ground for objection, and that Austrian subjects may be permitted to enter the States of the king on obtaining special authorization. He says: "As to the capture of the Austrian vessels in our ports, on which an embargo has been placed, the government reserves its decision." Department of State MS.

On the 8th of August, 1861, an act was passed by the Congress of the so-called Confederate States, providing that, whenever a declaration of war was made between those States and any foreign nation or government, all native citizens, denizens or subjects of the hostile nation or government, being males of fourteen years of age and upwards, who shall be within the Confederate States and not citizens thereof, shall be liable to be apprehended, restrained or secured and removed as alien enemies. Moore's Rebellion Record, vol. ii. p. 492. And, in accordance with this act, a proclamation was issued by President Davis, on the 14th of August, 1861, ordering all citizens of and adhering to the government of the United States, who came within the description of the act, (with certain reservations in favor of such persons residing in and declaring their intent to become citizens of the Confederate States, and of certain citizens of Delaware, Maryland, Kentucky, Missouri, District of Columbia, Arizona, New Mexico, and the Indian territory south of Kansas,) to depart from the Confederate States within forty days. Ib. p. 562.

The previous act of May, 1861, of the Confederate States, recognizing the existence of war between them and the United States, provides "that vessels of the citizens or inhabitants of the United States now in the ports of the Confederate States, except such as have been, since the 6th of April last, or may hereafter be in the service of the government of the United States, shall be allowed thirty days, after the publication of this act, to leave said ports and reach their destination; and such vessels and their cargoes, excepting articles contraband of war, shall not be subject to capture under this act, during said period, unless they shall have previously reached the destination for which they were bound on leaving said ports." Ib. p. 195. The act of the Congress of the United States, of July 17, 1861, which authorizes the President to declare the inhabitants of a State to be in a state of insurrection, enacted that from and after fifteen days after the issuing of the proclamation, any ship or vessel belonging, in whole or part, to any citizen or inhabitant of such State, found at sea, or in any port of the rest of the United States, shall be forfeited. Statutes at Large, 1861, p. 257. But this provision did not give any temporary immunity from capture to vessels belonging to inhabitants of insurgent districts. It was held by the District Courts of Pennsylvania and New York, in advance of any action of Congress, that the President's proclamation of the 15th of April, 1861, declaring the existence of an insurrection constituted a state of war, authorizing captures to be made by our public ships, and the prize courts to condemn them. And, in the District of Massachusetts, it was decided in a case where the capture was made before the passage of the above law, though the condemnation took place afterwards, that the District Courts of the United States were permanent prize tribunals, and took cognizance of questions of prize by virtue of their general jurisdiction, without any special authority being

The judgment of the Court stated, that the universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but that it simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason draws 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. The inquiry was, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends upon the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives

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imparted for the occasion, and that the acts of Congress passed in the summer of 1861, were intended to make the prosecution of the war more efficient, and in no degree to curtail the authority which the President already possessed. The belligerent right of capture at sea previously existed. In that case, also, it was maintained, that in those States whose State organization had recognized the Southern Confederacy, all the inhabitants were, as to captures, to be treated as enemies, without reference to their individual action. And this was held to be the case, even where a new State organization, as in Virginia, had been formed and recognized by the Federal government as representing the whole State, the Senators of which were admitted, as such, into the Senate of the United States. But the distinction was made between citizens of a loyal State like Kentucky or Missouri, where armed bands may make hostile incursions, and hold divided, contested, or precarious possession of portions of it, in which case local residence may not create any presumption of hostility, and such a State as Virginia, which, by the act of its established government, approved by a majority of its citizens, has placed itself in war with the Federal government. The State sovereignty was our enemy, and everything that could afford aid and comfort to the enemy was contraband of war, whatever the private opinions of its owner. The claimant was identified with the State of Virginia as a subject of that State, living in its jurisdiction, and for various reasons his claim to the property in question was inadmissable, and the said property must therefore be condemned. Law Reporter, April, 1862, p. 335. Massachusetts District Court, The Amy Warwick, February, 1862. Judge Sprague's Opinion]—*L.*

an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts, and on other property found within the country must be the same.

Even Bynkershoek, who maintains the broad principle, that in war everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property,—admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more in fact than in law." He adds to his observations on this subject: "Let it not, however, be supposed that it is only true of actions that they are not condemned *ipso jure*, for other things also belonging to the enemy may be concealed and escape confiscation." [1]

Vattel says, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy, who are within his dominions at the time of the declaration."

It was true that this rule was, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applied equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, the presence of the

[1] Quod dixi de actionibus recte publicandis, ita demum obtinet, si, quod subditi nostri hostibus nostris debent, princeps a subditis suis reverà exegerit. Si exegerit, rectè solutum est, si non exegerit, pace factâ reviviscit jus pristinum creditoris, quia occupatio quæ bello fit, magis in facto quam in potestate juris consistit. Nomina igitur, non exacta, tempore belli quodammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti. Secundum hæc inter gentes ferè convenit, ut nominibus bello publicatis, pace deinde factâ, exacta censeantur periisse, et maneant extincta, non autem exacta reviviscant, et restituantur veris creditoribus. . . . . Noli autem existimare, de actionibus duntaxat verum esse, eas ipso jure non publicari, nam nec alia quæque publicantur, quæ apud hostes, sunt et ibi fortè celantur. Unde et ea, quæ apud hostes ante bellum exortum habebamus, indictoque bello suppressa erant, atque ita non publicata, si a nostris denuo recuperentur, non fieri recuperantium, sed pristinis dominis restitui, rectè responsum est. Consil. Belg. t. iii. Consil. 67. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. vii.

owner could not exempt it from this operation of war. Nor could a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property, trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

The modern rule, then, would seem to be, that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted, stipulating for the right to withdraw such property.

This rule appeared to be totally incompatible with the idea, that war does, of itself, vest the property in the belligerent government. It might be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate, the property of the enemy; and the rules laid down by these writers went to the exercise of this right.

The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that 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.

This general reasoning would be found to be much strengthened by the words of the Constitution itself — That the declaration of war had only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results — such as a transfer of property — which are usually produced by ulterior measures of government, was fairly deducible from the enumeration of powers which accompanied that of declaring war: — "Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules

concerning captures on land and water was to be confined to captures which are extra-territorial. If it extended to rules respecting enemy's property found within the territory, then the Court perceived an express grant to Congress of the power in question as an independent, substantive power, not included in that of declaring war.

The acts of Congress furnished many instances of an opinion, that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found at the time within the territory.

War gives an equal right over persons and property; and if its declaration was not considered as prescribing a law respecting the person of an enemy found in our country, neither did it prescribe a law for his property. The act concerning alien enemies, which conferred on the President very great discretionary powers respecting their persons, afforded a strong implication that he did not possess those powers by virtue of the declaration of war.

The act "for the safe-keeping and accommodation of prisoners of war," was of the same character.

The act prohibiting trade with the enemy contained this clause: — "That the President of the United States be, and he is hereby authorized to give, at any time within six months after the passage of this act, passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States."

The phraseology of this law showed that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act conferred on the President was manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, was believed to be entirely free from doubt. Was there in the act of Congress, by which war was declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the President to use the whole land and naval force of the United States, to carry the war into effect; and "to issue

to private armed vessels of the United States commissions, or letters of marque and general reprisal, against the vessels, goods, and effects of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof."

That reprisals may be made on enemy's property found within the United States at the declaration of war, if such be the will of the nation, had been admitted; but it was not admitted that, in the declaration of war, the nation had expressed its will to that effect.

It could not be necessary to employ argument in showing, that when the attorney for the United States institutes proceedings at law for the confiscation of enemy's property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

The act "concerning letters of marque, prizes, and prize goods," certainly contained nothing to authorize that seizure.

There being no other act of Congress which bore upon the subject, it was considered as proved that the legislature had not confiscated enemy's property, which was within the United States at the declaration of war, and that the sentence of condemnation, pronounced in the court below, could not be sustained.

One view, however, had been taken of this subject, which deserved to be further considered. It was urged that, in executing the laws of war, the executive may seize, and the courts condemn, all property which, according to the modern law of nations, is subject to confiscation; although it might require an act of the legislature to justify the condemnation of that property, which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis that modern usage constitutes a rule which acts directly upon the thing itself, by its own force, and not through the sovereign power. This position was not allowed. This usage was a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, was addressed to the judgment of the sovereign; and although it could not be disregarded by him without obloquy, yet it might be disregarded.

The rule was, in its nature, flexible. It was subject to infinite modifications. It was not an immutable rule of law, but depended on political considerations, which might continually vary. Commercial nations, in the situation of the United States, had always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy's property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it was proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It was proper for the consideration of the legislature, not of the executive or judiciary. It appeared to the Court that the power of confiscating enemy's property was in the legislature, and that the legislature had not yet declared its will to confiscate property which was within our territory at the declaration of war.[1]

§ 12. Debts due to the enemy.

In respect to debts due to an enemy, previously to the commencement of hostilities, the law of Great Britain pursues a policy of a more liberal, or at least of a wiser character, than in respect to 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 ever 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.[2]

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[1] Mr. Chief Justice Marshall, Cranch's Rep. vol. viii. pp. 123–129.

[2] Bosanquet & Puller's Rep. vol. iii. p. 191, Furtado *v.* Rodgers. Vesey, jun. Rep. vol. xiii. p. 71, *Ex parte* Boussmaker. Edwards's Adm. Rep. p. 60, The Nuestra Signora de los Dolores.

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.[1]"

On the commencement of hostilities between France and Great Britain, in 1793, the former power sequestrated the debts and other property belonging to the subjects of her enemy, which decree 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, 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

[1] Dallas's Rep. vol. iii. pp. 4, 5, 199–285.

admiralty, was restored to the original owners under this treaty on the return of peace between the two countries.[1]

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.[2] [[174]

[1] Martens, Nouveau Recueil, tom. ii. p. 16.

[2] Maule & Selwyn's Rep. vol. vi. p. 92, Wolff *v.* Oxholm. Cranch's Rep. vol. viii. p. 110, Brown *v.* The United States.

[[174]] See, also, Thompson, Laws of War, p. 7: "The property in Danish vessels and cargoes, condemned as droits of admiralty in 1807, and in retaliation of which the British debts were confiscated, was computed at £1,265,000. The debts due from Danish to British subjects, ordered to be paid into the treasury, amounted to only from £200,000 to £300,000. When Great Britain demanded the payment of this sum from the Danish government, the latter offered to deduct it from the value of the ships and other property condemned as above mentioned. This was declined; and the British government ultimately satisfied their own merchants, by an indemnity granted by Act of Parliament." "It is difficult," said Mr. Wheaton, writing in reference to this transaction, "to show a reasonable distinction between debts contracted under the public faith in time of peace, and property found in the enemy's territory on the breaking out of the war, or taken at sea before the declaration of hostilities." Mr. Wheaton to Mr. Forsyth, 29th November, 1834. MS. Despatches.

§ 13. Trading with the enemy, unlawful on the part of subjects of the belligerent State.

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 laws of war; and in this manner there is partly war and partly peace between the subjects of both countries."[1]

An act was passed by the Congress of the so-called Confederate States, May 21, 1861, prohibiting all persons in any manner indebted to individuals or corporations in the United States, (except Delaware, Maryland, Kentucky, Missouri, and the District of Columbia,) from paying the same to their respective creditors, "pending the war waged by that government against the Confederate States or any of the slaveholding States above mentioned, and authorizing them to pay the amount of their indebtedness into the Treasury, in specie or treasury-notes, receiving a certificate therefor, redeemable at the close of the war in specie or its equivalent." Moore's Rebellion Record, vol. i. p. 265.] — *L.*

[1] "Quamvis autem nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, quisque enim subditus jubetur alterius Principis subditos, eorumque bona aggredi, occupare, et

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 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 of Europe.[1]

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 color 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

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quomodocumque iis nocere. Utilitas verò mercantium, et quòd alter populus alterius rebus indigeat, fere jus belli, quòd ad commercia, subegit. Hinc in quoque bello aliter atque aliter commercia permittuntur vetanturque, prout e re suâ subditorumque suorum esse censent Principes. Mercator populus studet commerciis frequentandis, et prout quisque alterius mercibus magis minusve carere potest, eò jus belli accomodat. Sic aliquando generaliter permittuntur mutua commercia, aliquando quòd ad certas merces, reliquis prohibitis, aliquando simpliciter et generaliter vetantur. Utcunque autem permittas, sive generaliter, sive specialiter, semper, si me audias, quoad hæc status belli suspenditur. Pro parte sic bellum, pro parte pax erit inter subditos utriusque Principis." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8.

[1] Valin, Comm. sur l'Ordonn. de la Marine, liv. iii. tit. 6, art. 8.

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 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 kind of cases: '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 decisions 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 acts; 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 civilian, 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.[1]

Decisions of the American courts, as to trading with the public enemy.

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 late war 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

[1] Robinson's Adm. Rep. vol. i. p. 196, The Hoop.

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. Everything that issues from a hostile country is, *primâ facie*, 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.[1]

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 confiscation. 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.[2]

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

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[1] Cranch's Rep. vol. viii. p. 155, The Rapid.

[2] Cranch's Rep. vol. viii. pp. 169–179, The Alexander.

out temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent, the right could not exist.[1]

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 Petersburg under a British license, granted the 8th of 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 light-house. 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. 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 com-

[1] Cranch's Rep. vol. viii. p. 434, The St. Lawrence; vol. ix. p. 120, S. C.

mitted, 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. 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*.[1]

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 rigor 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.[2] [[175]

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[1] Cranch's Rep. vol. viii. pp. 451, 455, The Joseph.

[2] Robinson's Adm. Rep. vol. vi. p. 127, The Franklin; vol. iv. p. 195, The Madonna della Gracie; vol. v. p. 141, The Juffrow Catharina; p. 251, The Alby. Wheaton's Rep. vol. ii. Appendix, Note I. p. 34. Wheaton on Captures, pp. 220–223.

[[175] Contrary to what, till the recent attempts to make war a contest between *State* and *State*, has been the received doctrine, Heffter (Das europäische Völkerrecht, § 123) says: "As a general rule, it is not to be maintained that a declaration of war always carries with it an absolute prohibition of trade between the belligerents. So far from this being the case, the belligerents should explain themselves clearly on this subject, if a general interdict is intended. The right of commerce is essentially individual, and not derived from the State, which can only regulate its conditions but

§ 14. Trade with the common enemy, unlawful on the part of allied subjects.

Not only is such intercourse with the enemy, on the part of the 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 can trade with the common enemy, with-

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not strike it in an absolute manner." For this proposition he cites against Bynkershoek, Nau, Völkerrecht, § 263. Heffter considers the view of the jurisprudence, on this subject, in England, America and France, as given by our author, too rigorous. In the preceding section, (§ 122,) he had said: "War does not put an end to the common and individual rights of man; they only undergo all the consequences of a scourge, which strikes without discrimination. It is evident that the subjects of the belligerents must submit to the effects of the restrictions, which they judge proper to impose expressly on enemy or neutral commerce; but in the absence of such restrictions, the modern laws of war forbid doing any injury to the individual rights of enemy's subjects."

During the Mexican war, it was held, by the Supreme Court of the United States, that in a state of war, the nations who are engaged in it, and all their citizens and subjects, are enemies to each other. Hence all intercourse or communication between them is unlawful. Attempts were made to evade the rule of public law by the interposition of a neutral port between the shipment from the belligerent port and their ultimate destination in the enemy's country; but in all such cases the goods were condemned as having been taken in a course of commerce rendering them liable to confiscation. Howard's Rep. vol. xviii. p. 114, Jecker *v.* Montgomery.

With respect to commercial intercourse with the enemy, by the subjects of belligerents themselves, important modifications have been introduced into the English maritime system, since the commencement of their late war with Russia. To an inquiry made, on the 20th of March, 1854, by the merchants connected with the Russian trade, whether produce of that country, brought over the frontier by land, and shipped from thence by British or neutral vessels, would be subject to seizure by Her Majesty's cruisers, and to subsequent confiscation in the High Court of Admiralty, the following answer, which is in accordance with the decisions rendered during former wars, was returned on the 25th of the same month, by direction of the Secretary of State for Foreign Affairs: —

"Lord Clarendon conceives that the question will turn upon the true ownership or the interest, or risk in, and the destination of, the property, which may be seized or captured; and that neither the place of its origin, nor the manner of its conveyance to the port from whence it was shipped, will be decisive, or even, in most cases, of any real importance.

"Such property, if shipped at neutral risk, or after it has become *bonâ fide* neutral property, will not be liable to condemnation, whatever may be its destination. If it should still remain enemy's property, notwithstanding it is shipped from a neutral port and in a neutral ship, it will be condemned, whatever may be its destination. If it be British property, or shipped at British risk, it will be condemned if it is proved to be really engaged in a trade with the enemy, but not otherwise. The place of its origin will be immaterial; and if there has been a *bonâ fide* and complete transfer of ownership to a neutral, (as by purchase in the neutral market,) the goods will not be liable to condemnation, notwithstanding they may have come to that neutral market from the enemy's country, either over land or by sea. Lord Claren-

out being liable to the forfeiture, in the Prize Courts of the ally, of his property engaged in such trade. This rule is a corollary

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don has, however, to observe, that circumstances of reasonable suspicion will justify capture, although release, and not condemnation, may follow; and that ships with cargoes of Russian produce may not improbably be considered, under certain circumstances, as liable to capture, even though not liable to condemnation." London Times, Marçh, 1854.

England having, however, in conjunction with France, by the royal declaration of the 29th of March, adopted not only the principle, "free ships free goods," but adhered to her former rule, not to claim the confiscation of neutral goods in enemy's vessels, neither of which relaxations would have given immunity to the property of the allies themselves, engaged in a trade with the enemy, an Order in Council, of the 15th of April, authorized not only a neutral trade in neutral ships with the enemy's ports, but it allowed it to be carried on by British subjects, provided neutral vessels were employed; the only restrictions on such trade being that it should not extend to contraband, and articles requiring a special permission to export them, or to a violation of blockade. But the prohibition, as regards British vessels, to enter or communicate with any port or place in possession of the enemy, and which, apart from any special provision, is the ordinary consequence of the war, was retained, in express terms.. "All goods and merchandises whatsoever, to whomsoever the same may belong, and which are words including even Russian property, may be shipped under any flag but the Russian; and it is open to all traders to take such cargoes on board in any port not being blockaded." The same order declares "that all the subjects of Her Majesty, and the subjects and citizens of any neutral or friendly State, shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places, wheresoever situate, which shall not be in a state of blockade; save and except that no British vessel shall, under any circumstances whatsoever, either under or by virtue of this order, or otherwise, be permitted or empowered to communicate with any port or place which shall belong to or be in the possession or occupation of Her Majesty's enemies." — London Gazette, April 18, 1854.

"The effect of this order is, therefore," it was said, "to leave the trade of this country with neutrals, and even the indirect trade with Russia, in the same state it was during peace, as far as the law of our courts maritime is concerned, and the doctrine of illegal trading with the enemy is at an end. The restrictions henceforth to be imposed are solely those arising out of direct naval and military operations; such as blockade, and those which the enemy may think fit to lay upon British and French property. As far as we are concerned, except that British ships are not to enter Russian ports, which it is obvious that they could not do without incurring the risk of a forfeiture of their property and the imprisonment of their crews, and which may otherwise be objectionable, on certain grounds of policy into which it is not necessary to enter in this place, the trade may be lawfully carried on in any manner which the ingenuity and enterprise of our merchants may devise." Loch's Practical Legal Guide. Edinburgh Rev. July, 1854, p. 113, Am. ed. Hosack, Rights of Neutrals, p. 67. The Russian declaration of 7th (19th) of April, 1854, says: "English and French goods, even should they belong to subjects of Great Britain and France, will be allowed to be imported under neutral flags into our ports, in accordance with the usual custom-house tariff regulations, without any hindrance on our part." Com. Gazette of the 7th (19th) of April, 1854, copied in London Gazette of the 2d of May. Hosack, Rights of Neutrals, App. p. 113.

of the other; and is founded upon the principle, that such trade is forbidden to the subjects of the co-belligerent by the munici-

It may not be irrelevant here to state that, in the discussions in Parliament during the Russian war, the proposition for a recurrence to the system of former wars, as to intercourse with the enemy, was most emphatically repudiated. Mr. Cardwell, the then President of the Board of Trade, maintaining the same principles which had previously been ably elucidated by Sir William Molesworth, argued strongly against old absurdities. It would not be prudent, he said, to announce to neutral countries that England contemplated a renewal of the "right of search for enemy's property in neutral vessels," and it would be impossible to carry out a decree of prohibition of Russian produce; and he went over a most instructive history of former attempts to crush trade in time of war, showing that they had fostered immorality, fraud, and perjury. Such measures, too, he remarked, would be sure of inflicting the *minimum* amount of injury on Russia and the *maximum* amount of injury on England. Hansard's Parliamentary Debates, 3 Series, vol. cxxxvi. p. 1613, February 20, 1855. So far from there being any disposition, on the part of the governments, to prevent commercial intercourse between their respective subjects, the Moniteur, the French official journal, announced the opening of correspondence by telegraph with Russia. The Russian government gave notice that private despatches having a political character would not be admitted, and that orders had been given not to receive them at the offices. But it resulted from this exclusion, that the right existed of exchanging commercial communications between France and Russia. Courrier des Etats Unis, 23 Juillet, 1855. During the late war with China, France and England published declarations, by which the two belligerents agreed to authorize the continuation of commerce between the English and French subjects and the subjects of the Chinese empire. Moniteur, 28 Juin, 1860.

By an act of July 13, 1861, the President is authorized, whenever he has called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when these insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, to declare by proclamation that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States. There is authority given to the President to license and permit intercourse with any part of the State or section, the inhabitants of which are declared in a state of insurrection, under regulations to be prescribed by the Secretary of the Treasury. This act further provided, as before stated, that from and after fifteen days after the issuing of the President's proclamation, any ship or vessel belonging in whole or in part to any citizen or inhabitant of a State, or part of a State, whose inhabitants are declared in a state of insurrection, found at sea, or in any port of the rest of the United States, shall be forfeited to the United

pal 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

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States. Statutes at Large, 1861, p. 257. By an act of July 31, 1861, the power of the President to declare the inhabitants of any State, or part thereof, in a state of insurrection, is made to extend to, and include, the inhabitants of any State, or part thereof, where such insurrection against the United States shall be found by the President at any time to exist. Ib. p. 284.

The President issued his proclamation, August 16, 1861, declaring the inhabitants of the seceding States, naming them, to be in a state of insurrection and subject to the consequences of the above act. Ib. p. v.

It will be noticed that in the law no discrimination is made between the loyal inhabitants and the rebels, the same rule being applied as in the case of a foreign war, where all the inhabitants of one of the hostile States are regarded as enemies to the other. As the Federal Constitution acts not upon the States, nor through the States upon the citizens of the several States, but directly on all the citizens of the United States, the propriety and regularity of recognizing the existence of the States and of the State governments, in matters affecting exclusively the allegiance of the inhabitants to the Union, and thereby subjecting loyal citizens to confiscations in consequence of the acts of their neighbors, might, it would seem, be well questioned. Such a course would be especially repugnant to natural justice, if the inhabitants, while exposed to the disabilities of alien enemies, are not permitted to plead the orders of a *de facto* government for acts done under its authority. In a case of civil war, apart from the question of conflict between State and Federal authority, it has been said by a Justice of the Supreme Court during the pending contest, "the citizens or subjects residing within the insurrectionary district not implicated in the rebellion, but adhering to their allegiance, are not enemies, nor to be regarded as such. This distinction was constantly observed by the English government in the disturbances in Scotland under the Pretender and his son, in the years 1715 and 1745. It modifies the condition of the citizens or subjects residing in the limits of the revolted district, who remain loyal to the government." Justice Nelson's Charge to the Grand Jury, 2d Circuit, 1862.

The previous sections of the act, which contemplated the closing of the ports of the United States, not in possession of the government, were never attempted to be enforced against foreign powers. England and France informed the Secretary of State that they would consider such a decree as null and void, and that "they would not submit to measures taken on the high seas in pursuance of such decree." Parliamentary Papers, 1862. North America, No. 1, p. 72. Lord Lyons to Lord John Russell, August 12, 1861.] — *L.*

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 interfere with the common operations, or that it has the allowance of the other confederate State.[1]

§ 15. Contracts with the enemy prohibited.

It follows, as a corollary from the principle interdicting all commercial and other pacific intercourse with the public enemy, 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; [[176] which last are dissolved by the mere force and act of

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10. Robinson's Adm. Rep. vol. iv. p. 251; vol. vi. p. 403, The Neptunus.

[[176] It was determined by the Supreme Court of New York, in the case of Griswold *v.* Waddington (Johnson's Reports, vol. xv. p. 57), and their decision was confirmed by the Court of Errors, Chancellor Kent giving the controlling opinion, (Ib. vol. xvi. p. 438,) that the war (of 1812) between Great Britain and the United States dissolved *ipso facto* a subsisting partnership between an American citizen residing in New York and a British subject residing in London. "The propriety of this decision," says Mr. Duer, "as applied to a commercial partnership, that, from its nature, supposes and requires a frequent intercourse and communication between the parties, cannot be disputed; but there are, doubtless, many contracts, of which a war suspends the existence without dissolving the obligation. The distinction is probably this: A vested right, under a subsisting contract, is not affected by a subsequent war; but where the contract is executory, and would have been illegal, if made in time of war, it becomes so from the time that hostilities commence, as to all acts to be performed by either party during the war." Duer on Insurance, vol. i. p. 478. See, also, Hosack, Rights of Neutrals, p. 83.

The following opinion was given, June 6, 1861, by the Attorney-General of Louisiana, in the case of a power of attorney to transfer stock, executed in New York, on the 22d of May, 1861, that is to say, since the commencement of the present war, and the recognition of its existence by the so-called Confederate States: —

the war itself, although, as to other contracts, it only suspends the remedy.[1]

§ 16. Persons domiciled in the enemy's country liable to reprisals.

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

"My opinion is, that the power of attorney is a nullity, and the proposed transfer of stock illegal and void, and therefore the bank, as a matter of public duty, should refuse to recognize the power of attorney, or permit the transfer to be entered on its books.

"No principle of international law is more firmly established than that the declaration of war arrests *all intercourse* between the belligerents. War puts every individual of the respective governments, as well as the governments themselves, in a state of hostility to each other. There is no such thing as a war for arms and a peace for commerce. The existence of civil contracts and relations is contradictory to a state of war, and hence it has been held that commercial partnerships existing between the citizens of one country and those of another are dissolved by the breaking out of a war between the two countries. Sir William Scott, one of the most profound jurists of his age, repeatedly declared in numerous cases adjudged by him, that by war all communications between the subjects of the belligerent countries is suspended; that no intercourse can be legally carried on without a special license from the government; 'that a state of war was a state of interdiction of communication.'

"The remittance of money for any purpose, the making of contracts, the acceptance of trusts, the creation of any civil obligation, or commercial relation whatever, is unlawful and forbidden, simply because it is inconsistent with the hostile attitude of the parties. The belligerent governments have placed their respective citizens in an attitude of hostility toward each other; and no relation inconsistent with hostility can be lawfully created by the acts of individuals without the express permission of the government." Public Journals.] — *L.*

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 21. Duponceau's Transl. p. 165, Note. Kent's Commentaries on American Law, vol. i. pp. 67, 68, 5th edit.

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." [1]

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 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

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[1] "Cæterùm non minus in hâc materiâ quàm in aliis cavendum est, ne confundamus ea quæ juris gentium sunt proprie, et ea quæ jure civili aut pactis populorum constituuntur.

"Jure gentium subjacent pignorationi omnes subditi injuriam facientes, qui tales sunt ex causâ permanente, sive indigenæ, sive advenæ, non qui transeundi aut moræ exiguæ causâ alicubi sunt. Introductæ enim sunt pignorationes ad exemplum onerum, quæ pro exsolvendis debitis publicis inducuntur, quorum immunes sunt qui tantùm pro tempore loci legibus subsunt. A numero tamen subditorum jure gentium excipiuntur legati, non ad hostes nostros missi, et res eorum." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. ii. § 7, No. 1.

"Latè autem patet hoc jus licentiæ, nam primùm non eos tantum comprehendit qui actu ipso arma gerunt, aut qui bellum moventis subditi sunt, sed omnes etiam qui intra fines sunt hostiles: quod apertum fit ex ipsâ formulâ apud Livium, *Hostis sit ille, quique intra præsidia ejus sunt;* nimirùm quia ab illis quoque damnum metui potest, quod in bello continuo et universali sufficit ut locum habeat jus de quo agimus: aliter quàm in pignorationibus, quæ, ut diximus, ad exemplum onerum impositorum ad luenda civitatis debita, introductæ sunt: quare mirum non est, si, quod Baldus notat, multò plus licentiæ sit in bello quàm in pignorandi jure. Et hoc quidem quod dixi in peregrinis, qui commisso cognitoque bello intra fines hosticos veniunt, dubitationem non habet.

"At qui ante bellum eo iverant, videntur jure gentium pro hostibus haberi, post modicum tempus intra quod discedere potuerant." Ib. lib. iii. cap. iv. §§ 6–7.

those who are 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." [1] [177]

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 the citizen of another, in time of peace, for the purposes of trade, and may become entitled to all the commercial privileges attached to his required 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.

§ 17. Species of residence constituting 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.

In the judgment of the Lords of Appeal in Prize Causes, upon the cases arising out of the capture 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, 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

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[1] Grotius, par Barbeyrac, *in loc.*

[177] See on this point Wheaton on Captures, p. 102, and the cases there cited.] — *L.*

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." [1]

"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 over a larger space of time. This matter is to be

[1] 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.

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."[1]

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 determined 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*."[2] [178]

The native character easily reverts.

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.[3]

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[1] Robinson's Adm. Rep. vol. ii. p. 324, The Harmony.

[2] Robinson's Adm. Rep. vol. iii. p. 12, The Indian Chief.

[178] See, also, Hagg. Adm. Rep. vol. i. p. 103, The Matchless] — *L.*

[3] Robinson's Adm. Rep. vol. v. p. 99, La Virginie. 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, Wheaton's Rep. vol. ii. p. 76, The Dos Hermanos.

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. 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. That decision is more particularly stated by Sir J. Nicholl, at the hearing of the case of The Harmony before the Lords, July 7, 1803. "The case of Mr. Dutilth also illustrates the present. He came to Europe about the end of July, 1793, at the time when there was a great deal of alarm on account of the state of commerce. He went to Holland, then not only in a state of amity, but of alliance with this country; he continued there until the French entered. During the whole time he was there, he was without any establishment; he had no counting-house; he had no contracts nor dealings with contractors there; he employed merchants there to sell his property, paying them a commission. Upon the French entering into Holland, he applied for advice to know what was left for him to do under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. Dutilth applied to Mr. Adams, the American Minister, who advised him to stay until he could get a passport. He continued there until the latter end of that year, and having wound up his concerns, came away. Some part of his property was captured before he came there. That part which was taken before he came there was restored to him, (The Fair American, Adm., 1796,) but that part which was taken while he was there was condemned, and *that* because he was in Holland at the time of the capture." The Hannibal and Pomona, Lords, 1800.[1]

The case of The Diana, determined 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 con-

[1] Wheaton's Rep. vol. ii. Appendix, 27, 28, 29.

tained 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, recognized 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 favor." [1]

Case of persons removing from the enemy's country on the breaking out of war.

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 further 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." [2]

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

[1] Robinson's Adm. Rep. vol. v. p. 60, The Diana.
[2] Ibid. p. 91.

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 appear under the circumstances that prevent it from being carried into execution. And Sir W. Scott, in the case of The Dree Gebroeders, 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.[1]

Decisions of the American courts.

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 late 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

[1] Robinson's Adm. Rep. vol. iv. p. 234; vol. v. p. 141, The Juffrow Catharina.

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 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 wi h 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 Eng-

land, 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 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.

But this national character which a man acquires 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 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 their 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 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. Vattel, liv. i. ch. 14, § 182. "In reprisals," continues the same author, "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." Liv. ii. ch. 18, § 344. 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?

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, 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. The privilege is supposed to be equal to the disadvantage, and is, therefore, just. The double privilege claimed seems too unreasonable to be granted.[1] [179]

§ 18. 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

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[1] Cranch's Rep. vol. viii. p. 277, The Venus. Wheaton's Rep. vol. i. p. 54, The Mary and Susan.

[179] It was decided by the Supreme Court of the United States, in a case arising during the Mexican war, that a neutral leaving, with his family, at the commencement of the war, a belligerent country, in which he had been domiciled, might carry with him his property acquired there. His neutral character reverts, as to his person and property, as soon as he sails from the hostile port. The property he takes with him is not liable to condemnation, for a breach of blockade by the vessel in which he embarks, when entering or departing from the port, unless he knew of the intention of the vessel to break it in going out. Howard's Rep. vol. xi. p. 60, United States *v.* Guillem.

If a British subject, domiciled in the enemy's country before the commencement of hostilities, voluntarily continues his residence during the war, he so far loses his rights of an Englishman, that he cannot maintain an action in an English court. Nor does it signify that he is recognized as a citizen of a neutral State. In the case referred to, the plaintiff was an Irishman, but was residing at Paris (England and France being at war) when the action was brought, and proof of his having been naturalized in the United States was not admitted. Prisoners of war do not fall under that rule, as they are not voluntary residents in the enemy's country. Hosack, Rights of Neutrals, p. 71.

Heffter says that, in the absence of any express prohibition, there is nothing in the modern laws of war to prevent the rights of enemies' subjects being regularly prosecuted before the competent tribunals; and for this he cites Zachariä, 40 Bücher vom Staat. xxviii. 7. 2. (tom. iv. p. 103.) Worm dans le Journal: Zeitschrift für Wissenschaft, vii. p. 350 suiv. Droit International par Bergson, § 122, p. 236.] —*L.*

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 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."[1]

§ 19. House of trade in the enemy's country.

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

[1] Robinson's Adm. Rep. vol. iii. p. 12, The Indian Chief.

connection during the war, he cannot protect himself by mere residence in a neutral country.[1] [180

[1] Robinson's Adm. Rep. vol. i. p. 1, The Vigilantia. Vol. ii. p. 255, The Susa. Vol. iii. p. 41, The Portland. Vol. v. p. 297, The Jonge Klassina. Wheaton's Rep. vol. i. p. 159, The Antonia Johanna. Vol. iv. p. 105, The Friendschaft.

[180] The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. 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 his property to another country. If he does not avail himself of the opportunity, he is to be 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.

The mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. In the Russian manifesto of the 26th of June, 1853, setting forth the grounds of occupation of the Danubian Principalities, it is said that it is deemed indispensable to order the troops to enter them, in order to show the Porte how far its obstinacy may lead it, but that it was not their intention to commence war, and when the Pruth was crossed, on the 2d and 3d of July, Prince Gortschakoff proclaimed: "We come amongst you neither with projects of conquests nor with the intention of modifying the institutions under which you live, or the political position which solemn treaties have guaranteed to you." Even after the war was declared by the Porte, in October, 1853, (England and France engaging in it as allies of the Sultan, in the following spring,) nothing was said or done by the Russian government to change the nature of the occupation, or to indicate any intention of converting into a conquest what had been originally announced as a provisional and temporary measure. In June, 1854, the Russian Minister stated to Austria that from the moment when the Porte declared war against Russia, the occupation of the Principalities had been for Russia only a military position, the maintenance or abandonment of which was entirely a matter connected with strategical considerations, and, on the 8th of August, 1854, Gortschakoff announced that the Emperor had ordered the complete evacuation of the two Principalities. On the 19th of July, 1854, a ship, under Wallachian colors, was captured, and the question was whether the owners of the cargo, who were Ionians, but merchants in Galatz, in Moldavia, were to be deemed alien enemies. The Lords of Appeal reversed the decision of Dr. Lushington, condemning the cargo. In the opinion of the Court, note (*a*) to page 48 of the last edition of this work was cited to show the anomalous political position of Moldavia and Wallachia. Moore's Privy Council Reports, vol. xi. p. 88, Cremidi *v.* Powell. See, also, Phillimore's International Law, vol. iii. Addenda, p. xliii.

It had been laid down by the Lords of Appeal, in a St. Domingo case, as early as 1808, that the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force. Though several parts of the island had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of France and its authority, and maintained within those parts at least an independent government, and the British government had shown a favorable disposition towards it, on the ground of common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion; yet, as this new power had not been directly and formally recognized by any express treaty, it

§ 20. Converse of the rule.

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

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was decided that nothing had been done by the British government that could authorize a British tribunal to consider this island generally, or parts of it, as being other than still a colony, or parts of a colony, of the enemy. But an Order in Council having declared, that "British vessels are permitted to go to such ports and in places in the island of St. Domingo as are not or shall not be under the dominion and in the actual possession of His Majesty's enemies," the previous decision of the Lords of Appeal was not deemed by Sir William Scott to control subsequent cases. Edwards's Adm. Rep. p. 5, The Manilla.

In the case of the controversy between the United States and Peru, growing out of the capture and confiscation of two American vessels, for taking guano under the authority of a revolutionary government in temporary possession of some of the seaports and guano deposits, and in contravention of the laws of Peru, it was maintained by the administration of President Buchanan, that the citizens or subjects of a foreign nation may carry on commerce with the portions of a country in the hands of either of the parties to a civil war, and without awaiting any action on the part of their own government, nor in such case can they be subjected to capture or detention by the other party, unless for a violation of neutral obligations.

"When a portion of the territory of one nation is taken possession of by the forces of another, with which it is at war, the conquering party has an undoubted right to declare the law of the place as long as his occupation of it continues, and all the rights of the previous sovereign are suspended until his possession is resumed. It is equally well settled that, when the former government resumes its possession of the territory, whether by force or under a treaty, it cannot call the citizens or subjects of a third nation to account for obeying the authority which was temporarily supreme during the enemy's occupation of the place. The *jus postliminii* has no sort of application to such a case. When the people of a republic are divided into two hostile parties, who take up arms and oppose one another by military force, this is civil war. Supposing, however, that the rebellion is but partially successful, and the old government maintains itself in one part of its territory, whilst it is obliged to surrender another, shall it then give law where it has no power to enforce obedience, or shall its authority be confined to the territory which it occupies? A revolutionary party, like a foreign belligerent power, is supreme over the country it conquers, as far and as long as its arms can carry and maintain it." Opinion of Mr. Black, Attorney-General of the United States, May 15, 1858. Congressional Doc. 35th Cong. 1st Sess. Senate, Ex. Doc. No. 69, pp. 28. 29. In answer to the statement of the Peruvian Minister, it was said by Mr. Cass, Secretary of State, "Mr. Osma insists that the existence or non-existence of civil war is a question not of fact but of law, which no private person has a right to decide for himself, — that foreigners must regard the former state of things as still existing, unless their respective governments have recognized the change. I am clearly of opinion that an American citizen, who goes to Peru, may safely act upon the evidence of his own senses. He has no choice. The government *de facto* will compel his obedience. If he resists the authority of the party in possession, on the ground that another has the right of possession, he departs from his neutrality, and so violates the duty he owes to both the belligerents, as well as to the laws of his own country." Mr. Cass to Mr. Clay, Minister to Peru, Nov. 26, 1858. MS.] — *L.*

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 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.[1]

§ 21. 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 late war with Great Britain, in the following case. The island of Santa Cruz, belonging to the King of Denmark, was subdued during the late European war by the arms of His Britannic Majesty. Adrian Benjamin 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.

In pronouncing its judgment, it was stated by the Court, 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 com-

[1] Mr. Chief Justice Marshall, Cranch's Rep. vol. viii. p. 253, The Venus.

mercial 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 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 Phœnix 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 endeavored 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."[1]

Afterwards, in the case of The Vrow Anna Catharina, Sir William Scott laid down the rule, and stated its reason. "It cannot

[1] Robinson's Adm. Rep. vol. v. p. 21, The Phœnix.

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."[1]

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 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

[1] Robinson's Adm. Rep. vol. v. p. 167, The Vrow Anna Catharina.

down by the British Prize Courts. The next inquiry was, how far that rule will be adopted in this country?

The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights, which are recognized 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 Phœnix 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.[1] [181

§ 22. National character of ships.

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 whose flag she sails: she makes a part of

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[1] Cranch's Rep. vol. ix. p. 191–199, Thirty Hogsheads of Sugar, Bentzon, claimant.

[181 By the conquest and military occupation of a portion of the territory of the United States, by a public enemy, that portion is to be deemed a foreign country, so far as respects our revenue laws. Goods imported into it are not imported into the United States, and are subject to such duties only as the conqueror may impose. The subsequent evacuation of the conquered territory by the enemy, and the resumption of authority by the United States, cannot change the character of past transactions. The *jus postliminii* does not apply to the case; and goods previously imported do not become liable to pay duties to the United States, by the resumption of their sovereignty over the conquered territory. Wheaton's Rep. vol. iv. p. 246, United States *v.* Rice; Gallison's Rep. vol. ii. p. 500, United States *v.* Hayward. But the capture and occupation of Tampico, by the arms of the United States, during the war with Mexico, though sufficient to cause it to be regarded by other nations as part of our territory, did not make it a part of the United States under our Constitution and laws; it remained a foreign country within the meaning of the revenue laws of the United States, and duties were properly levied on goods imported from Tampico into the port of Philadelphia, during such military occupation. Howard's Rep. vol. ix. p. 618, Fleming *et al. v.* Page. Ib. vol. xvi. p. 164, Cross *v.* Harrison. As regards goods imported from the United States and foreign countries into Mexican ports in the military possession of the United States, during the war of 1846, duties were levied according to a tariff prescribed by the President, or in California by one previously established by the naval and military commanders. They constituted a fund for the expenses of the government of occupation, the balance of which was paid into the treasury of the United States. Halleck, International Law, p. 789.] — *L.*

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.[1] [182]

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[1] Robinson's Adm. Rep. vol. i. p. 1, The Vigilantia. Vol. v. p. 161, The Vrow Anna Catharina. Dodson's Adm. Rep. vol. i. p. 131, The Success.

[182] There is a distinction between the French law and the English and American, in reference to the transfer of ships during war. The 7th article of the French regulations of the 26th of July 1778, still in force, provides that enemy-built vessels cannot be reputed to belong to neutrals, unless there is documentary proof, found on board, that the sale to a subject of an ally or neutral was made before the commencement of hostilities, and that the act of transfer has been duly registered before the proper officer at the port of departure and signed by the owner or his attorney. This regulation is thus defended in a recent French treatise, in answer to the question of what importance is it, whether enemy's vessels have been sold to neutrals, before or after hostilities. "Belligerents in desiring in maritime wars to appropriate to themselves ships of their enemies do not wish that the latter should, to avoid capture and confiscation, realize the capital which their vessels represent. All enemy's vessels pursued by cruisers and in danger of being captured would take refuge in neutral ports, and in order that they might not be captured, their owners would sell them to neutral citizens. At the commencement of the present war, the Russians sold their ships, which were in distant seas, and which they had no expectation that they could bring back to their own ports. As to Russian vessels sold since the declaration of war, (1854,) it is certain that if taken by French cruisers, they would be good prizes, though bearing a neutral flag." De Pistoye et Duverdy. Traité des Prises Maritimes. tom. ii. p. 1. Ib. p. 502. Conseil Impérial des Prises, 25 Novembre, 1854, Le Christiane.

Mr. Marcy writes to Mr. Mason, at Paris, 19th of February, 1856, in reference to a sale of a Russian ship to Americans, during the then war; "It is difficult

§ 23. Sailing under the enemy's license.

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

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to conceive how the purchase of merchant vessels can come within the restriction of contraband, which is the only one imposed on neutrals during war. It cannot be affected by the French municipal law." Department of State MS. The Russian rule would seem to be the same as the French. By the 8th article of the ukase of the 1st of August, 1809, no vessel of enemy-construction shall be considered neutral or friendly, if among its papers is not an authenticated act, which proves that the sale or cession was made before the declaration of war. In the contrary case the vessel and cargo will be confiscated to the crown. Courrier des Etats-Unis, 27 Octobre, 1855.

The best answer to the French rule is furnished by Hautefeuille. "One of the rules, published by most nations at war, as to maritime captures, declares subject to seizure and consequently a good prize even a vessel sailing under a neutral flag, with regular neutral papers, which having belonged to an enemy has been bought by a neutral since the commencement of the war. It is impossible to recognize such a right in belligerents. Commerce is free between neutrals and nations at war; this liberty is unlimited, with the exception of the two restrictions relative to contraband of war, and to besieged, blockaded, or invested places. Nations at peace can, then, when they think proper, buy merchant ships of one of the parties engaged in hostilities, without the other party having the right to complain, unless it has the power to annul those sales and treat as an enemy a vessel really neutral and regularly acknowledged by the neutral government as belonging to its subjects. To declare null and without effect a contract, it is indispensable that the legislator should have the authority and jurisdiction over the contracting parties. It is then necessary, in order that such a disposition should have effect, to suppose that the belligerent possesses jurisdiction over neutral nations. This is impossible; the pretension of the belligerents is an abuse of force. But, it is said, that the object of this disposition is to interpose an obstacle to the collusion which may exist between neutrals and the weaker belligerent at sea, by means of which the latter by simulated sales may put all his merchant vessels beyond the reach of the chances of war. This fear is only a pretext; but were it well founded, I do not see that the belligerent has a right to oppose it." Hautefeuille, Droits des Nations Neutres, tit. xi. ch. 2, sect. 1, tom. iii. p. 75, 2me edition.

The English writers, on the authority of Lord Stowell's decisions, sustain these transfers; requiring, however, that the sale shall be *bonâ fide*, and unconditional, and that the right of purchase should not extend to ships of war. The title of a neutral vendee to a merchant vessel sold by the enemy in time of war is valid, where the property is *bonâ fide* and absolutely transferred so as to devest the enemy of all future interest in it. Robinson's Admiralty Rep. vol. iv. p. 100, The Sechs Geschwistern. There have been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which, after much discussion and some hesitation of opinion, the validity of the purchase has been sustained. But it is not so, in case of a vessel fitted for war. Ib. vol. vi. p. 399, The Minerva. Wildman, International Law, vol. ii. p. 90; Hosack, Rights of Neutrals, p. 81; Hazlitt & Roche, Manual of International Law, p. 209.

To the same effect were the English admiralty decisions during the late war with Russia. In the case of a vessel claimed as the property of a Hamburger by pur-

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 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.[1] [183

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chase since the commencement of hostilities, Dr. Lushington said; "With regard to the legality of the sale, assuming it to be *bonâ fide*, it is not denied that it is competent to neutrals to purchase the property of enemies in another country whether consisting of ships or anything else. They have a perfect right to do so, and no belligerent right can override it. The present inquiry, therefore, is limited to whether there has been a *bonâ fide* transfer or not." English Reports in Law and Equity, vol. xxix. p. 562, The Johanna Emilia. In a later case, (March 21, 1857,) before the Judicial Committee of the Privy Council in Prize Cases, of a Danish claimant to a Russian vessel purchased *imminente bello*, the question turned on the two points, — whether there was a *bonâ fide* sale without collusion or fraud, and whether any interest remained in the seller at the time of capture. Their Lordships were of opinion that if the sale was absolute and *bonâ fide*, which in this case it was decided to be, it would be legal even *flagrante bello*, much more *imminente bello*. Phillimore's International Law, vol. iii. Addenda, p. xxxv., The Ariel. See, also, Moore's Privy Council Cases, vol. xi. p. 119.

This whole matter is examined by Mr. Cushing, in two opinions, August 7, 1854, and October 8, 1855. He has no doubt of the right of a citizen of the United States to purchase a merchant ship of a belligerent anywhere, at home or abroad, in a belligerent port, or a neutral port, or even upon the high seas; the bill of sale is a sufficient authentication of his title. Provided the purchase be *bonâ fide* made, and the property be passed absolutely and without reserve, the ship so purchased, though it has not the privilege, peculiar to American built ships, of being registered or enrolled, becomes entitled to bear the flag and receive the protection of the United States. Opinions of Attorneys General, vol. vi. p. 652. Ib. vol. vii. p. 538.] — *L.*

[1] Cranch's Rep. vol. viii. p. 181, The Julia. Ibid. p. 203, The Aurora. Wheaton's Rep. vol. ii. p. 143, The Ariadne. Ib. vol. iv. p. 100, The Caledonia.

[183] The wars, consequent on the French Revolution, brought fully to view the

whole system of licenses by belligerents to carry on a trade with the enemy, interdicted to the legitimate commerce of neutrals as well as of their own country. What was well calculated to increase the offensive character of the British proceedings was, that, while they excluded all neutral vessels from the trade assumed to be open to them in war but not in peace, that is to say, from the enemy's colonial and coasting-trade, a communication with the enemy's colonies was encouraged, by licenses and other means. Thus, by the Act of 45 Geo. III. c. 57, (27th of June, 1805,) free ports were established in the English West India islands, and an intercourse formed between them and the enemies' colonies and settlements. The articles therein mentioned, being the growth, produce, or manufacture of any of the colonies or plantations in America, belonging to any European State, were allowed to be imported, from any of those colonies or plantations, into the enumerated ports, in any foreign vessel whatever, not having more than one deck, and owned and navigated by persons inhabiting those colonies or plantations. Tobacco was especially permitted to be exported from those countries to the enumerated ports, and from thence to the United Kingdom. The exportation from those ports to any of the colonies or plantations in America, belonging to or under the dominion of any foreign European sovereign, in any vessel in which importations were authorized, of "rum, the produce of any British island, and also" (in order, it would seem, to encourage the British navigation engaged in the slave-trade,) "of negroes, which shall have been brought into the said island in British-built ships, owned, navigated, and registered according to law," was particularly favored. All other articles, except those specially prohibited, might likewise have been thus exported. Goods, also, from any port of Europe, were allowed to be, in the same way, brought into the British islands, and from thence to be exported in a British vessel to any British colony in America or the West Indies, and an Order in Council, of the 5th of August, 1805, prohibited, under the penalty of confiscation of the vessel and cargo, all intercourse of neutrals with the enemy's colonies, except through the free ports.

The same course was subsequently pursued, in reference to the trade with the Continent of Europe, after the declaration of the blockade of the whole French coast, in 1806. By the Act of 48 Geo. III. c. 37, (14th April, 1808,) the king was empowered by an Order in Council to permit, during hostilities, goods to be imported into any port of Great Britain or Ireland, from any port or place from which the British flag was excluded, in any ship or vessel belonging to any country, whether in amity with England or not. And it is stated that, while all regular neutral commerce was interdicted, 8000 English licenses were granted in 1811, and that in 1808 and 1809 the system had been carried to a still greater extent, in the latter year there having been 16,000 licenses granted. Thus English vessels had been authorized by their own government to violate a blockade, which this same government had been obliged, according to their declaration, to establish for the purpose of legitimate defence, and which it so vigorously maintained against neutrals. See Martens, Recueil, Supp., tom. v. p. 449, for the Orders in Council regulating the trade. Manning's Law of Nations, p. 340. Hautefeuille, Droits des Nations Neutres, tom. i. p. 18, 2me ed.

Nor was it any consolation to neutrals, that when the restrictions of France on them, as respects intercourse with England, were the most severe, similar relaxations were made in favor of her enemy. After having proceeded so far as to decree that all merchandise of English manufacture should be seized and burned, permission was given to import, under certain conditions, and on payment of stipulated duties, English colonial produce under French licenses. Klüber, Droit des Gens, Part II. tit. 2, § 313. It is said by his private secretary, that "the Emperor exerted

all his power to weaken the effect of the prohibitory measures which he was obliged to adopt. He proposed equivalents, the system of licenses, by means of which England was prevented from drawing money from the Continent in exchange for the products of her industry. Every vessel that carried a license, loaded with a cargo of French origin, could exchange it in England for an equivalent value in colonial produce, and in raw materials, but not in manufactured goods. Thus England did not receive any specie, nor the Continent merchandise of English manufacture." Maneval, Napoleon et Marie Louise, Souvenirs Historiques, tom. i. p. 482.

We have elsewhere noticed the great changes the Russian war introduced into the international code of Europe in reference to trade with an enemy, and which practically rendered licenses unnecessary. That trade in all previous wars, and especially in those between England and France, consequent on the French Revolution, was forbidden by the recognized law of nations to the merchants of the contending belligerents, under penalty of confiscation, while it was effectually interdicted to neutrals under the plea of the rule of the war of '56, interpolated by Great Britain into her maritime code, and by Orders in Council and retaliatory decrees. In the late war, instead of it being limited to an irregular commerce, through licenses, every facility consistent with a state of hostilities between *State* and *State*, was accorded by the maritime powers, as well to their own subjects as to neutrals, for the continuance of the ordinary commercial intercourse with all places not blockaded, and in all articles not contraband of war.] — *L.*

CHAPTER II.

RIGHTS OF WAR AS BETWEEN ENEMIES.

§ 1. 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. 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.[1] [184]

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. Wolfius, Jus. Gent. § 878. Grotius, de Jur. Bel. ac. Pac. lib. iii. cap. 4, §§ 5–7. Vattel, Droit des Gens, liv. iii. ch. 8.

[184] In the war of 1776, as well as in that of 1812, the tomahawks of the North American savages were employed by Great Britain. It was even objected, in the English Parliament, to the treaty recognizing the independence of the United States, that "twenty-five nations of Indians, who had entered into offensive alliances with us against the States, were given up without any conditions being stipulated for their security, a transaction," it was said, "sufficient to stigmatize the framers of the treaty, on our part, with indelible disgrace." Annual Register, 1783, p. 162]. And in the negotiations at Ghent, in 1814, the British commissioners, at first, stated

§ 2. 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

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that they were not authorized to conclude a treaty of peace which did not include the Indians as allies of His Britannic Majesty. Letters from the Commissioners of the United States, Wait's American State Papers, vol. ix. p. 319.

Complaints having been made of the course adopted by the United States, of sinking vessels laden with stone, in order to close the main channels to the Southern ports, not to assist military operations, and as a temporary measure of war, but to destroy them forever, and to reduce to misery the inhabitants of the cities connected therewith, instructions were sent to the British Minister at Washington, under date of the 20th of December, 1861, in which Lord Lyons was told that such a cruel plan would seem to imply utter despair of the restoration of the Union, the professed object of the war; for it never could be the wish of the United States to destroy cities from which their own country was to derive a portion of its riches and prosperity. Such a plan could only be adopted as a measure of revenge and of irremediable injury against an enemy. Even as a scheme of embittered and sanguinary war, such a measure was not justifiable. It would be a plot against the commerce of nations, and the free intercourse of the Southern States of America with the civilized world. It was a project worthy only of times of barbarism. Lord Lyons was desired to speak in this sense to Mr. Seward, who, it was hoped, would disavow the alleged project. Earl Russell to Lord Lyons, December 20, 1861.

Lord Lyons writes, on the 14th of January, 1862, to the Earl Russell, that he had called the attention of the Secretary of State to the subject. "Mr. Seward observed that it was altogether a mistake to suppose that this plan had been devised with a view to injure the harbors permanently. It was, he said, simply a temporary military measure adopted to aid the blockade. The government of the United States had, last spring, with a navy very little prepared for so extensive an operation, undertaken to blockade upwards of 3000 miles of coast. The Secretary of the Navy had reported that he could stop up the 'large holes' by means of his ships, but that he could not stop up the 'small ones.' It has been found necessary, therefore, to close some of the numerous small inlets by sinking vessels in the channels. It would be the duty of the government of the United States to remove all these obstructions as soon as the Union was restored. It was well understood that this was an obligation incumbent on the federal government. At the end of the war with Great Britain that government had been called upon to remove a vessel which had been sunk in the harbor of Savannah, and had recognized the obligation, and removed the vessel accordingly. Moreover, the United States were now engaged in a civil war with the South. He was not prepared to say that, as an operation in war, it was unjustifiable to destroy permanently the harbors of the enemy; but nothing of the kind had been done on the present occasion. Vessels had been sunk by the rebels to prevent the access to their ports of the cruisers of the United States. The same measure has been adopted by the United States in order to make the blockade complete. When the war was ended the removal of all these obstructions would be a mere matter of expense — there would be no great difficulty in removing them effectually." Parliamentary Papers, 1862. Correspondence relating to the Civil War in the United States, pp. 114, 128, 137.] — *L.*

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 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.[1] [185

[1] Rutherforth's Inst. b. ii. ch. 9, § 15.

[185] Mr. Livingston, Secretary of State, instructed, March 31, 1832, Mr. Buchanan, Minister in Russia, to insert in the treaty proposed to be negotiated: 1st. In case of war between the two high contracting parties, hostilities shall only be carried on by officers duly commissioned by the government, and by persons under their orders, except in repelling attack or invasion, and in defence of property, under such penalties as shall be provided for by the next article. 2d. In order to restrain citizens or subjects of the one or other of the high contracting parties respectively from contravening any of the articles of this convention, or infringing any of the known rules of modern warfare it is agreed that laws shall be passed by each of the said powers for inflicting proper punishment on such of its subjects or citizens or others under the authority of its laws, as shall be guilty of any infraction of any of the provisions of this convention, particularly those for the protection of fishermen, husbandmen, and non-combatants and their property in time of war between the parties; for breach of truce and armistice; for injuries offered to prisoners of war and breaches of capitulations; for unauthorized hostilities; for injuries offered to the bearers of flags of truce; for the massacre of enemies who have surrendered; for the mutilation of the dead; for injuries offered to diplomatic agents; for a violation of their epistolary correspondence, and for all other breaches either of this treaty or of the laws of nations for preserving peace or lessening the evils of war. And the two high contracting parties will enter into further negotiations for extending between themselves, and by their example to other nations, the improvements of modern civilization in mitigating the horrors consequent on a state of war, and

§ 8. Exchange of 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 ransoming, which continued through the feudal wars of the Middle Age. The present usage of exchanging prisoners was not firmly established in

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confining its operations, as much as possible, to the military forces of the parties. The object of the first article, Mr. Livingston said, was to express the national reprobation of the doctrine, which considers a state of war as one of declared hostility between every individual of the belligerent nations respectively. "To break an armistice," he added, "to massacre an unresisting and unarmed enemy, to poison his provisions and water, to assassinate a prisoner, and other similar acts, are universally acknowledged to be breaches of international law, and to justify retaliation, and an increase of the horrors of war. Yet it is no less strange than true, that no nation has yet provided a punishment for such of its citizens as have thus exposed it to the embittered hostility of the enemy, and what is worse, to the reproach and infamy attached to such acts. The remedy has been left to the injured party: that remedy is retaliation — that is to say, the punishment of the innocent for the guilty; or the disavowal of the act, and, where it can be done, the delivery of the offender to the injured party." Ex. Doc. No. 111, 33d Cong. 1st Sess. H. R.

Persons identifying themselves with savages are not entitled to the rights of civilized warfare, and are not to be considered as prisoners of war. Of this the case of Arbuthnot and Ambrister, alluded to by Lord Brougham, (Part II. ch. 2, § 15, Editor's note [79, p. 252, *supra*,) is an example. Mr. Adams writes, November 28, 1818, to Mr. Erving, at Madrid: "The two Englishmen, executed by order of General Jackson, were not only identified with the savages with whom they were carrying on war against the United States, but one of them was the mover and promoter of the war, which, without his interference and false promises to the Indians of support from the British government, never would have happened. The other was the instrument of war against Spain as well as the United States, commissioned by McGregor and expedited by Woodbine, upon their project of conquering Florida with these Indians and negroes. Accomplices of the savages, and, sinning against their better knowledge, worse than savages, General Jackson, possessed of their persons and of the proofs of their guilt, might, by the lawful and ordinary usages of war, have hung them both, without the formality of a trial. To allow them every possible opportunity of refuting the proofs, or of showing any circumstance in extenuation of their crimes, he gave them the benefit of trial by a court-martial of highly respectable officers. The defence of one consisted solely and exclusively of technical cavils at the nature of part of the evidence; the other confessed his guilt." American State Papers, vol. iv. p. 544. Lord Castlereagh announced, January 7, 1819, to Mr. Rush, as the opinion of the Cabinet, that the conduct of those individuals had been unjustifiable, and therefore not calling for the special interference of Great Britain. Rush's Memoranda, p. 437. The subject was subsequently brought before Parliament by the Marquis of Lansdowne, but the United States were sufficiently put in the right on the broad merits of the transaction, by the Ministers of the Crown, Lord Liverpool and Lord Bathurst. Ib., Residence at the Court of London, vol. i. p. 64.] — *L.*

Europe until some time in the course of the seventeenth century. Even now, this usage is not obligatory among nations who choose 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.[1] [186

[1] 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. Robinson's Adm. Rep. vol. iii. note, Appendix A. Correspondence between M. Otto, French Commissary of Prisoners in England, and the British Transport Board, 1801. Annual Register, vol. xliv. p. 265. (State Papers.) Wheaton's Hist. Law of Nations, pp. 162–164.

[186] The Dutch were in the habit of selling any prisoners they took from the Barbary powers as slaves to the Spaniards; and ordinances relating to this subject were made in 1661 and 1664. During the war of the Succession, on the death of the Emperor Charles VI., a convention of cartel, in 1743, for the exchange and ransom of prisoners, fixed the ransom of a marshal at 32,000 francs. It was under this cartel that the Duke of Belle-Isle, arrested in Hanover, as mentioned, Part III. ch. 4, § 20, p. 420, *supra*, on his way to Berlin as Minister of France, was ransomed. Martens, Causes Célèbres, tom. i. p. 285. From the treaties between the Porte and Austria, in 1791, and the Porte and Russia, in 1792, it appears that Christian prisoners were used as domestic slaves in Turkey at that period; but, by recent treaties with the Porte, prisoners are exchanged, as between Christian States, and stipulations to the same effect were also made in a treaty between the Porte and Persia, in 1823, and in one between Russia and Persia, in 1828. In the treaty of 1787, between the United States and Morocco, it was provided that, in the event of a war between the parties, all prisoners should be exchanged, and not used as slaves, and that any balance of prisoners should be redeemed, at the rate of one hundred Mexican dollars per man. Manning's Commentaries on the Law of Nations, p. 162.

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

§ 4. Persons exempt from acts of hostility.

A cartel of 12th March, 1780, between England and France, after regulating, in the 18th article, the number of privates to be exchanged against officers, by the 19th article stipulates the money price to be paid, in default of the necessary number of officers or men to effect an exchange. This ransom, in the case of a field-marshal of France, or an English field-marshal or captain-general, was fixed at £60 sterling. Martens, Recueil de Traités, tom. iii. p. 301. No money tariff has been admitted by France since the decree of May 25, 1793. Ib. tom. vi. p. 745. But it seems to have been deemed necessary even in the treaty of Amiens, of 1802, between Great Britain and the French and Batavian republics, to stipulate that the prisoners, on both sides, should be restored without ransom, (*seront restitués sans rançon.*) Ib. tom. ii. Supp. p. 565. There was no cartel during the wars between England and France since 1803. Martens, Droit des Gens, tom. ii. § 275, note *b*. And by the Berlin decree of November 21, 1806, every Englishman found in the countries occupied by France or her allies was declared a prisoner of war. Ib. § 326, b.

During the war of the American Revolution, there was no cartel for the exchange of prisoners on a national footing, though repeated efforts were made to that effect in 1778, 1779, and 1780; but, though the British government was unwilling to enter into that species of convention *durante bello*, which is known to the public law as a cartel between nations at war, they constantly permitted exchanges under the rules of war, for purposes of military convenience, and in relief of their own officers and privates in captivity. Exchanges took place to some extent before the Declaration of Independence, and they do not appear to have been materially affected by the king's proclamation of the 23d of August, 1775, denouncing to condign punishment all persons aiding and abetting those who were in arms against the government, or by the counter-proclamation of Congress of the 7th of December, 1775, declaring that whatever punishment should be inflicted on those aiding the cause of American liberty would be retaliated, in the same kind and degree, on those in the power of the Americans. An arrangement, effected in July, 1776, between General Washington and Sir William Howe, (and which excepted seamen, whose case was referred to the Admiral, and who, as is elsewhere stated — Part II. ch. 2, § 15, Editor's note [79, p. 249 — were, when taken to England, generally held in prison to the end of the war, under the act of 1777,) was continued till May, 1778. A question arose with respect to the American General, Lee, whom it was proposed to treat as a deserter, he having been an officer in the British army; but it was finally settled, as he had made a public resignation of his half-pay before entering the American army, by his exchange for General Prescott; and the arrangement for exchanges, as understood with Sir William Howe, was continued with his successor, Sir Henry Clinton. Curtis's Report to Massachusetts Historical Society.

It would seem that the arrangements for exchanges were facilitated by the objections, which the German mercenaries proposed to be employed by Great Britain had to engage in hostilities, where no cartel for prisoners existed. Sir Joseph Yorke, at the Hague, writes, September 5, 1775, to Secretary Weymouth: —

"As to the procuring recruits from Germany, I really think that if it is not inconvenient to His Majesty to afford us the necessary assistance in his Electoral Dominions, we may be furnished with recruits to any number, and at a tolerable easy rate. As to the military force which princes on the Continent may be engaged to supply, I am to take it for granted that such troops so demanded would be only meant

treated alike; though we may lawfully destroy some of them, it does not therefore follow, that we may lawfully destroy all. For

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to serve in Europe; for I must beg leave to mention an anecdote, relative to the Hessian troops in Scotland, in 1745, which was very embarrassing. I mean the difficulty made by them to combat our only enemy, the rebels, for want of a cartel for the exchange of prisoners, a point impossible for us to grant, because we could not treat upon it with rebels, which made the late Duke of Cumberland (while the few who knew it were enjoined secresy) get rid of them as fast as he could, and never attempt to bring them to action. I am afraid, was it ever intended to send such troops to America, we should not find them more pliable there than in Europe, and their fears would still be greater, as the objects and the ideas they would give rise to would be all new."

Lord George Germain wrote to General Howe, February 1, 1776: —

"This letter will be intrusted to the care of the commander of His Majesty's ship Greyhound, who will also deliver up to you the officers of the privateer fitted out by the rebels, under a commission from Congress, and taken by one of Admiral Graves's squadron. The private men have all voluntarily entered themselves on board His Majesty's ships, but the officers having refused so to do, it has been judged fit to send them back to America, for the same obvious reasons that induced the sending back the rebel prisoners, taken in arms, upon the attack of Montreal, in September last.

"It is hoped that the possession of these prisoners will enable you to procure the release of such of His Majesty's officers and loyal subjects as are in the disgraceful situation of being prisoners to the rebels; for, although it cannot be that you should enter into any treaty or agreement with rebels for a regular cartel for exchange of prisoners, yet I doubt not but your own discretion will suggest to you the means of effecting such exchange without the king's dignity and honor being committed, or His Majesty's name used in any negotiation for that purpose; and I am the more strongly urged to point out to you the expediency of such a measure, on account of the possible difficulties which may otherwise occur in the case of foreign troops serving in North America."

General Howe says to General Washington, August 1, 1776: —

"Wishing sincerely to give relief to the distresses of all prisoners, I shall readily consent to the mode of exchange which you are pleased to propose, namely: 'Officers for officers of equal rank, soldier for soldier, citizen for citizen,' the choice to be made by the respective commanders for their own officers and men. You must be sensible that deserters cannot be included in this arrangement; and for the mode of exchange in the naval line, I beg leave to refer you to the Admiral." Mr. Bancroft to the New York Historical Society, February 14, 1862.

A cartel for the exchange of prisoners, between the United States and Great Britain — such arrangements, made during war between belligerents, not being deemed treaties in the sense of the Constitution — was ratified by the American Secretary of State, May 14, 1813. It provided for American agents at Halifax and other places, and for British agents in the United States; and stipulated not only for an exchange of prisoners of the same rank, but for equivalents in men, where they were of different ranks. National Advocate, May 26, 1813. The act of March 1, 1817, ch. 29, extended by the act of March 3, 1823, ch. 70, authorized the War Department to settle the accounts of any person, who may have redeemed and purchased from captivity any citizen of the United States, taken prisoner during the late war with Great Britain, provided that in no case a greater sum than $150 is allowed for the ransom

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

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of any one person. Statutes at Large, vol. iii. pp. 351, 788. The prisoners, whose ransom was thus provided for, were such as fell into the hands of the Indian allies of Great Britain, and many of whom were retained in captivity long after the termination of the war. Niles's Register, vol. xi. p. 382.

In the war of 1812, a question arose in the District (Admiralty) Court for South Carolina, whether slaves belonging to British subjects, and captured by an American privateer, were to be regarded as prize of war, or whether they should be deemed prisoners of war. It was decided that they were not prize of war; but this turned not on general principles, but on the operation of the act of Congress, prohibiting the African slave-trade, which had made it unlawful, since the 1st of January, 1808, to import or bring into the United States, from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of him as a slave, or to be held to service or labor. "As to the claim of prisoners of war," Judge Drayton said, "I do not think it proper to decide thereon. It appears to me — as the laws of the United States are silent on the subject — it becomes a *matter of State;* respecting which it is not for the judiciary to determine. The right to do so remaining with the government of the United States." Hall's Law Journal, vol. v. p. 464, Privateer Caroline *v.* Certain Slaves.

During the conferences at Zurich, after the Italian war of 1859, there was a question as to Hungarian prisoners, who had entered into the French or Sardinian service. On a demand of Count Walewski, French Minister of Foreign Affairs, to apply to them the principle of the general amnesty, Count Rechberg writes to Count Colloredo, the Austrian Plenipotentiary, August 24, 1859: "We heard during the war that some refugees formed a Hungarian legion from the Hungarian prisoners that had fallen into the hands of the enemy; but we constantly refused to give credit to this rumor, because it was repugnant to our feelings to admit that the French government would sanction such an infraction of the law of nations, by permitting prisoners of war to take arms against their sovereign and against their compatriots, in whose ranks they had just fought." On the 29th of August, Count Colloredo sent to the French Plenipotentiary, Baron Bourqueney, an extract from a confidential letter of Count Rechberg: "Inform Baron Bourqueney that he may be perfectly assured as to the fate of these prisoners, provided that they are immediately sent to their homes on the same terms as the other prisoners; but it is impossible that their condition should be made more favorable than that of those who remained faithful to their colors." Le Nord, 15 Mars, 1861.

The abandonment of the intention of the Federal government to treat Southern privateersmen as pirates, has been noticed. See Part II. ch. 2, § 15, Editor's note [79, p. 253. A cartel was signed, the 22d of July, 1862, by a general officer of the United States and a general officer of the Confederate States, in which they are referred to as "having been commissioned by the authorities they respectively represent for a general exchange of prisoners." It stipulates that "All prisoners of war held by either party, including those taken on private armed vessels, shall be discharged upon the conditions specified. Prisoners to be exchanged man for man and officer for officer. Privateersmen to be placed upon the footing of officers and men in the navy; men and officers of lower grades may be exchanged for officers of a higher grade; and men and officers of the different services may be exchanged according to the scale of equivalents agreed on.

"Local, State, civil, and military rank held by persons not in actual military ser-

necessary to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore ex-

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vice will not be recognized, the basis of exchange being the grade actually held in the naval and military service of the respective parties.

"If citizens held by either party on charges of disloyalty or any civil offence are exchanged it shall only be for citizens captured, sutlers and teamsters, and all civilians in the actual service of either party are to be exchanged for persons in a similar position.

"The stipulations and provisions to be of binding obligation during the continuance of the war, it matters not which party may have the surplus of prisoners, the great principles involved being, — first, an equitable exchange of prisoners, man for man, officer for officer, or officers of higher grade exchanged for officers of lower grade, or for privates, according to the scale of equivalents; second, that privateersmen and officers and men of the different services may be exchanged according to the same scale of equivalents; third, that all prisoners of whatever arm of the service are to be exchanged or paroled in ten days from the time of their capture, if it be practicable to transfer them to their own lines in that time, if not, as soon thereafter as practicable; fourth, that no officer, soldier, or employé in the service of either party is to be considered as exchanged and absolved from his parole until his equivalent has actually reached the lines of his friends; fifth, that the parole forbids the performance of field, garrison, police or guard, or constabulary duty.

"And in case any misunderstanding shall arise in regard to any clause or stipulation in the foregoing articles, it is mutually agreed that such misunderstanding shall not interrupt the release of prisoners on parole as herein provided, but shall be made the subject of friendly explanations, in order that the object of this agreement may neither be defeated nor postponed." Public Journals.

Martens says that a person violating his parole may be punished with death. Précis du Droit des Gens, tom. ii. § 275. On the other hand, his commentator, Pinheiro Ferreira, remarks that he cannot find any valid reason for this assertion. The prisoner, who has given his parole of honor not to serve against us in order to be set at liberty, is deserving of contempt, and, if he becomes again a prisoner, may be punished, but not with death. If to perjury he added a thousand other crimes, what punishment would the author reserve for him? Ib. tom. ii. note 75, p. 388.

The case of Colonel Hayne, who had been executed in South Carolina, for an alleged breach of parole, was brought, February 4, 1782, to the notice of the House of Lords, by the Duke of Richmond. It was contended, on the one side, that, allowing it to be true as stated, on the ground of modern practice and ancient authority, Colonel Hayne having been taken in arms, after admission to his parole, was liable to be hanged up *instanter*, without any other form of trial than what was necessary to identify the person; and the authority of Earl Cornwallis was cited to show that this had been the practice in several instances under his command in America. On the other hand, it was asserted by the Earl of Shelburne, on his personal knowledge, that "the practice in the last war had been totally different. A greater degree of ignominy, perhaps a stricter confinement, was the consequence of such an action; the persons guilty of it were shunned by gentlemen, but it had never before entered into the mind of a commander to hang them." Annual Register, 1782, p. 157].

"In the war between the United States and Mexico, the Mexican authorities not only attempted, by proclamation, to induce such of their soldiers as had been released

empted the persons of the sovereign and his family, the members of the civil government, women and children, cultivators of the earth, artisans, laborers, 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

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by the Americans on parole to regard that obligation as null and void, but, in some cases, their unexchanged prisoners were actually forced to reënter the ranks and fight. Many others, under the promise of plunder, were induced to organize themselves into guerilla bands, under robber chiefs, who were furnished with military commissions from the government. Such attempts to violate the ordinary rules of war not only justify, but require prompt and severe punishment. Accordingly, General Scott announced his intention to hang every one who should be retaken after thus violating his parole of honor. In making further releases on parole, he required, in addition to the ordinary military pledge, the sanctity of a religious oath, administered by the Mexican clergy." Halleck, International Law, p. 438.

Martens says: "In the wars which preceded the French Revolution, it was scarcely admitted that the militia, (*milice,*) especially when it was employed offensively, could pretend to the same treatment as regular troops, and in the rare cases in which the government summoned all its subjects to take up arms for the defence of the country in danger, or when the inhabitants of a place armed themselves of their own accord for their defence, the other party considered that they were authorized to treat them with more harshness, and to refuse them the treatment of prisoners of war. But in the war of the French Revolution, the *levée en masse* decreed, on the 16th of August, 1793, became the basis of those conscriptions and forced requisitions, which, by augmenting immensely the number of combatants withdrawn from the national industry to act offensively against the enemy, forced the latter to imitate in some sort a new example." Précis du Droit des Gens, liv. viii. ch. 4, § 271.

Partisan and guerilla troops, which latter was the name by which the bands, that were formed in Spain to combat the French in the wars from 1808 to 1814, were designated, (Bouillet Dictionaire d'histoire, &c., p. 759,) are bodies of men self-organized and self-controlled, who carry on war against the public enemy, without being under the direct authority of the State. They have no commissions or enlistments, nor are they enrolled as any part of the military force of the State; and the State is, therefore, only indirectly responsible for their acts. Such partisan and guerilla bands are regarded as outlaws, and, when captured, may be punished as freebooters and banditti. If authorized and employed by the State, they become a portion of its troops, and the State is as much responsible for their acts as for the acts of any other part of its army. They are no longer partisans and guerillas, for they are no longer self-controlled, but carry on hostilities under the direction and authority of the State. The law of nations has not unfrequently been violated in European wars by disregarding the distinction between the unauthorized acts of self-constituted guerilla bands and the authorized acts of *levées en masse*, organized and armed under the authority of the State. Halleck, International Law, p. 386. A war may be a war of insurrection, or revolution, or independence, and at the same time a national war. Where such insurgent militia are called into the field, and organized under the constituted authorities of the State, they are entitled to all the rights of war, and are subject to all its duties and responsibilities. Ib. p. 334.] — *L.*

misconduct in violation of the usages of war, by which they forfeit their immunity.[1] [[187]

§ 5. Enemy's property, how far subject to capture and confiscation.

The application of the same principle has also limited and restrained the operations of war against the territory and other property of the enemy. From the moment one State is at war with another, it has, on general principles, a right to seize on all the enemy's property, of whatsoever kind and wheresoever found, and to appropriate the property thus taken to its own use, or to that of the captors. By the ancient law of nations, even what were called *res sacræ* were not exempt from capture and confiscation. Cicero has conveyed this idea in his expressive metaphorical language, in the Fourth Oration against Verres, where he says that "Victory made all the *sacred* things of the Syracusans *profane*." But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war. Private property on land is also exempt from confiscation, with the exception of such as may 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 extends even to the case of an absolute and unqualified conquest of the enemy's country. [[188] In ancient times, both the movable and immovable property of

[1] Rutherforth's 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.

[[187] Emerigon (ch. 12, sect. 19, § 8,) refers to ordinances of France and Holland, in favor of protection to fishermen during war; and to the like effect was the order of the British government in 1810, for abstaining from hostilities against the inhabitants of the Faroe Islands and Iceland. So, fishermen were included in the treaty between the United States and Prussia in 1785, as one of the classes of non-combatants whom the contending parties mutually stipulated not to molest. Hazlitt and Roche, Manual of Maritime Warfare, p. 56. See, also, as to the exemption of fishermen, Cussy, Droit Maritime, tom. i. p. 291; tom. ii. p. 164.] — *L.*

[[188] As military occupation produces no effect (except in special cases and in the application of the severe right of war by imposing military contributions and confiscations) upon private property, it follows as a necessary consequence that the ownership of such property may be changed, during such occupation, by one belligerent of the territory of the other, precisely the same, as though war did not exist. Halleck, International Law and Laws of War, p. 789.] — *L.*

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 of peace, has been followed by no 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 respect to the eminent domain. In other respects, private rights are unaffected by conquest.[1] [189

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[1] 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, &c., liv. viii. ch. iv. §§ 279–282.

[189] Were it not that they occurred in what the English chiefs, without reference to their own titles, chose to term rebellion, instead of foreign war, Ireland might offer more than one case analogous to the conquest of England by William of Normandy. "In Cromwell's time the confiscation comprehended by much the greater part of the surface of Ireland. Private soldiers, or desperate adventurers, became the lords of extensive tracts, once enjoyed by native families of ancient descent, or by the Anglo-Irish nobility. The land was likely to be useless for the want of cultivators. The continuance of a warfare, in which mercy was deemed a symptom of timidity or treachery, had swept away the peasantry. Numbers had been transported as slaves to the plantations; many had emigrated as soldiers or colonists. Hands were wanted on the new estates; the tenants were therefore retained, but they were treated with all the jealous severity arising from consciousness of weakness, and an apprehension that advantage would be taken of it. They experienced the hardship of slavery, without the enjoyment of the protection which the selfishness of ownership in some degree spreads over it." Encyclopædia Britannica, 8th ed. vol. xii. p. 485, Ireland.

It is not during a fratricidal contest that we are to look for any practical efforts towards carrying out the policy so happily inaugurated by the European belligerents in the Russian war, making war a contest between *State* and *State*, and exempting, so far as practicable, from its evils all the population not connected with the belligerent operations. To the just censure pronounced by Earl Russell on the act of the Confederate Congress of August 21, 1861, — confiscating the property of whatever nature, except public stocks and securities, held by an alien enemy, and in which term was included even foreigners domiciled in the United States, as well as to the previous law of May 21, 1861, prohibiting all persons indebted to individuals and corporations in the United States from paying their creditors, and authorizing the payment of their indebtedness into the public treasury, — reference has

§ 6. Ravaging the enemy's territory, when lawful?

The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of the same original principle of natural

already been made. The question in these cases may well occur, how far the exercise of such a power is consistent with the spirit of those treaties, including the 10th article of the treaty of 1794 with England, which provided against all the confiscations of the character of those above described, and which were concluded by the United States, when the so-called Confederate States were an integral portion thereof.

The proclamation of the President of the United States prohibiting, in accordance with the act of July 13, 1861, all commercial intercourse with the citizens of the insurrectionary States, with the forfeiture of all goods, chattels, wares, and merchandise connected therewith, including the vessel or vehicle conveying the same has, also, been noticed, ch. 1, § 14, Editor's note [175, p. 555, *supra*.

During the extra session of July, 1861, of the Congress of the United States, in addition to the above act, one was passed on the 6th of August, enacting that if during the present, or any future insurrection, any person shall purchase or acquire, sell, or give any property of whatsoever kind or description to be used or employed in aiding, abetting, or promoting such insurrection, or resistance to the laws, or any persons engaged therein; or if any owner of such property shall knowingly use or employ, or consent to the use or employment of the same, as aforesaid, all such property shall be lawful subject of prize and capture wherever found, and it shall be the duty of the President to cause the same to be seized, confiscated and condemned in the District or Circuit Court of the United States or in Admiralty. And that whenever, during the present insurrection, any person claimed to be held to labor under the law of any State, shall be required or permitted by the person to whom such labor or service is due to take up arms against the United States, or shall be required or permitted by such person to work or be employed in or upon any fort, navy yard, &c., or in any military or naval service whatsoever against the government and lawful authority of the United States, the person to whom such labor or service is due shall forfeit his claim to such labor; and whenever he shall seek to enforce it, it shall be a sufficient answer that the person whose service or labor is claimed had been employed in hostile service against the United States. Statutes at Large, 1861, p. 319.

In consequence of an undue extension given to the operation of this act, as well as to that of July 13th, the Secretary of State issued a circular in which, after stating the chief features of the acts of July 13th and August 6th, he said: "It would seem from an inspection of these provisions of the acts of Congress that no property is to be confiscated or subject to forfeiture, except such as is in transit, or provided for transit, to or from insurrectionary States, or used for the promotion of the insurrection. Real estate, bonds, promissory notes, moneys in deposit, and the like, are therefore not subject to seizure or confiscation in the absence of evidence of such unlawful use.

"All officers while vigilant in the prevention of the conveyance of property to or from insurrectionary States, or the use of it for insurrectionary purposes, are expected to be careful in avoiding unnecessary vexation and cost by seizures not warranted by law." Public Journals.

At the subsequent session, 1861–2, the legislation of Congress embraced several acts *in pari materia*, affecting as well the confiscation of property, in general, belonging to the inhabitants of the seceded States, under the form of sales for taxes, prohibition of slavery in the territories, its abolition in the District of Columbia, the forfeiture by emancipation without compensation of the slaves belonging to persons,

law, which authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the

in anywise, connected with the insurrection and virtually repealing the fugitive slave law, by rendering it a military misdemeanor for officers in the army or navy to aid even loyal masters in recovering their fugitive slaves.

By an act of March 13, 1862, all officers in the military or naval service of the United States were prohibited from employing any of the forces under their respective commands for the purpose of returning fugitives from service or labor, who may have escaped from any persons to whom such service or labor is claimed to be due, and any officer who shall be found guilty by a court-martial of violating this article shall be dismissed from the service. Statutes at Large, 1861–2, p. 354.

A joint resolution was passed, April 10, 1862, on the recommendation of the President, that Congress ought to coöperate with any State which may adopt gradual abolishment of slavery, giving such State pecuniary aid, to be used by such State at its discretion, to compensate for the inconveniences, public and private, produced by such change of system. Ib. p. 617.

By acts of April 16, 1862, and July 12, 1862, slavery was abolished in the District of Columbia, the owners to be allowed a compensation to be fixed by commissioners, excluding all claims of persons who had borne arms against the government in the present rebellion or in any way given aid or comfort thereto, or originating from a transfer from such person, and an appropriation was made to aid in the colonization of these emancipated slaves. Ib. pp. 376–538.

The declared object of the act of June 7, 1862, was to make the lands in the insurrectionary districts chargeable for their proportion of the direct taxes imposed by the act of August 6, 1861, by rendering them, with a penalty of fifty per cent. in addition thereto, a lien to be enforced thereon, by commissioners, whenever the commanding general of the forces of the United States, entering any insurrectionary State or district shall have established the military authority of the United States throughout any parish or district or county of the same. It provides for striking off to the United States the lands for the taxes, penalty, costs, and ten per cent. per annum interest on the tax, unless some person shall bid the same or a larger sum, and prescribes the terms for the redemption of the same by the owner or any loyal person of the United States having a valid interest in or lien thereon, the time for which may be extended to one or two years, in favor of persons who have not taken part in the insurrection, but by reason thereof are unable to pay the tax or redeem the lands, or in case of disabilities. Where owners have abandoned the land or not paid taxes thereon or redeemed it, and the commissioners shall be satisfied that the owners have left the same to join the rebel forces or otherwise engage in or abet the rebellion, and the same shall have been struck off to the United States, they may lease it in parcels to citizens of the United States, or persons who have declared their intention to become such, till the rebellion is put down, the civil authority of the United States established, and the people elect a legislature and State officers who shall take an oath to support the Constitution of the United States, to be announced by the President's proclamation; the leases to secure proper and reasonable employment and support, at wages or upon shares of the crop, of such persons or families, as may be residing upon the said parcels or lots (meaning the slaves). Commissioners may, instead of leasing it, sell the land in parcels not exceeding three hundred and twenty acres, at public sale, to any loyal citizen of the United States, or person who has declared his intention to become such, and special provisions are made in favor of those purchasers who have been officers, soldiers,

object of hostilities. The same general rule, which determines how far it is lawful to destroy the persons of enemies, will serve

or sailors in the United States service; and any citizen or person declaring his intention to become such, and being the head of a family, residing in the State or District and not the owner of any other lands, may have the right to enter upon and acquire the right of preëmption in such lands as may be unimproved and vested in the United States. One fourth of the proceeds shall be paid to the Governor of the State when the insurrection is put down, for the purpose of reimbursing loyal citizens, or for such other purpose as the State may direct; and one fourth shall be paid to the State as a fund to aid in the colonization or emigration from the State of any free person of African descent, who may desire to remove therefrom to Hayti, Liberia, or any other tropical State or Colony. Ib. p. 422.

By the act of June 19, 1862, from and after its passage, there shall be neither slavery nor involuntary servitude in any of the territories of the United States now existing, or which may at any time hereafter be formed or acquired by the United States, otherwise than in the punishment of crimes whereof the party shall have been convicted. Ib. p. 432. This act wholly ignores the decision of the Supreme Court on the constitutional question respecting the power of Congress over slavery in the territories. See Part I. ch. 2, § 24, Editor's note [39, p. 99.

The act of July 17, 1862, ch. 195, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," is here fully inserted, in order that its provisions may be tested by international law, as well as by the Constitution of the United States. It will be seen that no regard is had, in its proposed applications, to the universally recognized rule of public law, equally applicable in principle to successful rebellion and foreign conquest, that, during an adverse occupation, "the inhabitants become subject to such laws, and such laws only, as the conquerors choose to impose. No other laws could, in the nature of things, be obligatory upon them, for where there is no protection or sovereignty, there can be no claim to obedience." Gallison's Reports, vol. ii. p. 500, United States *v.* Hayward. Story, J. No provision is made for the case of individuals who, however loyal, residing in the insurrectionary districts, from which the protection of the United States is withdrawn, render, in accordance with what has been shown to be the doctrines regarding *de facto* governments, temporary obedience to the rebel authorities, including the performance of judicial and other public duties. See ch. 1, § 7, of this Part, Editor's note [171 p. 525. The provisions of the act are: —

"SECTION 1. Every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free; or he shall be imprisoned for not less than five years and fined not less than ten thousand dollars, and all his slaves, if any, shall be declared and made free; said fine shall be levied and collected on any or all of the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing the said crime, any sale or conveyance to the contrary notwithstanding.

"SEC. 2. If any person shall hereafter incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid or comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment, for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, f any he have, or by both of said punishments.

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

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"SEC. 3. Every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States.

"SEC. 4. This act shall not be construed in any way to affect or alter the prosecution, conviction or punishment of any person or persons guilty of treason against the United States before the passage of this act, unless such person is convicted under this act.

"SEC. 5. To insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof, for the support of the army of the United States, that is to say: First, of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the United States; secondly, of any person hereafter acting as President, Vice-President, Member of Congress, Judge of any Court, Cabinet Officer, Foreign Minister, Commissioner, or Consul of the so-called Confederate States of America; thirdly, of any person acting as Governor of a State, member of a Convention or Legislature, or Judge of any Court of any of the so-called Confederate States of America; fourthly, of any person who, having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called Confederate States of America; fifthly, of any person hereafter holding any office or agency under the Government of the so-called Confederate States of America, or under any of the several States of the said Confederacy, or the laws thereof, whether such office or agency be national, state, or municipal in its name or character: *Provided*, That the persons thirdly, fourthly, and fifthly above described shall have accepted their appointment or election since the date of the pretended ordinance of secession of the State, or shall have taken an oath of allegiance to, or to support the Constitution of the so-called Confederate States; sixthly, of any persons who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

"SEC. 6. If any person within a State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding and abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the estate and property, moneys, stocks, and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid, or the proceeds thereof. And all sales, transfers, or conveyances of any such property, after the expiration of the said sixty days from the date of such warning and proclamation, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

"SEC. 7. To secure the condemnation and sale of any such property after the same shall have been seized, so that it may be made available for the purposes afore-

just ends of war, it may be lawfully done, but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our

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said, proceedings *in rem* shall be instituted in the name of the United States in any District Court thereof, or in any Territorial Court, or in the United States District Court for the District of Columbia, within which the property above described or any part thereof may be found, or into which the same, if movable, may first be brought, which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases, and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property, and become the property of the United States, and may be disposed of as the Court shall decree, and the proceeds thereof paid into the treasury of the United States for the purposes aforesaid.

"SEC. 8. The several courts aforesaid shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof, where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act, and vest in the purchasers of such property good and valid titles thereto. And the said courts shall have the power to allow such fees and charges of their officers as shall be reasonable and proper in the premises.

"SEC. 9. All slaves of persons who shall hereafter be engaged in rebellion against the government of the United States, or who shall in any way give aid or comfort thereto, escaping from such person, and taking refuge within the lines of the army; and all slaves captured from such persons, or deserted by them and coming under the control of the government of the United States; and all slaves of such persons found or being within any place occupied by rebel forces, and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves.

"SEC. 10. No slave escaping into any State, Territory, or the District of Columbia from any other State, shall be delivered up, or in any way impeded or hindered of his liberty, except for crime or some offence against the laws, unless the person claiming said fugitive shall first make oath that the person to whom the labor or service of such fugitive is alleged to be due is his lawful owner and has not borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto; and no person engaged in the military or naval service of the United States shall, under any pretence whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or surrender up any such person to the claimant, on pain of being dismissed from the service.

"SEC. 11. The President of the United States is authorized to employ as many persons of African descent as he may deem necessary and proper for the suppression of this rebellion; and for this purpose he may organize and use them in such manner as he may judge best for the public welfare.

"SEC. 12. The President of the United States is hereby authorized to make provision for the transportation, colonization, and settlement, in some tropical country beyond the limits of the United States, of such persons of the African race, made free by the provisions of this act, as may be willing to emigrate, having first obtained the consent of the government of said country to their protection and settlement within the same, with all the rights and privileges of freemen.

"SEC. 13. The President is hereby authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any

own frontier secured, or if the approaches to a town intended to be attacked cannot be made without laying waste the interme-

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State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.

"SEC. 14. The Courts of the United States shall have full power to institute proceedings, make orders and decrees, issue process, and do all other things necessary to carry this act into effect." Statutes at Large, 1861–2, p. 589.

A supplementary resolution was passed, on the same day, by Congress, to meet certain objections which, it appears by the Message approving it, (Cong. Globe, 1862, p. 3406,) the President had to the bill. It is to the effect: —

That the provisions of the third clause of the 5th section shall be so construed as not to apply to any act or acts done prior to the passage thereof; nor to include any member of a State legislature or judge of any State court, who has not, in accepting or entering upon his office, taken the oath to support the constitution of the so-called "Confederate States of America;" nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life. Statutes at Large, 1862, p. 627. This last clause proceeds on the supposition, that the provision in the Constitution, against forfeiture on attainder for treason, technically construed, is confined to real estate, and does not extend to goods and chattels. See Cong. Globe, 1861–2, p. 3376.

The act of July 17, 1862, ch. 201, § 12, authorizes the President to receive into the service of the United States, for the purpose of constructing intrenchments or performing camp-service, or any other labor or any military or naval service for which they may be found competent, persons of African descent, to be enrolled and organized under such regulations not inconsistent with the Constitution and laws as the President may prescribe. By § 13, if any man or boy of African descent, owing service or labor (slave) to any person who during this rebellion has levied war or borne arms against the United States or adhered to the enemies by giving them aid or comfort, shall render the service provided for as above, he, and his mother, wife, and children, if they owe service to (i. e. are slaves of) any such person, shall ever thereafter be free. Statutes at Large, 1862, p. 599.

The President issued, July 25, 1862, a proclamation warning all persons within the contemplation of the 6th section of the above act of 17th July, 1862, ch. 195, to cease participating in, aiding, countenancing, or abetting the existing rebellion, or any rebellion against the government of the United States, and to return to their proper allegiance to the United States, on pain of the forfeitures and seizures as within and by the said section provided. Ib. p. iv.

Another proclamation was issued on the 22d of September, 1862, in which the Chief Magistrate is designated not only as "President of the United States," but as "Commander-in-chief of the army and navy thereof;" thereby, it would seem, implying that, in assuming to emancipate all the slaves in the seceded States, the Executive rested his authority not on the acts of Congress, — which, though they may be practically applicable to all the slaves in those States, do not profess in terms to declare universal manumission, — but on that undefined war-power, the existence of which in the President alone was denied as well by Senator Sumner, who claimed it for Congress, as by those senators who disclaimed altogether the doctrine that the Constitution is suspended by war, domestic or foreign. (See Editor's note [170 to ch. 1, § 5, of this Part, p. 515.)

While suggesting his intention to repeat his recommendation to Congress to tender pecuniary aid to all the slave States, not in rebellion, who may adopt immediate or

diate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war. If modern

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gradual emancipation of persons of African descent, with their colonization on this continent or elsewhere, the President proclaims and declares: "That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to suppress such persons, or any of them, in any efforts they may make for their actual freedom.

"That the executive will, on the first day of January aforesaid, by proclamation, designate the States, and parts of States, if any, in which the people thereof respectively shall then be in rebellion against the United States; and the fact that any State or people thereof, shall on that day be in good faith represented in the Congress of the United States, by members chosen thereto at elections wherein a majority of the qualified voters of such State shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such State, and the people thereof, are not then in rebellion against the United States."

The act of March 13, 1862, forbidding the army and navy from aiding in returning fugitive slaves, and the 9th and 10th sections of the act of July 17, 1862, "to suppress insurrection," &c., which have been given in this note, are incorporated into the proclamation, which thus concludes: "And I do hereby enjoin upon all persons engaged in the military and naval service of the United States to observe, obey, and enforce within their respective spheres the above recited act. And the Executive will, in due time, recommend that all citizens of the United States, who shall have remained loyal throughout the rebellion, shall, upon the restoration of the constitutional relations between the United States and their respective States and people, which shall have been suspended or disturbed, be compensated for all losses by acts of the United States, including the loss of slaves." Public Journals.

It may be premised that this proclamation, as well as the confiscation and emancipation acts of Congress, to be of any avail, can only be applied after the restoration of the Federal authority to the seceded States; while that must of itself *proprio vigore* bring back the legitimate operation of the Constitution, with the administration of justice in conformity thereto, and terminate all exceptional jurisdictions derived from the so-called war power or otherwise. So far were the founders of the Republic from contemplating an undefined power in the President during civil war, that they required, as we have seen, by the act of 1792, for calling forth the militia to suppress insurrection, the preceding sanction of a United States Judge. Nor is there any unlimited power of seizure of private property, even in time of foreign war, on the part of military officers, whether of the Commander-in-chief or of his subordinates. In a case arising during the Mexican war, it was held that; "Where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own. There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser. But we are clearly of opinion that, in all of these cases, the dan-

usage has sanctioned any other exceptions, they will be found in the right of reprisals, or vindictive retaliation. The whole inter-

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ger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for." Howard's Reports, vol. xiii. p. 134, Mitchell *v.* Harmony.

The principle of the institutional writers on *civil* war is, that during the contest *belligerent* rights govern, and that it is only after its termination, and the regular administration of justice is resumed, that proceedings under the municipal rights of sovereignty can be instituted against those, if any, who may be excepted from the amnesty, the modern usage being in political revolutions general, if not universal, oblivion of the past. All the proceedings of war cease when peace comes, and even during the contest, it is said, in the case usually cited by those who would assert the co-existence of belligerent and municipal rights in civil war, that, "admitting a sovereign who is endeavoring to reduce his revolted subjects to obedience to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. The nature of the law and the proceedings under it will decide whether it is an exercise of belligerent rights or exclusively of his sovereign power." Cranch's Rep. vol. iv. p. 272, Rose *v.* Himely.

The laws alluded to would seem to be obnoxious not only to the violation alike of the principles of international law and of the Constitution of the United States, whether we regard them as intended to apply to belligerents or to rebels, but they blend all distinctions between the two systems, proposing to enforce rights founded exclusively, if they exist at all, on war, through process applicable only to times of peace. In other words, as while an adverse possession of the seceded States exists, all legislation there would be inoperative, these enactments, based on belligerent claims, are made to apply after the war-power has ceased, and which, even on the supposition that the territory is thereafter to be regarded as a conquered country, and not to revert to its former condition as States of the Union, would be the exercise of a severity unknown to modern civilization.

This point is explained in an opinion rendered in a case of capture by the same judge, who had given the one cited ch. 1, § 11, Editor's note [173, p. 535, *supra*, in which is claimed the right to confiscate the property of the inhabitants of the seceded States taken *at sea*, without regard to the question of the personal loyalty of the individual owners.

"An objection," Judge Sprague says, "to the prize decisions of the District Court has arisen from an apprehension of radical consequences. It has been supposed that if the government have the rights of a belligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a State and its inhabitants may be permanently divested of all political privileges and treated as foreign territory acquired by arms. This is an error, a grave and dangerous error. Belligerent rights cannot be exercised when there are no belligerents. Conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession and holds absolute dominion over any portion of its territory, and the nation by force of arms expels or overthrows the enemy, and suppresses hostilities, it acquires no new title, but merely regains the possession of which it had been temporarily deprived. The nation acquires no new sovereignty, but merely maintains its previous rights. During the war of 1812, the British took

national code is founded upon reciprocity. The rules it prescribes are observed by one nation, in confidence that they will

possession of Castine, and held exclusive and unlimited control over it as conquered territory. Castine was restored to us under the treaty of peace, but it was never supposed that the United States acquired a new title by the treaty, and could thenceforward govern it as conquered territory.

"Another objection to those decisions of the District Courts is founded upon the apprehension that they may lead to or countenance cruel and impolitic confiscations of private property found on land. This apprehension is unfounded. No such consequence can legitimately follow. Those decisions undoubtedly assert that the United States have the rights of a belligerent. But the extent of those rights on land, or the manner in which they are to be exercised, was not discussed. They were not specially mentioned, except to say that enemy's property found by a belligerent on land, within his own country, on the breaking out of a war, will not be condemned by the courts, although it would be if found at sea. This distinction, so far as it goes, tends to show that the doctrine of maritime captures is not to be applied to seizures on land. But the danger upon which this objection is founded does not arise from the administration of the prize laws by the courts, or the exercise of belligerent rights by military commanders upon military exigencies. The objection really arises from fear of the legislation of Congress. It is apprehended that they may pass sweeping or general acts of confiscation, to take practical effect only after the rebellion shall have been suppressed; that whole estates, real and personal, which have not been seized during the war, may be taken and confiscated upon coming within reach of the government, after hostilities shall have ceased. This, as we have seen, would not be the exercise of belligerent rights, the war being at an end. Belligerent confiscations take effect only upon property of which possession is taken during the war. As against property which continues under the control of the enemy, they are wholly inoperative. If possession be acquired by or after the peace, then previous legislation may take effect, but it will be by the right of sovereignty, not as an act of war. Under despotic governments, the power of municipal confiscation may be unlimited; but under our government the right of sovereignty over any portion of a State is given and limited by the Constitution, and will be the same after the war as it was before. When the United States take possession of any rebel district, they acquire no new title, but merely vindicate that which previously existed, and are to do only what is necessary for that purpose. Confiscations of property, not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive; and punishment should be inflicted only upon due conviction of personal guilt. What offences shall be created and what penalties affixed must be left to the justice and wisdom of Congress within the limits prescribed by the Constitution. Such penal enactments have no connection whatever with the decisions of prize courts enforcing belligerent rights upon property captured at sea during the war." Law Reporter, June, 1862, p. 498, Case of the Amy Warwick.

Mr. Thomas of Massachusetts, while the subject was under discussion in the House of Representatives, said: "The seceded States, so called, and the people of those States are to-day integral parts of the Union, over whom, when the conflict of arms ceases, the Constitution of the United States and the laws made under it, will resume their peaceful sway. In seeking to know what this government ought to do in relation to the confiscation of private property, or the emancipation of slaves in the 'seceding States,' the obvious question is, what is the end which the government

be so by others. Where, then, the established usages of war are violated by an enemy, and there are no other means of restrain-

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and people are seeking to attain? It is to preserve the Union and the Constitution in their integrity, to vindicate in every part of this indivisible Republic our supreme law. In seeking to change it by force of arms, we become the rebels we are striving to subdue. The bills and joint resolutions before the House propose, with some differences of policy and method, two measures: the confiscation of the property of the rebels, and the emancipation of their slaves. Some of the resolutions propose the abolition of slavery itself, with compensation for loyal masters. The propositions for confiscation include the entire property of the rebels, real and personal, for life and in fee; substantially the property of eleven States and six millions of people. No consideration is to be given to the fact that allegiance and protection are reciprocal duties, and that for the last ten months the national government has found itself incapable of giving protection to its loyal subjects in the 'seceding States,' neither defending them nor giving them arms to defend themselves; and that deprived of our protection and incapable of resistance, they have yielded only to superior force. 'To state the proposition to confiscate the property of eleven States is to confute it; is to shock our common sense and sense of justice; is to forget not only the ties of history and of kindred, but those of a common humanity; is to excite the indignation of the civilized world, and to invoke the interposition of all Christian governments.'

"Apart from the injustice and impolicy of these acts, there is no authority to pass them, whether the confiscation and forfeiture of property be viewed as the punishment for crime or under the so-called 'war-power' of the government. The subject charged with treason may justly claim all the muniments and safeguards of the Constitution, — of the provisions against *ex post facto* laws, (art. 1, sec. 9); against depriving him of life, liberty, and property, without due process of law, that is, judicial process, (amendments, art. 5); immunity from being compelled to answer, (except for cases in the army and navy and militia in actual service,) for a capital or otherwise infamous crime, unless on presentment by a grand jury, and after a trial by an impartial jury of the State or district where the crime has been committed, (art. 3, sec. 2, amendments, art. 6); and that no attainder of treason can work a forfeiture except during the life of the person attainted, (art. 3, sec. 2,) meaning a judicial attainder, as attainder by act of legislature had been previously forbidden, (art. 1, sec. 9.)

"The thing sought to be done by these acts is the confiscation of the property of the rebel as the penalty of his offence and the attainment of this end without the trial and conviction of the offender. Though under the Constitution upon a trial and *conviction* of a traitor a life estate only can be taken, it is assumed that, without trial or conviction, the fee simple may be taken. There is no analogy between the proposed proceedings *in rem* and the case of seizures and forfeitures under the revenue law or proceedings in admiralty, where the offence attaches primarily to the thing itself.

"As to the war-power, — the resistance of any portion of the people to the Constitution and laws cannot confer upon Congress any new substantive power or abrogate any limitation on their powers, except in the cases expressly provided for, as in regard to the suspension of the *habeas corpus*, and permitting the quartering of soldiers in a house without the consent of the owner in time of war, 'in a manner to be prescribed by law.'"

But when the government uses the power of war, its limitations, recognized by the law of nations, as to the extent to which it may confiscate or subject to forfeiture

ing his excesses, retaliation may justly be resorted to by the suffering nation, in order to compel the enemy to return to the observance of the law which he has violated.[1]

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private property, as well as in other respects, must be observed. It is shown by an examination of the rules laid down by our author and other institutional writers that the propositions in the bills and resolutions under discussion, and which were essentially adopted in the laws passed, have no adequate support as belligerent rights or under the so-called war-power.

On the subject of emancipation, while Mr. Thomas recognizes as a general proposition that Congress in time of peace has no power over slavery in the States, and that strictly no power is conferred upon any department of government by war or rebellion, he suggests that a case may occur, as in the event of the employment of slaves in the military and naval service of the rebels, where in repressing insurrection and repelling invasion a right paramount to any claim of the master under the local law may arise, and a new power over the relation of master and slave may be brought into action. "But," he adds, "though the power may exist, there is with prudent and humane men no desire to use it. Nothing but the direst extremity would excuse the use of a power fraught with so great peril to both races." Cong. Globe, 1861-2, p. 1616, April 10, 1862.

Mr. Crittenden of Kentucky said: "You propose the confiscation of all the property of rebels, their aiders and abettors. What is the number of people who would be included in the proscription? Who would that include? All who have paid taxes? All who have made contributions to support the rebellion? All who have taken up arms, or all who have given aid and comfort to those who have taken up arms in support of the rebellion? How many would that leave? The exceptions will be but very few, if you consider who are the principals and who the aiders and abettors of this rebellion. Here are ten States, and by your law of confiscation you proscribe man, woman, and child. The whole history of mankind does not furnish anything like it. Such a proscription was never before issued by any human authority. No plague, no pestilence, which ever descended upon mankind, has ever wrought such mischief as this would. To inquire whether such a measure is against the Constitution of the United States would seem to be mockery. It is against the very instincts of mankind, against the lessons of human policy, against all lessons of Christianity and humanity. The Constitution says you shall pass no bill of attainder. You pass your judgment, and send your own officers to execute it. That is a bill of attainder. The Constitution did not use the word in any technical sense. We should abuse the power of construction by refusing to consider this as the enunciation of a great principle." Ib. p. 1636, April 11, 1862. On a subsequent day, he said: "The President has no right, he has no more power than any other man, as a general thing, to seize the property in slaves or any other description of property. This bill not only authorizes the President to take the property of rebels, but it authorizes him to take the property of every man who may own slaves. The Constitution considers slaves property, and Congress, under the Constitution, considered them property. Slaves are recognized as property by the Constitution and by the law, and under the Constitution and under the laws I have the same

[1] Vattel, liv. iii. ch. 8, § 142; ch. 9, §§ 166–173. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. viii. ch. 4, §§ 272–280. Klüber, Part II. tit. 2, sect. 2, ch. 1, §§ 262–265.

Discussions between the American and British governments upon this subject, during the late war.

The last war between the United States and Great Britain was marked by a series of destructive measures on the part of the latter, directed against both persons and property hitherto deemed exempt from hostilities by the general usage of civilized nations. These measures were attempted to be justified, as acts of retalia-

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right to be protected in that property as any other person has in any property which he may possess. This protection of property in slaves was intended to be secured by that provision of the Constitution, which declares that no man shall be deprived of life, liberty, or property, but by due process of law. By some sort of legal trick it is proposed to utterly strip a man of his property, without any judicial proceeding; yet it is called a proceeding *in rem*. By machinery of that sort the Constitution and laws are to be set aside." Ib. p. 1803. April 24, 1862.

Whether or no the new legislation is consistent with the Constitution of the United States might lead to a discussion on internal rather than international law, which might be deemed out of place in this treatise, were it not that the concurrence of most, if not all countries, bound by written constitutions, in prohibiting confiscations of property, even for political offences, would seem to give to the opposite policy the sanction of universal law. The Spanish Constitution, art. 10, provides that the penalty of confiscation of property should never be imposed. Cos-Gayon, Diccionario de derecho administrativo Español, p. 360. The 12th article of the Constitution of Belgium is to the same effect: "The punishment of confiscation of property can never be established." Code Civil Belge, p. 2.

The confiscation of all the property of an individual, as a consequence of certain crimes, or as a political measure, has disappeared from the penal legislation of France since the promulgation of the Charter of 1814. Devilleneuve et Gilbert, Jurisprudence du XIX. siècle, tom. i. p. 512. The general confiscation of property for crime existed under the old French monarchy, was abolished in 1790, reëstablished in 1792, and admitted in the Penal Code of 1810 for crimes against the safety of the State or political offences, as well as forgery, but it was abrogated by the Charter of 1814. Bouillet, Dictionaire des Sciences, &c., p. 395. The Charter of 1814, art. 66, says: "The punishment by confiscation of property (*confiscation des biens*) is abolished, and shall never be reëstablished." The 57th article of the Constitution of August 14, 1830, is expressed in the same terms, as is also the 12th article of the Constitution of 1848, which remains in force, so far as it is not altered by the Constitution of 7 (10) November, 1852. Tripier, Code Politique, pp. 244, 272, 319, 398. Confiscation no longer exists, even in the case of an attempt on the life of the Emperor, though that is treated by the law of June 10, 1853, as parricide. Tripier, Codes François, p. 840, Code Penal, art. 86.

Regarded in the light of the law of nations, the incompatibility of confiscation of property with the present state of civilization is sufficiently elucidated in our author's text, and the same views will be found in all contemporary writers; while in the efforts repeatedly made by the government of the United States to assimilate war on the ocean to war on land, the immunity of private property in the latter case has been assumed to be unquestionable, as we shall have occasion to notice in discussing that subject.

In a case in the Supreme Court of the United States, in 1833, Chief Justice Marshall said: "It may not be unworthy of remark that it is very unusual, even in cases

tion for similar excesses on the part of the American forces on the frontiers of Canada, in a letter addressed to Mr. Secretary

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of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." Peters's Reports, vol. vii. p. 86, United States *v.* Percheman. The principle of this case is stated by Dr. Phillimore, in the words of Marshall, International Law, vol. iii. p. 743.

The war of the Revolution has been sometimes appealed to, as countenancing the sequestration of debts and confiscation of property. This was denied by Mr. Hamilton, in his argument on the 10th article of the British treaty of 1794. He said, in reply to those "who represent the confiscation or sequestration of debts as our best means of retaliation and coercion, as our most powerful, and sometimes as our only means of defence. So degrading an idea will be rejected with disdain by every man who feels a true and well-informed national pride; by every man who recollects and glories, that in a state of still greater immaturity we achieved independence without the aid of this dishonorable expedient. The Federal government never resorted to it; and a few only of the State governments stained themselves with it. It may, perhaps, be said that the Federal government had no power on the subject: but the reverse of this is truly the case. The Federal government alone had power. The State governments had none, though some of them undertook to exercise it. This position is founded on the solid ground that the confiscation or sequestration of the debts of an enemy is a high act of reprisal and war, necessarily and exclusively incident to the power of making war, which was always in the Federal government." Hamilton's Works, vol. vii. p. 329, Camillus, No. XVIII.

To remedy, as far as was practicable, what in this view of the case might be deemed the usurpation of the States, under the old Confederation, not only was the provision in reference to debts, noticed in the text, (ch. 1, § 12, of this Part, p. 542, *supra*,) introduced into the treaty of peace of 1783, but another article (V.) contained an agreement on the part of Congress to recommend to the legislatures of the respective States to provide for the restitution of all estates, rights, and properties, which had been confiscated, and even in cases where the property had been sold, its restoration, on refunding to the persons in possession what they had paid in purchasing it since the confiscation. Statutes at Large, vol. viii. p. 82.

So far as respects the power of the Federal government to abolish slavery in the territories, the opinion of the Supreme Court has already been noticed; while we have seen that an alleged violation in some of the States of the provisions of the Constitution as to fugitives from labor, which Judge Story had pronounced to be "a fundamental article, without the adoption of which the Union could not have been formed," (Peters's Reports, vol. xvi. p. 611, Prigg *v.* Pennsylvania.) though it had then never been disregarded by the Federal authorities, was made the ostensible ground for the secession of South Carolina, the pioneer in the insurrection. Part I. ch. 2, § 24, Editor's note [24, p. 105.

The United States, in their diplomatic relations, have ever maintained that slaves were private property, and for them, as such, they have repeatedly received compensation from England, as we have had occasion to notice in preceding annotations.

Monroe, by Admiral Cochrane, commanding the British naval forces on the North American station, dated on board his flag-

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But the recent measures of the Federal authorities are not without precedent in the war of the colonies with the mother country. Mr. Bancroft thus refers to the proceedings in 1775, of the last Royal Governor of Virginia: "Encouraged by the most trifling success, Dunmore raised the king's flag, and, publishing a proclamation which he had signed on the 7th of November, he established martial law, required every person capable of bearing arms to resort to his standard under penalty of forfeiture of life and property, and declared freedom to 'all indented servants, negroes, or others appertaining to rebels,' if they would 'join for the reducing the colony to a proper sense of its duty.' The effect of this invitation to convicts and slaves to rise against their masters was not limited to their ability to serve in the army. 'I hope,' said Dunmore, 'it will oblige the rebels to disperse, to take care of their families and property.' At Dunmore's proclamation a thrill of indignation ran through Virginia, effacing all differences of party; and rousing one strong, impassioned purpose to drive away the insolent power by which it had been put forth. But in truth the cry of Dunmore did not arouse among the Africans a passion for freedom. For the bondage in Virginia was not a lower condition of being than their former one; they had no regrets for ancient privileges lost; their memories prompted no demand for political changes; no struggling aspirations of their own had invited Dunmore's interposition; no memorial of their grievances had preceded his offers. None combined to join him from a longing for an improved condition or even from ill-will to their masters." History of the United States, vol. viii. p. 223.

Adverting to the same proclamation, a contemporary annalist said: "It was received with the greatest horror in all the colonies, and has been severely condemned elsewhere, as tending to loosen the bonds of society, to destroy domestic security, and encourage the most barbarous of mankind to the commission of the most horrible crimes and the most inhuman cruelties; that it was confounding the innocent with the guilty, and exposing those who were the best friends to government, to the same loss of property, danger, and destruction with the most incorrigible rebels." Annual Register, 1776, p. 28.

The policy adopted by Dunmore of arming the slaves against their masters was not pursued during the war of the Revolution, and, when negroes were taken by the English, they were not considered otherwise than as property and plunder.

The treaty of 1783, Art. VII., prohibited the carrying away "any negroes or other property of the American inhabitants," and that of 1814 contained the same provision, using the terms "slaves or other property." But though the infractions of the former treaty were enumerated among the causes of complaint against Great Britain, no compensation for the negroes carried away by the British commanders was made in the treaty of 1794. Pitkin's Political and Civil History of the United States, vol. ii. pp. 394–443. The discussions growing out of the provision in the latter case have been adverted to in connection with the arbitration of the Emperor of Russia in 1822, during which the right to emancipate enemies' slaves was forcibly denied by the American Secretary of State. Part III. ch. 2, § 18, Editor's note [167, p. 495. And as it has sometimes been attempted to impeach the authority of these State Papers, by their supposed repugnance to opinions subsequently expressed in debate by Mr. Adams, while a representative in Congress, (Congressional Globe, 1841–2, vol. ii. p. 429,) it may not be irrelevant to refer to his despatches from London, the spirit of which fully accords with the instructions to Mr. Middleton. In one to

ship in the Patuxent River, on the 18th of August, 1814. In this communication it was stated that the British admiral, having

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the Secretary of State, dated August 22, 1815, speaking of the conferences at Ghent, he says: "Our object was the restoration of all property, including slaves, which, by the usages of war among civilized nations, ought not to have been taken. We considered the proclamations issued by British officers as deviations from the usages of war. We believed that the British government itself would, when the hostile passions arising from the state of war should subside, consider them in the same light, and that Great Britain would then be willing to restore the property, or to indemnify the sufferers for its loss." American State Papers, vol. iv. p. 117, fol. ed. See, also, note to Lord Castlereagh, August 9, 1815. Ib. p. 115. Furthermore, not only was the Slave Indemnity Convention, of November 13, 1826, negotiated in the presidency of Mr. J. Q. Adams, but instructions, to propose to Great Britain a convention for the surrender of fugitive slaves, were given by his Secretary of State, Mr. Clay, successively to Mr. Gallatin and to Mr. Barbour. Part II. ch. 2, § 13, Editor's note [78, p. 243.

The same views as are expressed in the papers of Mr. Adams, as to the unjustifiable nature of emancipation as a war measure, would seem to have been entertained by Napoleon I., who, notwithstanding the unusual mode of warfare resorted to by Russia, in laying waste her own territory, was never induced to issue a proclamation for the liberation of the serfs.

We have referred to the cases arising out of the liberation of American slaves in the Bahama and Bermuda islands, which were settled under the Convention of 1853, by awarding a full indemnity to the owners. Part II. ch. 2, § 9, Editor's note [70, p. 206. See, as to the *jus postliminii* in the case of slaves, § 12, p. 645, *infra*.

Nor is the danger of inviting retaliation, through measures at variance with the law of nations, to be disregarded. An attempt to deprive the officers and seamen employed in the Southern privateers of the ordinary rights of prisoners of war, was made the ground for subjecting to severe confinement, with the threat of undergoing the fate of those for whom they were detained as hostages, a correspondent number of United States officers. And it would seem that the emancipation acts of the Federal authorities have inaugurated in the congress of the so-called Confederate States propositions calculated, by treating as guilty of a capital offence those engaged in carrying into effect the President's proclamation and the acts of Congress, greatly to enhance the sufferings already endured in a domestic war, destructive, to an unprecedented extent, of human life and property.

In advance of confiscation and emancipation, and while those subjects were under discussion in Congress, it was asked by a Representative from Rhode Island, who, though he would vest in the President all the war-powers claimed by others for Congress, still believed those powers to be restricted by that code, by which every people belonging to the great community of nations is bound: —

"What is the nature of the controversy between the different sections of this country? It is rebellion. But it is more than a rebellion. It is a rebellion so gigantic, so comprehensive, that it embraces a civil war, and therefore the rights of general war are superadded to the municipal rights we have against the rebels, to treat and punish them as traitors.

"What are these rights of general war? They are fixed by the law of nations, and are a part of our Constitution, though they may not be modified without the consent of other nations. Congress cannot alter or control them. They are beyond its

been called upon by the governor-general of the Canadas to aid him in carrying into effect measures of retaliation against the

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reach, for they govern all civilized nations, and Congress cannot legislate but for one nation. For it to attempt to change the law of nations would be to attempt to extend its jurisdiction over all Christian nations. The law of nations depends upon the well-established usages of nations, and that usage cannot be changed but by the consent of those whom it is to bind.

"The Government, then, has the rights of general war, and the President executes the laws of war against the rebels precisely as he executes the laws of peace in times of peace. These rebels have a *status* as a party to a civil war, and their rights and duties are defined by the law of nations. They have a *status* in England, France, and in Spain. They are acknowledged by all those nations as belligerents. And we are bound to treat them according to the laws of war until we compel their submission to our municipal authority. And if we inflict upon them cruel, inhuman, and unusual punishments, such as are not warranted by the laws of war, it would be the right of other nations, who acknowledge them as belligerents under the law of nations, to interpose and see that justice is administered between us and them according to the law of nations." Congressional Globe, 1862, App. p. 169, May 23, 1862, Mr. Sheffield's Speech.

What are "cruel, inhuman, and unusual punishments not warranted by the laws of war"? If the pretension to carry away slaves from an enemy's territory be, as Mr. Adams pronounced it in 1820, as little defensible as a law of war, as "the right of putting to death all prisoners in cold blood, and without special cause," "or the right to use poisoned weapons or to assassinate," (see Part III. ch. 2, § 18, Editor's note [167, p. 496,) it is difficult to conceive, — when we call to mind the fact that it was the decree of the National Assembly of March 28, 1790, declaring universal manumission, that inaugurated the horrible massacres and other brutal atrocities in St. Domingo, — any condition of things to which the remarks of Mr. Sheffield could be more applicable than to a proposition, which threatens not merely a servile war, but a war of races, in eleven, if not in all, of the fifteen slave States.

Without discussing whether civil war superadds belligerent to municipal rights, or substitutes the former for the latter, or whether a recognition by third parties of the belligerent rights of rebels, or even the formal acknowledgment by them of their independence can affect their status as respects the legitimate government, it is very certain, that, should a case of servile war arise, it would not be necessary for the governments of Christendom to base their intervention on any such considerations. They might well found it on those instincts of a common humanity, which international law is far from repudiating, though they may neither concern questions of political power nor of national independence. Though the Western States of Europe went to war with Russia to maintain the independence of the Porte, and though, by the treaty of March 30, 1856, Turkey was declared to be admitted to the advantages "of the public law and system of Europe," the great powers have not, since these new relations received the most solemn sanction, been insensible to the appeals of their Christian brethren, as well in the provinces under the direct sway of the Sultan as in the semi-independent States. As to the latter, conferences are now going on between their representatives, at Constantinople, to prevent further collisions in Servia, while, in 1860, the Sultan was obliged to admit the active military coöperation of his allies, tendered professedly from considerations of humanity, to arrest the massacres in Syria. A former annotation (Part II. ch. 1, § 12, Editor's note [50, p. 133,) refers to the remonstrances of England and France to the then

inhabitants of the United States, for the wanton destruction committed by their army in Upper Canada, it had become the

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King of the Two Sicilies, followed up by the withdrawal of their legations, in consequence of the course pursued towards political prisoners; and we have also seen that the Minister of Francis II. was, on the termination of his mission, reminded by Lord Russell that the dethronement of his master was to be attributed to his not having followed the salutary advice proffered him, (Part III. ch. 1, § 23, Editor's note [144, p. 429.) Nor was the remonstrance made by England to the government at Washington, respecting the stone-blockade of Southern ports, regarded as a violation of diplomatic propriety, or as indicating a recognition of the Southern Confederacy. The support which England and France gave at Vienna to the government of Victor Emanuel, in its reclamations for the property of Lombards, rebel subjects of Austria, but naturalized Sardinians after the treaty of August 6, 1849, and which had been sequestered under the pretext of complicity in the movements at Milan, in February, 1853, were referred to in the late debates in the Senate, as showing not only that confiscation for political causes was opposed to the modern law and usages of nations, but that friendly powers were justified in proffering their good offices to avert it. Congressional Globe, 1862, p. 2902, June 24, 1862, Mr. Saulsbury of Delaware.

Aside from considerations of humanity, the measures proposed by the President's proclamation have the most important bearing on the international relations of the world. Treaties of commerce and negotiations for the promotion of reciprocal trade constitute no small portion of the subjects of diplomatic discussion. The foreign relations of the United States have hitherto been almost exclusively confined to them. Europe has professed and maintained an entire neutrality in the pending domestic contest, and has, deeming the interruption temporary, submitted to the great inconvenience to which the suspension of exports from the seceded States has subjected her. What might be the effect, not on this country alone, but on the whole civilized world, in its political as well as economical relations, of the withdrawal from agriculture of four millions of laborers, a fourth of whom are, or rather were till within the last year, (and there is abundant cotton land for the employment of the whole of them,) engaged in the cultivation of a product, — the basis of the principal industry and the source of the wealth of the great commercial and manufacturing nations of Europe, which is by nature a virtual monopoly of the seceded States, — is a problem, the solution of which may well demand the most serious attention of publicists. The effect on the United States, in the event of the reëstablishment of the Federal authority over the entire Union, of a radical change in the industrial population of the States that produce the great commodity of international interchange, would be seriously felt no less in its political than in its financial bearing abroad as well as at home.

The consequences of African emancipation elsewhere have fully established that, to continue the production of cotton by negroes, the relations between the whites and the blacks must remain essentially as they were. The means have not yet been discovered of perpetuating in the same country, without amalgamation and without subjecting the one to the other, two races of distinct origin. In an English review of a *brochure* published by the editor in Paris in 1860, (*L'industrie françoise et l'esclavage des nègres aux États-Unis,*) showing the connection between the commerce and manufactures of France, and of Europe in general, with negro slavery in the United States, the whole question respecting manumission is thus summarily enunciated: "Economically regarded, the question of negroes or no negroes is brought within a narrow compass. No blacks, no cotton; such is the finality." Morning Chronicle, May 16, 1860.

duty of the admiral to issue to the naval forces under his command an order to destroy and lay waste such towns and districts on the coast as might be found assailable.

But, as colonization forms an integral part of the President's plan, it would seem that the permanent occupation of the South by the emancipated negroes, in connection with the whites, is not contemplated. Was the Executive *projet* at all feasible, its consequences would defy all calculation. Besides the drain on the resources of the other sections of the country, diminished by the loss of all Southern trade, for the expenses of the proposed emigration of the present cultivators of the soil, in addition to the debt imposed by civil war, the United States would, by the emancipation and colonization of their negroes, be deprived in the commercial markets of the world of those great American staples, whose value annually has been not less than five sixths of the whole agricultural exports of the Union. If this loss should not be permanent, it must last, at least, for the indefinite period which may intervene before the process is gone through of substituting for the emancipated and colonized Africans, as has been attempted in the foreign West Indies, coolies and other Asiatics, as virtual slaves under another designation. As a matter of military defence, the cotton States, in consequence of their possessing from nature a monopoly article indispensable to England and France, were worth to the country at large more than armies like those of the latter State, or navies equal to the combined forces of both, could have been. The apprehension of losing their products rendered us so unassailable by all European powers, that it was not even deemed necessary to place garrisons in our maritime forts. But all this would be changed, should a continued suspension of production lead the nations of Europe to devise means to render themselves independent of American cotton, or the absence of labor prevent our supplying the demands of the manufacturing industry of the world.

Having, as due to the great question of the day, submitted the confiscation and emancipation policy of the Federal administration to the test of international law, and of the usages and practice of the States of Christendom, it is deemed proper, before closing this note, to insert the explanation of the President's proclamation, as given by the Secretary of State, in a circular, of the same date with the proclamation (22d of September, 1862,) addressed to the Ministers of the United States in foreign countries: —

"I have already," said Mr. Seward, "informed our representatives abroad of the approach of a change in the social organization of the rebel States. This change continues to make itself each day more and more apparent.

"In the opinion of the President, the moment has come to place the great fact more clearly before the people of the rebel States, and to make them understand that if these States persist in imposing upon the country the choice between the dissolution of this government, at once necessary and beneficial, and the abolition of slavery, it is the Union and not slavery that must be maintained and saved. With this object the President is about to publish a proclamation, in which he announces that slavery will no longer be recognized in any of the States which shall be in rebellion on the 1st of January next. While all the good and wise men of all countries will recognize this measure as a just and proper military act, intended to deliver the country from a terrible civil war, they will recognize at the same time the moderation and magnanimity with which the government proceeds in a matter so solemn and important."

In the answer of the American government to this communication, dated at Washington on the 6th of September, 1814, it

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In the circular of the 28th of May, which is referred to in the above instructions, Mr. Seward, after alluding to some military successes, had said: —

"The power of a losing faction under any circumstances must continually grow less. But that of the disunionists is abating under the operation of a cause peculiar to themselves, which it is now my duty to bring forward. I mean the practice of African slavery.

"I am aware that in regard to this point I am opening a subject which was early interdicted in this correspondence. The reason for the interdiction, and the reason for a departure from it are, however, equally obvious. It was properly left out of view so long as it might be reasonably hoped that by the practice of magnanimity this government might cover that weakness of the insurgents, without encouraging them to persevere in their treasonable conspiracy against the Union. They have protracted the war a year, notwithstanding this forbearance of the government, and yet they persist in invoking foreign arms to end a domestic strife, while they have forced slavery into such prominence that it cannot be overlooked.

"The region where the insurrection still remains flagrant embraces all or parts of several States, with a white population of four million five hundred thousand, and a negro population of three million five hundred thousand, chiefly slaves. It is thus seen to be a war between two parties of a white race, not only in the presence but in the very midst of the enslaved negro race.

"It is notorious — we could not conceal the fact if we would — that the dispute between them arose out of questions in which the negro race have a deep and lasting interest, and that their sympathies, wishes, and interests naturally, necessarily, inevitably fall on the side of the Union. Such a civil war between two parties of the white race, in such a place and under such circumstances, could not be expected to continue long before the negro race would begin to manifest some sensibility and some excitement. We have arrived at that stage already. If the war should continue indefinitely, every slave will become, not only a free man, but an absentee. If the insurgents shall resist their escape, how could they hope to prevent the civil war they have inaugurated from degenerating into a servile war? True, a servile population, especially one so long enslaved as the Africans, in the insurrectionary States, require time and trial before they can organize servile war; but if the war continues indefinitely, a servile war is only a question of time. The problem then, is, whether the strife shall be left to go on to that point. The government, animated by a just regard for the general welfare, including that of the insurrectionary States, adopts a policy designed at once to save the Union and rescue society from that fearful catastrophe, while it consults the ultimate peaceful relief of the nation from slavery.

"It cannot be necessary to prove to any enlightened statesman that the labor of the African in the insurrectionary region is at present indispensable as a resource of the insurgents for continuing the war, nor is it now necessary to show that this same labor is the basis of the whole industrial system existing in that region. The war is thus seen to be producing already a disorganizing of the industrial system of the insurrectionary States, and tending to a subversion of even their social system. Let it next be considered that the European systems of industry are largely based upon the African slave labor of the insurrectionary States employed in the production of cotton, tobacco, and rice, and on the free labor of the other States employed in producing

was stated that it had seen, with the greatest surprise, that this system of devastation which had been practised by the British forces, so manifestly contrary to the usages of civilized warfare,

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cereals, out of which combined productions arises the demand for European productions, materials and fabrics. The disorganization of industry, which is already revealing itself in the insurrectionary States, cannot but impair their ability to prosecute the war, and at the same time result indirectly in greater distress in Europe."

As a copy of this despatch had been delivered by Mr. Adams to the Earl Russell, the latter thus commented on it in a note to Mr. Stuart, Chargé d'Affaires at Washington, under the date of July 28, 1862: —

"I have left hitherto unanswered and unnoticed the despatch of Mr. Seward, which Mr. Adams delivered more than a month ago. I have done so partly because the military events referred to in it were in the opinion of Her Majesty's government far from being decisive, and partly because there was no proposal in it upon which Her Majesty's government were called upon to come to any conclusion.

"Events subsequent to the date of Mr. Seward's letter have shown that Her Majesty's government, in their opinion upon the first of these points, were not mistaken.

"Victories have been gained, reverses have followed, positions have been reached in the near neighborhood of the capital of the Confederates, and these positions have been again abandoned.

"These events have been accompanied by great loss of life in battle and in the hospitals, while such measures as the confiscation bill have passed through both Houses of Congress, and, with the proclamations of General Butler at New Orleans, bear evidence of the increasing bitterness of the strife.

"The approach of a servile war, so much insisted upon by Mr. Seward, in his despatch, only forewarns us that another element of destruction may be added to the loss of property and waste of industry which already afflicts a country so lately prosperous and tranquil.

"Nor on the other point to which I have adverted have I anything new to say. From the moment that intelligence first reached this country that nine States and several millions of inhabitants of the great American Union had seceded, and had made war on the government of President Lincoln, down to the present time, Her Majesty's government have pursued a friendly, open and consistent course. They have been neutral between the two parties to a civil war.

"Neither the loss of raw material of manufacture, so necessary to a great portion of our people, nor insults constantly heaped upon the British name in speeches and newspapers; nor a rigor beyond the usual practice of nations, with which the Queen's subjects attempting to break loose from the blockade of the Southern ports, have been treated — have induced Her Majesty's government to swerve an inch from an impartial neutrality.

"At this moment they have nothing more at heart than to see that consummation, which the President speaks of in his answer to the governors of eighteen States, namely: — 'The bringing of this unnecessary and injurious civil war to a speedy and satisfactory conclusion.'

"As to the course of opinion in this country, the President is aware that perfect freedom to comment upon all public events is, in this country, the invariable practice, sanctioned by law, and approved by the universal sense of the nation." Public Journals.] — *L.*

was placed on the ground of retaliation. No sooner were the United States compelled to resort to war against Great Britain, than they resolved to wage it in a manner most consonant to the principles of humanity, and to those friendly relations which it was desirable to preserve between the two nations, after the restoration of peace. They perceived, however, with the deepest regret, that a spirit alike just and humane, was neither cherished nor acted on by the British government. Without dwelling on the deplorable cruelties committed by the Indian savages, in the British ranks and in British pay, at the river Raisin, which had never been disavowed or atoned for, the American government referred, as more particularly connected with the subject of the above communication, to the wanton desolation that was committed, in 1813, at Havre-de-Grace and Georgetown, in the Chesapeake Bay. These villages were burnt and ravaged by the British naval forces, to the ruin of their unarmed inhabitants, who saw with astonishment that they derived no protection to their property from the laws of war. During the same season, scenes of invasion and pillage, carried on under the same authority, were witnessed all along the shores of the Chesapeake, to an extent inflicting the most serious private distress, and under circumstances that justified the suspicion, that revenge and cupidity, rather than the manly motives that should dictate the hostility of a high-minded foe, led to their perpetration. The late destruction of the houses of the government at Washington, was another act which came necessarily into view. In the wars of modern Europe, no example of the kind, even among nations the most hostile to each other, could be traced. In the course of ten years past, the capitals of the principal powers of the European continent had been conquered, and occupied alternately by the victorious armies of each other, and no instance of such wanton and unjustifiable destruction had been seen. They must go back to distant and barbarous ages, to find a parallel for the acts of which the American government complained.

Although these acts of desolation invited, if they did not impose on that government the necessity of retaliation, yet in no instance had it been authorized.

The burning of the village of Newark, in Upper Canada, posterior to the early outrages above enumerated, was not executed on the principle of retaliation. The village of Newark adjoined

Fort George, and its destruction was justified, by the officers who ordered it, on the ground that it became necessary in the military operations there. The act, however, was disavowed by the American government. The burning which took place at Long Point was unauthorized by the government, and the conduct of the officer had been subjected to the investigation of a military tribunal. For the burning at St. David's, committed by stragglers, the officer who commanded in that quarter was dismissed, without a trial, for not preventing it.

The American government stated, that it as little comported with any orders which had been issued to its military and naval commanders, as it did with the known humanity of the American nation, to pursue the system which had been adopted by the British. That government owed to itself, and to the principles it had ever held sacred, to disavow, as justly chargeable to it, any such wanton, cruel, and unjustifiable warfare. Whatever unauthorized irregularities might have been committed by any of its troops, it would have been ready, acting on the principles of sacred and eternal obligation, to disavow, and, as far as might be practicable, to repair them. But in the plan of desolating warfare which Admiral Cochrane's letter so explicitly made known, and which was attempted to be excused on a plea so utterly groundless, the American government perceived a spirit of deep-rooted hostility, which, without the evidence of such fact, it could not have believed to exist, or that it would have been carried to such an extremity for the reparation of injuries, of whatsoever nature they might be, not sanctioned by the law of nations, which the naval or military forces of either power might have committed against the other. That the government would always be ready to enter into reciprocal arrangements; but should the British government adhere to a system of desolation, so contrary to the views and practices of the United States, so revolting to humanity, and so repugnant to the sentiments and usages of the civilized world, whilst it would be seen with the deepest regret, it must and would be met with a determination and constancy becoming a free people, contending in a just cause for their essential rights and their dearest interests.

In the reply of Admiral Cochrane to the above communication, dated on the 19th September, 1814, it was stated that he had no authority from his government to enter into any kind of

discussion relative to the point contained in that communication. He had only to regret that there did not appear to be any hope that he should be authorized to recall his general order, which had been further sanctioned by a subsequent request from the governor-general of the Canadas. Until the admiral received instructions from his government, the measures he had adopted must be persisted in, unless remuneration should be made to the Canadians for the injuries they had sustained from the outrages committed by the troops of the United States.[1]

The disavowal of the burning of Newark by the American government had been communicated to the governor-general of the Canadas, who answered on the 10th February, 1814, that it had been with great satisfaction that he had received the assurance that it was unauthorized by the American government and abhorrent to every American feeling; that if any outrages had ensued, in the wanton and unjustifiable destruction of Newark, passing the bounds of just retaliation, they were to be attributed to the influence of irritated passions on the part of the unfortunate sufferers by that event, which it had not been possible altogether to restrain; and that it was as little congenial to the disposition of the British government as it was to that of the United States, deliberately to adopt any plan of hostilities which had for its object the devastation of private property.

Under these circumstances, the destruction of the Capitol, of the President's house, and other public buildings at Washington, in August, 1814, could not but be considered by the whole world as a most unjustifiable departure from the laws of civilized warfare. In the debate which took place in the House of Commons on the 11th of April, 1815, on the Address to the Prince Regent on the treaty of peace with the United States, Sir James Mackintosh accused the ministers of culpable delay in opening the negotiations at Ghent; which, he said, could not be explained, except on the miserable policy of protracting the war for the sake of striking a blow against America. The disgrace of the naval war, of balanced success between the British navy and the new-born marine of America, was to be redeemed by protracted warfare, and by pouring their victorious armies upon the American continent. That opportunity, fatally for them, arose.

[1] Correspondence between Mr. Secretary Monroe and Admiral Cochrane, American State Papers, fol. edit. vol. iii. pp. 693, 694.

If the Congress had opened in June, it was impossible that they should have sent out orders for the attack on Washington. They would have been saved from that success, which he considered as a thousand times more disgraceful and disastrous than the worst defeat. It was a success which had made their naval power hateful and alarming to all Europe. It was a success which gave the hearts of the American people to every enemy who might rise against England. It was an enterprise which most exasperated a people, and least weakened a government, of any recorded in the annals of war. For every justifiable purpose of present warfare, it was almost impotent. To every wise object of prospective policy, it was hostile. It was an attack, not against the strength or the resources of a State, but against the national honor and public affections of a people. After twenty-five years of the fiercest warfare, in which every great capital of the European continent had been spared, he had almost said respected, by enemies, it was reserved for England to violate all that decent courtesy towards the seats of national dignity, which, in the midst of enmity, manifest the respect of nations for each other, by an expedition deliberately and principally directed against palaces of government, halls of legislation, tribunals of justice, repositories of the muniments of property, and of the records of history; objects, among civilized nations, exempted 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 endeavored to justify the destruction of a distinguished capital, as a retaliation for some violences of inferior American officers, unauthorized and disavowed by their government, against he knew not what 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. Here there was very imperfect evidence of the outrage — no proof of refusal to repair — and demonstration of the excessive and monstrous iniquity of what was falsely called retaliation. The value of a capital is not to be

estimated by its houses, and warehouses, and shops. It consisted chiefly in what could be neither numbered nor weighed. It was not even by the elegance or grandeur of its monuments that it was most endeared to a generous people. They looked upon it with affection and pride as the seat of legislation, as the sanctuary of public justice, often as linked with the memory of past times, sometimes still more as connected with their fondest and proudest hopes of greatness to come. To put all these respectable feelings of a great people, sanctified by the illustrious name of Washington, on a level with half a dozen wooden sheds in the temporary seat of a provincial government, was an act of intolerable insolence, and implied as much contempt for the feelings of America as for the common sense of mankind.[1]

Restitution of the works of art in the Museum of the Louvre at Paris, in 1815, to the countries from which they had been taken during the wars of the French revolution.

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 are 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. In this note it was stated by the British plenipotentiary, 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; — and the same having been referred for the consideration of his court, he had received the Prince Regent's commands to submit, for the consideration of his allies, the following remarks upon that interesting subject.

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

[1] Hansard's Parliamentary Debates, vol. xxx. pp. 526, 527.

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 endeavors 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 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 such a 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 spoliations 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 recognize a variety of spolia-

tions, 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.[1]

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,

[1] Martens, Nouveau Receuil, tom. ii. p. 632.

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.[1] [190]

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[1] Life of Romilly, edited by his sons, vol. ii. p. 404.

[190] Napoleon, in his retirement at St. Helena, often admitted the injury which his cause had sustained from drawing the support of his armies from the invaded countries, thereby exciting the animosities of the inhabitants; and the Duke of Wellington, after his invasion of France, in 1813, objected to the suggestion of the ministry that he should have recourse to requisitions for the maintenance of his troops, regarding them as iniquitous as well as injurious to the party that resorted to them.

To a similar proposition made during the Mexican war to General Scott, he replied, May 20, 1847, "If it be expected at Washington, as is now apprehended, that the army is to support itself by forced contributions levied upon the country, we may ruin and exasperate the inhabitants and starve ourselves; for it is certain they would sooner remove or destroy the products of their farms than to allow them to fall into our hands without compensation. Not a ration for man or horse would be brought in except by the bayonet, which would oblige the troops to spread themselves out many leagues to the right and left, in search of subsistence and to stop all military operations." 30th Cong. 1st Sess. Ex. Doc. 60, H. R. p. 963.

In passing, as we did, in 1859, a few days after the battle of Magenta, from Turin to Milan, the admirable discipline of the European armies was especially to be noticed. No destruction of growing crops was to be seen; but the appearance of the fields adjacent to the great highways was no more affected by the march of the contending forces than it would have been by the passage of ordinary transportation wagons in time of peace. The whole supply for the commissariat of the French army, though going into Italy as the ally of Sardinia, was brought from their own country, and consequently there was no necessity of drawing supplies, either by forced contributions or otherwise, from the occupied territory, whether Piedmont or the conquered province of Lombardy.

An order was issued, July 22d, 1862, from the War Department at Washington, which, among other matters of complaint, was, as seizing and appropriating property without compensation to private owners, made the ground of the retaliation threatened, in an order from the Confederate government, of August 1st. The order first referred to, besides making provision for the employment of laborers of African descent, for military and naval purposes in those States, "ordered, that the military commanders within the States of Virginia, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas, in an orderly manner, seize and use any property, real or personal, which may be necessary or convenient for their several commands as supplies or for other military purposes, and while property may be destroyed for military objects, none shall be destroyed in wantonness or malice."

The commanding general of the Confederate forces having, in a note dated July 21, 1862, addressed to the United States general, McClellan, said, that it had come to his knowledge that many of the citizens of the Confederate States, engaged in peaceful avocations, had been arrested and imprisoned because they refused to take the oath of allegiance to the United States, while others, by hard and harsh treatment, had been compelled to take an oath not to bear arms against that government, General Halleck

§ 7. Distinction between private property, taken at sea, or on land.

The progress of civilization has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property 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.

§ 8. What persons are authorized to engage in hostilities against 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

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directed, August 13, 1862, a reply to be returned, in accordance with the following note: "The government of the United States has never authorized any extortion of oaths of allegiance or military paroles, and has forbidden any measures to be resorted to tending to that end. Instead of extorting oaths of allegiance and paroles, it has refused the application of several thousand prisoners to be permitted to take them, and return to their homes in the rebel States. At the same time this government claims, and will exercise the right, to arrest, imprison, or place beyond its military lines, any persons suspected of giving aid and information to its enemies, or of any other treasonable act. And if persons, so arrested, voluntarily take the oath of allegiance, or give their military parole, and afterwards violate their plighted faith, they will be punished according to the laws and usages of war. You will assure General Lee that no unseemly threats of retaliation on his part will deter this government from exercising its lawful rights over both prisoners and property of whatever name or character." Public Journals.] — *L.*

the regularly commissioned naval and military forces of the nation, and all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose. Cicero tells us, in his *Offices*, that by the Roman fecial 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.[1]

§ 9. Non-commissioned 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, are 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. Property thus seized is condemned to the government as prize of war, or, as these captures are technically called, Droits of Admiralty. The same principle is 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.[1] [[191]

[1] Vattel, Droit des Gens, liv. iii. ch. 15, §§ 223–228. Klüber, Droit des Gens Moderne de l'Europe, § 267.

[2] Brown's Civ. and Adm. Law, vol. ii. p. 526, Appendix. Robinson's Adm. Rep. vol. iv. p. 72, The Abigail, Dodson's Adm. Rep. p. 397, The Georgiana. Sparks's Diplomatic Correspondence, vol. i. p. 443. Wheaton's Rep. vol. ii. Appendix, Note I. p. 7.

[[191] It is provided by the arrêté of the 2d Prairial, year xi. art. 34, that where a prize is made by a vessel not having a letter of marque, and without the required security having been given, it will be confiscated to the State and the captain of the capturing vessel punished, unless the prize was made in legitimate defence by a merchant vessel furnished with a passport or sea license, (*passe-port ou congé de mer*). It was

§ 10. Privateers. The practice of cruising with private armed vessels commissioned by the State, has been hitherto sanctioned, by the laws of every maritime nation, as a legitimate means of destroying the commerce of an enemy. This practice has been 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 have been 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, furnishes an example worthy of applause and imitation. But this stipulation was not revived on the renewal of the treaty, in 1799; and it is much to be feared that, so long as maritime captures of private property are tolerated, this particular mode of injuring the enemy's commerce will continue to be practised, especially where it affords the means of countervailing the superiority of the public marine of an enemy.[1] [[192]

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decided by the Council of Prizes, that a prize made by the inhabitants of a maritime commune belongs to the State; that in case of rescue or recapture, if the recaptors have not letters of marque, the prize must be adjudged to the State. The employés of the customs had not the character of combatants against the enemy; if they made a prize, it was confiscated to the State, as if made by citizens not provided with letters of marque; but by a subsequent decision of the Council of State, 4th of April, 1809, they were assimilated to the land troops and to the seamen in ships of war. In case of recapture, after twenty-four hours, and confiscation for the benefit of the State, it is customary to restore, as a matter of favor, (*gracieusement,*) two-thirds to the former owners and to give one-third to the salvors.

When a merchant-ship, which has not a commission, rescues or recaptures a French vessel, before the expiration of twenty-four hours, the right of salvage of the one-third is acquired to the State, and the recaptors referred to its generosity. Merchant-vessels which are attacked, and which, in the course of a legitimate defence, recapture other vessels, captured at the same time by the enemy, are entitled to the same salvage as commissioned privateers. By the law of the 18th Vendemaire, year ii., vessels or boats, which may be carried off by French prisoners from any nation with which France is at war, are declared to be a good prize to the captors. And by the decision of the Council of Prizes, this law extends to enemy-vessels taken at sea by prisoners on board. De Pistoye et Duverdy. Traité des Prises, tom. 1, p. 163–171.] — *L.*

[1] Vattel, liv. iii. ch. 15, § 229. Franklin's Works, vol. ii. pp. 447, 530. Edinburgh Review, vol. viii. pp. 13–15. North American Review, vol. ii. (N. S.) pp. 166–196. Wheaton's Hist. Law of Nations, p. 308.

[192] That the immunity of private property from all capture at sea has ever

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

§ 11. Title to property captured in war.

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been deemed identical with the abolition of privateering, and that the prohibition of letters of marque, has always been sustained by arguments applicable to the general question of such immunity, a reference to the writings of the publicists who have discussed the subject, as well as to the language of treaties, will abundantly show. The Abbé Mably, who is usually cited as the earliest author on public law who called attention to the matter, prefaces his condemnation of all captures of merchantmen and of private property at sea by inquiring why, when two nations go to war, they should interdict all reciprocal commerce, and declaring that their so doing is a remnant of ancient barbarism. Œuvres de Mably, tom. 6, p. 545. Droit Public de l'Europe. Galiani, though he speaks of the privateersman (*armatore*), does so only to oppose him to the military leader on land in reference to the treatment of private property. De' Doveri de' Principi neutrali verso i Principi guerrezianti, cap. x. § 2, note, cited by Hautefeuille, Propriétés privées des sujets belligérants, &c., p. 4. It is sometimes supposed that Dr. Franklin and the King of Prussia were anticipated in their philosophical views by a convention made as early as 1675, between Sweden and the United Provinces. This treaty of commerce, which is based on the immunity of trade, is to be found in Dumont, tom. 7, p. 316, as well as in the Actes, &c., de la paix de Nimegue, tom. 1, p. 754. It was concluded during the pendency of a war, and reciprocally stipulates, as a means of avoiding annoyance to merchantmen and other property at sea, for the withdrawal of vessels furnished with the commissions of the two powers, and prohibits their subjects from taking commissions from other States to the prejudice of their commerce. By the recitals in the treaty of peace of October, 1779, it appears the convention had never been practically observed. Dumont, tom. 7, p. 432. Actes &c., de la paix de Nimegue, tom. 4, p. 675.

It is often alleged that inasmuch as it was scarcely possible that the United States and Prussia should be brought into hostile collision, the philanthropical provision inserted in the treaty of 1785, was merely one of those declarations in which speculative theorists might safely indulge. The sincerity of Dr. Franklin is best shown by the earnestness with which he pressed on Mr. Oswald, the negotiator of the provisional, and on Mr. Hartley, the plenipotentiary for the first definitive, British treaty with the United States, the introduction of a similar article. Nor is it a slight confirmation of the fact, that the abolition of privateering and the immunity of private property have been treated as indissolubly connected, that, though in all his letters he refers in terms merely to the former, both in the draft for the British treaty and in the article of that with Prussia, the specific clause against granting commissions to private armed vessels is a corollary to the exemption, expressed in the broadest language, of private property from injury or destruction, and of persons employed in the various peaceable pursuits of life from all molestation or inconvenience. Franklin's Works, by Sparks, vol. ix. pp. 467, 521.

A *projet* of decree was offered to the national assembly, on the 29th of May, 1792, by M. Kersaint, in the name of the diplomatic committee, and of the committee of marine and commerce, for the suppression of privateers. It provided, 1. That no commission should be issued for privateers, (*pour armer en course.*) 2. That merchantmen armed for legitimate defence should not seize any enemy's merchantmen, unless attacked. 3. Vessels of war of the State were prohibited from taking any

captor. This general principle is modified by the positive law of nations, in its application both to personal and real property.

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private commercial vessel belonging to the enemy, unless armed for war. The national assembly reserves the right of decreeing such exceptions, as the application of the law to the different circumstances of the war shall render necessary. 4. The crews of privateers taken by national vessels of war shall, on their arrival, be interrogated by the public prosecutor of the tribunal of the place, where the privateers shall be carried. If they are Frenchmen, they shall be punished with death; the subjects of the enemy shall remain in prison during the war; the punishment of subjects of nations, foreign to the two belligerents, shall be determined by conventions between France and the powers to whom they belong. In the meantime, they shall be retained in prison. 5. The losses which individuals may experience from privateers under the enemy's flag shall be ascertained and verified by the tribunals of commerce, before which the injured parties are authorized to establish their rights, and the amount of the damages will form a matter of claim for indemnity, which shall be preliminary to any agreement or negotiation for peace. 6. The national assembly invites the king to prepare, by diplomatic communications, all nations for the absolute suppression of privateering, and to secure by every means, which may depend on France, the liberty of navigation and commerce, the reciprocal bond of nations, and their common resource.

The assembly, on motion of M. Vergniaux, substituted for the foregoing the following decree: "The national assembly decrees that the executive authority shall be invited to negotiate with foreign powers to cause to be suppressed, in the wars which may take place on the sea, privateers (*les armémens en course*) and to secure the free navigation of commerce." De Pistoye et Duverdy. Traité des prises maritimes, tom. 1. p. 7–13. These negotiations only resulted in obtaining the adhesion of Hamburg and the Hanseatic Towns to the abolition of privateering. And in a decree of the 29th of March, 1793, it is declared that from that day, privateering at sea, (*la course sur mer*,) is and remains abolished with regard to the vessels of Hamburg and of the Hanseatic Towns. Ortolan, Diplomatie de la mer, tom. 2, liv. 3, ch. 3, p. 51, 2me edition.

France, in her last war against Spain, declared that she would grant no commissions to privateers, and that neither the commerce of Spain herself, nor of neutral nations, should be molested by the naval force of France, except in the case of breach of a lawful blockade. It was said in an official notice, in the *Moniteur* of the 20th of April, 1823, that "the king only considers as enemies of France pirates and Spanish corsairs. These alone are the object of the *surveillance* of the vessels commanded by the officers of the military marine." It appears certain, however, that France did not persist in her views as to Spanish merchant ships; for prizes were made, as is proved by a treaty concluded between Louis XVIII. and Ferdinand VII., January 5, 1824, to determine the mode of indemnity for the prizes taken from each other during the war. It was agreed that each country should retain its prizes. The treaty was promulgated in France by a royal ordinance of the 28th of February, 1824. Lésur, Annuaire, 1824, p. 661. The French declaration was, however, made the basis of action by the American government, and President Monroe stated in his Annual Message, of 1823, to Congress, that instructions had been given to our ministers with France, Russia, and Great Britain, to propose to their respective governments the abolition, in all future hostilities, of private war on the sea. Annual Register, 1823, p. 185.*

As to personal property, or movables, the title is, in general, considered as lost to the former proprietor, as soon as the enemy has

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This subject was fully brought to the notice of the British government during the negotiations at London, in 1823–4, between the American minister, Mr. Rush, and the British plenipotentiaries, Messrs. Huskisson and Stratford Canning. Mr. Adams, Secretary of State, in his instructions of July 28, 1823, said: —

"We press no disavowal on her, (England,) but we think the present time eminently auspicious for urging upon her, *and upon others*, an object which has long been dear to the hearts, and ardent in the aspirations, of the benevolent and the wise; an object essentially congenial to the true spirit of Christianity, and, therefore, peculiarly fitting for the support of nations intent, in the same spirit, upon the final and total suppression of the slave trade; and of sovereigns who have given public pledges to the world of their determination to administer imperial dominion upon the genuine precepts of Christianity.

"The object to which I allude is the abolition of private war upon the sea.

"It has been remarked that, by the usages of modern war, the private property of an enemy is protected from seizure or confiscation, as such; and private war itself has been almost universally exploded *upon the land*. By an exception, the reason of which it is not easy to perceive, the private property of an enemy *upon the sea* has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean, and there continues to disgrace and afflict them by a system of licensed robbery, bearing all the most atrocious characters of piracy. To a government intent, from motives of general benevolence and humanity, upon the final and total suppression of the slave trade, it cannot be unreasonable to claim its aid and coöperation to the abolition of private war upon the sea. From the time that the United States took their place among the nations of the earth, this has been one of their favorite objects. 'It is time,' said Dr. Franklin, (in a letter of 14th of March, 1785,) 'it is high time, for the sake of humanity, that a stop were put to this enormity. The United States of America, though better situated than any European nation to make profit by privateering, are, as far as in them lies, endeavoring to abolish the practice by offering, in all their treaties with other powers, an article engaging solemnly that, in case of future war, no privateer shall be commissioned on either side, and that unarmed merchant ships, on both sides, shall pursue their voyages unmolested. This will be a happy improvement of the law of nations. The humane and the just cannot but wish general success to the proposition.'

"It is well known that, in the same year in which this letter was written, a treaty between the United States and the King of Prussia was concluded, by the 28d article of which this principle was solemnly sanctioned, in the form of a national compact. The 26th article of the treaty between the United States and Great Britain, of the 19th November, 1794, carries it, in some respects, still further, though in others falling short of it. The articles of the enclosed draft combine the special stipulations of both those articles."

In rendering an account of this negotiation, at its close, Mr. Rush writes to the Secretary of State, August 12, 1824: —

"I next said to the British plenipotentiaries, that the question of abolishing privateering and the capture of private property at sea, whether by national ships or by privateers, was one that I considered as standing apart from those on which their decision had been given to me. Upon this question, therefore, I desired them to understand that I was ready to treat, as of one occupying ground wholly its own.

acquired a firm possession; which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after

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"They replied, that they were not prepared to adopt this course. All other questions of a maritime nature having been shut out from the negotiation, there would be, they said, manifest inconvenience in going into that for abolishing private war upon the ocean. They considered it a question belonging to the same class with maritime questions, and one which, besides being totally new, as between the two governments, contemplated a most extensive change in the principles and practice of maritime war, as hitherto sanctioned by all nations. Such was their answer.

"This answer was given in the terms that I state, and so entered upon the protocol. But, it is proper for me to remark, that no sentiment dropped from the British plenipotentiaries authorizing the belief that they would have concurred in the object, if we had proceeded to the consideration of it. My own opinion, unequivocally, is, that Great Britain is not prepared to accede, under any circumstances, to the proposition for abolishing private war upon the ocean." Cong. Doc. Senate, 18th Cong. 2d Session, Confidential, pp. 50, 100.

Mr. Adams, after referring to the declared intentions of France in the then existing war, which had been communicated to the American government, instructed, 13th of August, 1823, Mr. Sheldon, Chargé d'Affaires at Paris, to make the same proposition to France as was being made to England, for a convention regulating maritime and belligerent rights in time of war, by which all privateering and all warfare against private property upon the sea was disclaimed and denounced. M. Chateaubriand, in a note of the 29th of October, to Mr. Sheldon, says: "Your government has expressed a desire to see the system followed by France in the maritime operations of last year become a universal rule, 'that individual property on the ocean must be sacred in times of war.' If the trial successfully made by France can induce all governments to agree upon a general principle, which shall place wise limits to maritime operations, and be in accordance with the sentiments of humanity, His Majesty will congratulate himself still more in having given this salutary example, and in having proved that, without compromising the success of war, its scourge can be abated."

Instructions having been given to the United States minister at St. Petersburg to bring the subject before the Russian government, Count Nesselrode wrote to Mr. Middleton, February 1, 1824: "The principle will not be of great utility except as far as it shall have a general application. His Imperial Majesty charges the undersigned to declare, he fully appreciates the proposition of the American government; that he shares in the opinions and wishes expressed in Mr. Middleton's note; and that as soon as the powers, whose consent he considers as indispensable, shall have shown the same dispositions, he will not be wanting in authorizing his ministers to discuss the different articles of an act, which would be a crown of glory to modern diplomacy."

Mr. Van Buren, Secretary of State, in his instructions to Mr. Randolph, June 18, 1830, said: "In the *projet* of 1823, tendered through Mr. Middleton, there was a clause exempting merchant vessels and their cargoes, being private property, from capture in time of war, and thus entirely suppressing private warfare. This clause, inserted in the *projet*, in addition to all the principles of the armed neutrality, was an innovation upon the maxims of maritime legislation, as recognized by the conventional law of Europe prior to the war of the American Revolution, and affords the first instance, it is believed, of a formal proposition to admit it in the code of public

the booty has been carried into a place of safety, *infra præsidia* of the captor.[1]

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law. The very doubtful expediency of restricting our means of marine warfare to our young navy alone, is a consideration which would make the President pause before committing his country upon a subject of so deep importance to its security." And Mr. Buchanan, in a note to Count Nesselrode, of the 18th (30th) of May, 1832, says, that the "proposition to abolish private war on the ocean has been abandoned since the note to Mr. Middleton of the 1st of February, 1824."

Mr. Clay's instructions to Mr. Gallatin, of the 19th of June, 1826, referred to the abolition of privateering, with immunity of private property at sea, free ships free goods, the law of blockade, the law of contraband, the confiscation of debts or public stocks, the exemption of persons engaged in trade from molestation in consequence of war, and contained further special provisions to mitigate the rigors of war. He was instructed to state that the American government felt the unabated force of all those considerations which induced them to propose these provisions through Mr. Rush, but was discouraged from making a new attempt, and he was to decline to bring them forward. The instructions of Mr. Clay to Mr. Barbour of the 18th of June, 1828, were to the same effect. Ex. Doc. No. 111. 33d Cong. 1st Sess. H. R.

The treaties of the United States, of 1778 with France, of 1794 with England, of 1782 with the Netherlands, of 1836 with Peru-Bolivia, of 1785 and 1799 with Prussia, of 1795 with Spain, of 1783 and 1816 with Sweden, as well as with some other powers, all provided, that if any citizen or subject of either of the contracting parties took a commission, or letters of marque, for privateering against the other, from any power with whom the other was at war, he should be treated as a pirate; and in the treaties of 1827 and 1828, renewing those with Sweden and Prussia, which had expired, this provision was retained. Statutes at Large, vol. viii. pp. 24, 44, 74, 94, 127, 144, 172, 240, 354, 384, 493. The treaties with England and France have expired, without this provision being renewed in any subsequent treaty; and, therefore, any prohibition on this subject, which may exist in those countries, beyond the obligation of neutrality, required by the law of nations, must depend on the internal laws of the respective States. An act "to prevent citizens of the United States from privateering against nations in amity with, or against citizens of the United States," applying to cases of fitting out without the limits of the United States, was passed June 14, 1797, ch. 1. Statutes at Large, vol. i. p. 520. It was, however, repealed by the act of April 24, 1818, ch. 88, § 12. The 4th section of this latter act reënacts the provision as to privateering against citizens of the United States, without the limits of the United States, omitting what applies to nations in amity; but the 3d section, which is substantially the same as § 3 of the act of June 5, 1794, ch. 50, prohibits the fitting out, by any person within the United States, of any ship or vessel, to cruise or commit hostilities against the subjects, citizens or property of any foreign power or State, with whom the United States are at peace. Ib. vol. iii. pp. 448–450.

During the war between the United States and Mexico, Mexico made great efforts to induce the subjects of the neutral States of Europe to take commissions for privateers. England and France prohibited their subjects from accepting the offers made to them; and almost all the ordinances of neutral States, during war, forbid

[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 8; 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.

§ 12. Recaptures and salvage.

As to ships and goods captured at sea, and afterwards recaptured, rules are adopted somewhat different

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their subjects from accepting letters of marque from the belligerents, but they are, in general, without any adequate sanction for their enforcement. Hautefeuille, Droits des Nations Neutres, tome iv. p. 252.

The President of the United States announced, in his message of December, 1846, that he had, immediately after Congress recognized the existence of war with Mexico, called the attention, and, as he conceived, with effect, of the Spanish government, to the provision of the 14th article of our treaty with that power, of the 20th of October, 1795, which is among those heretofore noticed. The President, at the same time, recommended to Congress to provide, by law, for the trial and punishment, as pirates, of Spanish subjects, who should be found guilty of privateering against the United States. Annual Register, 1846, pp. 340–341]. A general act, to reach all cases, where such treaties existed, was passed March 3, 1847. Statutes at Large, vol. ix. p. 175. Part II. ch. 2, § 15, Editor's note [79, p. 254, *supra*. On a suggestion that a notice had been given by the United States government that they would treat as pirates *any* foreigners on board Mexican privateers, the British minister at Washington was instructed to express to the government there, that it was the expectation of Her Majesty's government that the threat would not be put into execution upon a British subject. Hansard's Parl. Deb. 3d ser. vol. lxxxix. p. 163, January 21, 1847, Lord Palmerston.

In the late war, between Russia, on the one side, and Turkey, England, France, and Sardinia on the other, no letters of marque were issued by the belligerents. The other powers of Europe strictly prohibited their subjects from any participation, by accepting letters of marque, or otherwise, in aiding the belligerents. An Austrian decree, of May 25, 1854, commences by stating that the use of letters of marque, or any participation in the armament of a vessel, no matter under what flag, is strictly forbidden to the subjects of His Imperial Majesty. He who shall infringe this order, will not only be deprived of the protection of the Austrian government, but will be liable to be punished by another State, and will also be proceeded against in the criminal courts of Austria. The entry of foreign privateers into Austrian ports is forbidden. Paris Moniteur, June 9, 1854.

The Queen of Spain issued an order, May, 1854, prohibiting proprietors, masters, or captains of Spanish merchant ships, from taking letters of marque from any foreign power, or giving them aid, unless in the cause of humanity, in the case of a fire or shipwreck. Even the Hawaiian government issued a proclamation, prohibiting their subjects from engaging, (either directly or indirectly,) in privateering against the shipping or commerce of any of the belligerents, under the penalty of being treated and punished as pirates.

The King of Denmark, and the King of Sweden and Norway, gave notice to all friendly powers, that, during the then existing contest, privateers would not be admitted into their ports, nor tolerated in the anchorage of their respective States. The Chargé d'Affaires of Denmark to the Secretary of State of the United States, January 20, 1854. The Chargé d'Affaires of Sweden to the Same, January 28, 1854.

In communicating to the government of the United States the course which England and France purposed pursuing toward neutrals in the pending war, after stating, under the date of April 21, 1854, that their Majesties had, for the present, resolved not to authorize the issue of letters of marque, Mr. Crampton says: "Her Britannic Majesty's government entertains the confident hope, that the United

from those which are applicable to other personal property. These rules depend upon the nature of the different classes of

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States government will receive with satisfaction the announcement of the resolutions thus taken, in common, by the two allied governments; and that it will, in the spirit of just reciprocity, give orders that no privateer under Russian colors shall be equipped, or victualled, or admitted with its prizes, in the ports of the United States; and also that the citizens of the United States shall rigorously abstain from taking part in armaments of this nature, or in any measure opposed to the duties of a strict neutrality."

The Count de Sartiges addressed the Secretary of State, on the 28th of April, 1854, to the same effect, on the part of the French government.

Mr. Marcy, in returning an answer to the English and French ministers, and which was expressed in the same terms to each of them, on the day of the date of the last note, remarks, that the "laws of this country impose severe restrictions not only upon its own citizens, but upon all persons who may be residents within any of the territories of the United States, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking part in any foreign war."

At an interview, in March, between Lord Clarendon and Mr. Buchanan, at which the former read the "declaration" in reference to neutrals, which had not yet been issued, he did not propose the conclusion of a treaty for the suppression of privateering, but he expressed a strong opinion against the practice, as inconsistent with modern civilization. He spoke in highly complimentary terms of the treaties of the United States with different nations, which stipulate that if one of the parties be neutral and the other belligerent, the subjects of the neutral accepting commissions, as privateers, to cruise against the other, from the opposing belligerent, shall be punished as pirates. Mr. Buchanan, in answer, stated that it did not seem to him possible, under existing circumstances, for the United States to agree to the suppression of privateering, unless the naval powers of the world would go one step further, and consent that war against private property should be abolished altogether upon the ocean, as it had already been upon the land. There was nothing really different, in principle or morality, between the act of a regular cruiser and that of a privateer in robbing a merchant vessel upon the ocean, and confiscating the property of private individuals on board, for the benefit of the captor. Suppose a war with Great Britain. The navy of Great Britain was vastly superior to that of the United States, in the number of vessels of war. The only means which we would possess to counterbalance, in some degree, their far greater numerical strength, would be to convert our merchant vessels, cast out of employment by the war, into privateers, and endeavor, by their assistance, to inflict as much injury on the British as they would be able to inflict on American commerce. On another occasion, Lord Clarendon spoke in high terms of our Neutrality Law of April 20, 1818, and pronounced it superior to their own, especially in regard to privateers.

Mr. Marcy, in his answer of the 13th of April, 1854, to Mr. Buchanan's despatches, says: "Both Great Britain and France, as well as Russia, feel much concern as to the course which our citizens will take, in regard to privateering. The two former powers would, at this time, most readily enter into a convention, stipulating that the subjects or citizens of the party, being a neutral, who shall accept a commission, or letters of marque, and engage in the privateer service, the other party being a belligerent, may be treated as pirates. A stipulation to this effect is contained in several of our treaties; but I do not think the President would permit it to be inserted

cases to which they are to be applied. Thus, the recapture may be made either from a pirate; from a captor, clothed

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in any new one. His objection to it does not arise from a desire to have our citizens embark in foreign belligerent service; but, on the contrary, he would much regret to see them take such a course. Our laws go as far as those of any nation — I think farther — in laying restraints upon them, in regard to going into foreign privateer service. This government is not prepared to listen to any proposition for a total suppression of privateering. It would not enter into any convention, whereby it would preclude itself from resorting to the merchant marine of the country, in case it should become a belligerent party." Cong. Doc. 33d Cong. 1st Sess. H. of Rep. Ex. Doc. No. 103.

The views of the American government will be found more fully stated, in advance of the declaration of the Congress of Paris, in the notice taken by President Pierce, in the Annual Message of 1854–5, of the suggestion of Prussia to connect the abolition of privateering with the question of neutral rights, which it had been proposed by the United States to regulate by convention. After referring to the convention recently concluded with Russia, he says: —

"The King of Prussia entirely approves of the project of a treaty to the same effect, submitted to him, but proposes an additional article providing for the renunciation of privateering. Such an article, for most obvious reasons, is much desired by nations having naval establishments, large in proportion to their foreign commerce. If it were adopted as an international rule, the commerce of a nation, having comparatively a small naval force, would be very much at the mercy of its enemy, in case of war with a power of decided naval superiority. The bare statement of the condition in which the United States would be placed, after having surrendered the right to resort to privateers, in the event of war with a belligerent of naval supremacy, will show that this government could never listen to such a proposition. The navy of the first maritime power in Europe is at least ten times as large as that of the United States. The foreign commerce of the nations is nearly equal, and about equally exposed to hostile depredations. In war between that power and the United States, without resort, on our part, to our mercantile marine, the means of our enemy to inflict injury upon our commerce, would be tenfold greater than ours to retaliate. We could not extricate our country from this unequal condition, with such an enemy, unless we at once departed from our present peaceful policy, and became a great naval power. Nor would this country be better situated, in war with one of the secondary naval powers. Though the naval disparity would be less, the greater extent and more exposed condition of our wide-spread commerce would give any of them a like advantage over us.

"The proposition to enter into engagements to forego resort to privateers, in case this country should be forced into war with a great naval power, is not entitled to more favorable consideration than would be a proposition to agree not to accept the services of volunteers for operations on land. When the honor or the rights of our country require it to assume a hostile attitude, it confidently relies upon the patriotism of its citizens, not ordinarily devoted to the military profession, to augment the army and navy, so as to make them fully adequate to the emergency which calls them into action. The proposal to surrender the right to employ privateers is professedly founded upon the principle, that private property of unoffending non-combatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle, which equally

with a lawful commission, but not an enemy; or, lastly, from an enemy.

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requires that such private property should not be seized or molested by national ships of war. Should the leading powers of Europe concur in proposing, as a rule of international law, to exempt private property, upon the ocean, from seizure by public armed cruisers, as well as by privateers, the United States will readily meet them upon that broad ground." Cong. Doc. President's Message, 1854. Annual Register, 1854, p. 413].

At the Congress of Paris of 1856, a declaration of principles was signed, on the 16th of April, by the plenipotentiaries of all the powers there represented, and the adhesion of all other powers was invited. It contained four articles. 1. That privateering is and remains abolished. 2. That the neutral flag covers the cargo of the enemy, except when it is contraband of war. 3. That the neutral goods, except contraband of war, are not seizable under the enemy's flag. 4. Finally, that blockades, to be obligatory, are to be effective, — that is to say, maintained by a sufficient force to shut out the access of the enemy's ships and other vessels in reality. By a memorandum of Count Walewski, approved by the Emperor of the French, 12th of June, 1858, it appears that the declaration in all its parts had then received the adhesion of thirty-eight States, including the Germanic Confederation. Many of them were, however, without a sea-port. They were, Baden, Bavaria, Belgium, Bremen, Brazil, The Duchy of Brunswick, Chile, The Argentine Confederation, Lubeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau, Oldenburg, Parma, The Netherlands, Peru, The Germanic Confederation, Denmark, The Two Sicilies, Ecuador, The Roman States, Greece, Guatemala, Hayti, Hamburg, Hanover, The Two Hesses, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Sweden, Switzerland, Tuscany, and Wurtemberg. In the government of Uruguay, the ratification of the legislature was only wanting. Spain and Mexico declined acceding to the first article, but declared that they appropriated the other three as their own, and the United States would be ready to grant their adhesion, if it were added to the enunciation of the abolition of privateering that the private property of citizens, subjects of the belligerent powers, would be free from seizure at sea from the war navies respectively. Lawrence on Visitation and Search, p. 196.

It was agreed by the plenipotentiaries, and inserted in the protocol of their proceedings, though not in the instrument itself, that the "declaration was indivisible, and that the powers which signed it, or should accede to it, could not thereafter enter into any arrangement in regard to the application of the maritime law in time of war, which did not rest on the four principles, which are the object of the declaration." This provision it was, however, on motion of the Russian plenipotentiaries, admitted could not have any retroactive operation or invalidate any existing conventions; as it had also been conceded, at the suggestion of Count Orloff, "that it would not be obligatory on the signers of the 'declaration' to maintain the principle of the abolition of privateering against those powers which did not accede to it." Ib. p. 5.

The policy of these rules was at the time the subject of much discussion in Parliament. In the debate in the House of Lords, May 22, 1856, the Earl of Clarendon, in answer to the attack on him for having yielded the principle, that "free ships make free goods," defended his course mainly on the ground that the "declaration" must be adopted as an entirety or not at all, and that, if the United States accepted it, they must acquiesce in the abandonment of privateering, which was to England more than an equivalent for a claim (taking enemy's property in neutral vessels)

Recaptures from pirates.

1. In the first case, there can be no doubt the property ought to be restored to the original owner; for as

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that she could not maintain; that privateering must become more important than heretofore, as commerce carried on in sailing vessels would be absolutely at the mercy of a privateer moved by steam, however small. The Earl of Harrowby, in sustaining the Ministry, said that England had suffered more injury from privateering than she could inflict, and that the United States would derive no benefit from the treaty, if they did not agree to abandon it. Ib. p. 9.

In a circular note to the American Ministers abroad, under date of the 14th of July, 1856, the Secretary of State, Mr. Marcy, informs them that "the diplomatic representatives of several of the European powers, which were parties to the late Paris Conference, have very recently presented to this government 'the declaration relative to neutral rights,' adopted at that conference, and, on behalf of their governments, asked the adhesion of the United States to it." Mr. Marcy, in his answer of the 28th of July, 1856, to Count Sartiges, while objecting to the indivisibility of the four articles, for two of which the United States were then negotiating, suggests that, as neither this limitation, nor the one restricting negotiations to their adoption as an entirety, is any part of the "declaration," any nation is at liberty to accede to it, in whole or in part. He considers that the article on blockades does nothing towards relieving the subject from the embarrassment attending on determining what fulfils the conditions of the definition, and that so far as privateering is concerned, as the right to resort to privateers is as clear as the right to use public armed ships and as incontestable as any other right appertaining to belligerents, the proceedings of the Congress are in the nature of an act of legislation and seek to change a well-settled principle of international law. The analogy of privateers to volunteers on land, with the difficulty of defining what particular class of maritime force should be regarded as privateers, and the preponderance which the adoption of the rule would give to a nation having a powerful military marine over one with an equal commercial one, but whose policy discarded a permanent navy, are fully discussed. The conclusion was that the United States would not surrender the practice of privateering, unless, in belligerent operations, the government and nation were entirely separated, and war was confined in its agencies and effects to the former. President's Message and Documents, 1856-7, p. 35.

The proposition for the abolition of privateering was, it is believed, a mistake, in confounding one of the means for the accomplishment of an object with the end to be obtained. That the entire immunity of private property at sea would follow as a necessary consequence from the abolition of cruising by private armed vessels would seem to have been the impression of those who, long before the Congress of Paris, advocated that proposition. If that should not to be the case, the article is without object. But it is only reasonable to presume that it was based on the supposition that, when there no longer exists a class of men to whom depredation on private property is the appropriate vocation, the right of capture of merchant ships, now exercised by the officers of the regular navy, must yield to the sentiments of an advanced civilization. Moreover, no new rule can stand the test of international morality, unless it confers equal advantages and imposes equal obligations on all States, great and small. The immunity proffered must be a defence as well against the spoliations of an enemy possessed of a great military marine, as of a State whose resources are confined to her mercantile navies. The article under consideration, in the terms of the "declaration," can only, like the denunciation of the slave-

pirates have no lawful right to make captures, the property has not been divested. The owner has merely been deprived of his

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trade by the Congress of Vienna, address itself to the consciences of the powers. That matter required, in order to give it any practical effect, special conventional stipulations, followed by legislation; and though, by a gross misnomer, the term "piracy" was applied to its infraction, the statute offence is distinguished from the crime of the same name under the law of nations, which was everywhere justiciable.

Whether any case is within the principle of the "declaration" of Paris, every nation, to which a vessel belongs, must decide for itself, subject, of course, to complaint on the part of the other contracting parties; but no State can undertake to outlaw a cruiser of another power, provided it has a commission from a *de facto* government, for any infraction of the article against privateering. It is not to be presumed that the Congress of Paris undertook to determine the form to be given either to the military or naval organization of the respective parties to the "declaration." What species of property shall be exposed to hostilities is a matter which comes home to the interests both of neutrals and belligerents, and it may be a subject for conventional regulation; but, so far as principle is concerned, it is certainly of little importance whether a war is conducted by vessels owned by individuals and chartered by the government, or whether they have been originally constructed in the public yards. It is well known that, at one period, France was in the habit of making arrangements with corsairs of other countries, as well as her own, to carry on public wars. There is, it is understood, a clause in the contracts which the British governments has with the transatlantic steamers, belonging to private companies, for their conversion into vessels of war, in the event of hostilities with foreign powers; and the United States are not only buying, but chartering and employing, merchant ships, to enforce the measures of coercion going on towards the seceded States, and they have established a volunteer navy, the commissions of which, though proceeding from the Federal government, are, like those of volunteers on shore, to be temporary, and confined to the immediate service. Statutes at Large, 1861, p. 272. Ib. 1861-2, p. 584. Can any one doubt, if the United States were a party to the "declaration," their right of employing in a foreign war this volunteer navy for any purpose, even for the capture of private property, in which their public vessels or those of other nations might properly be engaged? We may thence conclude that the addition which Mr. Marcy proposed to make to the privateer clause, viz.: "and that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband," was a legitimate development of the true spirit of the "declaration." Mr. Marcy, in a despatch of December 8, 1856, to Mr. Mason at Paris, propose "to formalize, by a convention, the 'declaration' with the amendment, as being the proper way of getting the matter before the Senate. Russia was willing to make such a treaty. This would not be inconsistent with the 'declaration,' as it embraces it and goes beyond it." Department of State MS.

President Pierce, in his message at the opening of the session of Congress, December, 1856, said: "I certainly cannot ascribe to the powers represented in the Congress at Paris any but liberal and philanthropic views in the attempt to change the unquestionable rule of maritime law, in regard to privateering. Their proposition was doubtless intended to imply approval of the principle that private property upon the ocean, although it might belong to citizens of a belligerent State, should be exempted from capture; and had that proposition been so framed as to give full

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.[1]

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effect to the principle, it would have received my ready assent on behalf of the United States. But the measure proposed is inadequate to that end. Private property would be still left to the depredations of the public armed cruisers." President's Message and Documents, 1856–7, pp. 22–35.

In proposing a new rule of international law, which can only be binding by obtaining an universal assent, it is not to be supposed that it can be so framed as to promote special interests, or that any one nation is to derive benefit from it to the prejudice of another. Unless the government is entirely separated from the individuals of the nation, and war confined to the former, the effect of surrendering the right of granting commissions to private armed cruisers would be to place the commerce of the world at the mercy of the power having the greatest military marine. If the consequence of the "declaration" was to be, to increase the maritime preponderance of Great Britain and France, without even benefiting the general cause of civilization, (as their public ships would retain the right of capturing private property, while the United States, with a superior mercantile marine, but with a comparatively small navy, would be divested of all the means of retaliation,) it could hardly have been supposed that the measure would receive the necessary sanction.

That the American amendment was necessary to give to the "declaration" of Paris full effect, was soon recognized by most of the European governments, as the writer of these notes has reason to know from the perusal of the papers in the Department of State at Washington, which were placed at his disposition by the late Secretaries, with a view to the preparation of the present edition of this work. Among the minor maritime States there was a clear unanimity of sentiment, but they naturally awaited, before giving a formal reply, the answer of the Great Powers. The adhesion of Russia was promptly rendered. Prince Gortschakoff instructed, so early as September, 1856, the Russian Minister at Washington, to communicate to Secretary Marcy a copy of his instructions to Baron Brurow. He says: "Your Excellency will have an opportunity, in Paris, of taking cognizance of Mr. Marcy's note, in which the American proposition is developed in that cautious and lucid manner which commands conviction. The Secretary of State does not argue the exclusive interests of the United States; his plea is put for the whole of mankind. It grows out of a generous thought, the embodiment of which rests upon arguments which admit of no reply. The attention of the Emperor has, in an eminent degree, been enlisted by the overtures of the American Cabinet. In his view of the question, they deserve to be taken into serious consideration by the powers which signed the treaty of Paris. They would honor themselves should they, by a resolution taken in common and proclaimed to the world, apply to private property on the seas the principle of inviolability which they have ever professed for it on land. They would crown the work of pacification which has called them together, and give it an additional guarantee of permanence. By order of the Emperor, you are invited to entertain this idea before the Minister of Foreign Affairs, and to apprise him

[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 9, § 17. Loccenius, de Jur. Marit. lib. ii. c. 2, No. 4. Brown's Civ. and Adm. Law, vol. ii. c. 3, p. 461. "Ea quæ piratæ nobis eripuerunt, non opus habent postliminio; quia jus gentium illis non concedit, ut jus dominii mutari possint." Dig. de Capt. et Postl. revers.

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

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forthwith that should the American proposition become the subject of common deliberation among the powers, it would receive a most decisive support at the hands of the representative of His Imperial Majesty. You are even authorized to declare that our august master would be disposed to take the initiative of this question."

The American Minister at Paris was assured by Count Walewski, in November, 1856, that the French government would agree to the "declaration" as modified by us, though a formal assent was deferred with a view to consultation with the other parties to the treaty of Paris. Prussia formally announced in May, 1857, to Mr. Cass, Secretary of State, who had replaced Mr. Marcy, that the Cabinet of Berlin gave its adhesion to the proposition made by the President of the United States to be added to the principles agreed on at Paris, declaring at the same time that "if this proposition should become the subject of a collective deliberation, it can rely on the most marked support of Prussia, which earnestly desires that other States will unite in a determination, the benefits of which will apply to all nations."

Mr. Daniel, Minister at Turin, writes to Mr. Marcy, February 3, 1857: "Count Cavour was explicit as to the extension of the proposition as to privateers. He said that he not only regarded it as a very just and logical deduction from the original ideas of the Paris Congress, but also an arrangement by which Sardinia, a weak power, with an easily blockaded coast, had everything to gain. He gave it his cordial approval, and if the Congress should reassemble, he would there be a warm advocate for it. At the same time, he could not give a separate or official assent to it, at this time, because Sardinia, having signed jointly the declaration of maritime law promulgated by the Congress, was bound not to modify it without the accord of the other parties represented. I found that the only opposition to the American principle in the world is made by England." Again, as the inference from a subsequent conference with the Sardinian Minister of Foreign Affairs, he says, in a despatch of the 7th of March, 1857: "The British government does not desire to see our amendment, rendering private property free from the devastation of war at sea as on land, pass into a principle of international law. At the same time, they wish to force the United States to give up the right of privateering, or, if they shall be unable to do so, render that right valueless, by depriving us of the right we have hitherto enjoyed in neutral ports."

Mr. Gevers, Netherland Minister of Foreign Affairs, writes to Mr. Belmont, Minister of the United States, at the Hague, November 21, 1856: "The government of the king has examined your note, as well as the papers annexed, with all the interest which the high importance of their subject should inspire. The declaration of Paris having evidently for its object a beneficial progress in international law, the adoption of the proposed amendment cannot but be regarded as the desirable completion of this progress. The Netherland government ardently desires the accomplishment of this beneficent work. The reception, which several powers have already given to it, appears to authorize also the hope that my government may be able to accede to it at a suitable time."

Instructions, the purport of which was communicated by Mr. Dallas, 25th April, 1857, had been given by President Buchanan to suspend negotiations, as was stated by Lord Palmerston in a debate in Parliament, in July, 1857, before any official action was taken by the government of Great Britain. Lord Palmerston, whatever change his opinions have since undergone, had expressed himself favorably to the

effects of the subjects or allies of France, retaken from pirates, and claimed within a year and a day after being reported at the

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proposition at a public meeting in Liverpool, November, 1856, declaring that "it is the conflict of armies by land and of fleets by sea that decides the great contests of nations." And we have, in the following despatch of Count Chreptovitsch, a further evidence of the interest which Russia took in the establishment of the principle. "I have," he says, writing under date of November 3d, (15th,) 1856, "improved a favorable opportunity to converse with Lord Clarendon in relation to the condition which the Cabinet of Washington appends to its accession to the principles of maritime law, embodied in the declaration of 4th (16th) April, and have delivered to him a copy of your Excellency's despatch under date of 1st September. The Premier, in answer to my communication, stated to me that Her Majesty's government recognized as a principle the equity of the amendment proposed by the American government, and that he saw no objection to make it the subject of a joint deliberation. He, however, added, that in the examination of the details of the question, it might find itself under the necessity of stipulating for certain reservations, which would be submitted at the proper time and place to the judgment of the powers that are called to discuss the matter."

Whether the withdrawal of the Marcy amendment by the last administration arose from the belief that the United States could not, in any event, surrender "a mode of maritime warfare" held by the then Secretary of State "to be peculiarly adapted to their condition and pursuits, and essential to their defence upon the ocean," or whether it was thought, as was intimated by President Buchanan to the New York Chamber of Commerce, (The Economist, 28th April, 1860,) that the right of blockade, even as defined in the "declaration of Paris," would render inoperative the promised advantages to the pacific commerce of belligerents, is a matter which in nowise affects the principles of this discussion; though the restoration of the rule, sustained by the earlier writers, of restricting blockades to places actually besieged, was also connected by the Senate of Hamburg with their late proposition for immunity of private property at sea. See as to this subject, in connection with blockades, ch. 3, § 28, Editor's note, *infra*.

Mr. Marcy had in his circular despatch of the 14th of July, 1856, heretofore referred to, directed the American Ministers to ascertain from the governments to which they were accredited what would be the treatment of American privateers, in case the United States should be at war with any other power which acceded to the "declaration." Subsequent events have rendered this matter no longer an open question. But Mr. Daniel wrote, under date of March 7, 1857, from Turin: "As to the treatment of our privateers in Sardinian ports, should the United States refuse to abolish letters of marque and become involved with some third power represented at the Congress, Count Cavour said that if the United States did not choose to accept the propositions of the Paris Congress, their privateers would, without doubt, always have the right to take refuge in the Sardinian ports from inimical cruisers, but it was questionable whether they would be permitted to sell their prizes there, and make their ports a basis of operations against the enemy. He said that the question had never been raised or thought of in the Congress, and that at present his mind was not distinctly made up as to the answer that he should give." Department of State MS.

Though the proposition for exempting merchantmen from capture by public ships was withdrawn by the Government of the United States, it was revived in 1858 by another American State. Brazil proposed that "all private property, without excep-

Admiralty, shall be restored to the owner, upon payment of one third of the value of the vessel and goods, as salvage. And the

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tion of merchant vessels, should be placed under the protection of maritime law, and be free from the attacks of cruisers of war." Note of 18th March, 1858, Minister of Foreign Affairs, to Minister of France at Rio Janeiro, cited by M. Hautefeuille. Proprietés privées, &c., p. 7. The subject was subsequently, in consequence of the movements of the commerce of Hamburg and Bremen, (Mémoire au Sénat, 1er Decembre, 1859, Ib. p. 35,) greatly discussed by the publicists of Germany, and in the Chamber of Deputies of Prussia.

During the war of 1859, in Italy, all the parties were signers of the declaration of Paris, and privateering was interdicted by them.

Though the 2d section of the act of August 5, 1861, to protect commerce and punish piracy, authorizes the President to instruct the commanders of "armed vessels, sailing under the authority of any letters of marque or reprisal granted by the Congress of the United States, or the commanders of any other suitable vessels," to subdue, &c., vessels intended for piratical aggressions, no act authorizing the issue of letters of marque during the present rebellion has been passed. Statutes at Large, 1861, p. 315. On an application for the privilege of arming for defence, the Secretary of the Navy, in a note of October 1, 1861, to the Secretary of State, says: "Under the clause, (which includes commanders of any other suitable vessels,) *letters permissive*, under proper restrictions, or guards against abuse, might be granted. This would seem to be lawful, and, perhaps, not liable to the objection of granting letters of marque against our own citizens, and that, too, without law or authority from the only constitutional power that can give it." New York Times, Oct. 19, 1861.

A bill was introduced into the Senate during the session of 1861-2, at the suggestion, it was stated, of the government, but failed to become a law, to authorize the President, during the continuance of the present insurrection, to grant letters of marque and reprisal, and to revive, in relation to all that part of the United States where the inhabitants have been declared in a state of insurrection, and the vessels and property to them belonging, the acts passed on this subject during the war of 1812. It was opposed, because it was assumed that letters of marque could only be granted against an independent State, and that their issue might be regarded as a recognition of the Confederate States. Such a measure, it was also said, would be an admission of weakness on the part of the Federal navy; and it was moreover objected to as introducing privateering, which, when attempted by the Confederate States, was branded, by the President and the public sentiment of the North, as piracy. Congressional Globe, 1861-2, pp. 3325, 3335.

It may be here noted that in the act passed by the British Parliament, during the American Revolution, to authorize privateering against the colonies, the words *letters of permission* were inserted in the place of *letters of marque*, the latter being thought only applicable to reprisals on a foreign enemy. Annual Register, 1777, p. 53].

On the 24th of April, 1861, and consequently after the commencement of the pending intestine contest, Mr. Seward, Secretary of State, addressed a circular to the Ministers of the United States, at the principal courts of Europe, in which, while expressing a preference for the Marcy amendment, he refers to the fact that "a portion of the American people have raised the standard of insurrection, and proclaimed a provisional government, and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States." He adds, "prudence and humanity combine in persuading the President, under the circum-

same is the law of Great Britain, but there is no doubt that the municipal law of any particular State may ordain a different

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stances, that it is wise to secure the lesser good offered by the Paris Congress, without waiting indefinitely in hope to obtain the greater one offered to the maritime nations by the President of the United States." President's Message, &c., 1861-2, p. 36.

With this view of the matter, negotiations were commenced with England and France. But before any communication was made to the British government, Lord John Russell had instructed Lord Lyons, May 18, 1861, that "Her Majesty's government cannot accept the renunciation of privateering on the part of the government of the United States, if coupled with the condition that they should enforce its renunciation on the Confederate States, either by denying their right to issue letters of marque, or by interfering with the belligerent operations of vessels holding from them such letters of marque, so long as they carry on hostilities according to the recognized principles, and under the admitted liabilities of the law of nations." And when informed by the French Ambassador that a proposition had been made by the United States Minister, in Paris, that privateers sent out by the so-styled Southern Confederacy should be treated as pirates, Lord John Russell writes, June 12, 1861, to Mr. Grey, directing him to read the despatch to M. Thouvenel, that "Her Majesty's government are not disposed to depart from the neutral character which Her Majesty, as well as the Emperor of the French, has assumed." Those views, M. Thouvenel declared, coincided entirely with his own. Mr. Grey to Lord John Russell, June 14, 1861.

It may be here added, that, even before any negotiations for the accession of the United States to the declaration of Paris by President Lincoln's administration, a disposition was manifested to waive altogether, on the part of England and France, the privateer clause of the "declaration," and to conclude, notwithstanding the protocol of the Congress as to their indivisibility, an arrangement with the United States with reference to the other articles. In other instructions to Lord Lyons, of the same date as those above cited, Lord John Russell says: "There can be no question but that the commander and crew of a ship bearing a letter of marque must, by the law of nations, carry on their hostilities according to the established laws of war. Her Majesty's government must, therefore, hold any government issuing such letters of marque responsible for, and liable to make good, any losses sustained by Her Majesty's subjects, in consequence of wrongful proceedings of vessels sailing under such letters of marque. In this way, the object of the declaration of Paris may, to a certain extent, be attained, without the adoption of any new principle." Parliamentary Papers, 1862. North America, No. 3, p. 47.

Owing to an impression on the part of the American Minister, Mr. Adams, that the subject was covered by the instructions to Lord Lyons, at Washington, it was not till the 11th of July that the matter was brought before Lord John Russell, so as to receive, by his note of July 18th, the assent of the government of England, to conclude, instead of an accession to the "declaration," a convention to the same effect, so soon as it was informed that a similar convention had been agreed on with France, so that the two conventions might be signed on the same day. Lord John Russell, on the 31st of July, informs Mr. Adams, that, "on the part of Great Britain, the engagement will be prospective, and will not invalidate anything already done." On the same occasion, he told him that he was correct in considering the Marcy amendment to be inadmissible.

On the 19th of August, Lord John Russell sent to Mr. Adams the following draft

rule as to its own subjects. Thus the former usage of Holland and Venice gave the whole property to the retakers, on the prin-

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of declaration, which he proposed to make: "In affixing his signature to the convention of this day, between Her Majesty the Queen of Great Britain and Ireland and the United States of America, the Earl Russell declares, by order of Her Majesty, that Her Majesty does not intend thereby to undertake any engagement which shall have any bearing, direct or indirect, on the internal differences now prevailing in the United States."

Mr. Dayton, at Paris, submitted the propositions with the Marcy amendment to Count Thouvenel, on the 28th of May, 1861. Mr. Seward, by a despatch of the 6th of July, reminds him that the tender of our adhesion to the "declaration" was to have been "pure and simple," and instructs him to renew it in the form originally prescribed. This was done on the 2d of August, and, on the 20th, M. de Thouvenel communicated the text of a declaration, which was in terms corresponding with that of Lord John Russell. On the 10th of September, Mr. Seward instructed Mr. Dayton to "inform M. Thouvenel that the proposed declaration on the part of the Emperor is deemed inadmissible by the President; and if it shall still be insisted upon, you will then inform him that you are instructed for the present to desist from further discussion on the subject involved." Mr. Seward had, in the previous instruction of July 6, said, in reference to the accession to the declaration of Paris; "We tendered it, of course, as the act of this Federal government, to be obligatory equally upon disloyal as upon loyal citizens."

The object of the special declaration was fully explained by the Ministers of Foreign Affairs both of France and England. M. Thouvenel said: "If the United States, before the actual crisis, had adhered to the declaration of the Congress of Paris, as this adhesion would have bound the whole Confederation from that moment, the Cabinet of Washington might, at the present time, have availed itself of it to contest the right of the Southern States to arm privateers. In accepting, then, a proposition presented (*formulée*) by the Federal government, when the war had already unhappily broken out between the Northern and Southern States of the Union, it was natural that the government of the Emperor, having decided not to turn aside from the attitude of reserve which it had imposed upon itself, should consider beforehand what extension the Cabinet of Washington might be induced, on account of its position, to give to an arrangement, by which it declared that the United States renounced privateering. The hostilities in which the Federal government is actually engaged, offering to it the opportunity of putting immediately into practice the abandonment of this mode of warfare; and its intention, officially announced, being to treat the privateers of the South as pirates, it was manifestly of importance to caution the Cabinet of Washington against the conviction, where it might exist, that the contemplated treaty obliged us thus to consider the privateers of the South as pirates." M. Thouvenel to Mr. Dayton, September 9, 1861.

Lord Russell had previously said to Mr. Adams, "It would follow logically and consistently from the attitude taken by Her Majesty's Government that the so-called Confederate States, being acknowledged as a belligerent, might, by the law of nations, arm privateers, and that their privateers must be regarded as the armed vessels of a belligerent. With equal logic and consistency it would follow, from the position taken by the United States, that the privateers of the Southern States might be decreed to be pirates; and it might be further argued by the government of the United States,

ciple of public utility; as does that of Spain, if the property has been in the possession of the pirates twenty-four hours.[1]

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that a European power signing a convention with the United States, declaring that privateering was and remains abolished, would be bound to treat the privateers of the so-called Confederate States as pirates." Earl Russell to Mr. Adams, August 28, 1861. Papers relating to Foreign Affairs, &c., 1861, pp. 18, 97, 100, 110, 118, 130, 132, 207, 215, 223, 227, 233, 236.

The rule as to the obligation of treaties, in the case of a revolutionary government, or of a division of a State, was explained by Mr. Adams, Secretary of State, in the instructions to the first American Minister appointed to Colombia. He says: "It is asserted that, by her declaration of independence, Colombia has been entirely released from all the obligations by which, as part of the Spanish nation, she was bound to other nations. This principle is not tenable. To all engagements of Spain with other nations, affecting their rights and interests, Colombia, so far as she was affected by them, remains bound in honor and justice." He refers, by way of illustration, to the treaties of 1795 and 1819 between the United States and Spain. To the stipulations of the former, Colombia is bound as by an express compact, made when she was a Spanish country. As to the latter, "this treaty having been made after the territories now composing the Republic of Colombia had ceased to acknowledge the authority of Spain, they are not parties to it, but their rights and duties in relation to the subject-matter remain as they had existed before it was made." Mr. Adams to Mr. Anderson, May 27, 1823. British and Foreign State Papers, 1825–6, p. 480.

According to Hautefeuille, speaking in reference to the existing civil war, "as the United States have not consented to the abolition of privateering, they have preserved this legitimate mode of warfare. They may arm cruisers against all the nations with which they are or shall be at war, even against those which have signed the declaration of Paris. In case they use this right, without doubt their adversary, though a signer of the treaty, would be perfectly authorized likewise to arm privateers to cruise against American vessels. If the United States, as one nation, as they existed in 1856, have this right in reference to England or France, the United States divided into two camps, by reason of their separation, possess it equally and for a still stronger reason, the one against the other. This right belongs to the two parties by the same title; for the two then only making one nation have refused to renounce privateering, they have consequently preserved the power of employing it in all cases, and even against one another. Privateering is, therefore, both for the United States of the North, and the Confederate States, a lawful mode of war." It is then shown that this fact has been recognized during the present war by the principal European powers. Quelques questions de droit international maritime à propos de la guerre d'Amérique, p. 11. Indeed, no disposition has been manifested, on the part of any of the signers to the "declaration," to apply its principles to those who have not voluntarily adopted it.

As to privateers and their prizes, Lord John Russell said, June 7, 1861: "We have made no proposal to the government of the United States, or to the Confederate States, with regard to bringing in prizes to any of Her Majesty's ports. What we have done is to give orders to the authorities in the ports of the United Kingdom, and to Her Majesty's governors in the Colonies, to interdict the entrance of ships of

[1] Grotius par Barbeyrac, liv. iii. ch. 9, § xvi. No. 1, and note.

Valin, in his commentary upon the above article of the French Ordinance, is of opinion that if the recapture be made by a for-

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war, or privateers with their prizes, into any of our ports. There is no doubt, according to the opinion of the Queen's Advocate, supported by the authorities on the law of nations, that any power has a right to interdict the entrance of prizes into its ports. Mr. Wheaton, in his well-known treatise, lays it down that it is entirely within the discretion of any power to interdict the entrance of ships of war, or privateers with their prizes." Hansard's Parliamentary Debates, 3d series, clxiii. p. 759.

Under the impression that a war might arise between the United States and Great Britain, on account of the affair of the mail steamer Trent, Earl Russell, on the 20th of December, 1861, instructed Lord Lyons to speak with Mr. Seward on the subject of letters of marque, and to say that, in case of war, Great Britain is willing to abolish privateering as between the two nations, if the President will make a similar engagement on the part of the United States. Parliamentary Papers, 1862, North America, No. 1, p. 114.

The question of immunity to private property at sea was discussed in the House of Commons, on the 11th of March, 1862, in connection with a resolution, proposing to declare the existing state of international maritime law unsatisfactory. In the course of the debate, Lord Palmerston pronounced the idea of the repeal of the "declaration" of Paris impossible. No one could seriously think the government was likely to adopt that course, or that, if adopted, the government was likely to get the other parties to agree to it. He denied that the exemption of private property by sea from capture was a logical deduction from the "declaration," which related entirely to the relations between belligerents and neutrals. The present proposition related to the relations of belligerents to each other. He intimated that he no longer entertained the views, as expressed by him at Liverpool, in 1856. "His (present) opinion distinctly was, that if you give up that power which you possess and which all maritime States possess and have exercised — of taking the ships, the property, and the crews, of the nation with whom you may happen to be at war, you would be crippling the right arm of our strength. You would be inflicting a blow upon our naval power, and you would be guilty of an act of political suicide." The motion was withdrawn without any vote on it. Macqueen, Law of War and Neutrality, pp 58. 86. That portion of the debate which referred to the obligation on the belligerents. who were signers to it, of the "declaration of Paris" has elsewhere been noticed, Part III. ch. 2, § 11, Editor's note [160, p. 474.

Immunity of private property at sea formed also, in connection with the rights of neutrals, the subject of a joint resolution, proposing a congress of maritime powers, which was introduced into the House of Representatives of the United States by Mr. Cox of Ohio, in the session of 1861-2. The resolution was approved by the Committee of Foreign Affairs, to whom it was referred. The whole matter, as bearing on the rights and interests of the United States, will be found explained in the speech of Mr. Cox. Cong. Globe, 1861-2, p. 1618, April 10, 1862.

Such a congress, for the Spanish-American States, has been invited by the new Colombian government, and one of the proposed articles of the International American doctrine is that "merchandise, belonging to the citizens of one of the belligerents, on board of his own vessels, and on the high seas, shall not be taken by the ships of war of the other belligerent, except it be contraband of war." La Crónica, 6 de Octúbre de 1862.

The views of publicists are, in general, favorable to the immunity of private prop-

eigner, 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 favor of a Dutch subject, who had retaken a French vessel from pirates.[1] 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.[2]

Under the term *allies* in this article are included *neutrals;* and Valin holds that the property of the subjects of friendly powers,

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erty at sea. But opposed to them is the eminent advocate of neutral rights, who considers that the objection to the employment of privateers arises rather from the exorbitant claims of belligerents against neutrals than from anything inherent in that species of force. Mr. Hautefeuille's argument, moreover, is based on controverting what he deems the false assumption, that private property on land was free from belligerent capture, and denying that its immunity either at sea or on land is demanded by any considerations of humanity. It may be remarked, that any inaccuracy of the advocates of exemption from capture at sea, with reference to the existing rule as to the land, can in nowise affect the principle except to include, if he is correct, the latter in the proposed reform. The treaty, as that author fully admits, of 1785, between Prussia and the United States, in its explicit provisions, both as to sea and land, left nothing to be supplied in this respect. Mr. Hautefeuille contends that the evils of war are to be estimated by its duration, and that the more destructive its operations are, the more it is brought home to all classes of the community, the more is the cause of humanity promoted. Without derogating from this course of reasoning, illustrated by the short Italian campaign of 1859, with its bloody battles of Magenta and Solferino, it is to be noticed that the absence of commerce and the stagnation of affairs enumerated by him are among the consequences of war, which it is the object of the proposed plan, at least, to diminish. Mr. Hautefeuille's argument, taken in its fullest extent, would ignore all the changes, which the civilization of centuries has introduced into the conduct of war. Neither the exchange nor ransom of prisoners would be tolerated, but slavery or death would be the lot of the captives. Droits des Nations Neutres, tit. iii. ch. 2, sec. 3, § 3, tom. i. p. 181. Droit Maritime International, pp. 333, 485. Propriétés privées des sujets belligerants sur mer, *passim*.

Much of this note is substantially the same as a letter addressed by the Editor to Mr. Westlake, Secretary of the International Department of the National Association for the promotion of Social Science, and published in their Transactions for 1861, p. 794.] — *L.*

[1] Valin, Comm. sur l'Ord. liv. iii. tit. 9, art. 10.

[2] Pothier, Traité de Propriété, No. 101.

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.[1] [193]

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 as 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 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

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[1] Valin, Comm. sur l'Ord. liv. iii. tit. 9, art. 10.

[193] Hautefeuille gives the same interpretation to the ordinance as Valin, and cites, also, for the rule of reciprocity, Massé, Droit Commercial, tom. i. ch. 2, sec. 3, § 6, No. 424. But he condemns the whole system of the French law in reference to salvage, in case of recapture from pirates, which, whether it be made by a privateer or a ship of war, whether it is applicable to subjects or allies, allows salvage equal to the one third of the ship and cargo. The recapture should be entirely gratuitous, especially when made by a ship of war, whose duty it is to assure the security of navigation, and consequently to pursue and destroy pirates. When the recapture is made by a privateer, it would be just that the owner should pay the expenses. He refers with approbation to the treaty of 1783, art. 17, between Sweden and the United States, which provides for the restitution entire to the true proprietor of a vessel and merchandise belonging to the one party, retaken either from an enemy or from pirates, by a ship of war or privateer of the other. Droit des Nations Neutres, tom. iv. p. 427. In England, the crown is, generally speaking, entitled to all *bona piratorum;* but if any person can establish a title to the goods, the title of the crown ceases. Hagg. Adm. Rep. vol. i. p. 144, The Hebe. By statutes 13 and 14 Vict. ch. 26, ships and effects captured from pirates are to be restored on the payment of one eighth of their value, which is to be distributed to the recaptors. See, also, 13 and 14 Vict. ch. 27, and 17 and 18 Vict. ch. 19, ch. 78. Stephens's (Blackstone's) Commentaries, vol. iv. p. 23.] — *L.*

by the law of nations and treaties, the original owner would not have been entitled to restitution.[1]

In general, no salvage is due for the recapture of neutral vessels and goods, upon the principle that the liberation of a *bonæ fidæi* 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.

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 endeavor 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 favor 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 forever, 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;

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[1] Martens, Essai sur les Prises et les Reprises, § 52. "Sa majesté a jugé pendant la dernière guerre, que la reprise du navire neutre faite par un corsaire Français (lorsque le navire n'était pas chargé de merchandises prohibées, ni dans le cas d'être confisqué par l'ennemi) était nulle." Code des Prises, an 1784, tom. ii.

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 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 favor of the claimant, restitution would follow of course.[1]

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 courts 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

[1] Décision relative à la prise du navire le Statira, 6 Thermidor, an 8, pp. 2–4.

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, as a meritorious service, and was accordingly remunerated by the payment of salvage.[1] These abuses were corrected under the consular government, and so long as the decisions of the Council of Prizes were conducted by that learned and virtuous 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 occasioned the exception to the rule as to salvage to be revived in the practice of the British Courts of Admiralty, who again adjudged salvage to be paid for the recapture of neutral property which was liable to condemnation under that decree.[2] 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

[1] Robinson's Adm. Rep. vol. ii. p. 299, The War Onskan. Vol. iv. p. 156, The Eleonora Catharina. Vol. v. p. 54, The Carlotta. Vol. vi. p. 104, The Huntress. Cranch's Rep. vol. i. p. 1, Talbot *v.* Seeman, Dallas's Rep. vol. iv. p. 34, S. C.

[2] Robinson's Adm. Rep vol. vi. p. 410, The Sansom. Edward's Adm. Rep. vol. i. p. 254, The Acteon.

general rule. And the same principle might justly be successively applied to the prize proceedings of all the belligerent powers during the last European war, which was characterized by the most flagrant violations of the ancient law of nations, which, in many cases, rendered the rescue of neutral property from the grasp of their cruisers and prize courts, a valuable service entitling the recaptor to a remuneration in the shape of salvage.

3. Lastly, the recapture may be made from an enemy. Recapture 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 to free persons or slaves returning *postliminii;* and to real property and certain movables, 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.[1] Grotius attests, and his authority is supported by that of the Consolato del Mare, 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.*[2] And Loccenius considers the rule of twenty-four hours possession as the general law of Christendom at the time when he wrote.[3] 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.[4]

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[1] Ins. lib. i. tit. 12, Dig. l. 49, tit. 15. "Navis longis atque onerariis, postliminium est, non piscatûs aut voluptatis causâ." Dig. 49.

[2] "Cui consequens esse videtur, ut in mari naves, et res aliæ captæ censeantur tum demum, cùm in navalia aut portus, aut ad eum locum ubi tota classis se tenet, perducta sunt: nam tunc desperari incipit recuperatio, sed *recentiori jure gentium* inter Europæos populos introductum, videmus, ut talia capta censeantur ubi per horas viginti quatuor in potestate hostium fuerint." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 8. Consolato del Mare, cap. 287, § 1. Wheaton's Rep. vol. v. Appendix, p. 56. Ayala, de Jur. Bel. ac Pac. cap. v. Wheaton's Hist. Law of Nations, p. 45.

[3] Loccenius, de Jure Marit. lib. ii. cap. 4, § 4.

[4] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

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 it was certainly a question of much curiosity to inquire what was the true rule on this subject. "When I say *the true rule*, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit that there is no rule operating with the proper force and authority of a general law. It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours possession; or it might be the rule of bringing *infra præsidia;* or it might be a rule requiring an actual sentence or condemnation: either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another; but the fact is that there is no such 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. But were the public opinion of European States more distinctly agreed on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it. That obligation could only arise from a reciprocity of practice in other nations; for, from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary to that one nation to pursue a different conduct: for instance, were there a rule prevailing among other nations, that the immediate possession, and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle, and to lay it down as a general rule, that a bringing *infra præsidia*, though probably the true rule, should in all case of recapture be deemed necessary to divest the original proprietor of his right. The effect of adhering to such a rule would be gross injustice to British subjects; and a rule, from

which gross injustice must ensue in practice, can never be the true rule of law between independent nations; for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on one side, and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent States.

"If I am asked, under the known diversity of practice on this subject, what is the proper rule for a State to apply to the recaptured property of its allies? I should answer, that the liberal and rational proceeding would be to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so; but I think such a rule would be both liberal and just. To the recaptured, it presents his own consent, bound up in the legislative wisdom of his own country: to the recaptor, it cannot be considered as injurious, where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing among his own countrymen, would restore, it brings an obvious advantage; and even in case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in the reliance of receiving reciprocal justice in its turn.

"It may be said, what if this reliance should be disappointed? — Redress must then be sought from retaliation; which, in the disputes of independent States, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of States cannot be balanced by minute arithmetic; something must, on all occasions, be hazarded on just and liberal presumption.

"Or it may be asked, what if there is no rule in the country of the recaptured? — I answer, first, this is scarcely to be supposed; there may be no ordinance, no prize acts immediately applying to recapture; but there is a law of habit, a law of usage, a standing and known principle on the subject, in all civilized commercial countries: it is the common practice of European States, in every war, to issue proclamations and edicts on

the subject of prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their prize acts. But secondly, if there should exist a country in which no rule prevails, — the recapturing country must of necessity apply its own rule, and rest on the presumption that *that* rule will be adopted and administered in the future practice of its allies.

"Again, it is said that a country applying to other countries their own respective rules, will have a practice discordant and irregular: it may be so; but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*. It is asked, also, will you adopt the rules of Tunis and Algiers? If you take the people of Tunis and Algiers for your allies, undoubtedly you must; you must act towards them on the same rules of relative justice on which you conduct yourselves towards other nations. And upon the whole of these objections it is to be observed, that a rule may bear marks of apparent inconsistency, and yet contain much relative fitness and propriety; a regulation may be extremely unfit to be made, which yet shall be extremely fit, and shall indeed be the only fit rule to be observed towards other parties, who have originally established it for themselves.

"So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider, what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this, that the maritime law of England, having adopted a most liberal rule of restitution or salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that 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 I consider to be the true statement of the law of England on this subject. It was clearly so recognized in the case of The San Jago; a case which was not, as it has been insinuated, decided on special circumstances, nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found among the manuscript collections of a very dis-

tinguished practitioner in this profession, (Sir E. Simpson,) which records the practice and the rule as it was understood to prevail in his time. The rule is: that England restores, on salvage, to its allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule."[1]

American law adopts the rule of reciprocity as to restitution of the property of friendly nations, recaptured from an enemy.

The law of our own country 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 3d 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.

Laws of different countries as to recaptures.

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.

British law.

The present British law of military salvage was established by the statutes of the 43d Geo. III. ch. 160, and the 45th Geo. III. ch. 72, which provide that any vessel, or goods therein, belonging to British subjects, and taken by the enemy as prize, which shall be retaken, shall be restored to the former

[1] Sir W. Scott, Robinson's Adm. Rep. vol. i. pp. 58–68.

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, 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. [194

American law.

The act of Congress of the 3d 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.[1] [195

It will be perceived, that there is a material difference between

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[194 In England a prize act is passed at the beginning of every war. The Prize Act, 17 Vic. ch. 18, 1854, for the Russian war, was similar in its terms to the one referred to in the text, omitting, however, all reference to privateers, which were not allowed to be employed during the Russian war. Tudor, Leading Cases of Mercantile Law, p. 818. Phillimore, International Law, vol. iii. p. 518.] — *L.*

[1] Cranch's Rep. vol. ix. p. 244, The Adeline.

[195 See, also, in reference to recaptures by privateers, act of 26th of June, 1812, ch. 107, § 5. Statutes at Large, vol. ii. p. 760.] — *L.*

the American and British laws on this subject; the act of Parliament continuing the *jus postliminii* forever, 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 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. [196]

By the more recent 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

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[196 See Phillimore's International Law, vol. iii. p. 520. Grotius says that the right of postliminy applies to slaves, who are restored to their ancient masters, although they may have been alienated or freed by the enemy; for the affranchisement by an enemy cannot operate to the prejudice of a master, who is a citizen of our State. De Jur. Bel. ac Pac. lib. iii. cap. 9, § 11.

A bill was introduced, June 30, 1862, into the Senate, which enacted that vessels, goods, and merchandise of citizens of the United States, or of other persons resident within that part of the United States, the inhabitants whereof have not been declared in a state of insurrection, which have been or hereafter during the present rebellion, shall be taken by assumed or pretended authority of "the Confederate States," so called, and retaken by any vessel acting under the authority of the United States, &c., shall be restored to the former owners, without charges or rates of salvage, if such owners have not been engaged in the rebellion. It was understood that, without such an act, the courts would regard such vessels as taken from an enemy. The bill, after passing the Senate, failed to be voted on in the House of Representatives. Cong. Globe, 1861-2, pp. 3007, 3156.

At the commencement of the war of American Independence, Great Britain, not considering her colonies as legitimate enemies, published two acts of Parliament, declaring that all British ships retaken from the rebels, by whomsoever recaptured, should be restored to the owners, upon the deduction of one eighth for salvage. Hautefeuille, Droits des Nations Neutres, tom. iii. p. 382, 2me ed.] — *L.*

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.[1] 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.[2] [[197]

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 to 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.[3]

The French law also restores, on payment of salvage, even after twenty-four hours' possession by the enemy, in cases where the 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,

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[1] Valin, sur l'Ord. liv. iii. tit. 9, art. 8. Traité des Prises, ch. 6, § 1, No. 8, § 88. Pothier, Traité de Propriété, No. 97. Emerigon, des Assurances, tom. i. p. 497.

[2] Emerigon, des Assurances, tom. i. p. 497.

[197] The arrêté of 2d prairial, year 11th, which now regulates the matter, somewhat mitigates the rigor of these regulations, in what concerns recaptures made by vessels of war, but it must be remarked that no authority has any longer the right to remit the confiscated part. The recaptured ship must be restored to the owner, with its cargo, on paying the recaptors one thirtieth of the value, if the recapture took place before the expiration of twenty-four hours, and the one tenth if after that time. The right of recapture for privateers remains fixed at a third in the first case, and, in the second, the ship and cargo belong to them. Hautefeuille, Droit des Nations Neutres, tom. iii. p. 380, 2me ed. The rule as to recapture applies to ships of allies, equally with French vessels. De Pistoye et Duverdy, Traité des Prises, tom. ii. pp. 104, 109.] — *L.*

[3] Pothier, de Propriété, No. 100. Emerigon, tom. i. p. 499. Azuni, Droit Maritime de l'Europe, Partie ii. ch. 4, § 11.

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 guères lui échapper lorsqu'il a été conduit dans ses ports."[1] 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 property saved.[2] 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.[3] Emerigon is also opposed to Valin on this question.[4]

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 in that of The Santa Cruz, before cited,) 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, art. 38, it was modified as to the property of friendly nations; it being provided that

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[1] Pothier, de Propriété, No. 99.

[2] Valin, sur l'Ord. *in loco*.

[3] Azuni, Droit Maritime, Partie ii. ch. 4, §§ 8, 9.

[4] Emerigon, 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.

when the recaptured ship 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. [198] 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.

Portuguese law.

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.

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[198] Spain, which had, at first, followed the law of restitution, as based on "the obligation of the king to defend, protect and free his subjects and the sea from corsairs," adopted by her ordinances of the 21st of August, 1702, and the 17th of November, 1718, the then French legislation, so far as regards privateers. Massé, Droit Commercial, tom. i. p. 407. The allowance to privateers, in case of recapture before the twenty-four hours is, therefore, one third, instead of one half, as stated in the text. Martens, Essai, § 62. Phillimore, International Law, vol. iii. p. 513. There is a special treaty on the subject of recapture between England and Spain, concluded 5th February, 1814, which fixes the salvage at one eighth when the recapture is made by a ship of war, and one sixth by a privateer, or jointly by a privateer and ship of war. The restoration is to be made in all cases, except when the retaken vessel has been set forth as a ship of war by the enemy, in which case it shall be adjudged lawful prize for the captors. The treaty makes no reference to the time that the ship has remained in the captor's hands, or whether it has been brought into the port of the captor or been condemned. Hautefeuille, Droits des Nations Neutres, tom. iv. p. 413. Martens, Nouveau Supplément, par Murhard, tom. ii. p. 240.] — *L.*

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.[1] 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 payment of a moiety of the value of 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 the clause in the act of Parliament, which may serve for the interpretation of our own law, as the provisions are the same in both. 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.[2] But a commission of war is decisive if there be guns on board.[3] 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 forever extinguished.[4] 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.[5] 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, What constitutes a "setting forth as a vessel of war," under the prize act.

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.
[2] Robinson's Adm. Rep. vol. vi. p. 320, The Horatio.
[3] Dodson's Adm. Rep. vol. i. p. 105, The Ceylon.
[4] Edwards's Adm. Rep. 185, The Actif.
[5] Robinson's Adm. Rep. vol. iii. p. 65.

although it be not regularly commissioned.[1] 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.[2]

Recapture by a non-commissioned vessel.

It is no objection to an allowance of salvage, or 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.[3] And if a convoying ship recaptures one of the convoy, which has been previously captured by the enemy, the recaptors are entitled to salvage.[4] But a mere rescue of a ship engaged in the same common enterprise gives no right to salvage.[5]

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 actually rescued from the enemy.[6] 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.[7] 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.[8] 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.[9] 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 restitu-

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[1] Dodson's Adm. Rep. vol. i. p. 105, The Ceylon.
[2] Dodson's Adm. Rep. vol. i. p. 397, The Georgiana.
[3] Robinson's Adm. Rep. vol. iii. p. 224, The Helen.
[4] Robinson's Adm. Rep. vol. vi. p. 315, The Wight.
[5] Edwards's Adm. Rep. vol. i. p. 66, The Belle.
[6] Robinson's Adm. Rep. vol. iv. p. 147, The Franklin.
[7] Robinson's Adm. Rep. vol. iii. p. 305, The Edward and Mary. Edwards's Adm. Rep. vol. i. p. 116, The Pensamento Felix.
[8] Robinson's Adm. Rep. vol. iv. p. 147, The Franklin.
[9] Robinson's Adm. Rep. vol. iii. p. 305, The Edward and Mary.

tion 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.[1] Where the original captors have abandoned their prize, and it is subsequently captured by other parties, the latter are solely entitled to the property.[2] 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.[3] 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.[4] 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.[5] 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 between belligerents.[6] 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.[7] 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 cap-

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[1] Robinson's Adm. Rep. vol. iv. p. 217, note *a*. Wheaton's Rep. vol. i. p. 125, The Astrea. Valin, sur l'Ord. tom. ii. pp. 257–259. Traité des Prises, ch. 6, § 1. Pothier, Traité de la Propriété, No. 99.

[2] Edwards's Adm. Rep. vol. i. p. 79, The Lord Nelson. Dodson's Adm. Rep. vol. i. p. 404, The Diligentia.

[3] Wheaton's Rep. vol. ii. p. 123, The Mary.

[4] Robinson's Adm. Rep. vol. iv. p. 216, The John and Jane.

[5] Robinson's Adm. Rep. vol. vi. p. 273, The Gage.

[6] Dallas's Rep. vol. iii. p. 188, The Mary Ford.

[7] Cranch's Rep. vol. viii. p. 227, The Adventure.

tured vessel.[1] 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. [[199]

[1] Cranch's Rep. vol. iv. p. 298, Hudson *v.* Guestier; vol. vi. p. 281, S. C. Dodson's Adm. Rep. vol. i. p. 404, The Diligentia.

[[199] The words of the last paragraph of the text are adopted by Phillimore, International Law, vol. iii. p. 527. They do not refer to how such rescue is to be regarded by the government and the courts of the neutral, but only to the prize courts of the captors.

It was said by Sir William Scott, in a case where the point decided was that resistance by an enemy-master will not affect the cargo, it being the property of a neutral merchant, that if a neutral master attempts a rescue, he violates a duty, which is imposed upon him by the law of nations, to submit to come in for inquiry as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner, and extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war. Robinson's Admiralty Reports, vol. v. p. 232, The Catherina Elizabeth. A decision to the effect of this opinion was rendered in the Circuit Court of the United States for Pennsylvania, it being declared that the attempt by the captain of a neutral vessel, captured by a belligerent, to rescue her, is contrary to the law of nations, and a sufficient cause of condemnation. Washington's C. C. Reports, vol. ii. p. 61. Dederer *v.* Delaware Ins. Co.

But though such might be the judgment of a prize court of the captor's country, it does not follow any more than in a case of contraband or of violation of blockade, that it is the duty of the neutral government to aid the belligerent in the prosecution of his rights of war against its merchant vessels. A complaint was made in February, 1800, by Mr. Liston, British Minister to the United States, of the rescue of three American vessels from the hands of the British captors, for the restoration of which he was instructed by his government to apply. He said: "The tenor of the instructions given by the President to the vessels of war of the United States, involves an acknowledgment of the right of the King's ships to search and detain such American vessels as are suspected of being loaded with enemies' property or with contraband of war destined for an enemy's port." The Secretary of State, Mr. Pickering, in his answer to Mr. Liston, May 3, 1800, said: "While, by the law of nations, the right of a belligerent power to capture and detain the merchant vessels of neutrals, on just suspicion of having on board enemies' property, or of carrying to such enemy any of the articles which are contraband of war, is unquestionable, no precedent is recollected, nor does any reason occur which should require the neutral to exert its power in aid of the right of the belligerent nation in such captures and detentions. It is conceived that after warning its citizens or subjects of the legal consequences of carrying enemy's property or contraband goods, nothing can be demanded of the sovereign of the neutral nation but to remain passive. If, however, the captors have any right to the possession of those American vessels or their cargoes, the question is of a nature cognizable before the tribunals of justice, which are opened to hear the captors' complaints, and the proper officer will execute their decrees."

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 redintegrated in their right of salvage.[1] 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

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President Adams required the opinion of the members of his cabinet. They all concurred in the views of the Secretary of State, except the Secretary of War, Mr. McHenry, who conceived that recapture came within the same principle as resistance to the right of search, and that a neutral vessel seized by a belligerent on the high seas cannot be rightfully retaken by a vessel of the neutral power, nor, if retaken, and brought into a port of the neutral nation, rightfully withheld by that nation from the captors, and that it resulted from this principle that a vessel or its cargo being prize or no prize, cannot be rightfully determined in other tribunals than those of the nation exercising the right of capture. He did not, however, disapprove of the answer of the Secretary of State, as he did not know of any precedent of a neutral nation, exerting its power in any similar case of recapture, in aid of the right of the belligerent power. Wait's American State Papers, vol. ix. pp. 7, 11.

A similar case has arisen during the present civil war in America. An English vessel, attempting to evade the blockade of the Southern ports, and having goods contraband of war on board, was captured by a United States ship of war, and a prize crew put on board of her. She was then rescued by her crew and brought by them into Liverpool. An application was made by Mr. Adams for her restoration, but refused by Lord Russell, after taking the opinion of the law-officers of the crown, on the same principles, it is understood, as had governed the case before the American government. It has been maintained on the part of England, that, "inasmuch as the English government would not have interfered if the rescue had not taken place, and the forms of law had been complied with, it follows, on the other hand, that the English government cannot come to the assistance of the captors, and complete an act which they were not themselves able to complete. When a blockade is declared and recognized as effective, a neutral sovereign warns his subjects that if they violate it they do so at their own risk, and cannot claim his protection if they are punished for the act. The Queen of Great Britain said so to her subjects at the commencement of hostilities between the Federals and the Confederates. She declines to associate herself in any way with such attempts. If an English vessel succeeds in breaking the blockade with impunity, the American government cannot make any demand upon us for the punishment of her owners or master. If, on the other hand, a British vessel is seized, we decline to vindicate their interests further than, perhaps, to see that they are adjudicated upon in the usual manner by the proper tribunal, which, in the United States, is the Supreme Court. It is wholly a question of force, resting between the ability of the blockading force to carry out its object, and of those who try to violate it to accomplish theirs. We do not thwart or impede the blockading power; but, on the other hand, we will not assist them or supply their deficiencies." The case of The Emily St. Pierre.] — *L.*

[1] Dodson's Adm. Rep. vol. i. p. 192, The Charlotte Caroline.

not for the government's ships or officers, or for other persons, upon the ground of superior authority, to dispossess them without cause.[1]

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.[2] 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.[3] [200

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[1] Dodson's Adm. Rep. vol. i. p. 414, The Blendenhale.

[2] Cranch's Rep. vol. i. p. 1, Talbot *v.* Seaman. Robinson's Adm. Rep. vol. iii. p. 308. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

[3] Dodson's Adm. Rep. vol. i. p. 317, The Louisa.

[200] Rescue and recapture are distinguishable from each other. The term recapture is ordinarily employed when a prize, having been captured by an enemy, is recovered from his possession by the arrival of a friendly force. The term rescue more usually denotes that recovery which is effected by the rising of the captured party himself against his captor. There is, however, another kind of rescue, which partakes of the nature of recapture; it occurs where the weaker party, before he is overpowered, obtains relief from the arrival of fresh succors, and is thus preserved from the force of the enemy. Chitty, Laws of Nations, p. 91, Am. ed. The reward of military salvage is not limited to cases of recapture, but extends to those of rescue effected by the rising of the captured party, and the recovery of the property after the capture has become complete and the possession of the enemy virtually absolute. When the rescue is effected by the arrival of fresh succor, which relieves the weaker party before he falls into the power of the adversary, no salvage is given to the rescuers, but when the rescue is effected by the rising of the captured crew against the captors, a salvage is given. Ib. p. 105. Sir William Scott, in 1799, exercised jurisdiction, notwithstanding the protest of the owners, on the prayer of a British subject concerned therein, in the case of salvage of an American vessel rescued from French capture by her crew, part of whom were British seamen. Having disposed of the question as to the existence of such a state of hostilities, as gave a title to salvage, he said that every person assisting in the rescue had a lien on the thing saved; that the act of rescue was no part of the general duty of the crew as seamen, nor would they have been guilty of a desertion of their duty in that capacity, if they had declined it. It is a meritorious act, but it is an act perfectly voluntary, in which each individual is a volunteer, and is not acting as part of the crew of the ship in discharge of any official duty, either ordinary or extraordinary. Even if they were American seamen, the court saw no inconvenience that would arise if a British court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions; for salvage is a question of the *jus gentium*, and materially different from the question of a mariner's contract; which is a creature of the particular institutions of each country. Robinson's Admiralty Reports, vol. i. p. 278, The Two Friends.

Marshall, Chief Justice, in a case in which a small prize crew had been put on board, who might have been easily overpowered by the original crew, said: "The

§ 13. Validity of maritime captures, determined in the courts of the captor's country. Condemnation of property

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 its 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. [201

attempt to take the vessel from them was no part of the duty of the Americans, and might, in the event of recapture, have exposed the vessel and cargo to the danger of condemnation, of which, without such rescue, they incurred no hazard." Cranch's Reports, vol. ix. p. 55, The Short Staple and Cargo *v.* The United States. Bello, (Principios de Derecho Internacional, p. 193,) adopts the English and American decisions. But Emerigon, (ch. xii. sec. 25,) holds that the duty of a captain is to preserve, defend, and consequently recover the vessel confided to him; that he never can be the *captor* of the very vessel of which he had been appointed *master*, and that the individuals who may aid him, whether they belong to the ship or not, have no more rights than he, though they may be entitled to a discretionary reward.] — *L.*

[201 The Supreme Court decided, that condemnations by prize courts, in California, of vessels and cargoes seized and brought in there, during the war between the United States and Mexico, were not sustainable under the law of nations or the Constitution of the United States, though these tribunals were established with the sanction of the Executive Department of the government. The prize courts within the districts of the United States, including the District of Columbia, had jurisdiction in such cases.

"All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure, and the question of prize or no prize, can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States, the judicial power of the General Government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President, nor any military officer, can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals, in prize cases, nor to administer the law of nations.

"The courts established and sanctioned in Mexico, during the war, by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions were under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize; and the sentence of condemnation in the court of Monterey is a nullity, and can have no effect upon the rights of any party.

"A prize court, when a proper case is made for its interposition, will proceed to adjudicate and condemn the captured property, or award restitution, although it is not actually in the control of the court. It may always proceed *in rem*, whenever the prize, or proceeds of the prize, can be traced to the hands of any person whatever.

"As a general rule, it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the act of Congress, in cases of capture by

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. [202

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 concluded, by her own inveterate practice, and that neutral merchants were sufficiently warranted in purchasing under such a sentence of condemnation, by the

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ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which, in all civilized countries, secures to the captured a trial in a court of competent jurisdiction, before he can finally be deprived of his property.

"But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize-crew to man the captured vessel; or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States." Howard's Reports, vol. xiii. p. 515, Jecker *v.* Montgomery.] — *L.*

[202 By the convention of May 10, 1854, between England and France, regulating joint captures during the war with Russia, the adjudication belonged to the country of the superior officer, and when a cruiser only intimidated by its presence, the jurisdiction belonged to the country of the actual captor. In case of the capture of a merchant ship of either country, the adjudication belonged to the country of the captured vessel. Hosack's Rights of Belligerents, p. 75, App. 102.] — *L.*

constant adjudications of the British tribunals. 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.[1]

§ 14. Jurisdiction of the courts of the captor, how far exclusive.

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 two 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.[2]

In either of these 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

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[1] Robinson's Adm. Rep. vol. iv. p. 43; vol. vi. p. 138, note (*a*). Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5. Duponceau's Transl., note, p. 38. Kent's Commentaries on American Law, vol. i. p. 103. Wheaton's Hist. Law of Nations, p. 321.

[2] Wheaton's Rep. vol. iv. p. 298, The Estrella; vol. vii. p. 283, The Santissima Trinidad.

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 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.[1] [203]

§ 15. 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.[2] [204]

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[1] 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 di Guerra, p. 228.

[203] On the principle that it is the relations of the countries, at the time of the capture, and not of the judgment, that is to decide the question of prize or no prize, judgments were rendered by Louis XVIII. for captures made under Napoleon. Conseil d'état, 20 Nov. 1815, Le Hoop contre Le Renard, &c. De Pistoye et Duverdy, Traité des Prises, tom. i. p. 145.] — *L.*

[2] Robinson's Adm. Rep. vol. i. p. 135, The Flad Oyen.

[204] During the wars of her Revolution, France claimed a right to adjudicate, through consular commissions, on prizes brought into neutral ports, and the Court of Cassation decided, 29th of March, 1809, that a nation which consents to the establishment of a French consul upon its territory, is deemed to have agreed to permit the exercise of his jurisdiction and the execution of his decrees, and of the

§ 16. 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, 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, of which the author is treating,) though it be not lawful to use it so long as they can obtain their right in the ordinary course of justice."[1]

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

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decisions rendered on appeal from the decrees. De Pistoye et Duverdy, Traité des Prises, tom. ii. pp. 178, 188. By the decree of the Emperor Napoleon III. of the 18th July, 1854, all consular commissions (*commissions consulaires*) are, by implication, at least, annulled. Phillimore, International Law, vol. iii. p. 469.] — *L.*

[1] "Quod fieri intelligitur non tantum si in sontem aut debitorem judicium intra tempus idoneum obtineri nequeat, verum etiam si in re minimè dubiâ (nam in dubiâ re præsumptio est pro his qui ad judicia publicè electi sunt) plane contra jus judicatum sit. Nam auctoritas judicantis non idem in exteros quod in subditos valet. . . . Hoc interest, quod subditi exsecutionem etiam injustæ sententiæ vi impedire, aut contra eam jus suum vi exsequi licitè non possunt, ob imperii in ipsos efficaciam: exteri autem jus habent cogendi, sed quo uti non liceat quàmdiu per judicium, suum possint obtinere." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 2, § 5, No. 1.

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.[1]

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.

Distinction between municipal tribunals and courts of prize.

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 person or property of a foreigner by his consent, either *expressed* by 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

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 24. Vattel, Droit des Gens, liv. ii. ch. 18, § 350.

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 toward 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 proceedings 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 inju-

rious acts of the whole government, of the supreme authority, incontestably exists in foreign States, whose subjects have suffered by those acts. Much more clearly then 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 jurisdiction; 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 cap-

tors 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 con-

firmed 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." [1]

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,

[1] Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19.

palpable and evident injustice, a manifest violation of rules and forms," &c.[1]

In the case above referred to, the King of Prussia (then neutral) had undertaken to set up within his own dominions a commission to reëxamine the sentences pronounced against his subjects in the British prize courts; a conduct which is treated 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 shall 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 determination 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.[2]

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

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[1] Vattel, Droit des Gens, liv. ii. ch. 7, § 84.

[2] Wheaton's Hist. Law of Nations, pp. 206–217.

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 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. [205

[205 It could scarcely have been supposed, that it would have been contended in England, at so late a date as the treaty of 1794, that the final decree of an Admiralty Court was conclusive as against the claimants under a convention for indemnity; yet this point was raised by their Commissioners under that treaty, and in a way that, had it been successful, would have rendered the whole convention a nullity. The British Commissioners inquired: "What are the cases which are to be entertained and examined by this Board? The treaty requires that the complainant shall state that he has suffered loss or damage, for which he cannot obtain just and adequate compensation in the course of judicial proceedings. The last step of regular judicial proceeding in England is the ultimate decision of the High Court of Appeals, that is to say, of the King in Council. Does any one suppose that this Board has power to examine, revise, and reverse the decisions of this supreme tribunal?" asked the British members of the Board. "Certainly," replied the American members; "if it should appear to us, that in any case the High Court of Appeals had decided, rather in conformity with the laws and usages of England, than in consonance with the law of nations, and the principles of equity and justice, it will become our duty, as it is clearly within our power, to examine the case, and to make such decision as shall be in conformity with the law of nations and the principles of justice and equity. If this be not the true construction of our powers, it does appear to us that this article of the treaty is little better than a nullity." The fifth commissioner, who by the treaty was chosen by lot, which had resulted in the selection of an American, proposed to take the opinion of the Lord Chancellor (Loughborough). Col. Trumbull, who thus occupied the place of arbiter, tells us that the Chancellor answered immediately and frankly: "The construction of the American gentlemen is correct. It was the intention of the high contracting parties to the treaty to clothe this commission with power paramount to all the maritime courts of both nations, — a power to review, and (if in their opinion it should appear just) to revise the decisions of any or of all of the maritime courts of both. Gentlemen, you are invested with august and solemn authority. I trust that you will use it wisely." Trumbull's Reminiscences of his own Times, p. 193.

In a debate in the House of Commons, on the 7th of March, 1862, on the American blockade, the same principle was declared by the Solicitor-General, Sir Roundell Palmer. "Nothing is better known," he said, "than that, if a belligerent State is acting *bonâ fide* to maintain a blockade with such forces as it may think sufficient, and in such a manner as it may think right, neutral powers must await patiently the decision of the prize court before which any of their ships may be taken for an alleged infringement of the blockade. More than that, they must not interfere, except by appeal, if the first decision is contrary to what they think right. However, if in the court of ultimate appeal, some flagrant and indisputable wrong has been done, —

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.

These principles have received recent 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 of the tribunals of the capturing

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some principle of the law of nations disregarded, — undoubtedly the country aggrieved is not bound by that decision, but has a right to demand restitution and compensation for the individuals ill-treated by the decision of the prize-court. That is the ordinary law of nations. It is not a question whether a neutral country shall dictate belligerent operations to a belligerent nation, but whether, in every particular case, justice or injustice shall be done to the subject of a neutral government." Parliamentary Debates.] — *L.*

nation was exclusive 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 forever 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 in 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 reëxamination 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 forever 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.[1] [[206]

§ 17. Title to real property, how transferred

We have seen that a firm possession, or the sentence of a competent court, is sufficient to confirm the captor's title to personal property or movables taken in war.

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[1] Martens, Nouveau Recueil, tom. viii. p. 350.

[[206]] The American negotiator with Denmark was Mr. Wheaton, whose argument, at length, establishing the doctrines laid down in the text, in answer to the Danish Commissioners, Count Schimmelmann and M. de Stemann, will be found in the Cong. Doc. H. R. Ex. Doc. 1831–2, No. 249, pp. 24–30. It preceded the discussions given in the 3d chapter of this Part, § 32, in reference to the liability to capture of vessels sailing under enemy's convoy.] — *L.*

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 alienation 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.[1] [207] in war. — *Jus postliminii.*

[1] 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, &c., liv. viii. ch. 4, § 282 *a*. Where the case of conquest is complicated with that of civil revolution, and a change of internal government recognized by the nation itself and by foreign States, a modification of the rule may be required in its practical application. Vide ante, Part I. ch. 2, § 11, p. 48.

[207] The total or partial conquest of a territory has not the direct effect of replacing the conquered government by that of the conqueror, so long as the contest can be continued with any chance of success. It is only after a people have been made to undergo a complete defeat (*debellatio, ultima victoria.*) after the possibility of a longer resistance has been taken from them, that the conqueror can establish his dominion over them, by taking possession of the sovereign power. Till then, he can only sequester the domains of the government provisionally, and *de facto*, dispossessed of its prerogatives. He may avail himself of all its resources, that are easy to be realized, in order to indemnify himself for his losses. Thus he may seize the revenues of the State; he may make the necessary dispositions to maintain himself in possession of the conquered country. But it cannot be pretended that the conquest operates a complete subrogation of the conqueror to all the rights of the conquered government. The views of publicists on this important matter are indicated by De Kamptz, § 307. The theory of most of the authors is erroneous in this sense, that they confound simple occupation with complete acquisition and definitive possession. Cocceji, in his Commentaries on Grotius, liv. iii. ch. 6, and in his dissertation, *De jure victoriæ*, has indicated the true theory. Heffter, Droit International, par Bergson, § 131. History is only too fruitful in lamentable recitals of wars, which have resulted in the general and definitive subjection of conquered peoples and of their sovereigns. The submission may be absolute or conditional. According to the modern law of war the conquering State acquires the sovereign and absolute power over the conquered State, but it cannot, in any wise, dispose of the private rights of the conquered

§ 18. Good faith towards enemies.

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

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subjects, nor of their persons. Ordinarily, the conquered territory is united to that of the conqueror, either by being entirely incorporated with it or as a dependant State, or by a personal union under one sovereign, or as a member of a confederation. Heffter says, that the question is sometimes put whether a sovereign conqueror can reserve to himself personally the disposition of the conquered territory or cede it to another sovereign. Ib. § 178. His answer, that the discussion belongs to the domain of internal public law rather than to international law, shows that it is a point which cannot be raised either in the interest of the conquered or of third parties, where no treaty stipulations intervene. The cession of Louisiana to the United States professes to be founded on an agreement, by Spain, in the treaty of St. Ildelfonso, to cede it to France. Statutes at Large, vol. viii. p. 202. In the treaty of cession of Lombardy, of the 10th of November, 1859, by Austria to France, the Emperor of the French intimates his intention to deliver the ceded territory to Sardinia, which was effected by a treaty of the same date. Martens, Nouveau Recueil, par Samwer, tom. xvi. Part II. pp. 516–522.

To extend the territory of the United States belongs to the treaty-making power or to the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief he may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of the Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power. Speaking in reference to the portion of Mexico, during the war of 1846, in possession of our troops, Chief Justice Taney said: "As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union. While it was occupied by our troops they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and allegiance, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist." The court remarked that in reference to the distribution of powers between the different departments of government, English precedents were not applicable. There foreign territories become the dominion and its inhabitants the subjects of the king, *ipso facto*, by the conquest made by the British arms, without any action of Parliament. Howard's Reports, vol. ix. pp. 615, 616, Fleming *v.* Page.

We have elsewhere referred to the powers of the President as recognized by the Supreme Court to govern such conquered country, according to the rules of military occupation, not only till the conquest has been consummated, but till the action of Congress, in admitting it as a State, or otherwise legislating for it by the establishment of a territorial government. Part I. ch. 2, § 24, Editor's note [39, p. 99.

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.[1]

§ 19. Truce or armistice.

There are various modes in which the extreme rigor 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.[2]

§ 20. Power to conclude an armistice.

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.[3]

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. Robinson's Adm. Rep. vol. iii. p. 139, The Daifje.

[2] Vattel, Droit des Gens, liv. iii. ch. 16, §§ 235, 236.

[3] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, § 8. Barbeyrac's note. Vattel, Droit des Gens, liv. iii. ch. 16, §§ 233–238.

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.[1]

§ 21. Period of its operation.

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.[2]

§ 22. Rules for interpreting conventions of truce.

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 peculiar 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 truce to execute, without peril to himself, what the continu-

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[1] Vide ante, Part III. ch. 2, §§ 3–4, p. 442.

[2] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 5. Vattel, Droit des Gens, liv. iii. ch. 16, § 239.

ance 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 succors 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.[1]

It is obvious that the contracting parties may, by express compact, derogate in any and every respect from these general conditions.

§ 23. 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 Fecial 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.[2]

§ 24. Capitulations for the surren-

Capitulations for the surrender of troops, fortresses, and particular districts of country, fall naturally within

[1] Vattel, Droit des Gens, liv. iii. ch. 16, §§ 245–251.

[2] Liv., Hist. lib. iv. cap. 30. As to the laws of war observed by the Romans, see Wheaton's Hist. Law of Nations, pp. 20–25.

der of troops and fortresses.

the scope of the general powers intrusted 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 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 undertake to stipulate for the perpetual cession of that place, or enter into other engagements not fairly within the scope of his implied authority, his promise amounts to a mere *sponsion*.[1]

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.[2]

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 military com-

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[1] Vide ante, Part III. ch. 2, § 4, p. 442.

[2] See the account given by Livy of this remarkable transaction.

manders 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 upon the ground of the defect in Sir Sidney Smith's powers, and, after the battle of Heliopolis, insisting upon its being performed by the French, when circumstances had varied and rendered its execution no longer consistent with their policy and interest. Good faith may have characterized the conduct of the British government in this instance, as was strenuously insisted by ministers in the parliamentary discussions to which the treaty gave rise, but there is at least no evidence of perfidy on the part of General Kleber. His conduct may rather be compared with that of the Duke of Cumberland at Closter-Seven, (and it certainly will not suffer by the comparison,) in concluding a convention suited to existing circumstances, which it was plainly his interest to carry into effect when it was signed, and afterwards refusing to abide by it when those circumstances were materially changed. 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.[1] [208

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[1] 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.]

[208] The capitulation of Closter-Seven, in 1757, which rendered Marshal Richelieu master of the States of the King of England in Germany, and of those of his allies, gave him, moreover, the facility of sending new succors to the Empress Queen and to the Elector of Saxony, as well as of attacking the King of Prussia in the Duchy of Magdeburg. But the King of England, in his quality of Elector of Hanover, refused to ratify the capitulation, which was thus annulled, and the Hanoverians, who had promised no longer to bear arms, resumed them two months afterwards. The motives assigned for the refusal of the capitulation were: 1st. That the army which had capitulated belonged to the Elector, and that it was resuming active service as the *army of the king of Great Britain*. 2d. That the capitulation had been concluded without powers, as well on the part of the Duke of Cumberland as of the Marshal Richelieu.

"The first cause," Flassan says, "was a bad subtility, and the second was not well founded; for a general may be obliged any day to conclude forced arrangements, in consequence of his position, and for which he has impliedly the powers,

§ 25. Passports, safe conducts, 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.[1]

§ 26. 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 by war, operates as a dispensation with the laws of war, so far as its terms can be fairly construed to extend. 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

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especially when the treaty, capitulation, truce, or armistice is judged advantageous at the time that it is concluded. The Duke of Cumberland ought, on the refusal of the ratification, to have resumed the disastrous positions which had induced the unfavorable capitulation, and, as he could not do so, having already evacuated those places, the capitulation should, in the rigor of law, and according to the principles of honor, have been maintained by the King of England." Histoire de la diplomatie françoise, tom. v. p. 236, ed. 1809.

The refusal of the British admiral, Lord Keith, to recognize the convention of El Arish, already in part executed by France, was placed on the orders of his government, forbidding him to consent to any capitulation with the French army, except on their laying down their arms and becoming prisoners of war, and delivering up their ships in Alexandria. After the rupture of the armistice, which was followed by the battle of Heliopolis and the reconquest of Egypt by Kleber, when the condition of the French army was entirely changed, England offered, in vain, to ratify the convention, which, though actually negotiated by Sir Sydney Smith, and containing stipulations, on the part of England, essential to the evacuation, was only signed by the plenipotentiaries of Kleber and of the Grand Vizier. Annual Reg. 1800, p. 220. Thiers, Histoire du Consulat et de l'Empire, tom. ii. pp. 49, 73.] — *L.*

[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 14. Vattel, droit des Gens, liv. iii. ch. 17, §§ 265–277.

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 down the general rule, that safe-conducts, of which these licenses are a species, are to be liberally construed; *laxa quàm stricta interpretatio admittenda est.* And during the last war, licenses were eventually interpreted with great liberality in the British Courts of Prize.[1] [209

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[1] Chitty's Law of Nations, ch. 7. Kent's Commentaries on American Law, vol. i. p. 163, note (*b*), 5th edit.

[209] See ch. 2, § 23, of this Part, Editor's note [183, p. 583. The same section of the act of July 13, 1861, which authorizes the President, in certain cases, to declare the inhabitants of a State to be in a state of insurrection, also declares that he may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury. Statutes at Large, 1861, p. 257. A proclamation, of May 12, 1862, declared that the blockade of Beaufort, in North Carolina, Port Royal in South Carolina, and New Orleans in Louisiana, should so far cease and determine, from and after the 1st of June; that commercial intercourse with those ports, except as to persons and things, and information contraband of war may, from that time, be carried on subject to the laws of the United States,

§ 27. 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 commit-

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and to the limitations in the regulations prescribed by the Secretary of the Treasury. A circular from the Secretary of State, dated May 20, 1862, to the consuls abroad, who are clothed with discretion to grant licenses to vessels clearing from foreign ports, referring to the instructions of the Secretary of the Treasury to the collectors of customs in the loyal States, contains a list of the articles deemed contraband, in which are included, besides articles directly and exclusively useful in war, rosin, sail-cloth of all kinds, hemp and cordage, masts, ship-timber, tar and pitch, and ardent spirits, and also a list of other articles for which, if shipped to the ports to be opened, or to ports from which they may easily be reshipped, in aid of the existing insurrection, bonds are required. As, however, this intercourse is only opened with ports, the actual possession of which has been recovered by the United States, the licenses, granted under the instructions of the Secretary of the Treasury, are rather to be deemed matters of municipal regulation than relaxations of belligerent rights. Public Journals.] — *L.*

ting 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 intrusted 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 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. In the case of The Reward, 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.[1]

§ 28. Ransom of captured property.

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, permit-

[1] Dodson's Adm. Rep. vol. i. p. 226, The Hope. Ibid. Appendix, (D.) Stewart's Vice-Adm. Rep. p. 367.

ting the captured vessel and cargo to proceed to a designated port, within a limited time. 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 shall discharge the captured from the payment of the ransom, this clause is restrained 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.[1]

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[1] 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.

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 by the statute 22 Geo. III. cap. 25, from ransoming enemy's property; 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 the European continent.[1]

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[1] Robinson's Adm. Rep. vol. i. p. 201, The Hoop. See Lord Mansfield's judgment, in the case of Ricord *v.* Bettenham, Burrow's Rep. p. 1734. Pothier, Propriété, Nos. 136, 137.

CHAPTER III.

RIGHTS OF WAR AS TO NEUTRALS.

§ 1. Definition of neutrality.

It deserves to be remarked, that there are no words in the Greek or Latin language which 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 neighboring 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."[1] Bynkershoek, in treating of the subject of neutrality, says:—"*Nos hostes* appello, qui neutrarum partium sunt, nec ex fœdere his illisve quicquam debent; si quid debeant, Fœderati sunt, non simpliciter Amici."[2]

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[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 9.

[2] 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*. 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 is not modified by special compact.

§ 2. Different species of neutrality.

There are two species of neutrality recognized by international law. These are, 1st. Natural, or perfect neutrality; and 2d. Imperfect, qualified, or conventional neutrality.

§ 3. Perfect neutrality.

1. 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.

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 correspondent 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 favor one party to the detriment of the other.[1] 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."[2]

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 103–110.

[2] "Horum officium est, omni modo cavere, ne se bello interponant, et his quàm illis partibus sint vel æquiores vel iniquiores. . . . . *Bello se non interponant*, hoc est, in causâ belli alterum alteri ne præferant, et eo solo recte defunguntur, qui neutrarum partium sunt. . . . . Si recte judico, belli justitia vel injustitia nihil quicquam pertinet ad communem amicum; ejus non est, inter utrumque amicum, sibi invicem hostem, sedere judicem, et ex causâ æquiore vel iniquiore huic illive plus minusve tribuere vel negare. Si medius sim, alteri non possum prodesse, ut alteri noceam." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

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." [1] [210

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[1] "Exposui compendio, quod mihi videatur de officio eorum, qui ex fœdere nihil quicquam debent, sed perfectè sunt neutrarum partium. Hos simpliciter *amicos* appellavi, ut à Fœderatis et Sociis distinguerem." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

[210] A proclamation was issued by the Queen of England, bearing date the 13th of May, 1861, in reference to the civil war then just commenced. It begins by stating that, —

"*Whereas* we are happily at peace with all Sovereigns, Powers, and States:

"And whereas hostilities have unhappily commenced between the government of the United States of America and certain States styling themselves 'the Confederate States of America.'

"And whereas we, being at peace with the government of the United States, have declared our Royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties:

"We, therefore, have thought fit, by and with the advice of our Privy Council, to issue this our Royal Proclamation:

"And we do hereby strictly charge and command all our loving subjects to observe a strict neutrality in and during the aforesaid hostilities, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the law of nations in relation thereto, as they will answer to the contrary at their peril."

Attention is then called to the provisions of the act of 59 Geo. III. ch. 69, (Foreign Enlistment Act,) which will be found noticed in our author's text, § 17, of this chapter. The proclamation adds: —

"And we do hereby further warn all our loving subjects, and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this Royal Proclamation, and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral sovereign, in the said contest, or in violation or contravention of the law of nations in that behalf — as, for example and more especially, by entering into the military service of either of the said contending parties as commissioned or non-commissioned officers or soldiers; or by serving as officers, sailors, or marines on board any ship or vessel of war or transport of or in the service of either of the said contending parties; or by serving as officers, sailors, or marines on board any privateer bearing letters of marque of or from either of the said contending parties; or by engaging to go or going to any place beyond the seas with intent to enlist or engage in any such service, or by procuring or attempting to procure within Her Majesty's dominions, at home or abroad, others to do so; or by fitting out, arming, or equipping any ship or vessel to be employed as a ship of war, or privateer, or transport, by either of the said contending parties; or by breaking, or endeavoring to break, any blockade lawfully and actually established by or on behalf of either of the said contending parties; or by carrying officers, soldiers, dispatches, arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties, all persons so offend-

2. Imperfect, qualified, or conventional neutrality, is that which is modified by special compact. § 4. Imperfect neutrality.

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ing will incur and be liable to the several penalties and penal consequences by the said statute, or by the law of nations, in that behalf imposed or denounced.

"And we do hereby declare that all our subjects and persons entitled to our protection who may misconduct themselves in the premises will do so at their peril and of their own wrong, and that they will in nowise obtain any protection from us against any liabilities or penal consequences, but will on the contrary, incur our high displeasure by such misconduct." London Gazette.

The French decree, as published in the *Moniteur*, June, 1861, was as follows: —

"His Majesty the Emperor of the French, taking into consideration the state of peace which exists between France and the United States of America, has resolved to maintain a strict neutrality in the struggle between the government of the Union and the States which propose to form a separate Confederation.

"In consequence, His Majesty, considering article 14 of the Ordinance of the Marine, of August, 1861, the 3d article of the law of the 10th of April, 1825, articles 84 and 85 of the Penal Code, article 65 and the following articles of the decree of the 24th March, 1852, article 313 and the articles following of the Maritime Penal Code, and article 21 of the Code Napoleon, declares: —

"1. No vessel of war or privateer of either of the belligerent parties will be allowed to enter or stay with prizes in our ports or roadsteads longer than twenty-four hours, except in a case of compulsory delay (*relâche forcée.*)

"2. No sale of goods belonging to prizes is allowed in our ports or roadsteads.

"3. Every Frenchman is prohibited from taking a commission under either of the two parties to arm vessels of war, or to accept letters of marque for privateering purposes, or to assist, in any manner whatsoever, the equipment or armament of a vessel of war or privateer of either party.

"4. Every Frenchman, whether residing in France or abroad, is likewise prohibited from enlisting or taking service, either in the land army or on board of vessels of war or privateers of either of the two belligerent parties.

"5. Frenchmen, residing in France or abroad, must likewise abstain from any act which, committed in violation of the laws of the Empire, or of the law of nations, might be considered as an act hostile to one of the two parties, and contrary to the neutrality which we have resolved to observe. All persons acting contrary to the prohibitions and recommendations contained in the present declaration, will be prosecuted, if the case occurs, conformably to the provisions of the law of the 10th of April, 1825, and of articles 84 and 85 of the Penal Code, without prejudice to the application that may be made against such offenders of the enactments of the 21st article of the Code Napoleon, and of article 65 and of the following articles of the decree of the 24th of March, 1852, respecting the merchant service, of article 313 and the following articles of the Penal Code for the military marine.

"His Majesty declares, moreover, that every Frenchman contravening the present enactments shall have no claim to any protection from his government against any acts or measures, whatever they may be, which the belligerents may exercise or decree."

The prohibitions in the Spanish decree, under the date of the 17th of June, 1861, are similar to the French. One of the articles of the Queen's proclamation declares: "The transportation, under the Spanish flag, of all articles of commerce is guaranteed, except when they are directed to blockaded ports. The transportation of munitions of war is forbidden, as well as the carrying of papers, or communications for the bel-

The public law of Europe affords several examples of this species of neutrality.

Neutrality of the Swiss Confederation.

1. Thus the political independence of the confederated Cantons of Switzerland, which had so long existed in fact, was first formally recognized by the Germanic Empire, of which they originally constituted an integral portion, at the peace of Westphalia, in 1648. 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

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ligerents. Transgressors shall be responsible for their acts, and shall have no right to the protection of my government." Papers, relating to foreign affairs, accompanying President's Message, December, 1861, p. 247. Complaint having been made of the admission of vessels under the Confederate flag into the ports of Spain, the Spanish Minister of Foreign Affairs thus explained the course of his government, in a note of October 16, 1861, to the Minister of the United States, Mr. Schurz: — "Spain had followed, in relation to vessels coming from the ports of the so-called Southern Confederacy, the same rules of action which she had adopted in the case of vessels clearing from the ports of the kingdom of the Two Sicilies, after the assumption of royal authority in that kingdom by King Victor Emanuel. It was well known that Spain had not recognized the so-called kingdom of Italy, and that the consular agents of King Francis II. were still exercising their functions in Spanish ports. Nevertheless, Spain did not oblige the masters of vessels arriving in Spanish ports from the ports of the kingdom of Naples to submit to the authority of the consuls of Francis II., but permitted them to address themselves either to them or to the consular officers of King Victor Emanuel, as they saw fit. But this permission, given to vessels coming from the Neapolitan ports to transact their business with the consuls of King Victor Emanuel, was by no means intended to imply a recognition of the Italian kingdom; for Spain recognized in the kingdom of the Two Sicilies no other authority, as lawful and legitimate, than that of King Francis II." Ib. p. 270.

The Russian regulations, based likewise on the course pursued in reference to the kingdom of Italy, as to vessels from the Confederate States, were to the same effect. By an order from the Ministry of Marine, transmitted May 22, (June 3,) 1861, in a despatch of Mr. Appleton, Minister of the United States at St. Petersburg, to whom it had been unofficially communicated, "the flag of men-of-war belonging to the seceded States must not be saluted; but, that there may be no obstacle in the way of commerce, merchant vessels of the seceded States are to be treated according to the rules acted on by us with regard to Italian merchant vessels sailing under the Italian flag; *i. e.*, according to the treaties that are at present in force (the commercial treaty concluded between America and us, December (6) 18, 1832.) Should the crews of vessels belonging to the seceded States not wish to acknowledge the authority of the consuls appointed by the Federal government at Washington, then, in case of dispute, they must abide by the decision of the local authorities, in the same manner as foreigners whose governments have no representatives in our empire." Ib. p. 286.] — *L.*

separate Cantons and foreign States, forming treaties of alliance or capitulations for the enlistment of Swiss troops in the service of those States. [211] 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. Such is the peculiar geographical position of Switzerland, between Germany, France, and Italy, among the stupendous mountain chains from which flow the great rivers, the Danube, the Rhine, the Rhone, and the Po, that if the passage through the Swiss territories were open to the Austrian armies, they might communicate freely from the valley of the Danube to the valley of the Po, and thus menace the frontier of France from Basle to Nice. To guard against this impending danger, France must be fortified along the whole of this frontier; whilst, on the other hand, if the passes of the Swiss Alps are shut against her enemy, she may concentrate all her forces upon the Rhine; since all history shows that the attempts of the Imperialists to penetrate into the southern provinces of France by the Var have ever failed, owing to the remoteness and difficulty of the scene of operations. The advantages to be derived by France from the permanent neutrality of Switzerland are therefore manifest. Nor is this neutrality less essential to the security of Austria. Let Switzerland once become a lawful battle-ground for the bordering States, and the French armies would be sure to anticipate its occupation by the Austrians. The two great Austrian armies operating, whether for offence or defence, the one in Swabia, the other in Italy, being separated by the massive rampart of the Alps, would have no means of communicating with each other; whilst the French forces, advancing from the Lake of Constance on the one side, and the great chain of the Alps on the other, might attack either the flank of the Austrian army in Swabia or the rear of its army in Italy.[1]

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

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[211] These capitulations no longer exist. See Part III. ch. 2, § 14, Editor's note [163, p. 480, *supra*.] — *L.*

[1] Thiers, Histoire du Consulat et de l'Empire, tom. i. liv. 8, p. 182.

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 recognized 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.[1]

When the allied armies advanced to invade the French territory, in 1813, the Austrian corps under Prince Schwartzenberg passed through the territory of Switzerland, and crossed the Rhine at three different places: at Basle, Lauffenberg, and Shaffhausen, without opposition on the part of the federal troops. The perpetual neutrality of Switzerland was, nevertheless, recognized by a declaration of the Congress of Vienna, March 20th, 1815;[2] but on the return of Napoleon from the island of Elba, the allied 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 reëstablishment 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

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[1] Schoell, Histoire des Traités de Paix, tom. ii. ch. 33, p. 339.

[2] Wheaton's Hist. Law of Nations, p. 493.

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.[1]

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, recognized 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 coöperation not only real, but also of the highest importance. 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 favorable 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,

[1] Martens, Nouveau Recueil, tom. ii. p. 166.

and engage them to support with fortitude the burden of an armament so considerable.[1]

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.[2]

On the reëstablishment 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 recognized 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 influence unfavorable 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.[3] [212

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[1] Martens, Nouveau Recueil, tom. ii. p. 170. [2] Ibid.

[3] Ibid. tom. iv. p. 186.

[212] The same powers in their declaration, of the 20th November, 1815, which is also signed by Portugal, acknowledge and guarantee equally the neutrality of the parts of Savoy, designated by the act of the Congress of Vienna, of the 20th of May, 1815, and of the treaty of Paris of the said 20th of November, as entitled to enjoy the neutrality of Switzerland, in the same manner, as if they belonged to her. Martens, Nouveau Recueil, tom. iv. p. 187. By the final act of the Congress of Vienna, of the 9th of June, 1815, which was signed by Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, and Sweden, art. 92, it is declared that the provinces of Chablais and Faucigny, and all the territory of Savoy to the north of Ugine, belong-

2. The geographical position of Belgium, forming a natural barrier between France on the one side, and

Neutrality of Belgium.

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ing to the King of Sardinia, shall make part of the neutrality of Switzerland, as recognized and guaranteed by these powers. Consequently, whenever the powers bordering on Switzerland shall be in open or imminent hostility, the troops of the King of Sardinia, which shall be in these provinces, shall be withdrawn, and for that purpose shall pass through the Valois, if necessary; no armed troops of any power shall pass over or be stationed in the above-mentioned provinces and territories, unless the Swiss Confederation shall think proper to station them there; it being understood that this condition of things shall in nowise interfere with the administration of those territories, in which the civil agents of His Sardinian Majesty may likewise employ the municipal guard for the maintainance of good order. Ibid. tom. ii. p. 421.

This article was proposed by a note from the Sardinian plenipotentiary, of the 26th of March, 1815, to the plenipotentiaries of England, Austria, Prussia, and Russia, at the Congress of Vienna, and is annexed to the protocol of the 29th of March. Ib. pp. 175–177. It was incorporated, as the 8th article, into the five several treaties, signed, on the 20th of May, 1815, by Sardinia, with Austria, Russia, Great Britain, Prussia, and France, respectively. Ib. p. 301. The Swiss Confederation acceded to the acts of the Congress of Vienna of the 29th of March, on the 12th of August. Ib. tom. iv. p. 184. The treaty between Sardinia and Switzerland, of the 16th of March, 1816, art. 7, refers to this acceptance and to the official note of the Federal Directory of the 1st November, 1815, to the Minister of Sardinia, declaring that Switzerland does not make, on the subject of the admission of the provinces of Chablais, Faucigny, and of the territory to the north of Ugine, into its system of neutrality, any reserve or distinction, which can tend to weaken or modify the dispositions announced in the acts of the Congress of Vienna, of the 29th of March, 1815. The same article recognizes, also, the declaration and treaty of the 20th November, 1815, referred to at the beginning of this note, and thus concludes: "These different declarations and stipulations, which Switzerland acknowledges and accepts, and to which His Majesty the King of Sardinia accedes in the most formal manner, will be the rule between the two States." Ib. p. 220.

The cession of Savoy to France, by the treaty of Turin of the 24th of March, 1860, led to a discussion of the effect of the stipulations, as regards the restrictions, which they imply to the alienation of the territory by Sardinia, as well as to the security guaranteed to Switzerland. It was before the treaty of cession understood by the Federal Council (Message of 28th March, 1860,) that, in the event of the cession of Savoy, the Emperor would be disposed to cede the neutralized districts to the Confederation. In the whole matter, it was, however, declared by M. Thouvenel to the Minister of Switzerland, in Paris, that the vote of the populations must prevail. As regards the obligations imposed by the several acts of the Congress of Vienna and the treaty of 1816, between Sardinia and Switzerland, the 2d article declares that "it is understood that 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 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 guarantees required by the stipulations referred to."

In advance of the actual conclusion of the treaty of cession, the Federal Council directed its representative at Turin to call the attention of Count Cavour to the

Germany and Holland on the other, would seem to render the independence and neutrality of the first-mentioned country as

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rights which result to Switzerland from the treaty of 1564, between Savoy and Berne, stipulating that neither party should cede its territory to any other prince or State. This treaty was guaranteed by France and Spain, and was claimed to be confirmed as well by the acts of the Congress of Vienna, as by the 23d article of the treaty of 1816, which confirms all previous treaties not inconsistent therewith. Almanach de Gotha, 1861, p. [49. In reply, Count Cavour, denying the application of the treaty of 1564, as in its nature transient, and terminated through the general stipulations subsequently regulating the law of Europe, and as not revived by the treaties of Vienna, restoring to Sardinia the provinces lost to her in 1792, or by the terms of the treaty of 1816, which apply to commerce and the facilities of communication, maintains that "the neutralization of those countries was established in the interest of Sardinia principally, who demanded and obtained it in compensation for a cession of territory in favor of Geneva, and, consequently, of the Confederation." He adds: "If, however, Switzerland believes that this neutralization is of use to her, we shall in no way oppose the taking of her interests into serious consideration. This France herself had formally declared. The point should be examined into and decided with the concurrence of the powers which signed the treaty of Vienna; for it affects the general interests of Europe as well as the private understanding of Sardinia and Switzerland."

The communication of Switzerland to the Sardinian government was followed, on the 19th of March, by a circular to the signers of the treaty of Vienna, calling on them to protect her rights, and by one, of the 5th of April, Russia, Austria, England, and Prussia, are requested to confer on the affairs of Savoy. On the 9th of April, there was a protest against the system of popular vote organized in Savoy, the results of which the Federal Council declare that they will never recognize. M. Thouvenel, in a note of the 7th of April, to the Ministers of France, accredited to the powers represented in the Congress of Vienna, contends, as M. Cavour had done, that the treaty of 1564 forms no part of the ancient treaties confirmed by that of 1816, and that the neutralization of Northern Savoy is an obligation of Switzerland, undertaken in behalf of Sardinia. In these views, however, England did not concur. On the contrary, Lord John Russell writes to Lord Cowley, March 22, 1860: "It is plain that these engagements about Savoy, to which France is a party, were intended as a security for Switzerland against danger coming from France; but what would become of that security if Savoy were annexed to France, and if the very power against which this access to Switzerland has been barred, should become the owner of the barrier thus erected for the protection of the Confederation? It is indeed implied in the despatch of M. Thouvenel that France, in taking Savoy, would accept also the engagements, by which the King of Sardinia is bound, in regard to the neutralized portion of that country; but it is no disparagement to France to say that neither Switzerland nor the powers of Europe could consider such an arrangement as affording to the integrity and neutrality of the Swiss Confederation that security which the above-mentioned stipulations of the treaty of Vienna are calculated to afford; and Her Majesty's government contend that it is not competent for France and Sardinia, by any compact between them, and without the consent of the other States of Europe, so materially to impair, as the proposed cession of Savoy would do, an element of security which a great European compact has provided for a State, whose independence is an object of European concern." Annual Register, 1860, p. 259.

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 belonged to the house of Austria, either of the Spanish or the German branch, these provinces had been, for successive ages, the battle-

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An appeal was taken on the 22d and 23d of April, to universal suffrage, after which M. Thouvenel declared to the English Ambassador, that "any territorial concession to Switzerland was more impossible than ever, in consequence of the unanimity with which, in the neutralized districts, the annexation to France had been voted." Annuaire des deux mondes, 1860, p. 89. All efforts of Switzerland to prevent possession being taken, pending her appeal, of the neutralized territory, having failed, M. Thouvenel, in a circular to the representatives of France at the courts of the signers of the treaty of Vienna, on the 20th of June, 1860, announced that the treaty of Turin having received its definitive sanction, and the delivery of the ceded territories being accomplished, the moment had arrived for fulfilling the obligation which the Emperor had assumed, of coming to an understanding with the powers who had signed the general act of Vienna, as well as with the Helvetic Confederation, on the subject of the eventual neutralization of a part of Savoy, by putting the 92d article of the acts of Vienna, in accord with the 2d article of the treaty of Turin, and to consecrate the accord by a diplomatic act, to take its place in the European law. He refers the mode of doing so to the other Cabinets, — whether by conference or exchange of notes, by which the government of the Emperor would assume towards the courts that had guaranteed the neutrality of Switzerland, and towards Switzerland herself, the obligations agreed to by Sardinia. Finally, a preliminary negotiation might be recommended between France and Switzerland, which would determine the reciprocal rights and duties arising from the neutrality, and which could be effected by remodelling and completing the treaty, signed at Turin in 1816, between Sardinia and the Swiss Confederation.

No congress or conference was held. From a despatch of the 17th July, 1860, to the Marquis de Turgot, at Berne, it appeared that there was a general impression that the period was inopportune for such a meeting, and, the annexation having been completed, there was a general disposition, on the part of the other powers, not to provoke a European discussion, but to acquiesce in and accept the declaration of France scrupulously to observe the obligations which the treaties had imposed on Sardinia, with regard to the neutralized districts. Russia, on the reiterated demand of Switzerland for the meeting of the Conference, adhered to the proposition, though she assured France that it need not be doubted that the Cabinet of St. Petersburg would take the same view as it had done in the preceding phases of the affair. The British government, with whom Portugal agreed, pronounced in favor of a conference, as being desired by Switzerland, the power most interested in the question, and as constituting the best means of arriving at a frank discussion and friendly explanation, with a view of putting the 92d article of the act of Vienna in accord with the 2d article of the treaty of Turin. Le Nord, 15 Février, 1861.] — *L.*

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.[1]

Neutrality of Cracow.

3. We have already seen that by the final act of the Congress of Vienna, 1815, art. 6, the city of Cracow, with its territory, is declared to be a perpetually free, independent, and neutral State, under the joint protection of Austria, Prussia, and Russia.[2] The neutrality, thus created by special compact and guaranteed by the three protecting powers, is 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 has been actually respected by the protecting powers, or how far the successive temporary occupations of its territory by their military forces, and how far their repeated forcible interference in its internal affairs, may have been 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, are questions which have given rise to diplomatic discussions between the great European powers, contracting parties to the treaties of Vienna, but which are foreign to the present object.[3]

The permanent neutrality of Switzerland, Belgium, and Cra-

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[1] Wheaton, Hist. Law of Nations, p. 552.

[2] Vide supra, Part I. ch. 2, § 13. p. 59, and same page, note 3.

[3] Wheaton's Hist. of Law of Nations, pp. 441–445.

cow, has thus been solemnly recognized as part of the public law of Europe. 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 permanently 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.[1]

The question remains, whether this restriction on the sovereign power of the permanently neutral State is confined to political alliances and guarantees, 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

[1] Arendt, Essai sur la Neutralité de la Belgique, pp. 87–95.

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 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 not at war with the other, and in order to favor the latter, would be departing from the line of strict neutrality."[1]

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.

§ 5. Neutrality modified by a limited alliance with one of the belligerent parties.

Neutrality may also be modified by antecedent engagements, by which the neutral is bound to one of the parties to the war. Thus the neutral may be bound by treaty, previous to the war, to furnish one of the belligerent parties with a limited succor in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally, with their prizes. The fulfilment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy.[2]

How far a neutrality, thus limited, may be tolerated by the opposite belligerent, must often depend more upon considerations of policy than of strict right. Thus, where Denmark, in

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[1] Vattel, Droit des Gens, liv. iii. ch. 7, § 104.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. 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, Part III. ch. 2, §§ 14, 15, p. 480.

consequence of a previous treaty of defensive alliance, furnished limited succors 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 succors, 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 succors stipulated by the treaty of 1773, or Russia had consented to dispense with its fulfilment.[1]

§ 6. Qualified neutrality, arising out of antecedent treaty stipulations, admitting the armed vessels and prizes of one belligerent into the neutral ports, whilst those of the other are excluded.

Another case of qualified neutrality arises 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: — 1. Admission for her privateers, with their prizes, to the exclusion of her enemies. 2. 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

[1] Annual Register, vol. xxx. pp. 181, 182. State Papers, p. 292. Eggers, Leben von Bernstorf, 2 Abtheil, pp. 118–195.

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 might, therefore, be observed without giving just offence to any.[1]

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 favors to the one, to the prejudice of the other, would import a fraudulent neutrality, of which no nation would be the dupe; that no succor 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.[2] [[218]

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[1] Mr. Jefferson's Letter to Mr. Hammond and Mr. Van Berckel, Sept. 9, 1793. Waite's State Papers, vol. i. pp. 169, 172.

[2] Mr. Jefferson's Letter to Mr. G. Morris, Aug. 16, 1793. Waite's State Papers, vol. i. p. 140.

[[218]] Mr. Trescot remarks, in reference to our position at the commencement of the wars growing out of the French Revolution: "There were two courses open to the United States, — either to give way to the pressure of circumstances and join one or other of the contending parties, or to declare the French treaties null and void, and, without approaching England, hold themselves free and neutral. After a long and conscientious deliberation, General Washington determined upon a course which was neither one nor the other; and which, notwithstanding its fair and honest spirit combined, it must be acknowledged, the difficulties of both. He resolved to maintain neutrality and the French treaties together." Diplomatic History of the Administrations of Washington and Adams, p. 138. The exoneration of the United States from the duties imposed by the French treaties, would seem to have been far from clear, even in the minds of those who had maintained the right, under the circumstances, of our being at liberty to absolve ourselves from the obligation of them. Mr. Ham-

§ 7. Hostilities within the territory of the neutral State.

The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it fol-

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ilton, notwithstanding the advice which he had given as a member of Washington's cabinet in 1793, and his subsequent repugnance in 1799 to any renewal of negotiations with a revolutionary government in France, in 1797, in a letter to his successor in office, advocated an extraordinary mission, and which, according to him, "ought to embrace a character in whom France and the opposition have full confidence." The motive assigned was: "We may remould our treaties. We may agree to put France on the same footing as Great Britain by our treaty with her. We may also liquidate, with a view to *future* wars, the import of the mutual guarantee in the treaty of alliance, substituting specific succors and defining the *casus fœderis*. But this last may or may not be done, though with me it is a favorite object." Gibbs's Memoirs of the Administrations of Washington and Adams, vol. i. p. 490. Mr. Hamilton to Mr. Wolcott, April 5, 1797. C. F. Adams, Works of John Adams, vol. x. p. 254.

The embarrassments arising from the special privileges accorded to France, referred to in the text, were much increased by the insertion of similar provisions in the treaty of 1794 with England, and by the measures adopted by Congress to abrogate the French treaties, after the offensive termination, in 1798, of the mission of General Pinckney, with whom were associated Mr., afterwards Chief Justice, Marshall, and Mr. Gerry. In order to comprehend fully the subsequent negotiations between Ellsworth, Davie and Murray, and Joseph Bonaparte, Fleurieu and Rœderer, which resulted in the convention of September 30, 1800, "the following facts," Mr. Trescot says, "must always be borne in mind: 1. That by the 11th article of the treaty of alliance, France and the United States had mutually guaranteed their American possessions, and that by the 17th and 22d articles of the treaty of commerce of 1778, they granted to each other the mutual and exclusive privilege of taking their prizes and privateers into each other's ports. 2. That by the (24th and 25th articles of the) treaty of 1794 with England, this same exclusive privilege had been granted by the United States to that power; but that owing to the priority of the French treaty, and the exclusive character of the privilege, it remained in abeyance as far as England was concerned, so long as the French treaty lasted. 3. That by the act of July 1798, the United States government had cancelled the French treaties of 1778, and thus given priority and activity to the exclusive privilege stipulated in the treaty with England." Diplomatic History, &c., p. 208.

The draft of the convention presented by the American plenipotentiaries contained an article for a commission to ascertain indemnities mutually due, and it provided in reference to the commissioners, that "They shall decide the claims in question according to the original merits of the several cases, and to justice, equity, and the law of nations, and in all cases of complaint existing prior to the 7th of July, 1798, (the date of the act of Congress cancelling the treaties,) according to the treaties and consular convention then existing between France and the United States."

That France should admit the validity of the unilateral abrogation of the treaties, except as an act of war, which of itself would discharge all reclamations for their previous violation, could scarcely have been expected, on the part of the United States. Much less could it have been supposed that if she stipulated to make compensations for infractions of conventional obligations, France would recognize those altered relations, professedly induced by a disregard of our reclamations, which had transferred to England the special privileges that the treaties of the revolution secured to her. "The French plenipotentiaries would consent to the abrogation of

lows, that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral State, which is the common friend of both parties.[1]

§ 8. 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, is one of those *imperfect* rights, the exercise of which depends upon the consent of the proprietor, and which cannot be compelled against his will. It may be granted or withheld, at the discretion of the neutral State; but its being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to him, unless there be sufficient reasons for withholding it.[2] [214

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the old treaties; but as such an abrogation could only be the result of war, they were obliged to consider the action of the United States preceding, as equivalent to war, and a new treaty, in necessary consequence, as a treaty of peace. In such case, the question of indemnity must be laid aside, because a war extinguished all mutual obligation; each party had taken the remedy of complaints in its own hands, and a treaty of peace was a fresh start upon such a new basis as their respective positions warranted them in proposing. And therefore they offered to the American ministers, either the abrogation of the old treaties without indemnity, or indemnity with the old treaties. And they added that, in any new treaty, while France would cheerfully abandon her privilege of exclusive asylum, she would not consent to occupy an inferior position to any other nation." Ib. p. 215.

We have elsewhere given the article, which, as contained in the convention originally signed, postponed to a future and indefinite time the subjects of indemnities mutually due or claimed, as well as stated the circumstances, which, connected with the final exchange of ratifications, were deemed a renunciation of the respective pretensions, which were the object of that article. See Part III. ch. 2, § 15, Editor's note [165, p. 492.] — *L.*

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. Martens, des Prises et Reprises, ch. 2, § 18.

[2] Vide ante, Part II. ch. 4, § 12, p. 346. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 119–131. Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 13. Sir W. Scott, Robinson's Adm. Rep. vol. iii. p. 353.

[214 Grotius maintains that neutral nations ought to afford a free passage to an army seeking to recover its rights in a just war. But this doctrine, if ever received, has long been exploded. Heron, History of Jurisprudence, p. 399. So far is it from being allowable to neutrals, voluntarily, to grant the passage to one of the belligerents, that the granting of it may be the motive for an immediate declaration of war, on the part of the belligerent injured thereby. Hautefeuille, Droit des Nations Neutres, &c., tom. i. p. 250, 2me edit. The same rule does not, however, according to the last author, extend to the maritime territory. The constant practice

The extent of the maritime territorial jurisdiction of every State bordering on the sea has already been described.[1] [215

§ 9. 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 this 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 harbor 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 their course down the river, and made the capture in question within three English

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of nations has admitted that vessels of war of belligerents, either singly or in fleets, as well as private armed vessels when on their way for other countries, and even when sailing towards the enemy's country to attack it, may traverse the territorial seas of neutral States, without violating their territory. The true cause of the distinction is that sovereign nations are not in the habit of causing their territorial seas to be guarded by fleets or protected by fortresses in order to secure the complete and absolute possession of them in their entire extent. Besides vessels, even public or private armed vessels, are received into neutral ports; they there find a refuge against the dangers that may threaten them, and the assistance of which they have need. It would be impossible to admit them into the ports and refuse them a passage through the territorial seas. The innocuousness of the passage is complete. However numerous the fleet that may navigate even a territorial sea, it leaves no traces. Ibid. p. 314.] — *L.*

[1] Vide ante, Part II. ch. 4, §§ 6–8, pp. 320–326.

[215] The following is a note, dated Washington, August 14, 1862, from the Secretary of State to the Secretary of the Navy: — "Current newspaper reports, which of course may not be altogether reliable, give some reason for believing that the United States ship Adirondack has lately continued the chase of a British vessel, The Herald, understood to be engaged in violating the blockade, even within the line of maritime jurisdiction, that is to say, within a marine league of the island of New Providence. The President desires that you ascertain the truth of this fact with as little delay as possible, since, if it be true, the commander of The Adirondack has committed an inexcusable violation of the law of nations, for which acknowledgment and reparation ought to be promptly made. To guard against any such occurrence hereafter, the President desires that you at once give notice to all commanders of American vessels of war, that this government adheres to, recognizes and insists upon the principle that the maritime jurisdiction of every nation covers a full marine league from the coast, and that acts of hostility or of authority within a marine league of any foreign country by any naval officer of the United States are strictly forbidden, and will bring upon such officer the displeasure of his government." Public Journals.] — *L.*

miles of the alluvial islands formed at its mouth, restitution of the captured vessel was decreed by Sir W. Scott. [216 So, also,

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[216 "The respect due to neutral territorial seas is not confined to a total abstinence from every act of hostility; it equally extends to the proceedings immediately preparatory to those acts. Thus a fleet, or vessel of war or privateer, cannot, without committing a violation of territory, establish itself upon any point of this sea, in order to watch the passage of vessels, whether of war or merchantmen of the enemy or neutral ships, even if it leaves its retreat, in order to attack them outside of the limits of the neutral jurisdiction. It is even prohibited to cruise in the reserved waters, in order to attain the same object. Without doubt hostilities, the employment of force, the exercise of the right of war, have no place within the jurisdictional limits of pacific sovereigns friendly to the two parties; but the law of war does not admit that the territory of a neutral people should serve as an ambuscade for one of the belligerents to favor his operations of war to the detriment of the other. All the prizes made under such circumstances are then unlawful, and give to the neutral the right of claiming from the belligerent, who does these acts, a reparation, as if they had been committed on his own proper territory and within the limits of his jurisdiction." Hautefeuille, Droits des Nations Neutres, tom. i. tit. vi. ch. 1, § 2, p. 337. And the same author elsewhere says: "Galiani, Azuni, and several other publicists state as one of the conditions of enjoying the right of asylum, the refraining from lying in wait within the territorial seas, under the protection of the capes and islands, to watch and surprise the enemy's ships which may enter into or go out of the ports, or even those which traverse the ocean." Ib. ch. 11, § 1, p. 355.

"Belligerent vessels ought to remain on a strict footing of peace with all the vessels which may be in neutral ports, neither increase their crews nor their armament, and not establish a *surveillance with the view of watching the vessels that are about sailing.*" Baron Van Zuylen, Minister of Foreign Affairs, to the American Minister at the Hague, 17th of September, 1861. Le Nord, 17 Janvier, 1862. Papers relating to Foreign Affairs, &c., 1862, p. 352.

If it be not admissible for an armed vessel of a belligerent to take advantage of neutral waters, in the manner mentioned in the text, as against enemy's vessels, it is, *à fortiori*, a violation of neutrality thus to use them, for the purpose of intercepting the merchant vessels of the same or of another neutral State, under suspicion of having contraband on board, or for any other purpose which might make them liable to the belligerent right of search.

In consequence of the laying in wait at Southampton, by an American steamer of war, watching for the departure of a Confederate armed steamer, and sending men on shore for that purpose, Earl Russell wrote, January 10, 1862, to Mr. Adams, "I think it necessary to state to you that, except in case of stress of weather forcing them to land, Her Majesty's government cannot permit armed men in the service of a foreign government to land upon British ground. I have also to inform you that no act of hostility can be permitted between the Federal steamer and its enemy within British waters, and that orders to that effect will be issued to the Board of Admiralty. In the case of The Nashville leaving British waters, the Federal steamer of war will not be permitted to start from British waters in pursuit of her till after the expiration of twenty-four hours. The same rule will be applied to the vessels of the so-called Confederate States."

Lord Russell also caused, on the same day, the Lords Commissioners of the Admi-

where a belligerent ship, lying within neutral territory, made a capture with her boats out of the neutral territory, the capture

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ralty to be informed that, in his opinion, orders should be immediately given for placing a ship of war of superior force, as near Southampton as the circumstances of the case may require, "in order to prevent any hostilities taking place within British waters between the Federal and Confederate steamers, and with instructions, in the event of either of these steamers proceeding to sea, not to allow the other to start in pursuit of her until the expiration of twenty-four hours."

Lord Russell in sending, February 1, 1862, to Mr. Adams, a statement of the proceedings of the Admiralty in reference to The Tuscarora and Nashville, says: "I think that you will see from this summary that Her Majesty's government have reason to complain of the commander of The Tuscarora, as an attempt to carry on hostilities in the waters of a neutral." He also encloses a copy of the London Gazette, of the 31st of January, containing a general order on this subject. Parliamentary Papers, 1862. North America, No. 6, pp. 19, 29.

That order provides; 1. That no ship of war or privateer belonging to either of the belligerents shall be permitted to enter or remain in the port of Nassau, or in any other port, roadstead, or waters of the Bahama Islands, except by special leave of the lieutenant-governor, or in case of stress of weather. If any such vessel should enter any such port, roadstead, or waters, by special leave, or under stress of weather, the authorities of the place shall require her to put to sea as soon as possible, without permitting her to take in any supplies, beyond what may be necessary for her immediate use.

If there shall be any such vessel already within any port, roadstead, or waters of those islands, the lieutenant-governor shall give notice to such vessel to depart, and shall require her to put to sea, within such time as he shall, under the circumstances, consider proper and reasonable. If there shall be ships of war or privateers belonging to both the said belligerents within the territorial jurisdiction of Her Majesty, in or near the same port, roadstead, or waters, the lieutenant-governor shall fix the order of time in which such vessels shall depart. No such vessel of either belligerent shall be permitted to put to sea until after the expiration of at least twenty-four hours from the time when the last preceding vessel of the other belligerent (whether the same shall be a ship of war, or privateer, or merchant ship) which shall have left the same port, roadstead, or waters adjacent thereto, shall have passed beyond the territorial jurisdiction of Her Majesty.

2. All ships of war and privateers of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom of Great Britain and Ireland, or in the Channel Islands, or in any of Her 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 of warlike equipment.

3. If any ship of war or privateer of either belligerent shall enter any port, roadstead, or waters belonging to Her Majesty, either in the United Kingdom, or in the Channel Islands, or in any of Her Majesty's colonies or foreign possessions or dependencies, such vessel shall be required to depart and to put to sea within twenty-four hours, 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 case, the authorities of the port 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

was held to be invalid; for though the hostile force employed was applied to the captured vessel lying out of the territory, yet

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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.

There is the same regulation in this and the preceding article as in the first article, for securing the interval of twenty-four hours between the departure of the vessels of the two belligerents, and there is a general provision against any ship of war or privateer taking 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 destination; and no coal shall be again supplied to any such ship of war or privateer, in the same or any other port, roadstead, or waters, subject to the territorial jurisdiction of Her 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.

In sending this order, Lord Russell writes to Lord Lyons, February 1, 1862: "I enclose for your information, and for communication to Her Majesty's consuls in the northern and southern States, copies of the Gazette of last evening, containing a copy of a letter which I have addressed to the Lords Commissioners of the Admiralty, to the several Secretaries of State, and to the Lords Commissioners of Her Majesty's Treasury, signifying the Queen's pleasure with regard to the rules which Her Majesty, with the view of preserving a strict neutrality, has commanded to be observed in all ports, harbors, roadsteads, and waters within Her Majesty's territorial jurisdiction during the continuance of the existing hostilities between the United States and the States calling themselves the Confederate States of North America." Parliamentary Papers, 1862. North America, No. 1, p. 140.

Speaking in a debate in the House of Lords, March 10, 1862, of the course which had been pursued by Great Britain, in the American civil war, Lord Russell said: —

"It would have been a great misfortune if, owing to circumstances, we should have thought ourselves obliged to take a course in such a quarrel that would have made us become partisans either of the North or South. It was my object and the object of every member of Her Majesty's government, from the very beginning of the conflict, to watch the course of events, with the determination to act in an impartial spirit and preserve a strict neutrality between the two powers. Sometimes our course, as when we acknowledged the Southern States as belligerents, may have been considered as having an injurious effect on the North. On the other hand, when forbidding privateers to carry their prizes into any British port, it may have been considered to have had an effect unfavorable to the South. But we did not consider the tendency of these acts. We only considered whether they were just in themselves, and becoming the character of this country. If we had been obliged to take part either with one side or the other, it would have been a misfortune and a calamity for the world, and for the people of America especially." Parliamentary Debates.

In a communication to Lord Russell from the ship-owners of Liverpool, it is said: —

"Your memorialists view with considerable anxiety and apprehension the hostile attitude at present assumed by Federal cruisers in the Bahama waters; these cruis-

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*

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ers are now blockading the British port of Nassau, as if it were a Confederate port, and are making prizes of British vessels sailing from one British port to another with British goods, though such vessels are perfectly innocent of any attempt to run the blockade."

The following answer under the date of July 5, 1862, was returned by Mr. Layard: —

"I am directed by Earl Russell to acknowledge the receipt of your letter of the 2d instant, enclosing a memorial from certain British merchants and ship-owners at Liverpool, in which they state that they view with considerable anxiety and apprehension the hostile attitude assumed by Federal cruisers in the Bahama waters, and the memorialists pray that steps may be taken by Her Majesty's government to protect British shipping in those waters, and put a check on the seizures so repeatedly made by the Federal cruisers. I am to state to you, in reply, that it is alleged, on the other hand, by Mr. Seward and Mr. Adams, that ships have been sent from this country to America with a fixed purpose to run the blockade; that high premiums of insurance have been paid with this view; and that arms and ammunition have been thus conveyed to the Southern States to enable them to carry on the war.

"Lord Russell was unable either to deny the truth of those allegations or to prosecute to conviction the parties engaged in those transactions. But he cannot be surprised that the cruisers of the United States should watch with vigilance a port which is said to be the great *entrepôt* of this commerce. Her Majesty's government have no reason to doubt the equity and adherence to legal requirement of the United States prize courts. But he is aware that many vessels are subject to harsh treatment, and then, if captured, the loss to the merchant is far from being compensated, even by a favorable decision in a prize court. The true remedy would be that the merchants and ship-owners of Liverpool should refrain from this species of trade. It exposes innocent commerce to vexatious detention and search by American cruisers; it produces irritation and ill-will on the part of the population of the Northern States of America; it is contrary to the spirit of Her Majesty's proclamation; and it exposes the British name to suspicions of bad faith, to which neither Her Majesty's government nor the great body of the nation are justly obnoxious.

"It is true, indeed, that supplies of arms and ammunition have been sent to the Federals equally in contravention of that neutrality which Her Majesty has proclaimed. It is true, also, that the Federals obtain more freely and more easily that of which they stand in need. But if the Confederates had command of the sea they would no doubt watch as vigilantly, and capture as readily, British vessels going to New York as the Federals now watch Charleston, and capture vessels seeking to break the blockade. There can be no doubt that the watchfulness exercised by Federal cruisers to prevent supplies reaching the Confederates by sea will occasionally lead to vexatious visits of merchant ships not engaged in any pursuit to which the Federals can properly object.

"This, however, is an evil to which war on the ocean is liable to expose neutral commerce, and Her Majesty's government have done all they can fairly do; that is to say, they have urged the Federal government to enjoin on their naval officers greater caution in the exercise of their belligerent rights. Her Majesty's government, having represented to the United States government every case in which they were

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.[1] [217

justified in interfering, have only further to observe that it is the duty of Her Majesty's subjects to conform to Her Majesty's proclamation, and abstain from furnishing to either of the belligerent parties any of the means of war which are forbidden to be furnished by that proclamation." Public Journals.] — *L.*

[1] The Anna, November, 1805, Robinson's Adm. Rep. vol. v. p. 373; The Twee Gebroeders, July, 1800, vol. iii. p. 162.

[217] In 1759, while England and France were at war, two ships belonging to the former were captured, and two others destroyed off Lagos, within the jurisdiction of Portugal, by a British fleet. Earnest reclamations were made by the Conde d'Oeyras, (afterwards the Marquis de Pombal,) then at the head of the Portuguese government, on England, and an extraordinary mission was sent "to give the most public and ostensible satisfaction to the King of Portugal." Administration de Pombal par le Chevalier Dezotaux, tom. iii. p. 10. Révue Etr. & Fr. tom. vii. p. 751. Neither of these works states what subsequently occurred, which omission induced the annotator to assume in his last edition that the captured vessels had been restored. All restoration of or compensation for the ships was refused by England. Mr. Pitt, in a postscript to instructions marked "most secret," of the 12th of September, 1759, to Mr. Hay, Minister at Lisbon, says: "I have thought it may not be improper, for your more certain guidance, expressly to signify to you, that any personal mark on a great Admiral, who has done so essential a service to his country, or to any one under his command, is totally inadmissible, as well as the idea of restoring the ships of war taken." In a despatch to the Earl of Kinoul, of May 30, 1760, he says: "In this dilemma it is judged most advisable that your Excellency should carefully forbear entering into much controversial reasoning on the matter, and content yourself with only touching lightly this single fundamental fact, namely, that it highly deserves consideration, that the engagement, which begun at a distance, and which, accidentally leading so near Lagos, ended in destroying and taking the French ships, may, on the principles of the law of nations, be maintained as one continued action." Mahon's History of England, vol. iv. pp. 153, 396–402, Leipsig ed. No restoration having been made, this matter became subsequently, in 1762, one of the alleged causes of war by France against Portugal. Annual Register, 1762, p. [220]. De Pistoye et Duverdy, Traité des Prises, tom. i. p. 107. Hautefeuille, Droit des Nations Neutres, tom. i. p. 329.

A case of violation of neutral territory occurred in the destruction, in the harbor of Fayal, in September, 1814, of the American privateer General Armstrong, by an English squadron. Reclamations against Portugal, founded on it, were finally terminated by the treaty of the 26th of February, 1851, by the second article of which it was agreed that the claim should be submitted to the arbitration of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties. Statutes at Large, vol. x. p. 912. Under this provision, Louis Napoleon, then President of the French Republic, was selected as arbiter. There is some discrepancy between the American statement, to be deduced from the documents, and the summary of facts on which the award proceeds. The Prince President, in pronouncing that no indemnity was due from Portugal, does not deny the responsibility of a neutral to make

§ 10. 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.[1] 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 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

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compensation to a belligerent, whose property has been captured or destroyed within his jurisdictional limits by the opposing belligerent; but he bases his decision on the assumed fact, that the American commander had not applied, from the beginning, for the intervention of the neutral sovereign; that by having recourse to arms, to repel an unjust aggression of which he pretended to be the object, he had himself failed to respect the neutrality of the territory of the foreign sovereign, and had thereby released that sovereign from the obligation in which he was to afford him protection by any other means than that of a pacific intervention; and that the Portuguese government could not be held responsible for the results of the collision which took place, in contempt of its rights of sovereignty, and in violation of the neutrality of its territory, and without the local officers having been required, in proper time, and enabled to grant aid and protection to those having a right thereto. Cong. Doc. 32d Cong. 1st Sess. H. Rep. Ex. Doc. No. 53. 32d Cong. 2d Sess. Senate Ex. Doc. No. 24.] — *L.*

[1] Quæst. Jur. Pub. lib. i. cap. 8. This opinion of Bynkershoek, in which Casaregis seems to concur, is reprobated by several other public jurists. Azuni, Diritto Maritimo, Part I. ch. 4, art. 1. Valin, Traité des Prises, ch. 4, § 3, No. 4, art. 1. D'Habreu, Sobre las Prisas, Part I. ch. 4, § 15.

done away; the property must be restored, notwithstanding that it may actually belong to the enemy."[1]

§ 11. Claim on the ground of violation of neutral territory must be sanctioned by the neutral State.

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 technical 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.[2]

§ 12. Restitution by the neutral State of property captured within its jurisdiction, or otherwise in violation of its neutrality.

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, "Whether this Hamburger, being taken within one of your Majesty's chambers, 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

Captures within the places called the *King's Chambers*.

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[1] Robinson's Adm. Rep. vol. v. p. 15, The Vrow Anna Catharina.

[2] Robinson's Adm. Rep. vol. iii. note, Case of the Etrusco. Wheaton's Rep. vol. iii. p. 447, The Anne.

have been eight leagues at sea, over against Harwich. King James (of blessed memory) his direction, by proclamation, March 2, 1604, being that all officers and subjects, by sea and land, shall rescue and succor all merchants and others, as shall fall within the danger of such as shall await the coasts, in so near places to the hindrance 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."[1]

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 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 commu-

[1] Life and Works of Sir L. Jenkins, vol. ii. p. 727.

nications 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 recognized by treaties between the United States, and some of the powers with whom 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 endeavors 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 con-

stitutional arrangement of the different authorities 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.[1]

§ 13. 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 has been applied, is actually terminated.[2]

§ 14. Right of asylum in neutral

An opinion is expressed by some text-writers, that belligerent cruisers, not only are entitled to seek an

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[1] Mr. Jefferson's Letter to M. Genet, November 8, 1793. Waite's 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, September 5, 1793. Waite's State Papers, vol. i. p. 165. Wheaton's Reports, vol. iv. p. 65, note *a*.

[2] Wheaton's Rep. vol. v. p. 385. The Amistad de Rues, vol. viii. p. 108. La Nereyda, vol. ix. p. 658. The Fanny, vol. vii. p. 519. The Arrogante Barcelones. Ibid. p. 283, The Santissima Trinidad.

ports dependent on the consent of the neutral State.

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 public law which can prevent the neutral State from withholding the exercise of this privilege 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 seaports, 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 these purposes.[1] [[218]

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[1] Bynkershoek, Quæs. Jur. Pub. lib. i. cap. 15. Vattel, liv. iii. ch. 7, § 132. Valin, Comm. sur l'Ordonn. de la Marine, tom. ii. p. 272.

[[218] A distinction is made by many countries as to asylum in the case of privateers. They admit them only to refuge in the event of tempest, want of provisions, or hostile pursuit. Hautefeuille, tom. i. p. 380, 2me ed. This has been the rule universally adopted during the present hostilities in America.

During the last European war in which Russia was involved, a writ of habeas corpus was issued, by a judge of a local court of the State of California, to inquire into the legality of the confinement and detention of persons belonging to the crew of a Russian vessel alleged to be a prize to a British man-of-war, and which had been brought into the Bay of San Francisco. The commander of the prize, without regarding the writ, got under way, and departed from the jurisdiction of California. The Attorney-General, on a complaint to the President from the Governor of California, as for a public wrong to the judicial and political authorities of the State, says: "I cannot say that, in my opinion, it was the duty of the commander of The Sitka to remain in port to answer to the process of a court having no jurisdiction of the matter in issue; especially if there was any danger of his lawful prisoners being taken away from his custody by such process. The following deductions are to be derived from the opinion: —

Belligerent ships of war, privateers, and the prizes of either, are entitled, on the score of humanity, to temporary refuge in neutral waters from casualties of the sea and war. By the law of nations, belligerent ships of war, with their prizes, enjoy asylum in neutral ports, for the purpose of obtaining supplies or undergoing repairs, according to the discretion of the neutral sovereign, who may refuse the asylum absolutely, or grant it under such conditions of duration, place, and other circumstances, as he shall see fit, provided that he must be strictly impartial in this respect towards all the belligerent powers. Where the neutral State has not signified its determination to refuse the privilege of asylum to belligerent ships of war, privateers, or their prizes, either belligerent has a right to assume its existence, and enter upon its enjoyment, subject to such regulations and limitations as the neutral State may please to prescribe for its own security. The United States have not, by treaty with any of the present belligerents, bound themselves to accord asylum to either;

§ 15. Neutral impartiality, in what it consists.

Vattel states that the impartiality, which a neutral nation ought to observe between the belligerent parties, consists of two points. 1. To give no assistance where there is no previous stipulation to give it; nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war. "I do not say *to give assistance equally*, but *to give no assistance:* for it would be absurd that a State should assist at the same time two 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 succors. 2. In whatever does not relate to the war, the neutral must not refuse to one of the parties, merely because he is at war with the other, what she grants to that other." [1] [219]

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but neither have the United States given notice that they will not do it; and of course our ports are open, for lawful purposes, to the ships of war of either Great Britain, France, Russia, Turkey, or Sardinia. A foreign ship of war, or any prize of hers in command of a public officer, possesses, in the ports of the United States, the right of exterritoriality, and is not subject to the local jurisdiction. A prisoner of war on board a foreign man-of-war, or her prize, cannot be released by habeas corpus issuing from courts either of the United States or of a particular State. But, if such prisoner of war be taken on shore, he becomes subject to the local jurisdiction or not, according as it may be agreed between the political authorities of the belligerent and the neutral power. Opinions of Attorneys General, vol. vii. p. 123. Mr. Cushing, April 28, 1855.] — *L.*

[1] Droit des Gens, liv. iii. ch. 7, § 104.

[219] In 1855, under an act of Parliament, passed 22d December, 1855, "to permit foreigners to be enlisted, and to serve as officers and soldiers in Her Majesty's forces," a depot was established at Halifax, Nova Scotia, for the reception and enrolment of recruits, and agents came into the United States to make arrangements for engaging and forwarding the recruits through Canada or otherwise, and, as is elsewhere stated, the British Minister in the United States, and several consuls, were implicated in the proceedings. In an opinion, to which this matter gave rise, the following principles are sustained: —

It is a settled principle of the law of nations that no belligerent can rightfully make use of the territory of a neutral State for belligerent purposes, without the consent of the neutral government. The undertaking of a belligerent to enlist troops of land or sea in a neutral State without the previous consent of the latter, is a hostile attack on its national sovereignty. A neutral State may, if it please, permit or grant to belligerents the liberty to raise troops of land or sea within its territory; but for the neutral State to allow or concede the liberty to one belligerent and not to all, would be an act of manifest belligerent partiality, and a palpable breach of neutrality. The United States constantly refuse this liberty to all belligerents alike, with impartial justice; and that prohibition is made known to the world by a permanent act of Congress. Great Britain, in attempting, by the agency of her mil-

§ 16. 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 arming and equipping vessels, and enlisting men within the ports of the United States, by the respective belligerent powers, to cruise against each other. It was 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 Wolfius 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. By their treaties with several of the belligerent powers, treaties forming part of the law of the land, they had established

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itary and civil authorities in the British North American provinces, and her diplomatic and consular functionaries in the United States, to raise troops here, committed an act of usurpation against the sovereign rights of the United States. All persons engaged in such undertaking to raise troops in the United States for the military service of Great Britain, whether citizens or foreigners, individuals or officers, except they be protected by diplomatic privilege, are indictable as malefactors by statute. Foreign consuls are not exempted, either by treaty or the law of nations, from the penal effect of the statute. In case of indictment of any such consul, or other official person, his conviction of the misdemeanor, or his escape by reason of arranged instructions or contrivances to evade the operation of the statute, is primarily a matter of domestic administration, altogether subordinate to the consideration of the national insult or injury to this government, involved in the fact of a foreign government instructing its officers to abuse, for unlawful purposes, the privilege which they happen to enjoy in the United States. The act of Congress prohibiting foreign enlistments, is a matter of domestic or municipal right, as to which foreign governments have no right to inquire, the international offence being independent of the question of the existence of a prohibitory act of Congress. All which it concerns such government to know, is, whether we as a government permit such enlistments. It has no business to inquire whether there be statutes on the subject or not. Least of all has it a right to take notice of such statutes to see how they may be evaded.

A foreign minister, who engages in the enlistment of troops here for his government, is subject to be summarily expelled from the country; or, after demand of recall, dismissed by the President. Opinions of Attorneys General, vol. vii. p. 367. Mr. Cushing, August 9, 1855.] — *L.*

a state of peace with them. But without appealing to treaties, they were at peace with them all by the law of nature; for, by the natural law, man is at peace with man, till some aggression is committed, which by the same law authorizes one to destroy another, as his enemy. For the citizens of the United States, then, to commit murders and depredations on the members of other nations, or to combine to do it, appeared to the American government as much against the laws of the land as to murder or rob, or combine to murder or rob, their own citizens; and as much to require punishment, if done within their limits, where they had a territorial jurisdiction, or, on the high seas, where they had a personal jurisdiction, that is to say, one which reached their own citizens only; this being an appropriate part of each nation, on an element where each has a common jurisdiction.[1]

§ 17. Prohibition enforced by municipal statutes.

The same principles were afterwards incorporated in a law of Congress, passed in 1794, and revised and reënacted in 1818, by which it is declared to be a misdemeanor 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 whom they are at peace; or to prepare any military expedition against the territories of any foreign nation with whom 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 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 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.[2] [220]

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[1] Mr. Jefferson's Letter to M. Genet, June 17, 1793. American State Papers, vol. i. p. 155.

[2] Kent's Comm. on American Law, vol. i. p. 123, 5th ed.

[220] For the act of 1794, ch. 50, see Statutes at Large, vol. i. p. 381; for the act of 1818, ch. 88, Ib. vol. iii. p. 447. The act of 1794 was produced in consequence of an attempt of the French Minister, M. Genet, to take advantage of the sympathies of the United States, to involve them in a war with England and other European powers. Waite's State Papers, vol. i. p. 39. President's Message, December 8,

Foreign Enlistment Act.

The example of America was soon followed by Great Britain, in the act of Parliament 59 Geo. III. ch. 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 License." The previous statutes, 9 and 29 Geo. II., enacted for the purpose of preventing the formation of Jacobite armies in France and Spain, annexed capital punishment as for a felony, to the offence of entering the service of a foreign State. The 59 Geo. III. ch. 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

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1793. In the case of a ship, alleged to have been fitted out and armed, with the intent that she should be employed in the service of that part of the island of St. Domingo, which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens, and property of that part of the island of St. Domingo which was then under the government of Christophe, neither the government of Petion nor of Christophe ever having been recognized as a foreign State, by the government of the United States or of France, it was held that the rival chiefs in the island of St. Domingo were not foreign princes or states within the act of 1794, ch. 50, prohibiting the fitting out any ship for the service of any foreign prince or state, to cruise against any other foreign prince or state. Wheaton's Reports, vol. iii. p. 325, Gelston *v.* Hoyt.

The law of 1818 does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States. Peters's Reports, vol. vi. p. 466, United States *v.* Quincy.

We have elsewhere referred to the question which arose with the German empire, with regard to a vessel built for its navy, and which, in consequence of the pending hostilities with Denmark, was subjected to the American neutrality act of 1818. See Part I. ch. 2, § 23, Editor's note [38, p. 95.

The act of March 10, 1838, ch. 31, provided for the seizure and detention of any vessel, or arms and munitions of war, provided or prepared for any military expedition or enterprise against the territory of any foreign prince, or of any colony, district, or people coterminous with the United States, and with whom they are at peace. This act, which was limited to two years, was passed with reference to the then Canadian insurrection. Statutes at Large, vol. v. p. 211. Benton, Debates of Congress, vol. xiii. p. 639.] — *L.*

with warlike stores, upon which the former law had been entirely silent.

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 required 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 recognized 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 favor 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 succors 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 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 guarantee 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 correspondent 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 favor 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.[1] [221]

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[1] Annual Register, vol. lxi. p. 71. Canning's Speeches, vol. iv. p. 150; vol. v. p. 34.

[221] The Duke of Newcastle instructed, November 15, 1861, the governors of the colonies, "that no foreign consul has any power or jurisdiction to seize any vessel, under whatever flag, within British territorial waters, and that the British authorities ought not to take any step adverse to merchant vessels of the Confederate States, or to interfere with their free resort to British ports. With respect to supplies, even of articles clearly 'contraband of war,' such as arms or ammunition, to the vessels of either party, the colonial authorities are not at liberty to interfere, unless something should be done in violation of the Foreign Enlistment Act, 59 Geo. III. cap. 69, which prohibits the equipping, furnishing, fitting out, and arming of ships or vessels for the service of foreign belligerent powers, and also the supply of guns or equipments for war, so as to increase the warlike force of vessels of war, but which does not render illegal the mere supply of arms or ammunition, &c., to private ships or vessels. With respect to the supplying in British jurisdiction of articles *ancipitis usus*, such for instance as coal, there is no ground for any interference whatever on the part of the Colonial authorities."

The Duke of Newcastle, in a despatch of November, 1861, to the Governor of Bermuda, says: "I have further to state that both you and Captain Hutton showed a very proper discretion in declining to furnish supplies to a war-vessel of one of the belligerent parties from public stores belonging to the British government." On a subsequent occasion, Lord Russell justified the authorities at Nassau in refusing to allow to be transshipped to a vessel of war of the United States coal, which had been sent from the United States for the supplying of their vessels of war. A distinction was made between this case and that of furnishing coal, by a merchant, to a private trading-vessel, not armed, of the Confederate States, which could not be construed into a breach of neutrality. He also pointed out that the cases of The James Adger and The Nashville, (one of which belonged to the United States and the other to the so-called Confederate States,) at Southampton, were not parallel cases. These vessels were some thousands of miles distant from their respective homes, and to them, consequently, coal was an article of real necessity, whereas The Flambeau was within a very short distance of the ports of her own nation — Key West, for instance — where her necessities could be readily supplied. The obligation to preserve a strict neutrality was imposed by the Queen's proclamation, and the contiguity of the port of Nassau to the American coast was an additional reason for adhering strictly to its provisions. Papers relating to Foreign Affairs, 1862, p. 58. Earl Russell to Mr. Adams, March 25, 1862.

To complaints made by Mr. Adams, in a note of November 22, 1861, of the reception in the port of Southampton of an armed steamer, called The Nashville, after burning an American merchant vessel at sea, and intimating that she should be treated as a pirate, Earl Russell replied, November 28, "That The Nashville appears to be a Confederate vessel of war; her commander and officers have commissions in the so-styled Confederate navy; some of them have written orders from the Navy Department at Richmond to report to Lieutenant Peagram 'for duty' on board The Nashville, and her crew have signed articles to ship in the Confederate navy. In these circumstances the act, done by The Nashville, of capturing and burning on the high seas a merchant vessel of the United States, cannot be considered as an act 'voluntarily undertaken by individuals not vested with powers generally acknowl-

§ 18. Immunity of the neutral territory, how far it

The unlawfulness of belligerent captures, made within the territorial jurisdiction of a neutral State, is incontestably established on principle, usage, and authority.

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edged to be necessary to justify aggressive warfare,' nor does it at all 'approximate within the definition of piracy.'" He states that orders have been given that no infringement of the foreign enlistment act should be permitted in regard to The Nashville, and that as to the allegation that some of the officers of The Nashville are to be put in command of vessels now fitting out in British ports, for purposes hostile to the United States, if reasonable evidence can be procured to that effect, all parties concerned, who shall be acting in contravention of the foreign enlistment act, shall be legally proceeded against, with a view to the punishment of the persons, and forfeiture of the vessels. He added that "if, in order to maintain inviolate the neutral character which Her Majesty has assumed, Her Majesty's government should find it necessary to adopt further measures, within the limits of public law, Her Majesty will be advised to adopt such measures." Parliamentary Papers, 1862. North America, No. 6, pp. 10, 12.

Other acts on the part of Great Britain, which were supposed to be not only a violation of the law of nations but of her own neutrality act, were complained of by the United States. The case of The Oreto, a war steamer fitted out at Liverpool, with a view of acting hostilely against the United States was brought to the notice of Lord Russell, as early as February 15, 1862. It was stated by the commissioners of the customs, to whom the subject was referred, and it was repeated even after her actual sailing on the 22d of March, that her destination was Palermo. On the 25th of August, Lord Russell wrote to Mr. Adams that The Oreto had been seized at Nassau and was to be tried before the Admiralty Court of the Bahamas for a breach of the foreign enlistment act. Papers relating to Foreign Affairs, 1862, pp. 35, 65, 185.

Another case was that of the gunboat 290, whose depredations on American commerce, under the name of The Alabama have rendered her quite notorious. The attention of the British government was called by Mr. Adams, so early as the 23d of June, to her being fitted out at Liverpool, and in the same note to Lord Russell, he remarks as to The Oreto: "Notwithstanding the statements returned from the authorities of that place, with which your Lordship favored me in reply, touching a different destination of that vessel, I have the strongest reason for believing that that vessel went directly to Nassau, and that she has been there engaged in completing her armament, provisions and crew for the object first indicated by me."

On the 4th of July, Lord Russell sends to Mr. Adams a report to the commissioners of the customs, in which it is stated that there is no attempt on the part of the builders to disguise what is most apparent, that the steamer 290 is intended for a vessel of war. She has, it is said, several powder canisters on board, but as yet neither guns nor carriages. It is not denied by the builders that she has been built for a foreign government, but they do not appear disposed to reply to any questions respecting the destination of the vessel, after she has left Liverpool. The solicitor of the customs gave it as his opinion that there was not sufficient ground to warrant the detention of the vessel or any interference on the part of that department. It is suggested that, as the United States Consul states that he has evidence entirely conclusive to his mind, that the vessel is intended for the so-called Confederate government, he should submit it to the Collector of the port, who would thereupon take such measures as the provisions of the foreign enlistment act would require. On the

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? extends to neutral vessels on the high seas.

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.[1] 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 taken between the public and the private vessels of a nation. In respect to its *public* vessels, it is universally admitted, that neither the Distinction between public and private vessels.

22d and 24th of July various depositions were sent to Lord Russell, accompanied by the opinion of counsel, that it was the duty of the Collector on those affidavits to detain the vessel, that it would be difficult to make out a stronger case of infringement of the foreign enlistment act, and that it well deserves consideration whether, if she be allowed to escape, the Federal government would not have serious grounds of remonstrance. The vessel sailed on the 29th of July without register or clearance.

In an interview of Mr. Adams with Earl Russell on the 31st, his Lordship remarked that a delay in determining upon the case of 290 had most unexpectedly been caused by the sudden development of a malady of the Queen's advocate, totally incapacitating him for the transaction of business. This had made it necessary to call in other parties, whose opinions had at last been given for the detention of the gunboat, but before the order arrived at Liverpool the vessel was gone. Mr. Adams to Mr. Seward, August 1, 1862. In a note of October 16, 1862, from Lord Russell to Mr. Adams, acknowledging the receipt of further evidence as to this gunboat, it is said: "With reference to your observations with regard to the infringement of the enlistment act, I have to remark that it is true the foreign enlistment act, or any other act for the same purpose, can be evaded by very subtle contrivances; but Her Majesty cannot, on that account, go beyond the letter of the existing law." Ib. pp. 130, 151, 162, 223.] — *L.*

right of visitation 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 visitation 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?[1]

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 movable thing, the property of private individuals, form any part of the territory of that power to whose subjects it belongs. [[222] 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 jurisdiction. 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.[2]

§ 19. Usage of nations subjecting enemy's goods in

Whatever may be the true original abstract principle of natural law on this subject, it is undeniable that the constant usage and practice of belligerent nations, from

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[1] *Vide ante*, Part II. ch. 2, § 10, p. 208.

[[222] This view is thus combated by Hautefeuille: "Sea vessels are of two descriptions: those which, belonging to the State, are intrusted with the exercise of the sovereign power and jurisdiction, and consequently with making war, while those which are private property are confined to the commercial operations of the subjects of the State. These two classes of vessels possess equally and to the same degree *territoriality*. I cannot on this point agree with a modern writer (Ortolan, Diplomatie de la Mer, liv. ii. ch. 10, tom. i. p. 211,) who would confine this quality to ships of war. Without doubt, there is between these two descriptions of vessels a great difference, but it does not bear on the question of *territoriality*. Both belong to the country whose flag they bear, both are subject to the laws of the sovereign, consequently both are territorial. It is even indispensable that they should both have and maintain this quality, for if one ceased to possess it, the other would immediately cease to have over it any right of protection and jurisdiction, since these rights can only be exercised upon the territory." Droit des Nations Neutres, tit. vi. ch. 1, § 1; tom. i. p. 290, 2me ed.] — *L.*

[2] Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19. Azuni, Diritto Maritimo, Part II. ch. 3, art. 2. Letter of American Envoys at Paris to M. de Talleyrand, January 17, 1798. Waite's American State Papers, vol. iv. p. 34.

the earliest times, have subjected enemy's goods in neutral vessels to capture and condemnation, as prize of war. This constant and universal usage has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations.[1] [223

neutral vessels to capture.

§ 20. Neutral vessels laden with enemy goods subject to confiscation by the ordinances of some States.

The regulations and practice of certain maritime nations, at different periods, have not only considered the *goods* of an enemy, laden in the ships of a friend, liable to capture, but have doomed to confiscation the neutral *vessel* on board of which these goods were laden. This practice has been 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.[2]

Thus, by the marine ordinance of Louis XIV., of 1681, all vessels laden with enemy's goods are 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.[3]

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[1] Consolato del Mare, cap. 273. Wheaton's 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. Part II. ch. 3, arts. 1, 2.

[223] The modifications which it has been attempted, since the publication of Mr. Wheaton's work, to establish by general conventional arrangements in the law of nations as expounded in this section, and in those which immediately follow, will be explained in the note to § 23.] —*L.*

[2] Barbeyrac, note to Grotius, lib. iii. cap. 6, § 6, note 1.

[3] Valin, Comm. liv. iii. tit. 9. Des Prises, art. 7. Wheaton's Hist. Law of Nations, pp. 111–114.

§ 21. Goods of a friend on board the ships of an enemy, liable to confiscation by the prize codes of some nations.

Although by the general usage of nations, independently of treaty stipulations, the goods of an enemy, found on board the ships of a friend, are liable to capture and condemnation, yet the converse rule, which subjects 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's 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 has been 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, are 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 lade their goods on board an enemy's vessels thereby favor 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's 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, in respect to goods, the property of the king's subjects, in lading them on board an enemy's vessels they contravene the law which interdicts to them all commercial intercourse with the enemy, and deserve to lose their goods for this violation of the law.[1]

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 lading his goods on board an enemy's 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

[1] Valin, Comm. liv. iii. tit. 9. Des Prises, art. 7. Pothier, Traité de Propriété, No. 96.

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 lading 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 belligerent pretensions may be fairly coupled with a correspondent 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 this 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.

§ 22. 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 an enemy's 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. The exemption of neutral property from capture has no other exceptions than those arising from the carrying of contraband, breach of blockade, and other analogous cases, where the conduct of the neutral gives to the belligerent a right to treat his property as enemy's property. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. States have changed this simple and natural principle of the law of nations, by mutual compact, in whole or in part, 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 preëxisting 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, upon 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.[1] [[224]

§ 23. Conventional law as to *free ships free goods.*

The conventional law, in respect to the rule now in question, has fluctuated at different periods, according to the fluctuating policy and interests of the different maritime States of Europe. It has been much more flexible than the consuetudinary law; but there is a great preponderance of modern treaties in favor 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 two centuries past, there has been a constant tendency to establish, by compact, the principle, that the neutrality of the ship

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[1] Cranch's Rep. vol. ix. p. 388, The Nereide.

[[224] Garden says, as to the two cases of enemy's property in the ship of a friend, and of friend's property in the ship of an enemy: "In the first case, the friendly flag protects the enemy's property, because it prohibits to cruisers the entering of the vessel, and consequently its visitation; in the second, the flag does not change the nature of the property." Traité de Diplomatie, tom. ii. p. 365.] — *L.*

should exempt the cargo, even if enemy's 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 recognized 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 laden on board the vessels of his enemies, and the goods of his enemies laden on board French vessels, were both exempted from capture by Turkish cruisers. The capitulation expressly declares, art. 10: — "Parceque des sujets de la France naviguent sur vaisseaux appartenants à nos ennemis, et les chargent de leurs marchandises, et étant rencontrés, ils sont faits le plus souvent esclaves, et leurs marchandises prises; pour cette cause, nous commandons et voulons qu'à l'avenir, ils ne puissent être pris sous ce prétexte, ni leurs facultés confisquées, à moins qu'ils ne soient trouvés sur vaisseaux en course," etc. Art. 12:— "Que les marchandises qui séront chargées sur vaisseaux Français appartenantes aux ennemis de notre Porte, ne puissent être prises sous couleur qu'elles sont de nos dits ennemis, puisque ainsi est nôtre vouloir." [1] [225

[1] Flassan, Histoire de la Diplomatie Française, tom. ii. p. 226. M. Flassan observes: "C'est a tort qu'on a donné à ces Capitulations le nom de *traité*, lequel suppose deux parties contractantes stipulant sur leurs intérêts; ici on ne trouve que des concessions de privilèges, et des exemptions de pure libéralité faites par la Porte à la France." In the first English edition of this work, and also in another work more recently published, under the title of "History of the Law of Nations," the author has been misled, by following the authority of Azuni and other compilers, into the erroneous conclusion, that the above capitulation was intended to change the primitive law, as observed among the maritime States of the Mediterranean from the earliest times, and to substitute a more liberal rule for that of the Consolato del Mare, of which the Turks must necessarily be supposed to have been ignorant, and which the French king did not stipulate to relax in their favor, when the goods of his enemies should be found on board Turkish vessels.

[225] Flassan, (who is referred to in Mr. Wheaton's note as showing that the term *treaty*, implying two contracting parties stipulating for their interests, was errone-

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 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's property, was suspended; but it was found impossible to obtain any relaxation as to the liability to capture of enemy's property in neutral vessels. The Dutch negotiator in Paris, in his correspondence with the grand pensionary De Witt, states that he had obtained the "repeal of the pretended French law, *que robe d'ennemi confisque celle d'ami;* so that if, for the future, there should be found in a free Dutch vessel effects belonging to the enemies of France, these effects alone will be confiscable, and the ship with the other goods will be restored; for it is impossible to obtain the twenty-fourth arti-

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ously applied to the *capitulations*, which were concessions of privileges and exemptions of pure liberality, made by the Porte to France,) says, that De Brèves, who had filled the French embassy at Constantinople for twenty-two years, obtained from the Sultan Achmet, in 1604, the confirmation and extension of the capitulations or privileges accorded to the French in 1535 and 1569, and by Mahomet III., the predecessor of Achmet. Diplomatie Française, tom. ii. p. 170, ed. 1809. The text of the capitulations of 1604 will be found in Dumont. The instrument is said to have been written on the 20th of May, 1604, and purports to be a grant from the Turkish Emperor to Henry IV., who is styled Emperor of France, made at the solicitation of the French ambassador. The articles are *forty-two* in number, and the 4th of them extends the permission to people of other nations generally to trade in the Turkish dominions, under the security of the French flag, obeying the French consuls resident in the different ports. The 10th article, as given by Mr. Wheaton, is the 9th in Dumont, and the phraseology of both that and the 12th is somewhat varied. As inserted in the Corps Diplomatique, they may be thus rendered: "Art. IX. And, because subjects of France sail in vessels belonging to our enemies, and carry their merchandise in them, and, when met, they are often made slaves and their merchandise taken, we therefore command and will, that henceforward they cannot be taken under this pretext, nor their property confiscated, unless they are found on board of cruising vessels (*vaisseaux de course.*) Art. XII. Merchandise belonging to the enemies of our Porte, laden as freight (*chargées à nolis*) on board of French vessels, shall not be taken under color of belonging to our enemies, (*qu' elles sont de nos dits ennemis*) since such is our will." Dumont, Corps Diplomatique, tom. v. Part II. p. 39. In the extract, which Flassan gives from the latter article, the words are *qu' elles venaient des ennemis de la Porte.* Diplomatie Française, *in loc. cit.*] — *L.*

cle of my Instructions, where it is said that the freedom of the ship ought to free the cargo, even if belonging to an enemy." This latter 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 Pyrénées 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 very 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 guarantee which constituted the equivalent for the concession made to the neutral flag, in derogation of the pre-existing law of nations.[1] [226]

A treaty of commerce and navigation was concluded between the Republic of England and the King of 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 has never since been renewed.

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[1] Dumont, Corps Diplomatique, tom. vi. Part 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; 2d ed. 1794; 3d ed. 1801.

[226] The "discourse" of Lord Liverpool is examined with great ability, and the immunity of neutral navigation vindicated by M. de Rayneval. Liberté des Mers, tom. i. p. 252. A French translation of Lord Liverpool's entire pamphlet is given in the second volume, p. 108, with notes by M. de Rayneval.] —*L.*

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 Britain and Spain, by the treaty of Aix-la-Chapelle, in 1748, and of Paris in 1763, between Great Britain, France, and Spain.[1]

Armed neutrality of 1780.

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 France and Great Britain. With a view to conciliate those powers which 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 upon 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 maxims that enemy ships should make enemy goods. The court of London 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 dif-

[1] Wheaton's Hist. Law of Nations, pp. 120–125.

ferent 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 dispute between Great Britain, and the other members of the armed neutrality.[1] [227]

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 France and Great Britain, 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.

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

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[1] Flassan, Diplomatie Française, tom. vii. pp. 183, 273. Annual Register, vol. xxiii. p. 205, State Papers, pp. 345–356; vol. xxiv. p. 300, State Papers. Wheaton's Hist. Law of Nations, pp. 294–305.

[227] Lord Mahon says, in a note to his History of England, vol. vii. p. 46, Leipzig ed. 1854: "Besides the many older writers on the 'Armed Neutrality,' I would commend to English readers an account of it in the unpretending, but candid and very able volume, recently published by Mr. W. H. Trescot, in America," (Diplomacy of the Revolution, New York, 1852).] — *L.*

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. 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 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 has been since concluded between these two powers.[1]

Armed neutrality of 1800.

The maritime law of nations, by which the intercourse of the European States is regulated, has been adopted by the new communities which have sprung up in the western hemisphere, and was considered by the United States as obligatory upon them during the war of their revolution. During that war, the American courts of prize acted upon the generally received principles of European public law, that enemy's 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

The international law of Europe adopted by America, and modified by treaty.

[1] Wheaton's Hist. Law of Nations, pp. 397–401.

recognizing the maxims of the armed neutrality of 1780, upon 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 recognized. 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's 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 are free, and the goods of an enemy found in the vessel of a friend are lawful prize. It was true, that several nations, desirous of avoiding the inconvenience of having their vessels stopped at sea, overhauled, carried into port, and detained, under pretence of having enemy's 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 treaty, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it. 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 are lawful prize though found in the ships of a friend. Nor was it perceived that France could, on the whole, suffer; for though she lost her goods in American vessels, when found therein by England, Spain, Portugal, or Austria; yet she gained American goods when found in the vessels of England, Spain, Portugal, Austria, the United Netherlands, or Prussia; and as the Americans had more goods afloat in the vessels of those six nations, than France had afloat in their vessels, France was the gainer, and they the losers, by the principle of the treaty between the two countries. Indeed, the United States were the losers in every direction of that principle; for when it worked in their favor, it was to save the goods of their friends; when it worked against them, it was to lose their own, and they would continue to lose whilst it was only partially established. When they should have established it with all nations, they would be in a condition neither to gain nor lose, but would be less exposed to vexatious searches at sea. To this condition the United States were endeavoring to advance; but as it depended on the will of other nations, they could only obtain it when others should be ready to concur.[1]

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's 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's 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, recognizing the principles of the armed neutrality.

To these complaints, it was answered by the American gov-

[1] Mr. Jefferson's Letter to M. Genet, July 24, 1793. Waite's State Papers, vol. i. p. 134. See, also, President Jefferson's Letter to Mr. R. R. Livingston, American Minister at Paris, September 9, 1801. Jefferson's Memoirs, vol. iii. p. 489.

ernment, that when the treaty of 1778 was concluded, the armed neutrality had not been formed, and consequently the state of things on which 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 this 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.[1]

Discussion between the American and Prussian governments.

The principle of *free ships free goods*, had been stipulated by the treaty of 1785, art. 12, between the United States and Prussia, without the correlative maxim of *enemy ships enemy goods*. By the 12th article of this treaty it was provided, that "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

[1] Letter of the American Envoys at Paris, Messrs. Marshall, Pinkney, and Gerry, to M. de Talleyrand, January 17, 1798. Waite's State Papers, vol. iv. pp. 38–47.

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."

The above treaty having expired, by its own limitation, in 1796, a negotiation was commenced by the American and Prussian governments for its renewal. In the instructions given by the former to its plenipotentiary, Mr. J. Q. Adams, it was stated that the principle of *free ships free goods*, recognized in the 12th article, was a principle which the United States had adopted in all their treaties, (except that with Great Britain), and which they sincerely desired might become universal; but they had found by experience, that treaties formed for this object were of little or no avail; because the principle was not universally admitted among maritime nations. It had not been observed in respect to the United States, when it would operate to their benefit; and might be insisted on only when it would prove injurious to their interests. The American plenipotentiary was therefore directed to propose to the Prussian cabinet the abandonment of this article in the new treaty which he was empowered to negotiate.[1]

It was further stated, in an additional explanatory instruction given by the American government to its plenipotentiary, that, in the former instruction, the earnest wishes of the United States were meant to be expressed, that the principle of *free ships free goods* should become universal. This principle was peculiarly interesting to them, because their naval concerns were mercantile, and not warlike; and it would readily be perceived, that the abandonment of that principle was suggested by the measures of the belligerent powers, during the war then existing, in which the United States had found, that neither the obligations of the pretended modern law of nations, nor the solemn stipulations of treaties, secured its observation; on the contrary, it had been made the sport of events. Under such circumstances, it appeared to the President desirable to avoid renewing an obligation, which would probably be enforced when their interest might require its

[1] Mr. Secretary Pickering to Mr. John Quincy Adams, Minister of the United States at Berlin, July 15, 1797.

dissolution, and be contemned when they might derive some advantage from its observance. It was possible, that in the then pending negotiations of peace, the principle of *free ships free goods* might be adopted by all the great maritime powers; in which case, the United States would be among the first of the other powers to accede to it, and to observe it as a universal rule. The result of these negotiations would probably be known to the American plenipotentiary, before the renewal of the Prussian treaty; and he was directed to conform his stipulations on this point to the result of those negotiations. But if the negotiations for peace should be broken up, and the war continued, and more especially if the United States should be forced to become a party to it, then it would be extremely impolitic to confine the exertions of their armed vessels within narrower limits than the law of nations prescribes. If, for instance, France should proceed, from her predatory attacks on American commerce, to open war, the mischievous consequences of any other limitations would be apparent. All her commerce would be sheltered under neutral flags; whilst the American commerce would remain exposed to the havoc of her numerous cruisers.[1]

In acknowledging the receipt of these instructions, the American plenipotentiary questioned the expediency of the proposed alteration, in the stipulation contained in the 12th article of the treaty of 1785. He stated that the principle of making free ships protect enemy's property, had always been cherished by the maritime powers not having large navies, though stipulations to that effect had been, in all wars, more or less violated. In the then present war, indeed, they had been less respected than usual; because Great Britain had held a more uncontrolled command of the sea, and had been less disposed than ever to concede the principle; and because France had disclaimed most of the received and established ideas upon the law of nations, and considered herself as liberated from all the obligations towards other States which interfered with her present objects, or the interests of the moment. Even during that war, however, several decrees of the French Convention, passed at times when the force of solemn national engagements was felt, had recognized the promise contained in the treaty of 1778, between

[1] Mr. Secretary Pickering to Mr. John Quincy Adams, July 17, 1797.

the United States and France; and, at times, this promise had been, in a great degree, observed. France was still attached to the principles of the armed neutrality, and yet more attached to the idea of compelling Great Britain to assent to them. Indeed, every naval State was interested in the maintenance of liberal maxims in maritime affairs, against the domineering policy of the latter power. Every instance, therefore, in which those principles which favor the rights of neutrality should be abandoned by neutral powers, was to be regretted, as furnishing argument, or at least example, to support the British doctrines. There was certainly a great inconvenience when two maritime States were at war, for a neutral nation to be bound by one principle to one of the parties, and by its opposite to the other; and, in such cases, it was never to be expected that an engagement favorable to the rights of neutrality would be scrupulously observed by either of the warring States. It appeared to the American plenipotentiary that the stipulation ought to be made contingent, and that the contracting parties should agree, that in all cases when one of the parties should be at war and the other neutral, the neutral bottom should cover enemy's property, *provided the enemy of the warring power admitted the same principle*, and practised upon it in their Courts of Admiralty; but if not, that the rigorous rule of the ordinary law of nations should be observed.[1]

In a subsequent communication of the American plenipotentiary to his government, he states that he should be guided by its instructions relative to this matter, although he was still of opinion that the proposed alteration in the previous treaty would be inexpedient. Sweden and Prussia were both strongly attached to the principle of making the ship protect the cargo. They had more than once contended, that such is the rule even by the ordinary law of nations. A Danish writer of some reputation, in a treatise upon the commerce of neutrals in time of war, had laid it down as a rule, and argued formally, that, by the law of nature, free ships make free goods.[2] Lampredi, a recent Florentine author, upon the same topic, had discussed the question at length; and contended that by the natural law, in this case,

[1] Mr. John Quincy Adams to Mr. Secretary Pickering, October 31, 1797, May 17, 1798.

[2] Hübner, De la Saisie des Batimens neutres. Wheaton's Hist. Law of Nations, pp. 219–229.

there is a collision of two rights equally valid; that the belligerent has a right to detain, but that the neutral has an equal right to refuse to be detained. This reduced the matter to a mere question of force, in which the belligerent, being armed, naturally enjoys the best advantage.[1] He confessed that the reasoning of Lampredi had, in his mind, great weight, and that this writer appeared to have stated the question in its true light. Under these circumstances, he intended to propose a conditional article, putting the principle upon a footing of reciprocity, and agreeing that the principle, with regard to bottom and cargo, should depend upon the principle guiding the Admiralty Courts of the enemy. This would at once discover the American inclination and attachment to the liberal rule, and yet not make them the victims of their adherence to it, while violated by their adversaries. Acting under the instructions of his government, he should not accede to the renewal of the article, under its form in the previous treaty.[2]

The American negotiator, following the letter of his instructions, proposed, in the first instance, to the Prussian plenipotentiaries, to substitute, instead of this article, the ordinary rule of the law of nations, which subjects to seizure enemy's property on board of neutral vessels. This proposition was supported, upon the ground that although the principle, which communicates to the cargo the character of the vessel, would be conformable to the interests of the United States, of Prussia, and of all the powers preserving neutrality in maritime wars, if it could be universally acknowledged and respected by the belligerent powers, yet it was well known that the powers most frequently engaged in naval wars did not recognize, or, if they recognized, did not respect, the principle. The United States had experienced, during the then present war, the fact, that even the most formal treaty did not secure to them the advantage of this principle; but, on the contrary, only contributed to accumulate the losses of their citizens, by encouraging them to load their vessels with merchandise declared free, which they had, notwithstanding, seen taken and confiscated, as if no engagement had promised them complete security. At the then present moment,

[1] Lampredi, Del Commercio dei Popoli neutrali in Tempo de Guerra. Wheaton's Hist. Law of Nations, pp. 314, 319.

[2] Mr. John Quincy Adams to Mr. Secretary Pickering, May 25, 1798.

neither of the powers at war admitted the freedom of enemy's property on board of neutral vessels. If, in the course of events, either of the contracting parties should be involved in war with one or the other of those powers, she would be obliged to behold her enemy possess the advantage of a free conveyance for his goods, without possessing the advantage herself, or else to violate her own engagements, by treating the neutral party as the enemy should treat her.[1]

The Prussian plenipotentiaries, in their answer to these arguments, stated that it could not be denied that the ancient principle of the freedom of navigation had been little respected in the two last wars, and especially in that which still subsisted; but it was not the less true that it had served, until the present time, as the basis of the commerce of all neutral nations; that it had been, and was still maintained, in consequence. If it should be suddenly abandoned and subverted, in the midst of the then present war, the following consequences would result: —

1. An inevitable confusion in all the commercial speculations of neutral nations, and the rejection of all the claims prosecuted by them in the Admiralty Courts of France and Great Britain, for illegal captures.

2. A collision with the northern powers, which sustained the ancient principle, at that very moment, by armed convoys.

3. Nothing would be gained in establishing, at the present moment, the principle that *neutral property on board enemy vessels should be free from capture.* The belligerent powers would be no more disposed to admit this principle than the other, and it would furnish an additional reason to authorize their tribunals to condemn prizes made in contravention of the ancient rule.

4. Even supposing that the great maritime powers of Europe should be willing to recognize the principle proposed to be substituted by the United States, it would only increase the existing embarrassments incident to judicial proceedings respecting maritime captures; as, instead of determining the national character of the cargo by that of the vessel, it would become necessary to furnish separate proofs applicable to each.

[1] Mr. John Quincy Adams to MM. Finkenstein, Alvensleben, and Haugwitz, July 11th, 1798.

All these difficulties combined induced the Prussian minister to insist on inserting the 12th article of the treaty of 1785 in the new treaty, qualified with the following additional stipulation: —

"That experience having unfortunately proved, in the course of the present war, that the ancient principle of free neutral navigation has not been sufficiently respected by the belligerent powers, the two contracting parties propose, after the restoration of a general peace, to agree, either separately between themselves, or jointly with the other powers alike interested, to concert with the great maritime powers of Europe such an arrangement as may serve to establish, by fixed and permanent rules, the freedom and safety of neutral navigation in future wars." [1]

The American negotiator, in his reply to this communication, stated, that the alteration in the former treaty, proposed by his government, was founded on the supposition, that, by the ordinary law of nations, enemy's property, on board of neutral vessels, is subject to capture, whilst neutral property, on board of enemy's vessels, is free. That this rule could not be changed but by the consent of all maritime powers, or by special treaties, the stipulations of which could only extend to the contracting parties. That the opposite principle, the establishment of which was one of the main objects of the armed neutrality during the war of American Independence, had not been universally recognized even at that period; and had not been observed, during the then present war, by any one of the powers who acceded to that system. That Prussia herself, whilst she remained a party to the war against France, did not admit the principle; and that, at the then present moment, the ancient principle of the law of nations subsisted in its whole force between all the powers, except in those cases where the contrary rule was stipulated by a positive treaty.

In proposing, therefore, to recognize the freedom of neutral property on board of enemy's vessels, and to recognize, as subject to capture, enemy's property, on board of neutral vessels, nothing more was intended than to confirm by the treaty those principles which already existed independently of all treaty; it

[1] MM. Finkenstein, Alvensleben, and Haugwitz, to Mr. John Quincy Adams, 25th September, 1798.

was not intended to make, but to avoid a change, in the actual order of things.

Far from wishing to dictate, in this respect, to the belligerent powers, it had not been supposed that an agreement between Prussia and the United States could, in any manner, serve as a rule to other powers not parties to the treaty, in respect to maritime captures; and as the effect of such a convention, even between the contracting parties, would not be retroactive, but would respect the future only, it had been still supposed that the just claims of the subjects of neutral powers, whether in England or in France, on account of illegal captures, could be in any manner affected by it.

Nor had it been apprehended that such a convention would produce any collision with the northern powers, since they could not be bound by a treaty to which they were not parties; and this supposed contradiction would still less concern Russia, because, far from having maintained the principle that the neutral flag covers enemy's property, she had engaged by her convention with Great Britain, of the 25th of March, 1793, to employ all her efforts against it during the then present war.

Sweden and Denmark, by their convention of the 27th March, 1794, engaged reciprocally towards each other, and towards all Europe, not to claim, except in those cases expressly provided for by treaty, any advantage not founded upon the universal law of nations, "recognized and respected unto the present time by all the powers and by all the sovereigns of Europe." It was not conceived possible to include, under this description, the principle that the cargo must abide the doom of the flag under which it is transported; and it might be added, that experience had constantly demonstrated the insufficiency of armed convoys to protect this principle, since they were seen regularly following, without resistance, the merchant vessel under their convoy into the ports of the belligerent powers, to be there adjudged according to the principles established by their tribunals; principles which were entirely contrary to that by which the ship neutralizes the cargo.

According to the usage adopted by the tribunals of all maritime States, the proofs as to the national character of the cargo ought to be distinct from those which concern that of the vessel.

Even in those treaties which adopt the principle that the flag covers the property, it is usual to stipulate for papers applicable to the cargo, in order to show that it is not contraband. The charter-party and the bills of lading had been referred to by the Prussian ministers, as being required by the Prussian tribunals, and which it was proposed to designate as essential documents in the new treaty. It would seem, then, that the adoption of the principle in question would not require a single additional paper, and, consequently, would not increase the difficulty of prosecuting claims against captors; at the utmost, it could only be regarded as a very small inconvenience, in comparison with the losses occasioned by the recognition of a principle already abandoned by almost all the maritime powers, and which had been efficaciously sustained by none of them; of a principle which would operate injuriously to either of the contracting parties that might be engaged in war, whilst its enemy would not respect it, and that party which remained neutral would hold out to its subjects the illusory promise of a free trade, only to see it intercepted and destroyed.

But as the views of the Prussian government appeared, in some respects, to differ from those of the American, in regard to the true principle of the law of nations, and it appeared to the Prussian ministers that several inconveniences might result from the substitution of the opposite principle to that contained in the former treaty, the American negotiator proposed, as an alternative, to omit entirely the stipulations of the 12th article in the new treaty; the effect of which would be, to leave the question in its then present situation, without engaging either of the contracting parties in any special stipulation respecting it. And as the establishment of a permanent and stable system, with the hope of seeing it maintained and respected in future wars, was an important object to commerce in general, and especially to that of the contracting parties, he was willing to consent to an eventual stipulation similar to that proposed by the Prussian ministers; but which, without implying, on either part, the admission of a contested principle, should postpone the decision of it until after the general peace, either by an ulterior agreement between the contracting parties, or in concert with other powers interested in the question. The United States would always be disposed to adopt the most liberal principles that might be

desired, in favor of the freedom of neutral commerce in time of war, whenever there should be a reasonable expectation of seeing them adopted and recognized in a manner that might secure their practical execution.[1]

The Prussian ministers replied to this counter-proposition, by admitting that the rule by which neutral property, found on board enemy vessels, was free from capture, had been formerly followed by the greater part of European powers, and was established in several treaties of the fourteenth and fifteenth centuries; but they asserted that it had been abandoned by maritime and commercial nations, ever since the inconveniences resulting from it had become manifest. In the two treaties concluded as early as 1646, by the United Provinces, with France and with England, the rules of free ships free goods, and of enemy ships enemy goods, were stipulated; and these principles, once laid down, had been repeated in almost all the treaties since concluded between the different commercial nations of Europe. The convention of 1793, between Russia and England, to which the American negotiator had referred, was exclusively directed against France, and merely formed an exception to the rule; and if, during the commencement of the revolutionary war, the allied powers deemed it necessary to deviate from the recognized principle, this momentary deviation could only be attributed to peculiar circumstances, and it was not the less certain that Prussia had never followed any other than one and the same permanent system, relative to neutral commerce and navigation. This system was founded upon the maxim announced in the 12th article of her former treaty with the United States, which best accorded with the general convenience of commercial nations, by simplifying the proofs of national character, and exempting neutral navigation from vexatious search and interruption.

The Prussian ministers also declared their conviction that, during the then present war, when the commerce and navigation of neutral nations had been subjected to so many arbitrary measures, the principle proposed by the American negotiator would not be more respected than the former rule; several recent examples having demonstrated that even neutral vessels, exclusively

[1] Mr. John Quincy Adams to MM. Finkenstein, Alvensleben, and Haugwitz, October 29th, 1798.

laden with neutral property, had been subjected to capture and confiscation, under the most frivolous pretexts. But it would be useless to prolong the discussion, as both the parties to the negotiation were agreed that, instead of hazarding a new stipulation, eventual and uncertain in its effects, it would be better to leave it in suspense until the epoch of a general peace, and then to seek for the means of securing the freedom of neutral commerce upon a solid basis during future wars. The Prussian ministers, therefore, proposed to suppress provisionally the 12th article of the former treaty, and to substitute in its place the following stipulation: —

"Experience having demonstrated, that the principle adopted in the 12th 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 subsists; and the contradictory dispositions of the principal belligerent powers not allowing the question in controversy to be determined in a satisfactory manner at the present moment, the two high contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or conjointly 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 of neutral navigation and commerce in future wars."[1]

In his reply to this note, the American negotiator declared that he would not hesitate to subscribe to the stipulation proposed by the Prussian ministers, if the following words could be omitted: "And the contradictory dispositions of the principal belligerent powers not allowing the question in controversy to be determined in a satisfactory manner at the present moment." It was possible that the belligerent powers might find in these expressions a kind of sanction to their dispositions, which would not accord with the intentions of the contracting parties; and, besides, the American negotiator would desire to omit entirely an allusion to a point, of which it was the wish of the two governments to defer the consideration, rather than to announce it formally as a contested question.

[1] MM. Finkenstein, Alvensleben, and Haugwitz, to Mr. John Quincy Adams, 29th October, 1798.

In order to justify the opinion of his government on the subject of the principle in question, he deemed it his duty to observe, that this opinion was not founded on the treaties of the fourteenth and fifteenth centuries. He considered the principle of the law of nations as absolutely distinct from the engagements stipulated by particular treaties. These treaties could not establish a fixed principle on this point; because such stipulations bound only the parties by whom they were made, and the persons on whom they operated; and because, too, in the seventeenth and eighteenth centuries, as well as in the fourteenth and fifteenth, different treaties had adopted different rules for each particular case, according to the convenience and agreement of the contracting parties.

Rejecting, therefore, all positive engagements stipulated in treaties, it might well be doubted whether a single example could be found, antecedent to the American war, of a maritime belligerent power which had adopted the principle, that enemy's property is protected by a neutral flag. For, without speaking of England, whose system in this respect is known, France, by the Ordinance of 1774, renewing the provisions of that of 1681, declared enemy's property, on board neutral vessels, subject to seizure and confiscation. It excepted from this rule the ships of Denmark and the United Provinces, conformably to the treaties then existing between these powers and France. This ordinance continued to have its effect in the French tribunals until the epoch of the Ordinance of the 26th July, 1778. By the first article of this last ordinance the freedom of enemy's property, on board of neutral ships, is yielded to neutrals as a favor, but not as a principle of the law of nations, since the power is reserved to withdraw it at the expiration of six months, if a reciprocal stipulation should not be conceded by the enemy. Spain, by the Ordinance of the 1st of July, 1779, and the 13th March, 1780, ordered, in like manner, the seizure and confiscation of enemy's property, found on neutral vessels.

It would only be added that a celebrated public jurist, a Prussian subject, who, in the first part of the 18th century, wrote a highly esteemed work upon the law of nations, Vattel, says expressly, (Book 3, sect. 115,) that "when effects belonging to an enemy are found on board a neutral vessel, they may be seized

by the laws of war." He cited no example where the opposite principle had been practised or insisted on.

When, however, the system of armed neutrality was announced, the United States, although a belligerent power, hastened to adopt its principles; and during the period succeeding this epoch, in which they were engaged in war, they scrupulously conformed to them. But on the first occasion when, as a neutral power, they might have enjoyed the advantages attached to this system, they saw themselves deprived of these advantages, not only by the powers who had never acceded to those principles, but also even by the founders of the system. The intentions of the combined powers, it was true, were exclusively directed against France; but the operation of their measures did not less extend to all neutrals, and especially to the United States. However peculiar might have been the circumstances of the war, the rights of neutrality could not be thereby affected. The United States had regretted the abandonment of principles favorable to the rights of neutrality, but they had perceived their inability to prevent it; and were persuaded that equity could not require of them to be the victims, at the same time, both of the rule and of the exception; to be bound, as a belligerent party, by laws of the advantage of which, as a neutral power, they were wholly deprived.

It was the wish, however, of the United States government to prove, that it had no desire to depart from the principles adopted by the treaty of 1785, except upon occasions when an adherence to those principles would be an act of injustice to the nation whose interests were confided to it. The American negotiator therefore agreed to adopt the proposed new stipulation, excepting the words above cited, and adding the following clause: —

"And if, during this interval, one of the high contracting parties shall be engaged in a war, to which the other is neutral, the belligerent power will respect all the property of enemies laden on board the vessel of the neutral party, provided that the other belligerent power shall acknowledge the same principle with regard to every neutral vessel, and that the decisions of his maritime tribunals shall conform to it."

If this proposition should not be acceptable to the Prussian

cabinet, then the American negotiator proposed to adopt nearly the formula of the treaty of 1766 between Prussia and Great Britain, and to stipulate that "as to the search of merchant vessels, in time of war, the vessels of war and the private armed vessels of the belligerent power will conduct themselves as favorably as the objects of the then existing war will permit; observing, as much as possible, the principles and rules of the law of nations as generally recognized." [1]

The treaty was finally concluded on the 11th July, 1799, with the article on this subject proposed by the Prussian plenipotentiaries, and modified on the suggestion of the American negotiator in the following terms: —

"Art. 12. Experience having proved that the principle adopted in the twelfth article of the treaty of 1785, according to which *free ships make free goods*, has not been sufficiently respected during the 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 favorably as the course of the war then existing may permit; observing the principles and rules of the law of nations generally acknowledged." [2]

On the expiration of the treaty of 1799, the twelfth article of the original treaty of 1785 was again revived, by the present subsisting treaty between the United States and Prussia of 1828, with the addition of the following clause: —

"The parties being still desirous, in conformity with their intention declared in the twelfth article of the said treaty of

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[1] Mr. John Quincy Adams to MM. Finkenstein, Alvensleben and Haugwitz, 24th December, 1799.

[2] American State Papers, fol. edit. vol. ii. pp. 251–269.

1799, to establish between themselves, or in concert with other maritime powers, further provisions to insure just protection and freedom to neutral navigation and commerce, and which may at the same time advance the cause of civilization and humanity, engage again to treat on this subject at some future and convenient period."

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 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, was thereby permanently sacrificed. But the neutral claim to cover enemy's 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 their enemy for the protection of the same neutral flag. It is 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 recognize 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.[1]

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's 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's property in the *ship*, as well as the cargo.[2] Thus during the war of the Revolution, the United States, recognizing the principles of the armed neutrality of 1780, 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 continental 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 colorable 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 shall give such protection. Nor could they have said so, without confounding all the distinctions of right and wrong; and Congress did not mean, in

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[1] 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's ship, see Wheaton's Rep. vol. ii. Appendix, note I. pp. 54–56.

[2] Robinson's Adm. Rep. vol. vi. p. 358, The Citade de Lisboa.

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 particularized.[1]

By the treaty of 1654, between England and Portugal, it was stipulated, (art. 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."

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 subjects to condemnation the goods of either nation found on board the ships of the enemy of the other 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 favorable 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.[2]

The same principle has been frequently incorporated into

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[1] Dallas's Rep. vol. ii. p. 34, The Erstern.

[2] Robinson's Adm. Rep. vol. v. p. 28, The Marianna.

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 recognize 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." [2] [228

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[1] 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 Equador, art. 16, the term of *six* months.

[228] [In the relations of neutrals and belligerents, as regards the rules of maritime law, the European war of 1854–6 produced the most important modifications. Though the treaties concluded at Utrecht, between the principal maritime powers, were repeatedly renewed by conventions, to which, including the treaty of commerce of 1786 with France, England was a party; and, though in the case of the Spanish marriages, in 1846, she invoked the political arrangements there entered into, having for their object to prevent the union of the French and Spanish crowns, neither her government nor her courts of admiralty had, since her ascendency on the ocean was established, admitted that the rules of maritime law there recognized were binding as the common law of nations; but they had ever maintained that their operation was confined to the contracting parties. Whatever fluctuations her orders in council, in other respects, occasioned in her maritime code, yet England constantly asserted, as a general principle, in the absence of conventional engagements, that enemy's goods, on board of neutral vessels, are good prize; while she conceded the immunity of neutral goods in enemy's ships. The latter part of the rule, however, was not unfrequently rendered nugatory by an arbitrary law of contraband, and by the prohibition to neutrals of the enemy's coasting and colonial trade, extending sometimes to a practical interdict of all neutral commerce. See Schoell, Histoire des Traités de Paix, tom. ii. pp. 108, 121. Ib. tom. iv. p. 21. Ib. tom. x. pp. 44, 127. Annual Reg. 1846, p. 286. Hautefeuille, Droits des Nations Neutres, tom. iii. p. 270.

England had, indeed, in all her treaties with France from the year 1655 to 1786, it being recognized in five treaties of peace and three commercial conventions, adopted the rule that *free ships make free goods*; and the same principle is found in most of her treaties with other powers, before the French Revolution. But for the last three quarters of a century, her policy had been different even as respects treaty stipulations, and since the commercial convention with France of 1786, until the "declaration of Paris of 1856," she had entered into no new compact to the prejudice of her belligerent pretensions; and which, as asserted by her, under the plea of

§ 24. Contraband of war.

The general freedom of neutral commerce with the respective belligerent powers is subject to some exceptions. Among these is the trade with the enemy in cer-

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the right of search, enabled her to institute a police over all neutral navigation, applying not only to the merchandise, but extending to an investigation, tested by her own municipal laws, of the nationality of the crew, with a view of subjecting them, by impressment, to a forced duty in her military marine.

The only treaty, containing the provision that the flag covered the property of the cargo, to which England was a party, that was operative during any portion of the wars between 1793 and 1814, was that of 1654 with Portugal, (Dumont, Corps Dipl. tom. i. Part II. p. 82,) and which, as regards that point, was abrogated by the treaty of commerce of 19th February, 1810. The mutual abandonment of the privilege, granted by former treaties to vessels of the respective countries to carry merchandise belonging to the enemies of the other, is also repeated in the subsisting treaty between these powers of 13th July, 1842. Martens, Nouveau Supp. tom. ii. p. 143. Ib. Nouveau Recueil, par Murhard, tom. iii. p. 343.

England succeeded in having her views recognized, with some concessions, after the failure of the second armed neutrality, in the maritime convention of 1801 with Russia, to which Sweden and Denmark acceded, as well as in the treaty of 1794 with the United States. And she ever, previously to the war of 1854–6, resisted the attempts, made by the latter power, to induce her to take into consideration, with a view to their modification, those rules of maritime law, which though recognized by the courts of both countries were at variance with the common sense of Christendom, as shown by the general current of conventional stipulations during the last two centuries. In 1823, it was proposed by us to discuss them in connection with the abolition of privateering and the immunity of private property, but with no more success than had attended the former suggestions on that subject. Nor, in 1826–7, when many questions in controversy between the two countries were settled, was there any better disposition manifested to examine the conflicting maritime principles. Cong. Doc. Senate, 18 Cong. 2 Sess. Confidential, p. 99. Mr. Rush to Mr. Adams, August 12, 1824. Mr. Gallatin to Mr. Clay, Secretary of State, 26th September, 1827, MS.

Notwithstanding the capitulation granted by the Ottoman Porte to Henry IV., in 1604, according immunity to French property in enemy's ships, while it allowed the French flag to protect enemy's property, was the first concession to that extent, in favor of neutrals, the internal ordinances of France were not only inconsistent with the numerous treaties, including those of Utrecht, to which she was a party, but were even more severe than those of England, or of the *Consolato del Mare* on which the latter were based. That code, while it authorized the condemnation of enemy's property, on board of neutral vessels, left free the vessel itself and the rest of the cargo, and moreover allowed freight to the place of destination to the neutral carrier, with an indemnity for the detention.

By a decree of Francis I., in 1543, (the principles of which, after some temporary modifications, were reaffirmed in the marine ordinance of 1681, and which continued in force till 1744,) not only was enemy's property, on board of a neutral vessel, condemned, but the vessel itself and the rest of the cargo were, also, confiscated. At the same time, the goods of a friend, laden on board of an enemy's ship, were declared good and lawful prize. By an ordinance of 1704, all articles of the produce

tain articles called contraband of war. The almost unanimous authority of elementary writers, of prize ordinances, and of

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and manufacture of the enemy's country, on board of a neutral vessel, were subject to capture, though they did not cause the confiscation of the vessel and of the other parts of the cargo, which the carrying of enemy's property still continued to do. The peculiar provisions of this ordinance, like the French decrees and British orders in council of the present century, of which neutral nations were the victims, were attempted to be justified as retaliatory measures; England and Holland, with whom France was at war, having by the convention of 22d August, 1689, which was renewed in the war of the Spanish Succession, not only declared all articles of the produce and manufacture of France liable to seizure in neutral vessels, but subjected the rest of the cargo, as well as the vessel, to be confiscated. Dumont, Corps Dip. tom. vii. Part II. p. 238. In 1744, the ordinance of 1681 was so far modified that the carrying of enemy's goods did not confiscate the neutral vessel or the rest of the cargo, but enemy's goods, as well as articles of the produce and manufacture of the enemy's country, in neutral vessels, were still liable to confiscation.

The treaty of February 6, 1778, between the United States and France, adopting the principle *free ships free goods*, was extended by an ordinance of July 26, 1778, to all neutrals, but it contained a provision for returning to the old law, if the enemies of France did not recognize the same rule, and the neutral powers suffered it to be violated. The ordinance was in fact suspended, with respect to the United Provinces, from 14th January, 1779, to 22d April, 1780. As the ordinance of 1681 governed in those cases, for which that of 1778 had made no provision, neutral goods on board of enemy ships continued to be subject to confiscation. The principle that free ships make free goods has, since the American war, been the generally recognized rule of French maritime law, though it was, not unfrequently, violated by the revolutionary governments. The national assembly, by a decree of 14th February, 1793, continued in force the existing laws as to prizes, until otherwise ordered, though by a decree of May 9, of the same year, in consequence, it was alleged, of the course of the British government, enemy's property on board of neutral vessels was made liable to confiscation. From the operation of this order the United States were, on the 1st of July, declared to be excepted on account of their treaty of 1778, as were likewise, subsequently, Sweden and Denmark, and all others who had treaties with France consecrating the rights of the neutral flag, though, as we have elsewhere seen, (Part III. ch. 2, § 15, Editor's note [165, p. 492,) these conventional obligations soon, again, ceased to be observed, as regards America. The government of the Directory considered the treaty of 1794, between the United States and Great Britain, as a hostile act, on the part of America towards France, and taking advantage of one of the articles of the treaty of 1778, by which it was declared that any favors granted by the one party to a foreign nation should become common to the other, it was declared by the decree of 12 Ventose, year 5, (2 March, 1797,) that the French had acquired by reason of the treaty with England, the right of taking enemy's property in American vessels. The United States, on their part, by an act of Congress of July 7, 1798, declared themselves, in consequence of the violation of the existing treaties by France, and her refusal to make reparations for injuries, or to negotiate respecting them, freed from their stipulations. After some acts of reprisal, authorized by the laws of the United States, the provision respecting "free ships free goods," as contained in the treaty of 1778, was renewed in the treaty of 1800, with a declaration, at the time of the exchange of ratifications, on which the

treaties, agrees to enumerate among these all warlike instruments, or materials by their own nature fit to be used in war.

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claims of American citizens on their own government for spoliations anterior to its date are founded, of a renunciation of the indemnities mutually due or claimed growing out of the preceding treaties.

A law of 29 Nivose, year 6, (18 January, 1798,) declared good prize every neutral vessel laden with enemy's goods, coming from England or her possessions. This was abrogated by the law of 23 Frimaire, year 8, (14 December, 1799,) and a decree was issued on 20th December, 1799, after the accession of Bonaparte, as First Consul, restoring the laws and usages of the monarchy, as they were in 1778, in regard to neutrals. The report of the Minister of Foreign Affairs to the Emperor Napoleon, of March 10, 1812, commences by declaring that the maritime rights of neutrals were solemnly recognized by the treaty of Utrecht, which, it assumes, had become the common law of nations. That the flag covers the property, — that goods under a neutral flag are neutral, and that goods under the enemy's flag are enemy's goods, are among the principles recited.

The disregard by England and France of all international neutral rights, from the rupture consequent on the peace of Amiens to the end of the general European war in 1814, by orders and decrees professedly retaliatory of each other, and which sacrificed all neutral powers to their conflicting belligerent pretensions, have been disavowed by both, as constituting precedents for the future conduct of nations. So far as England is concerned, all claims of the United States for indemnity were merged in the war of 1812, induced by a violation of our neutral rights both as regards persons and property; while, in the case of France, as well as of Spain, Denmark, and Naples, whose illegal edicts were, in general, based on those of France, adequate indemnities were paid to the American government, under conventions to that effect, and distributed to the citizens aggrieved. Turkey, the ally or *protegée* in the late contest of England and France with Russia, did much to vindicate a claim to be received within the pale of international law, by the respect which she has evinced for the immunity of the flag. The other maritime powers of Europe have, especially since the armed neutrality of 1780, to which most of them became parties, conformed their internal ordinances, when not under the controlling influence of the dominant States, to the principles so generally adopted in their commercial conventions. Russia, during the exceptional period of the French Revolution, especially in 1793 and 1801, deviated widely from that system, with which it was the glory of Catharine II. to have had her name connected, and which was sanctioned, and even extended beyond what was established in the respective conventions of armed neutrality, by her late great belligerent adversaries. See Hautefeuille, Droit des Nations Neutres, tom. iii. pp. 254–279. Martens, Recueil de Traités, Supplément, tom. v. p. 530. Ortolan, Diplomatie de la Mer, liv. iii. ch. 5, t. ii. p. 140. Annual Reg. 1800, p. 55. Statutes at Large, vol. i. p. 578. Ibid. vol. viii. pp. 26, 192. Cong. Doc. 19th Cong. 1st Sess. Senate, No. 102, Ex. Doc.

Though following England in the recognition by their executive government, as well as by their tribunals, of a different principle, as the rule of international law, independently of conventional arrangements, the United States, who, as belligerents, in 1781, declared their adhesion to the first armed neutrality, have always endeavored to incorporate the principle of free ships free goods into their treaties. The instructions given, in 1784, to their ministers, for negotiating treaties of commerce, — besides stipulating for the abolition of any confiscation for contraband, the

Beyond these, there is some difficulty in reconciling the conflicting authorities derived from the opinions of public jurists, the

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repeal of the old system of marque and reprisal, and the exemption in war from armed interference of "all fishermen, all cultivators of the earth, and all artisans and manufacturers, unarmed, and inhabiting unfortified towns, villages, or places, who labor for the common subsistence and benefit of mankind, and all merchants and traders, exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to obtain and more general,"— required them to negotiate for the freedom of goods, though belonging to an enemy of one of the contracting parties, if found on board of a vessel of the other contracting party remaining neutral. Diplomatic Correspondence, 1783–9, vol. i. p. 114. Trescot, Diplomatic History of the Administrations of Washington and Adams, p. 21. This rule was adopted in the treaties with France of 1778 and 1800, (neither of which is now in force,) with the United Provinces in 1782, with Sweden in 1783, 1816, and 1827, with Prussia in 1785; and although the rule was suspended in the treaty of 1799 with the last power, it was revived in that of 1828. Statutes at Large, vol. viii. *passim*.

In no case has a treaty been concluded by the United States, sustaining a different principle, except the one of 1794 with England, and which expired before the war of 1812; while in the next year, 1795, a treaty was negotiated with Spain, making free ships free goods, without including the usual accompanying provision, that enemy ships make enemy goods. The embarrassments, however, arising from a different rule, as to the two belligerents, when one of the contracting parties is at war with a third power, and the other neutral, induced, in 1819, a change in the treaty to the effect, that the flag of the neutral should only cover the property of an enemy whose government acknowledged the principle. The rule thus modified has since been applied in our treaties with the other American States, viz., in that of 1824 with Colombia, of 1825 with Central America, of 1828 with Brazil, of 1831 with Mexico, of 1832 with Chili, of 1833 with Peru-Bolivia, and of 1836 with Venezuela. Statutes at Large, vol. viii. pp. 262, 312, 328, 393, 437, 472, 490.

Recurring to their respective systems, as understood previous to the late Russian war, it was very evident, that if two nations situated like England and France, one possessing the largest military marine in the world, and the other a navy only inferior to that of its ally, were, as co-belligerents, each to maintain its own peculiar principles of maritime law, neutral commerce must altogether cease. Neutral property, which England would not condemn for being found in an enemy's vessel, would be good prize to the French cruiser; while the neutral ship, whose flag was a protection against France, would be subject to be searched by English officers for enemy's property, the mere suspicion of having which on board might induce the sending of her into an English port, and thus breaking up a voyage, for which any allowance that might be made, either for freight or damages, would be a very inadequate indemnity. A compromise of principles was necessary to the cooperation of the navies of the allies. And this, instead of further aggravating the difficulties to which war always subjects neutrals, was effected by an abandonment of the obnoxious pretensions of England, as a consideration for obtaining from France additional concessions in favor of neutral commerce.

The Ministers of England and France communicated to the Secretary of State of the United States, on the 21st of April, 1854, the declaration made on the 28th of

fluctuating usage among nations, and the texts of various conventions designed to give to that usage the fixed form of positive

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March in the same terms by their respective governments, on occasion of the commencement of the war against Russia. That of England was as follows: —

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

"It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches; and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts.

"But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

"It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemies' ships; and Her Majesty further declares, that, being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers."

Mr. Marcy, in acknowledging, on the 28th of April, the note of Mr. Crampton, with its enclosure, says: —

"The undersigned has submitted those communications to the President, and received his direction to express to Her Majesty's government his satisfaction that the principle that free ships make free goods, which the United States have so long and so strenuously contended for as a neutral right, and in which some of the leading powers of Europe have concurred, is to have a qualified sanction by the practical observance of it in the present war by both Great Britain and France, — two of the most powerful nations of Europe.

"Notwithstanding the sincere gratification which Her Majesty's declaration has given to the President, it would have been enhanced if the rule alluded to had been announced as one which would be observed not only in the present, but in every future war in which Great Britain shall be a party. The unconditional sanction of this rule by the British and French governments, together with the practical observance of it in the present war, would cause it to be henceforth recognized throughout the civilized world as a general principle of international law. This government, from its very commencement, has labored for its recognition as a neutral right. It has incorporated it in many of its treaties with foreign powers. France, Russia, Prussia, and other nations, have, in various ways, fully concurred with the United States in regarding it as a sound and salutary principle, in all respects proper to be incorporated in the law of nations.

"The same consideration which has induced Her Britannic Majesty, in concurrence with the Emperor of the French, to present it as a concession in the present war, — the desire 'to preserve the commerce of neutrals from all unnecessary obstruction,' — will, it is presumed, have equal weight with the belligerents in any future war, and satisfy them that the claims of the principal maritime powers, while neu-

law. Grotius, in considering this subject, makes a distinction between those things which are useful only for the purposes of

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tral, to have it recognized as a rule of international law, are well founded, and should be no longer contested.

"To settle the principle that free ships make free goods, except articles contraband of war, and to prevent it from being called again in question from any quarter, or under any circumstances, the United States are desirous to unite with other powers in a declaration that it shall be observed by each, hereafter, as a rule of international law."

An answer, in the same terms, was addressed to the Count de Sartiges.

On the 9th of May, 1854, Mr. Crampton transmitted to Mr. Marcy the two Orders in Council of the 15th of April, before referred to, ch. 1, § 11, Editor's note [173, p. 533, and § 13, Editor's note [175, p. 553. One of them enlarged the time for the departure of Russian vessels; the other, after reciting and confirming the royal declaration of the 28th of March, still further extended the privileges accorded to neutrals, by virtually allowing, except in British ships and in the case of blockaded ports, the same intercourse with the enemy as in peace.

The articles requiring a special permission to export were confined to arms, munitions, and marine machinery, which may be available in war, and the total prohibition to export them, contained in the Order in Council of the 18th of February, 1854, in anticipation of hostilities, was subsequently modified, as is hereafter stated. *Vide infra*, § 24, Editor's note.

Whatever the doubts that might have existed as to the permanent character of the modifications in the principles of international law, adopted, during the war, by England, would seem to have been removed even in advance of the Congress of Paris, by the explanations given in Parliament, by a minister of the crown, (Sir W. Molesworth,) speaking avowedly in behalf of the government, in a debate, on the 4th of July, 1854. Mr. J. Phillimore, (whose views were, also, sustained by his relative, Mr. R. Phillmore, the commentator on International Law, then likewise a member of the House of Commons,) had moved a resolution that, however, from the peculiar circumstances of this war, a relaxation of the principle that the goods of an enemy in the ship of a friend are lawful prize, may be justifiable, to renounce or surrender this right, would be inconsistent with the security and honor of the country. Sir W. Molesworth said, the resolution raised two distinct questions — one a practical question of political expediency; the other a theoretical question of international law, as to the rights of the subjects of neutral States, with reference to belligerents. The expediency of relaxing the principle that the goods of an enemy in the ship of a friend might be confiscated, had been admitted by Mr. Phillimore from the peculiar circumstances of this war; but he (Sir William) denied that the position of that honorable member, — that the right to confiscate an enemy's goods on board a friend's ship was on principle maintainable, — was indisputably true; and he disputed the validity of the authorities he had cited, contending that all the best modern publicists dissented from the old authorities, and supported the rule 'free ships free goods.' Sir William developed and discussed at considerable length the arguments urged by the friends of the extension of neutral rights, who maintained that a belligerent had no more right to enter a neutral ship to search for enemy's goods than to enter a neutral port for that purpose, and that so long as an independent sovereign was at peace with a belligerent power, the latter had no right to ask any questions as to articles on board the ships of subjects of the neutral sovereign.

war, those which are not so, and those which are susceptible of indiscriminate use in war and peace. The *first*, he agrees with

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So far from the principle contended for by Mr. Phillimore being indisputably true, he insisted that it was demonstrably false, and he appealed to bilateral treaties concluded between England and the maritime powers of Western Europe; from that of 1654 with Portugal, which recognized as a rule of amicable intercourse that free ships make free goods, which rule was all but invariable during the last two centuries, although it had not always been observed in practice. Even if reasonable doubts might be entertained upon the question, the House ought not to pledge itself to an assertion of the right contended for, and he insisted that there was no logical connection between the rules 'free ships free goods' and 'enemy's ships enemy's goods,' which were placed in juxtaposition as a mere verbal antithesis. Sir William then discussed the practical question, arguing that it was wise and expedient to waive, in conjunction with France, our belligerent rights; and stated that a rule of maritime warfare had been adopted by a mutual compromise between the two countries. Assuming that the position of Mr. Phillimore was true, the House, he contended, ought not to agree to this abstract resolution, unless some practical benefit would result from its adoption. None had been shown, and the waiving of a right, if it existed, was no renunciation or surrender of it. He moved the previous question. Hansard's Parliamentary Debates, vol. cxxxiv. 3d series, p. 1098.

A reference has been, heretofore, made to the course of the Russian government, as respects Turkish vessels in Russian ports, on occasion of the declaration of war, by Turkey, in October, 1853. At the same time, it was declared that, as the Ottoman Porte had not excepted their merchant marine from the rigors authorized by war, Russian cruisers were authorized to capture Turkish vessels, which, as well as their cargoes, even if they belonged to neutral nations, were declared to be good prizes. Neutral vessels were to enjoy the same freedom of navigation, during the war, as before. Avis du Ministre des Finances, le 25 Octobre, 1853. Annuaire, &c., 1853–4, Appendix, p. 926.

Russia, when the war extended to England and France, promulgated decrees declaring that enemy's goods in neutral vessels would be regarded as inviolable, and might be imported, and that subjects of enemy powers, on board of neutral vessels, would not be molested. *Vide supra*, Part IV. ch. 1, § 11, Editor's note [173, p. 534.

"It is a clearly established rule of international law, that, during a conjoint war, no belligerent right can be renounced or suspended by one power, without the sanction of its allies. The assent of the Sultan to the concessions made by England and France, though it does not seem to have been publicly announced, was implied in accordance with the principle here laid down." Hosack on Rights of Neutrals, pp. 43, 44, note.

Mr. Marcy, in writing, May 9, 1854, to Mr. Seymour, Minister of the United States at St. Petersburg, after referring to the communications of the French and English ministers, says: —

"You will observe that there is a suggestion in the enclosed for a convention among the principal maritime nations to unite in the declaration that free ships should make free goods, except articles contraband of war. This doctrine has had heretofore the sanction of Russia, and no reluctance is apprehended on her part to becoming a party to such an arrangement. Great Britain is the only considerable power which has heretofore made a sturdy opposition to it. Having yielded it for

all other text-writers in prohibiting neutrals from carrying to the enemy, as well as in permitting the *second* to be so carried; the

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the present in the existing war, she thereby recognizes the justice and fairness of the principle, and would hardly be consistent if she should withhold her consent to an agreement to have it hereafter regarded as a rule of international law. I have thrown out the suggestion to Great Britain and France to adopt this as a rule to be observed in all future wars. The President may instruct me to make the direct proposition to these and other powers. Should Russia, Great Britain, and France concur with the United States in declaring this to be the doctrine of the law of nations, I do not doubt that the other nations of the world would at once give their consent, and conform their practice to it. If a fair opportunity should occur, the President requests you to ascertain the views of His Majesty, the Emperor of Russia, on the subject.

"The decisions of admiralty courts, in this and other countries, have frequently affirmed the doctrine that a belligerent may seize and confiscate enemy's property found on board of a neutral vessel; the general consent of nations, therefore, is necessary to change it. This seems to be a most favorable time for such a salutary change. From the earliest period of this government, it has made strenuous efforts to have the rule that free ships make free goods, except contraband articles, adopted as a principle of international law; but Great Britain insisted on a different rule. These efforts, consequently, proved unavailing; and now it cannot be recognized, and a strict observance of it secured, without a conventional regulation among the maritime powers. This government is desirous to have all nations agree in a declaration that this rule shall hereafter be observed by them respectively, when they shall happen to be involved in any war, and that, as neutrals, they will insist upon it as a neutral right. In this the United States are quite confident that they will have the cordial consent and coöperation of Russia." Cong. Doc. 33 Cong. 1 Sess. H. of Rep. Ex. Doc. No. 103.

The two principles of "free ships free goods," and freedom of neutral property in an enemy's vessel from capture and confiscation, except it be contraband of war, were established, with a view to their adoption, as permanent and immutable, in a treaty concluded at Washington, on 22d of July, 1854, by Mr. Marcy, Secretary of State of the United States, and Mr. de Stoeckl, Chargé d'Affaires of Russia.

By the first article "the two high contracting parties recognize as permanent and immutable the following principles, to wit: —

"1. That free ships make free goods — that is to say, that the effects or goods belonging to subjects or citizens of a power or State at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

"2. That the property of neutrals on board an enemy's vessel is not subject to confiscation, unless the same be contraband of war. They engage to apply these principles to the commerce and navigation of all such powers and States as shall consent to adopt them, on their part, as permanent and immutable."

By the 2d article the two high contracting parties reserve themselves to come to an ulterior understanding, as circumstances may require, with regard to the application and extension to be given, if there be any cause for it, to the principles laid down in the first article. But they declare from this time that they will take the stipulations contained in said article first as a rule, whenever it shall become a question, to judge of the rights of neutrality.

third class, such as money, provisions, ships, and naval stores, he sometimes prohibits, and at others permits, according to the

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By the 3d article "it is agreed that all nations which shall or may consent to accede to the rules of the first article of this convention, by a formal declaration stipulating to observe them, shall enjoy the rights resulting from such accession as they shall be enjoyed and observed by the two powers signing this convention. They shall mutually communicate to each other the results of the steps which may be taken on the subject." Statutes at Large, vol. x. p. 1105.

The conclusion of this treaty was announced, in President Pierce's Message, at the commencement of the session of 1854–5. It further states that a proposition for treaties, on the same basis, has been submitted to the governments of Europe and America, and that no objection has been taken to the proposed stipulations; but, on the contrary, they are acknowledged to be essential to the security of neutral commerce; and the only apparent obstacle to their general adoption is in the possibility that it may be incumbered by inadmissible conditions. President's Message, &c., December, 1854, p. 5. A treaty in the same terms was signed with the Two Sicilies, January 13, 1855. Ib. vol. xi. p. 607. Also with Peru, 22d July, 1856. By this last convention, the 22d article of the treaty of July 26, 1851, which made the goods of neutrals in enemy's ships prize, in case enemy's goods in neutral vessels were free, was annulled. Ib. vol. xi. p. 695.

It has already been stated in connection with the annotations on the article relating to privateering, (chap. 2, § 10, of this Part, p. 637,) that the rules, "that the neutral flag covers the cargo of the enemy, except when it is contraband," and "that neutral goods, except contraband of war, are not seizable under the enemy's flag," were incorporated into the declaration of maritime principles, of the Congress of Paris, of April, 1856, which has since been acceded to by nearly all the powers of Europe and America. The assent of the United States, as well as of Spain and Mexico, was, moreover, only withheld on account of their unwillingness to agree to the privateer clause, at least, in its actual form.

The opposition made in Parliament to the principle of allowing enemy's goods to pass freely in neutral vessels, when it was only a temporary measure, did not cease with the adoption of the "declaration of Paris." In the debate of May 22, 1856, the Earl of Derby admitted that there were very weighty reasons in the late war, when France and England were allies, for waiving the exercise of the right of taking enemy's goods under neutral flags, but that to give it up permanently was an abandonment of British naval superiority. Under the rule, as previously contended for by England, "in case of war with France, you could prevent her sending a single bale of cotton to sea. Now, she will make her merchantmen vessels of war, and have seamen for them, by sending away everything under neutral flags." Lord Clarendon, who had been the plenipotentiary at Paris, defended his course mainly on the ground that the "declaration" must be adopted as an entirety or not at all, and that if the United States accepted it, they must acquiesce in the abandonment of privateering. Hansard's Parliamentary Debates, 3d series, vol. cxlii. p. 482. Lawrence on Visitation and Search, p. 10. The eminent civilian, who had supported in the House of Commons, the motion of his relative against the abandonment of the peculiar English doctrines of international law, had, on the publication of the third volume of his Commentaries, an opportunity to express his dissent to the action of the Paris Congress; while, as we have seen that M. Hautefeuille does, he also questions whether the exemption of individuals from the inconveniences of international contests, confining them to the military enterprises of State against State, is not calcu-

existing circumstances of the war.[1] Vattel makes somewhat of a similar distinction, though he includes timber and naval stores

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lated to prolong hostilities and protract the horrors of war. Phillimore, International Law, vol. iii. pp. x., 294.

The negotiations set on foot by President Pierce for an extension of the principles of the "declaration," so as to include the entire immunity of private property at sea, having been arrested on the accession of President Buchanan, Mr. Cass, addressed, on the 27th of June, 1859, a circular instruction to the Ministers of the United States in Europe, in which, among other points, he directs them to call the attention of the powers, to which they are accredited, to the provisions of the "Declaration of Paris," as affecting enemy's property on board of neutral vessels. "This mutual agreement," he says, "protects the property of each of those States, when engaged in hostilities, from capture on board a neutral vessel by an enemy a party to the same act. It is not necessary that a neutral should have announced its adherence to this declaration in order to entitle its vessels to the immunity promised; because the privilege of being protected is guaranteed to belligerents, co-parties to that memorable act, and protects their property from capture whenever it is found on board of a vessel belonging to a nation not engaged in hostilities. While conceding the authority of belligerent nations to relax the rigid principles of war, so far as regards their own rights, and to exempt other powers from penalties which might be enforced, but for such concession, whether this is done for a consideration or without it, those neutral nations which are prevented from being parties to such an arrangement have a right to insist that it shall not necessarily work to their injury. This dictate of justice would be palpably violated in the case of the United States, should

[1] "Sed et quæstio incidere solet quid liceat in eos qui hostes non sunt, aut dici nolunt, sed hostibus res aliquas subministrant. Nam et olim et nuper de eâ re acriter certatum scimus, cùm alii belli rigorem, alii commerciorum libertatem defenderent.

"Primum distinguendum inter res ipsas. Sunt enim quæ in bello tantùm usum habent, ut arma: sunt quæ in bello nullum habent usum, ut quæ voluptati inserviunt: sunt quæ in bello et extra bellum usum habent, ut pecuniæ, commeatus, naves, et quæ navibus adsunt. In primo genere verum est dictum Amalasuinthæ ad Justinianum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus querelam non habet. . . . . In tertio illo genere usûs ancipitis distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei exsecutionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax exspectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit: et ad damni dati modum res quoque ejus capi, et dominium earum debiti consequendi causâ quæri poterit. Si damnum nondum dederit sed dare voluerit, jus erit rerum retentione eum cogere ut de futuro caveat obsidibus, pignoribus, aut alio modo. Quod si præterea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantùm civiliter tenebitur de damno, sed et criminaliter, ut is qui judici imminenti reum manifestum eximit: atque eo nomine licebit in eum statuere quod delicto convenit, secundum ea quæ de pœnis diximus, quare intra eum modum etiam spoliari poterit." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 1, § v. 1, 2, 3.

among those articles which are particularly useful for the purposes of war, and are always liable to capture as contraband;

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this protecting clause of the Paris conference not enable their vessels, when neutral, to shield from capture the property of belligerents carried as freight." President's Message, &c., December, 1859.

That the United States are not a party to the "Declaration of Paris" may not be without practical embarrassment to us, even in reference to those matters in which there is no diversity of views between us and foreign governments. An English publicist says: "They (the United States) retain the practice of privateering; but should they avail themselves of it under the old law, they would clearly not be entitled to invoke any of the provisions of the new law in their own favor, and the same power might of course be used by their adversary. So, too, as to the principle which affords to enemy's property at sea the protection of the neutral flag; the United States have acquired no right to invoke it against this country. It would rest in the option of England either to adhere to the old rules of maritime warfare in a war with the United States, or to maintain the principles of the Declaration of Paris." Edinburgh Review, No. ccxxxiii. Art. 10, p. 133, Am. ed.

Notwithstanding the continuous diplomatic efforts, since our very origin as a nation, to change the rule, our Supreme Court deciding what the law of nations is, as declared at the time that the United States were a component part of the British empire, and not what publicists might deem most accordant with just theory, or what special conventions have established, have uniformly maintained the principle laid down in § 19 of this chapter, that "enemy's goods in neutral vessels are subject to capture and condemnation as prize of war." Nor is it perceived that there is any difference as to the power of the executive over this rule and over the article abolishing privateering, or any other article for which the assent of the Senate is confessedly required. To change it, and afford immunity to enemy's goods in neutral ships, requires the action of the treaty-making or of the legislative power, and until that is effected, except where existing treaties intervene, enemy's goods on board of neutral vessels remain prize of war. This is the view, in reference to the pending contest in America, taken by M. Hautefeuille, who says, that "as the United States have not adhered to any portion of the Declaration of 1856, the President has no right to change the law of nations without the consent of the Senate, English property on board of Confederate ships is safe, while" (supposing as he does the treaty of 1800 to be still operative, he adds,) "French property is confiscable." Quelques questions de droit international maritime, à propos de la guerre de l'Amerique, pp. 61–65.

This point appears not to have escaped the attention of foreign powers, and with a view to remove difficulties and to prevent conflicts, which might arise from differences of opinion between belligerents and neutrals, while the United States remained outside of the treaty of Paris, Lord J. Russell, on the 18th of May, 1861, instructed Lord Lyons to waive, as mentioned in a note to chap. 2, § 10, of this Part, the privateer clause, and in concert with the French Minister at Washington, M. Mercier, to come to an agreement on the other articles binding on France, Great Britain, and the United States. Papers relating to Foreign Affairs, &c., accompanying President's Message, December, 1861, p. 133.

It may become matter of regret that a formalization of these doctrines into a convention, was not then acceded to. The proposition would seem to be in full accordance with the treaties, which President Pierce's administration inaugurated

and considers provisions as such only under certain circumstances, "when there are hopes of reducing the enemy by fam-

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before the declaration of Paris, by a convention with Russia, intended to be extended to all nations, as well as with the circular instructions of Mr. Cass, in the administration of President Buchanan. That the British government, who had avowedly relied on the indivisibility of the articles of the declaration to coerce our abandonment of privateering, should withdraw the obnoxious pretension, was a triumph of preceding American diplomacy, of which the present administration might happily have availed itself. It is not to be questioned that if the philanthropic views embodied in Mr. Marcy's proposition were not attainable, an opportunity was offered of obtaining a recognition of principles, for which we had ever contended, leaving unimpaired our resources in the event of a maritime contest. To such an arrangement Russia was already bound to us by treaty, and the declarations of the Prussian and Austrian ministers, to which we are about to allude, show that their assent was given in advance.

For the reason already explained the executive alone is not, under the Constitution of the United States, competent to effect modifications of the public law, and should the case come before the judiciary, the courts might not deem themselves bound by the assurance contained in Mr. Seward's instructions, of the 7th of September, 1861, to Mr. Adams, and reiterated in the note of December 26th, 1861, to Lord Lyons, that the neutral flag should cover enemy's goods not contraband of war. That the decision of the Secretary of State, though communicated to the minister of the power whose subjects are to be directly affected thereby, is not controlling, in matter of prize, on a judge of admiralty, appears from a case arising under the law of blockade, and which will be found particularly noticed in its appropriate place. See § 28, Editor's note.

It would seem that the same suggestions were made by England and France to the so-called Confederate States as to the United States. Their adhesion is in the form of a resolution of their Congress under date of the 13th of August, 1861. It adopts the 2d, 3d, and 4th articles, and in place of the first, it declares that "we maintain the right of privateering, as it has been long established by the practice and recognized by the law of nations." This arrangement was made through the British and French consuls at Charleston, under direction of their respective ministers at Washington. Parliamentary Papers. North America, No. 3, p. 25.

At the commencement of the American difficulties a dispatch was addressed by Baron Schleinitz to the Prussian Minister at Washington, in which the warmest sympathy with the welfare of the Union, and the deepest regret for the unfortunate discord is expressed. Baron Gerolt is instructed to discuss the important question of the treatment of neutral ships with the American government in a friendly and open manner.

Regret is expressed that President Pierce had not succeeded in giving effect to the proposition that the inviolability of private property at sea should be included among the provisions of the law of nations. "It would certainly be most desirable to us that the government of the United States should embrace this occasion to announce their adhesion to the Paris declaration. Should this not be attained, then, for the present, we would urge that an exposition might be made, to be obligatory during the now commencing intestine war, in regard to the application generally of the second and third principles of the Paris declaration to neutral shipping. The provision of the second principle, that the neutral flag covers the enemy's cargo, (with the exception

ine."[1] 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 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

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of contraband of war,) is already assured to Prussian shipping by our treaty with the United States of May 1, 1828, again adopting article twelve of the treaty of September 10, 1785. We lay much stress upon this toward bringing round a determination to make application of this principle at the present time to neutral shipping generally and universally. We doubt this the less because, according to a despatch from the then President, addressed by the Secretary of State, Mr. Cass, under date of June 27, 1859, to the Minister of the United States at Paris, and also communicated to us, without further referring to the Paris declaration, it is expressly mentioned that the principle that the neutral flag covers the enemy's cargo, (contraband of war excepted,) would be reduced to application in respect to the shipping of the United States, always, and in its full extent. The import of the third principle, by which neutral property under an enemy's flag (except contraband of war,) is inviolable, becomes, in respect of its immediate recognition by the United States, a stringent necessity to the neutral powers. Papers relating to Foreign Affairs, &c., 1861, p. 26. Baron Schleinitz to Baron Gerolt, June 13, 1861.

In answer to a question put to him in the Austrian *Reichsrath*, as to the measures which the government had taken to protect their merchant marine, in the conflict which had broken out between the Northern and Southern States of America, Count Rechberg said: "The government attaches great importance to maintaining, favoring, and protecting the relations of commerce and navigation with North America. England, France, and the Netherlands have increased their naval forces in the neighboring seas; but the other maritime States have not sent ships of war there. All, England and France among the first, have endeavored especially to induce the United States to accept the principles of maritime law formalized in the declaration of 1856, which Austria had likewise signed, and which had been adopted by all the governments. The Austrian government has also renounced the intention of sending ships of war to America, but it has instructed the Minister Resident, at Washington, to cause to be acknowledged and applied to the Austrian marine the principles of the declaration in question. The last three of these principles, which the United States had already previously acknowledged, are sufficient to give adequate security to the navigation and commerce of Austria. There is only the contraband trade, and an illegal participation of Austrian ships in the contest, — acts provided for and punished by the Austrian laws themselves, — which can expose our vessels to danger. For such risks they cannot invoke the protection of their government; and as to other cases, all other necessary instructions have been given to the Imperial consuls and agents in America." Le Nord, 17 Juilet, 1861.] — *L.*

[1] Vattel, Droit des Gens, liv. iii. ch. 7, § 112.

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."[1]

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[1] "Grotius, in eo argumento occupatus, distinguit inter res, quæ in bello usum habent, et quæ nullum habent, et quæ promiscui usûs sunt, tam in bello, quàm extra bellum. Primum genus non hostes hostibus nostris advehere prohibet, secundum permittit, tertium nunc prohibet, nunc permittit. Si sequamur, quæ *capite præcedenti* disputata sunt, de primo et secundo genere non est, quod magnopere laboremus. In tertio genere distinguit Grotius, et permittit res promiscui usûs intercipere, sed in casu necessitatis, si aliter meaque tueri non possim, et quidem sub onere restitutionis. Verùm, ut alia prætercam, quis arbiter erit ejus necessitatis, nam facillimum est eam prætexere? an ipse ego, qui intercepi? Sic, puto, ei sedet, sed in causâ meâ me sedere judicem omnes leges omniaque jura prohibent, nisi quod usus, Tyrannorum omnium princeps, admittat, ubi fœdera inter Principes explicanda sunt. Nec etiam potui animadvertere, mores Gentium hanc Grotii distinctionem probasse; magis probarunt, quod deinde ait, neque obsessis licere res promiscui usûs advehere, sic enim alteri prodessem in necem alterius, ut latius intelliges ex *Capite seq.* Quòd autem ipse ille Grotius tandem addit, distinguendum esse inter belli justitiam et injustitiam, ad Fœderatos, certo casu, pertinere posse, sed ad eos, qui, neutrarum partium sunt, nunquam pertinere *Capite præced.* mihi visus sum probasse.

. . . . "Ex his fere intelligo, *contrabanda* dici, quæ uti sunt, bello apta esse possunt, nec quicquam interesse, an et extra bellum usum præbeant. Paucissima sunt belli instrumenta, quæ non et extra bellum præbeant usum sui. Enses gestamus ornamenti causâ, gladiis animadvertimus in facinorosos, et ipso pulvere bellico utimur pro oblectamento, et ad testandam publicè lætitiam, nec tamen dubitamus, quin ea veniant nomine *τῶν contrabande Waren*. De his, quæ promiscui usûs sunt, nullus disputandi esset finis, et nullus quoque, si de necessitate sequamur Grotii sententiam, et varias, quas adjicit, distinctiones. Excute pacta Gentium, quæ diximus, excute et alia, quæ alibi exstant, et reperies, omnia illa appellari *contrabanda*, quæ, uti hostibus suggeruntur, bellis gerendis inserviunt, sive instrumenta bellica sint, sive materia per se bello apta: nam quod Ordines Generales 6 Maj. 1667, contra Succos decreverunt, etiam materiam, bello non aptam, sed quæ facilè bello aptari possit, pro *contrabanda* esse habendam, singularem

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.[1]

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 23d 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

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rationem habebat, ex jure nempe retorsionis, ut ipsi Ordines in eo decreto significant.

"Atque inde judicabis, an ipsa materia rerum prohibitarum quoque sit prohibita? Et in eam sententiam, si quid tamen definiat, proclivior esse videtur Zoucheus, *de Jure Feciali*, Part II. sect. vii. Q. 8. Ego non essem, quia ratio et exempla me moveant in contrarium. Si omnem materiam prohibeas, ex quâ quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex quâ non saltem aliquid, bello aptum, facilè fabricemus. Hâc interdictâ, tantum non omni commercio interdicimus, quod valde esset inutile. Et § 4, Pacti 1 Dec., 1674, inter Carolum II., Angliæ Reg. et Ordines Generales; et § 4, Pacti 26 Nov., 1675, inter Regem Suecorum et Ordines Generales; et § 16, Pacti 12 Oct., 1679, inter eosdem, amicos hostibus quibis arma non licet, permittunt advehere ferrum, æs, metallum, materiam navium, omnia denique, quæ ad usum belli parata non sunt. Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis eâ quàm maxime indigeat, et absque eâ commode bellum gerere haud possit. Quum Ordines Generales, in § 2, edicti contra Lysitanos, 31 Dec., 1657, iis, quæ communi Populorum usu *contrabanda* censentur, Lysitanos juvari vetuissent, specialiter addunt in § 3, ejusdem edicti, quia nihil nisi mari a Lysitanis metuebant, ne quis etiam navium materiam iis advehere vellet, palam sic navium materia a *contrabandis* distincta sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum instrumentis belli in § 2, edicti contra Anglos, 5 Dec., 1652, et in edicto Ordinum Generalium contra Francos, 9 Mart., 1689. Sed sunt hæ exceptiones, quæ regulam confirmant." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

[1] Valin, Comm. sur l'Ordonn. liv. iii. tit. 9. Des Prises, art. 11. Pothier, de Propriété, No. 104.

of St. Germain, concluded with 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."[1]

In the famous case of the Swedish convoy, determined in the English Court of Admiralty, in 1799, Sir W. Scott (Lord Stowell), states, "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 contrabande aujourd'hui et depuis le commencement de ce siècle, ce qui n'etoit 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 et 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

[1] Valin, Comm. sur l'Ordonn. liv. iii. tit. 9. Des Prises, art. 11.

footing, on which the notions then more generally prevailing in Europe had placed it." [1]

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 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.[2]

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

[1] Robinson's Adm. Rep. vol. i. p. 372, The Maria.

[2] Schlegel, Examen de la Sentence prononcée par le tribunal d'Amirauté Anglaise, le 11 Juin 1799, dans l'affaire du convoi Suédois, p. 125.

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 favor 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 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."[1]

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 favor of the commerce, in articles the peculiar growth and production 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

[1] Life and Correspondence of Sir L. Jenkins, vol. ii. p. 751.

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 3d 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, firelocks, flints, matches, powder, saltpetre, sulphur, helmets, pikes, swords, sword-belts, saddles and bridles; excepting, however, the 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 declared, 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 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."

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 preemption by the belligerent party, upon condition of paying an indemnity of ten per centum 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 preëmption; 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.[1]

Provisions and naval stores, when contraband.

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

[1] Martens, Recueil, tom. vii. pp. 150–281.

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 favorably 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 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."[1]

Articles of promiscuous use becoming contraband, when destined to a

The distinction, under which articles of promiscuous use are considered as contraband, when destined to a port of naval equipment, appears to have been subsequently abandoned by Sir W. Scott. In the

[1] Robinson's Adm. Rep. vol. i. p. 192.

port of naval equipment.

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 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."[1]

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, upon 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 notoriously 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 apply 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 laboring 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

[1] Robinson's Adm. Rep. vol. v. p. 305.

an immediate operation of the very persons who had declared war, and were then carrying it on against Great Britain.[1]

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 anything 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.[2]

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 of 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*

[1] Mr. Hammond's Letter to Mr. Jefferson, 12th September, 1793. Waite's State Papers, vol. i. p. 398.

[2] Mr. Jefferson's Letter to Mr. T. Pinkney, 7th September, 1793. Waite's State Papers, vol. i. p. 393.

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 provision order of April, 1795.

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 government.

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:—

1. 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.

2. That 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 rested 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 this supposed law of nations 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."[1]

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 respectable writers on international law, by which might be discovered that which 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

[1] Droit des Gens, liv. iii. ch. 7, § 112.

carry the doctrine of special contraband further 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.

The authority of Grotius was also adduced, as countenancing this position.

Grotius 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 intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat." This "causa alia" is afterwards explained by an example, "ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur."

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. sec. 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: as, 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. sec. 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 Rutherforth, in commenting on Grotius, (lib. iii. cap. 1, sec. 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." [1]

Bynkershoek also confines the right of seizing goods, not generally contraband of war, (and provisions among the rest,) to the above-mentioned cases.[2]

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 rested 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.

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[1] Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

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 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?

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.

As to the second ground upon which the Order in Council was justified, *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.

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 had 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 indemnification 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.[1] [229

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[1] 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.

[229] The "declarations" of the French and English governments, at the commencement of the Russian war, excepted contraband of war from the articles, whether they be enemy's property on board of neutral vessels, or neutral property on board of enemy's vessels, to which immunity is accorded. The documents of this period contain no new definition of contraband, unless we are to regard the British Order in Council, of the 18th of February, 1854, issued in anticipation of the declaration of war, as indicative of the views of England on that subject. By it "all arms, ammunition, and gunpowder, military and naval stores, and the following articles, being articles which are judged capable of being converted into or made useful in increasing the quantity of military or naval stores; that is to say, marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, fire bars, and every article or any other component part of an engine or boiler, or any article whatsoever, which is, or can, or may, become applicable for the manufacture of marine machinery, are prohibited either to be exported from the United Kingdom, or carried coastwise." London Gazette.

This order is not in terms a belligerent measure, but purports to be founded on the Customs' Consolidation Act of 1853. The application of it was restricted soon after it was issued, by an Order in Council of April 11, 1854, so as not to apply to countries out of Europe, except the possessions of Russia, and, by a further modification, on the 24th of April, the prohibited articles were reduced to three classes only: namely, 1st. Gunpowder, saltpetre, and brimstone; 2d. Arms and ammunition; and, 3d. Marine engines and boilers, and the component parts thereof. These articles were forbidden to be exported to any port of Europe, north of Dunkirk or of the Mediterranean Sea, east of Malta, without a special permit of the Privy Council. To all other places they might be exported, with the restriction of a bond. It is understood, however, that the permit given in such case was merely an authority to the officers of the customs to allow the export of the articles, but not a license for their transport at sea, as affecting the law of contraband. We were, therefore, still referred, in determining what might safely be done in this matter by neutrals, to the former usages of the tribunals of the two countries, and to the past decrees and orders of their governments. Destination is essential in a question of contraband; and, consequently, under these regulations, the trade in all articles, whether included in that denomination or not, was free to all vessels under a neutral

Of the same nature with the carrying of contraband goods is the transportation of military persons or despatches in the service of the enemy.

§ 25. Transportation of military persons and

or friendly flag, as long as it was not obnoxious to the suspicion of conveying contraband or prohibited articles to an enemy's port, or indirectly for the enemy's use.

By the French Ordinance of 1681, which is still the rule, it being recognized in the Ordinance of 1778, which abolished the intervening regulations, only arms and ammunition are regarded as contraband; though, during the wars of the French Revolution, all distinctions on this point, as in other matters relating to neutrals, were often practically disregarded. The English rule has varied, as well for those cases in which there were no treaty stipulations, as in their conventional arrangements; their Orders in Council, and admiralty decisions, frequently including naval stores in the permanent list of contraband articles, and, under circumstances, extending the list even to provisions, in some cases absolutely, and in others so far as to authorize their appropriation to the use of the belligerent government, on its paying the value thereof. The articles defining "contraband of war" in the various treaties, twenty-six in number, concluded by Great Britain, beginning with the one with Spain and the Netherlands of the 18th of August, 1604, and terminating with the treaty with Brazil of the 17th of August, 1827, will be found collected by Pratt. They present various phases of the rule. Law of Contraband of War, pp. 208–249, Appendix A.

One of the latest English text-writers, before the Russian war, defined contraband to be: "1. Articles which have been constructed, fabricated, or compounded into actual instruments of war; 2. Articles which, from their nature, qualities, and quantities, are applicable and useful for the purposes of war; 3. Articles which, although not subservient generally to the purposes of war, such as grain, flour, provisions, naval stores, become so by their special and direct destination for such purposes, namely, by their destination for the supply of armies, garrisons or fleets, naval arsenals and ports of military equipment." Reddie, Researches Historical and Critical in Maritime International Law, vol. ii. p. 456.

It may be here noticed, that in the case of an article, however noxious with reference to contraband, as, for instance, gunpowder itself, a moderate quantity would be considered as part of the ship's stores, and intended for its use; and this is not unfrequently provided for in treaties. Pratt, Law of Contraband of War, p. xxviii. The same author says, "that the principle of considering the sale of ships of war to the enemy as contraband is strictly held, but its application has been restricted to cases, in which no doubt existed as to the character of the vessel or the purpose for which it was intended to be sold." Ib. p. xxiv.

It has been remarked, that a mere change of the implements of war can make no difference with regard to the principle of the prohibition, as applied to contraband; and that if the *usus bellici*, as to particular articles, shift, the law shifts with them. No greater change could have occurred in maritime warfare than what has been produced by the introduction of steam into navigation. In the Order of the 18th of February, 1854, steam-engines are classed with naval stores, into which category, when intended for vessels, they properly fall, and whether they are to be considered as contraband, therefore, depends on the rule as to naval stores generally. So far as regards the two great maritime allies in the Russian war, there had previously been no more accordance in their views on this than on other questions connected with neutral rights; though, as in the case of the flag covering the property, the only treaties between them, which refer to this subject, as is shown in the text, adopt the

despatches in the enemy's service.

A neutral vessel, which is used as a transport for the enemy's forces, is subject to confiscation, if captured by

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most liberal rule; and they, moreover, exclude, in express terms, naval stores from the list of contraband.

The subject of the introduction, among contraband of war, of steam-engines, as well as of coal, as necessary to their use, was discussed even in advance of the Russian war, by text-writers on the Continent, especially Hautefeuille and Ortolan. The latter objects to the English extension of contraband *ad libitum*, and declares his opinion to be, that, on principle, under ordinary circumstances, arms and munitions of war, which serve directly and exclusively for belligerent purposes, are alone contraband. In his second edition, (1853,) he confines the special cases to certain determinate articles, whose usefulness is greater in war than in peace, and which, from circumstances, are in their character contraband, without being actually arms or munitions of war; such as timber, evidently intended for the construction of ships of war or for gun-carriages; boilers or machinery, for the enemy's steam vessels; sulphur and saltpetre, or other materials for arms or munitions of war. He corrects his former opinion, that, with the increased importance of the military steam marine, coal, as indispensable for it, may be included in this class, notwithstanding its great use for industrial and pacific purposes; and he denies that, looking to the immense commercial navigation to which it is essential, and to the fact that it can never assume a form which shows that it is intended for the exclusive use of the military marine, it can ever, under any circumstances, become contraband. Ortolan, Diplomatie de la Mer, liv. iii. ch. 6, tom. ii. pp. 179–206, 2d edit. Hautefeuille, of course, excludes these articles from the contraband list. This is consistent with the principle of his treatise, which admits, according to the secondary as well as primitive law of nations, however special conventions or the internal law of particular States may have derogated from the principle, but one class of contraband, and confines that to objects of first necessity for war, which are exclusively useful in war, and which can be directly employed for that purpose, without undergoing any change; that is to say, to arms and munitions of war. He considers that steam engines are, like sails, the moving powers of a ship, and cannot be distinguished from the other articles which enter into the construction of the vessel; and he deems them, as naval stores, the objects of a free commerce. Hautefeuille, Droits des Gens Neutres, tom. ii. p. 412; tom. ii. pp. 84, 101, 154, 2me ed.; Ib. tom. iii. p. 222.

The numerous treaties, to which the United States have been parties, which contain stipulations respecting contraband, with the single exception of that of 1794, with England, confine it to arms and munitions of war; and the early ones exclude naval stores, in express terms, from the list. See Statutes at Large, vol. viii., *passim*. See, also, vols. ix. x. xi. &c.

A Swedish ordinance of the 8th of April, 1854, issued with reference to the then war, declared that —

"All kinds of goods, even such as belong to belligerents, may be carried in Swedish ships as neutral, except contraband of war; by which are understood cannons, mortars, all kinds of arms, bombs, grenades, balls, flints, linstocks, gunpowder, saltpetre, sulphur, cuirasses, pikes, belts, cartouch-boxes, saddles, bridles, and all other manufactures immediately applicable to warlike purposes; herein, however, are not included a stock of such articles necessary for the defence of ship and crew.

"In regard to contraband of war, should any change or addition be made, in consequence of agreement between us and other powers, a separate notice thereof shall be proclaimed." Public Documents.

the opposite belligerent. Nor will the fact of her having been impressed by violence into the enemy's service, exempt her. The

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In an English review of the Orders in Council on trade, during the war, it was said: "It was never intended that the prohibition (in the Order of the 18th of February, and the subsequent orders modifying it,) should be construed into a fresh declaration of contraband of war. It rests with the courts of maritime jurisdiction to determine that question; and we presume that as steam machinery has become an important element of navigation and maritime warfare since the last war, the parts or materials of this machinery, when transported to an enemy's port, or for the use of the enemy, will be as liable to condemnation as sailcloth, cordage, or spars, have been in former wars, when not restricted by treaty with neutrals." . . . . "A question has been much discussed, whether *coals*, which are destined to play so essential a part in modern warfare, are to be held to be contraband; but it is of so much importance to our own cruisers to be able to take in coals at neutral ports, which they would not be able to do if coal was universally regarded as a prohibited article, that we should probably lose more than we can gain by contending for the prohibition. Coals, however, have been stopped on their way to an enemy's port on the Black Sea; though it appears, from an answer given in the House of Commons by Sir James Graham, that coals will be regarded by our cruisers as one of the articles *ancipitis usus*, not necessarily contraband, but liable to detention under circumstances that warrant suspicion of their being applied to the military or naval uses of the enemy." Edinburgh Review, No. 203. art. 6, July, 1854, p. 103, Am. ed. There does not appear to have been, during the Russian war, any agreement between the Allies as to what constituted contraband, the French confining it to arms and munitions, as in their ordinance, while the English extended it, as previously contended for by them. Speech of the Attorney-General, 30th March, 1854, — of Sir James Graham, 29th June, 1854. De Pistoye et Duverdy, Traité des Prises, tom. i. p. 404. Though the professed object of the declaration of Paris was to establish a uniform doctrine on maritime law, which it premises "has long been the subject of deplorable disputes; that the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents, which may occasion serious difficulties and even conflicts," (Annual Register, 1856, p. 321,) it prescribes no definition of *contraband*, the principle of which is, however, recognized in the articles excluding, in terms, "contraband of war" from the immunity in other cases accorded to enemy's property in neutral vessels, and to neutral property in enemy's vessels. "It authorizes the seizing of *contraband of war*, without saying in what this *contraband* shall consist, which is the whole question." Revue des deux mondes, Janvier 15, 1862, p. 429, — Article par Casimir Périer.

That there was even no implied understanding among the signers to the "declaration," as to a uniform definition of contraband is, moreover, obvious from what has since occurred. The British Foreign-Office stated, in answer to an inquiry, whether the Queen's proclamation of the 13th of May, 1859, (issued in reference to the war between France and Sardinia on the one side, and Austria on the other,) contemplated coal as contraband, "that Her Majesty's proclamation does not specify, and could not properly specify, what articles are or are not contraband of war; and that the passages therein referring to contraband are intended not to prohibit the exportation of coal or any other article, but to warn Her Majesty's subjects, that if they do carry for the use of one belligerent articles, which are contraband of war, and their property be captured by another belligerent, Her Majesty's government will not undertake to interfere in their favor against such capture or its consequences. The prize

master cannot be permitted to aver that he was an involuntary agent. Were an act of force exercised by one belligerent power

court of the captor is the competent tribunal to decide whether coal is or is not contraband of war, and it is obviously impossible for the government of Her Majesty, as a neutral sovereign, to anticipate the result of such decision. It appears, however, to Her Majesty's government that having regard to the present state of naval armaments coal may, in many cases, be rightly held to be contraband of war; and therefore that all who engage in this traffic must do so at a risk from which Her Majesty's government cannot relieve them." Jurist, 1859, vol. v. Part II. p. 203.

At the commencement of the civil war in the United States, it was said in the House of Lords, by the Earl of Ellenborough, "I confess I very much regret to see so much vagueness in the expressions used as to 'contraband of war.' The proclamation speaks of 'arms, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations.' How are plain men to find out what articles have of late been considered contraband of war by the usage of nations? They must look through all the recent decisions of courts of admiralty jurisdiction, not only in this country, but in others; and it is highly probable that they will be found conflicting with one another. I wish, therefore, to know what are the further articles not mentioned to which it is intended that the proclamation should apply, and which Her Majesty's subjects are cautioned not to carry upon the sea. The law with respect to contraband of war is in a state of constant change. It must change year after year, according as the manner of conducting war is changed. When I looked into this matter six years ago, I recollect to have found in the law books of best authority that all these changes were controlled by one prevailing principle — viz., that that is contraband of war which in the possession of an enemy would enable him better to carry on war. That is a clear, reasonable, and intelligible principle, and I very much regret that, instead of using the words which I find in this proclamation, Her Majesty's ministers did not go back to a principle which all can understand, and which is not affected by changes in the mode of carrying on war."

Earl Granville said: "To a certain extent the noble Earl answered his own question, for he stated that what is contraband of war must vary from time to time according to the character of the war which is carried on. There are certain articles which are clearly contraband of war, but there are certain other articles the character of which can be determined only by the circumstances of the case, as, for instance, the ports for which they are destined, and various other incidents which can be properly judged of only in a prize court. The decision of such a court, unless there has been a flagrant violation of international law, all those who have recognized the rights of the belligerents must accept."

Lord Brougham said: "Taking into account the great changes and improvements in all the appliances of warfare which had of late years taken place, I should hold that coal might be looked upon as amounting to contraband of war, if furnished to one of the belligerents to be used in warfare against the other."

Lord Kingsdown said: "The determination of what was contraband must depend on the circumstances of each particular cargo. Provisions, though they might be safely sent under other circumstances, yet if sent to a port where an army was in great want of food, they would then become contraband. So with regard to coals. They might be sent for the purposes of manufacture, but if sent to a port where there were war steamers, with the view of supplying them coals, then they became contraband. With respect to blockade, that again had been very much altered by

on a neutral ship or person to be considered a justification for an act, contrary to the known duties of the neutral character,

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the introduction of steam, as two or three steam-vessels might now be as effective as twenty sailing-vessels had formerly been." Parliamentary Debates, May 26, 1861.

So far from contraband being then defined, an able treatise published in England, just before the Trent affair, with particular reference to the pending hostilities, begins by stating that what is and what is not contraband of war has long been a question of difficulty, not only in the cabinets of jurisconsults, but in those of diplomatists and statesmen, not unfrequently superinducing a supplemental war to that already raging. Moseley, on Contraband of War, p. 1.

But in an instruction from Earl Russell to Lord Lyons, January 23, 1862, with regard to the case of The Trent, which was communicated to the American government, contraband is confined to its narrowest limits. It is there said: "The doctrine of contraband has its whole foundation and origin in the principle which is nowhere more accurately explained than in the following passage of Bynkershoek. After stating in general terms the duty of impartial neutrality, he adds: —

"Et sane id, quod modo dicebam, non tantum ratio docet, sed et usus, inter omnes fere gentes receptus. Quamvis enim libera sint cum amicorum nostrorum hostibus commercia, usu tamen placuit, ne alterutrum his rebus juvemus, quibus bellum contra amicos nostros instruatur et foveatur. Non licet igitur alterutri advehere ea, quibus in bello gerendo opus habet; ut sunt tormenta, arma, et quorum præcipuus in bello usus, milites; * * * * Optimo jure interdictum est, ne quid eorum hostibus subministremus; quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere.

"The principle of contraband of war," Lord Russell adds, "is here clearly explained; and it is impossible that men, or despatches, which do not come within that principle, can in this sense be contraband." Parliamentary Papers, 1862. North America, No. 5.

The citation from Bynkershoek is made more favorable to neutrals by the omission of the clause which is indicated by asterisks, thereby, it would seem, abandoning the British doctrine not only of the prize courts, but as declared on the most recent occasions by the Foreign Office and in Parliament. The words left out are: "Quin et milites variis gentium pactis excepti sunt, excepta quandoque et navium materia, si quam maxime ea indigeat hostis ad exstruendas naves quibus contra amicos nostros uteretur. Excepta sæpe et cibaria quando ab amicis nostris obsidiones premuntur hostes, aut alias fame laborant." Bynkershoek, Quæst. Jur. Pub. lib. i. ch. 9. Opera Omnia, tom. ii. p. 180, ed. 1761.

The whole paragraph, as rendered by Duponceau, the part omitted in Lord Russell's note being here enclosed in brackets, is: —

"And, indeed, what I have just now said, is not only conformable to reason, but to the usage admitted by almost all nations. For although it be lawful for us to carry on trade with the enemies of our friends, usage has so ordered it, [as I shall show more at large in the next chapter,] that we should not assist either of them with those things which are necessary in war, such as cannon, arms, and, what is most essentially useful, soldiers; [nay, soldiers are positively excepted by the treaties of various nations, and *sometimes, also, materials for building ships, which might be used against our friends. Provisions likewise are often excepted, where the enemies are besieged by our friends or are otherwise (alias) pressed by famine*]. The law has very properly forbidden our supplying the enemy with any of those things; for it would be, as it

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.[1] As to the number of military persons necessary to subject the vessel to confiscation, it is difficult to define; since fewer persons of high quality and character may 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 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

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were, making war against our friends." Duponceau's Translation, p. 68. The importance of the omission, as evincing the extent of the change in British maritime law, will be appreciated from the following note, which Duponceau appends to the passage cited. "It was probably on the principle which this vague word '*otherwise*' (*alias*) seems to indicate that the British government issued their provision order against France, or rather against neutrals, on the 8th of June, and signed their convention with Russia on the 25th of March, 1793." Ib. p. 69.

It may be here noted, what will appear in the sequel, that the placing, as Bynkershoek does, in the same category military persons, who may be seized on board neutral vessels, and articles contraband of war, is not in accordance with the usual arrangement employed in treaties.

The continental journal, to which we have frequently referred for foreign documents, commenting on this despatch, says: "We remark particularly the doctrine, assuredly very new in England, that Lord Russell professes with regard to contraband. It is known that there exists on this subject two systems, with respect to which the publicists have been divided for centuries. The first, the French doctrine, which France has caused to prevail on every occasion since the treaties of Utrecht, limits contraband of war to arms, munitions, and to the men and things, which serve as the direct and immediate instruments for the operations of war. The second, the English doctrine, extends the definition of contraband of war, according to circumstances, to a great many things, serving only indirectly to the objects of the belligerents, and which in the treaty of 1794, with the United States, for example, had extended in such a way the term of contraband, that it might embrace everything that England might choose to include in it. Lord Russell, in his last despatch, produces in its very terms, and adopts entirely, the definition of contraband given by Bynkershoek, which expressly limits, as the French doctrine does, the list of articles of contraband to arms, munitions of war, and to soldiers, to what serve directly as instruments of war. Thus the noble Lord adopts the doctrine, which confines contraband to arms and munitions of war." Le Nord, 5 Fevrier, 1862.] — *L.*

[1] Robinson's Adm. Rep. vol. iv. p. 256, The Carolina.

arising to the belligerent from the employment in which the vessel is found. If imposition be 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.[1]

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. "The carrying of two or three cargoes of military stores," says 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

[1] Robinson's Adm. Rep. vol. vi. p. 430, The Orozembo.

things, be applied. The vehicle in which they are carried must, therefore, be confiscated." [1]

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 despatches from persons who are, in a peculiar manner, the favorite 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

[1] Robinson's Adm. Rep. vol. vi. p. 440, The Atalanta.

its interests may require that the intercourse of correspondence with 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." [1] [230

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[1] Sir W. Scott, Robinson's Adm. Rep. vol. vi. p. 461, The Caroline.

[230] The preventing of neutrals bearing enemy despatches was included with the seizing of articles of contraband, as an exception to the otherwise unrestricted freedom of commerce, conceded to them by the "declarations" of England and France, and by the Order in Council, of the 15th of April, 1854. The Queen of England's declaration of neutrality, in the present war between the United States and the Confederate States, includes in the same category with articles of contraband, "carrying of officers, soldiers, despatches, &c., for the use or service of either of the said contending parties." It is considered by M. Hautefeuille that the carrying of despatches can only invest a neutral vessel with a hostile character in the case of its being specially employed for that purpose by the belligerent, and that it cannot affect with criminality either a regular postal packet or a merchant ship, which takes a despatch in its ordinary course of conveying letters, and of the contents of which the master must necessarily be ignorant." Since the European wars, in which the adjudications cited in the text were made, many of the governments have established regular postal packets, whose mails, by international conventions, are distributed throughout the civilized world; while in other countries every merchant vessel is obliged to receive, till the moment of its setting sail, not only the despatches of the government, but all letters sent to it from the post-offices. Hautefeuille, Droits des Nations Neutres, tom. ii. p. 463; tom. ii. p. 187, 2me ed. Ib. tom. iii. p. 24. See among others, the Postal Treaty of December 15, 1848, between the United States and Great Britain. As to the vessels in which the mails may be carried, it is provided by the 20th article of that convention: "In case of war between the two nations, the mail packets of the two offices shall continue their navigation without impediment or molestation until six weeks after a notification shall have been made, on the part of either of the two governments, and delivered to the other that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection to their respective ports." Statutes at Large, vol. ix. p. 965. During the war with Mexico British postal steamers were allowed to go to Vera Cruz.

Hautefeuille applies, also, to passengers the same rules as to despatches, confining the prohibition to vessels employed either voluntarily or *jure angariæ* for the transportation of troops, though he considers the transporting of military persons for the

§ 26. Penalty for the carrying of contraband.

In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated, and the carrier-master is refused his freight,

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account of a belligerent, a graver violation of the duties of neutrality than the carrying of contraband. He maintains that a packet-boat sailing from a neutral port for a port of one of the belligerents, even if individuals belonging to the army of the sovereign of the place of destination present themselves singly and take passage on board, there is no mingling in hostilities, no act of contraband of war, though there may be on board a skilful and formidable general capable of changing the chances of war. This solution, he adds, is completely opposed to that given by Wheaton. That author thinks that in this case, even though the neutral captain was absolutely ignorant of the quality of his passengers, the ship ought to be treated as an enemy's ship, altogether in the same manner as if it was loaded with troops, on account of the belligerent. He considers that the error, into which the captain has been led, can have no other effect than the violence which might have been interposed to induce him to perform the service of a government transport, in which case M. Hautefeuille himself maintains that the compulsion or *jus angariæ* would not prevent his being chargeable with mingling in the hostilities and carrying on a trade in contraband of war. This difference in the solution of the question arises from the fact that Wheaton regards the prohibition of certain trade as the result of the right of the belligerents, whilst Hautefeuille finds its source in the duty of the neutral to abstain from it. In Wheaton's view the right of the belligerent has, for its basis, his own interest; he has the right of prohibiting certain trade, because that trade is injurious to him. Setting out from this point Wheaton finds that the act in question, despite the ignorance of the neutral captain and the other circumstances, is as essentially injurious to one of the belligerents, as if this ignorance and the other circumstances did not exist. The injury being the same, he is induced to think that the consequences ought to be identical. The reasoning of Wheaton goes almost to the admission of the right of necessity, or rather of fitness (*convenance*), since it measures the pretended offence that has been committed by the neutral, according to the interest of the belligerent.

The opinion which Hautefeuille enunciates, he contends, is supported by the secondary law. A great number of solemn treaties contain an express disposition, to the effect that passengers belonging to one of the belligerent nations, found on board of neutral vessels, shall be respected, *and shall not be taken from them*, unless they are military persons, in the actual service of the enemy. This stipulation, which is not to be found in the article respecting contraband of war, but in the one which consecrates the rights of the neutral flag, clearly proves that the military persons, actually in the service of the enemy found on board of a visited vessel, may be taken from it and treated as prisoners. But it equally establishes that the vessel is not considered culpable either of a violation of the duties of neutrality or of contraband. If it were otherwise, the declaration of culpability would have been expressed. Moreover, it would not have been necessary to stipulate that the military passengers may be taken from the vessel, if the vessel itself was to be seized. Droits des Nations Neutres, tom. ii. p. 179, 2me ed.

In connection with this subject, Hautefeuille says, that "neutral vessels are sometimes employed for the purposes of espionage, acting the part of spies. It is a flagrant violation of neutrality, an intermeddling in the direct acts of war. He who is guilty of it should be considered as the subject of the people in whose service he has

to which he is entitled upon innocent articles which are condemned as enemy's property. 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. [231] And even where

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engaged and as the enemy of the other belligerent. This question does not appear to me to be susceptible of discussion." Ib. p. 188.

Ortolan inserts and adopts the passages of Wheaton in reference to the illegality of carrying enemy's despatches, excepting in the case stated of the despatches of an ambassador or other public minister resident in a neutral country. Diplomatie de la Mer, tom. ii. p. 213, 2me ed.

Wildman, whose work was published in 1849, expresses the same views, though without referring to Wheaton, and he gives some cases in support of them from the decisions of Sir William Scott, which are not cited by our author. One of these (The Madison, Edwards's Rep. 224,) extends the immunity granted to the despatches of enemy's ministers in a neutral country to the cases of despatches from a hostile government to its consul-general in a neutral country, and where no question of diplomatic privilege can arise. Such a communication, it is said, does not necessarily imply anything that is of a nature hostile and injurious to the other belligerent. It is not to be so presumed. In such a correspondence, the neutral government itself is interested. A consul-general of the enemy in a neutral country is not stationed there merely for the purpose of the enemy's trade, but of the neutral's trade with the enemy. His functions relate to the neutral commerce in which the two countries are engaged. Wildman, International Law, vol. ii. p. 235. See, also, cases referred to in Robinson's Admiralty Reports, vol. vi. p. 461, note.

Another English commentator, after giving the decisions with regard to articles assumed to be contraband of war, says, in reference both to despatches and passengers, "Assistance may be rendered to an enemy by a neutral in many other ways than by the supply of such material articles as have been already mentioned, particularly by the communication of information and orders from the belligerent government to its officers abroad, or the conveyance of military passengers. Such a proceeding is justly considered as being at variance with the duties of a neutral, and contrary to the precepts of international law, and may not be inaptly termed *quasi* contraband." Pratt, Law of Contraband, p. liv.

Phillimore, in referring to the exception in favor of the despatches of enemy's ministers in neutral countries, connects it, as other publicists do, with the declaration, that "it is competent to a belligerent to stop the ambassador of his enemy on his passage." International Law, vol. iii. p. 368.

The proposition here enunciated derives special interest from its recent practical application to the case of the commissioners of the Confederate States, seized by the commander of an American steamer of war on their way to fulfil their missions in Europe. It has been already referred to in connection with impressment, and will be discussed in its relations to the subject of this section in the case of The Trent. Editor's Appendix, No. 3.] — *L.*

[231] The French *réglement* of the 26th of July, 1778, which is still in force, also confiscates both vessel and cargo, when three fourths in value of the cargo are contraband. This is only an internal law of France, not binding on other nations, and is sustained by no treaty. The confiscation of anything beyond the actual contraband is opposed, as well by Ortolan as by Hautefeuille, though they differ as to the principle on which their opinions are based. "We believe firmly," says the

the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circumstances of

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former, "that, in no case, should the ship which carries the contraband nor the innocent merchandise be confiscated. We must not overlook the fact that the subjects of neutral States, strangers to the quarrels of the belligerent powers, preserve, in principle, the liberty of carrying on commerce with each of those powers. When, in this commerce, they carry to the one or the other, or to both, articles of a nature to serve directly and exclusively for war, the act is not that of enemies, but of merchants; neither of the belligerents, then, is authorized to treat them, on that account, as enemies, and to declare, under that title, good prize, the neutral ship and the innocent portions of the cargo. However, it is true that in extending their commerce to such objects, they injure the interests of one or other of the powers at war, and expose themselves to the exercise of the acknowledged right of those powers to interpose obstacles to the transportation of such articles. The consequence is, that this merchandise may be stopped on its way, and, the international reason adds, in order to give more efficiency to the prohibition, it shall be subject to confiscation. This confiscation is a logical punishment, which flows from the very nature of things, and is proportioned to the gravity of the infraction, since it reaches all the prohibited objects, whether the quantity be small or great. To go further, and confiscate the neutral vessel and the merchandise not prohibited, would be to apply a punishment variable and arbitrary in its extent, falling often on the innocent and unjustifiable even in the particular cases mentioned." Ortolan, Diplomatie de la Mer. tom. ii. liv. iii. ch. 6, p. 187, 2me ed.

Hautefeuille considers the prohibition of a trade in contraband to arise, not from any right of the belligerent, but from a duty imposed by the primitive law on neutrals. He says: "The primitive law makes it a duty for neutrals not to connect themselves with the hostilities; and consequently not to furnish to the belligerents the direct means of fighting; but this duty stops there. At the side of this duty exists a right likewise altogether sacred and absolute: that of preserving the freedom of trading in all innocent objects with all peoples, even with the belligerents. The seizing and taking of contraband articles are in reality only the means of execution for a right; they never can be considered as a punishment applied to a guilty party. If they had that character, it would be necessary to interdict them to a belligerent, because he has no quality to pronounce a punishment against a neutral, against the subject of a foreign sovereign. This right only belongs to him who possesses the jurisdiction. As to a punishment, if one is to be applied, the chief of the injured nation should address himself to the neutral sovereign, and ask that the guilty parties should be tried in their own country and according to its laws. The power of the belligerent is not to punish the author of the act which injures him, but to prevent this act from being consummated, that the contraband should not be carried into the country of his enemy; to seize these articles when they are destined to the ports of his adversary. The secondary law, going further than the primitive law, has authorized him to confiscate the contraband, which he should have only detained. But the innocent articles, whether in greater or less quantity, of greater or less value, the ship itself, are not dangerous for the belligerent: he has not the right of taking possession of them to prevent their going to the place of their destination. He could only do that in order to punish the act of contraband, and not to prevent it; but his power does not extend so far; it is restricted, as I have just stated." Hautefeuille, Droits des Nations Neutres, tom. iii. pp. 224–234, tit. xiii. ch. 1.

false papers and false destination, will work a confiscation of the ship as well as the cargo. 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 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.[1]

The general rule as to contraband articles, as laid down by Sir W. Scott, is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. "Under the present understanding of the law of nations, you cannot

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The last author also contends for a right of the neutral on delivering the contraband to the cruiser to continue on his voyage. This is sanctioned by several treaties which he cites, among which is that of September 30, 1800, between the United States and France, which was the first treaty made by the Consular government, and which M. Thiers notices as embodying those great principles of neutral rights for which France and all the maritime States have contended. Histoire du Consulat et de l'Empire, tom. ii. p. 217. Ortolan also refers to the provision in question, as being contained in nearly all the treaties made by the United States with the other American Republics. Diplomatie de la Mer, tom. ii. p. 195. Such a provision, Hautefeuille says, would be inconsistent with a rule that would extend the confiscation beyond the articles actually contraband.

In case of the delivery of the goods to the cruiser, equally, as when the ship is sent into port, the validity of the seizure is to be decided by the proper tribunals. The articles are not to be deemed *prize* till condemned. Ib. 227. The principle of the French *réglement* of 1778 is wholly opposed, as we have seen, by Hautefeuille, who considers it only an internal law, which is equally null with regard to those nations who have by special conventions regulated the case of seizure for contraband, and those, he holds contrary to the opinion of Massé, who have not concluded with France any treaty of this nature. Ib. p. 235. Ortolan supposes it applicable to the States with which France has not conventions to the contrary. There was in the treaty of 1800, between France and the United States, — which was limited to a time that has long since expired, but to which in this connection Ortolan refers, — a provision in the article confining contraband to articles connected with war, that "the vessel in which they are laden, and the residue of the cargo, shall be considered free, and not in any manner infected by the prohibited goods, whether belonging to the same or a different owner." Diplomatie de la Mer, tom. ii. p. 195.] — *L.*

[1] Robinson's Adm. Rep. vol. i. p. 91, The Ringende Jacob. Ib. 244, The Sarah Christina. Ib. 288, The Mercurius. Ib. vol. iii. p. 217, The Franklin. Ib. vol. iv. p. 69, The Edward. Ib. vol. vi. p. 125, The Ranger. Ib. vol. iii. p. 295, The Neutralitet.

As to how far the ship-owner is liable for the act of the master in cases of contraband, see Wheaton's Rep. vol. ii. Appendix, Note I. pp. 37, 38.

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 endeavoring 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."[1] But the same learned 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.[2]

Although the general policy of the American government, in its diplomatic negotiations, has aimed to limit the catalogue of contraband by confining it strictly to munitions of war, excluding all articles of promiscuous use, a remarkable case occurred during the late war between Great Britain and the United States, in which the Supreme Court of the latter appears to have been 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. Upon 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,

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[1] Robinson's Adm. Rep. vol. iii. p. 168, The Ionia.

[2] Ib. vol. ii. p. 343, The Rosalie and Betty. Ib. vol. iii. p. 122, The Nancy. The soundness of these last decisions may be well questioned; 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, but to all future cargoes of the vessel, which would thus never be purified from the contagion communicated by the contraband articles.

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 favoring 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 vigor 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, upon 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, (6 Rob. 420,) 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 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.[1] [232

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[1] Wheaton's Rep. vol. i. p. 382, The Commercen.

[232] "It is not the practice of nations to undertake to prohibit their own subjects, by previous laws, from trafficking in articles contraband of war. Such trade is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of nations or particular treaties. If it be true, therefore, that citizens of the United States have been engaged in a commerce by which Texas, an enemy of Mexico, has been supplied with arms and munitions of war, the government of the United States, nevertheless, was not bound to prevent it, could not have prevented it, without a manifest departure from the principles of neutrality, and is in no way answerable for the consequences. . . . . The 18th article (of the treaty between the United States and Mexico) enumerates those commodities which shall be regarded as contraband of war; but neither that article nor any other imposes on either nation any duty of preventing, by previous regulation, commerce in such articles. Such commerce is left to its ordinary fate, according to the law of nations." Webster's Works, vol. vi. p. 452. Mr. Webster to Mr. Thompson, July 8, 1842.

The above view of the law of contraband was cited from the note to our last edition, and adopted by the Solicitor-General, (Mr. Layard,) in a speech in the House of Commons, on the 22d of February, 1862, in which he also took occasion specially to allude to "Wheaton, who," he said, "as everybody knows, has written one of the most valuable treatises on the subject that was ever composed." He thus explains further the duty of a neutral government: —

"I think it desirable that a few words should be said to correct a total misapprehension of a matter of law into which the honorable gentleman opposite has fallen. He implies, by the terms of his notice of motion and more distinctly stated in his speech, that all masters of British merchant vessels, who may have run the blockade with articles contraband of war on board, have been guilty of illegal acts, in violation of Her Majesty's proclamation, which the government of this country, having their attention called to them, ought to have interfered to prevent, but had not done so.

"He has also suggested that the authorities of the port of Nassau must be subject to serious blame for having permitted ships under similar circumstances to call at that port and to take in supplies, and to have the benefit of calling and remaining there when they had on board articles contraband of war, which the honorable gentleman seemed to suppose that Her Majesty's proclamation had made it illegal for them to have on board, and which, therefore, they could not be permitted to carry without a violation of neutrality. In all these respects the honorable gentleman has totally misunderstood the law. This country is governed by law, and except as far as Her Majesty's government have powers by law to control the action of private British subjects, whether the masters of ships or others, of course they are perfectly powerless in the matter.

"The only law which enables Her Majesty's government to interfere in such cases is commonly called the Foreign Enlistment Act, and the whole nature and

§ 27. Rule of the war of 1756.

It had been contended in argument in the above case, that the exportation of grain from Ireland being gen-

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scope of that act is sufficiently and shortly set out in the title. It is, 'An Act to prevent the enlisting and engagement of Her Majesty's subjects to serve in foreign service, and the fitting out or equipping in Her Majesty's dominions vessels for warlike purposes without Her Majesty's license.' That act does not touch in any way whatever private merchant vessels which may carry cargoes, contraband or not contraband, between this country, or any of the dominions of Her Majesty, and any port in a belligerent country, whether under blockade or not; and the government of this country, and the governments of our colonial possessions, have no power whatever to interfere with private vessels under such circumstances.

"It is perfectly true that in the Queen's proclamation there is a general warning at the end, addressed to all the Queen's subjects, that they are not, either in violation of their duty to the Queen as subjects of a neutral sovereign, or in violation or contravention of the law of nations, to do various things, one of which is carrying articles considered and deemed to be contraband of war, according to law or the modern usages of nations, for the use or service of either of the contending parties. That warning is addressed to them to apprise them that if they do these things they will have to undergo the penal consequences by the statute or by the law of nations in that behalf imposed or denounced. In those cases in which the statute is silent, the government are powerless and the law of nations comes in.

"The law of nations exposes such persons to have their ships seized and their goods taken and subjected to confiscation, and it further deprives them of the right to look to the government of their own country for any protection. And this principle of non-interference in things which the law does not enable the government to deal with, so far from being a violation of the duty of neutrality — which the government are sincerely anxious to comply with — is in accordance with all the principles which have been laid down by jurists, and more especially by the great jurists of the United States of America." Parliamentary Debates.

"As the law has been declared by the decisions of courts of admiralty and elementary writers, it allows belligerents to search neutral vessels for articles contraband of war and for enemy's goods. If the doctrine is so modified as to except from seizure and confiscation enemy's property under a neutral flag, still the right to seize articles contraband of war, on board of neutral vessels, implies the right to ascertain the character of the cargo. . . . . A persistent resistance by a neutral vessel to submit to a search renders it confiscable, according to the settled determinations of the English admiralty." Mr. Marcy to Mr. Buchanan, April 13, 1854. Cong. Doc. 33d Cong. 1st Sess. H. R. Doc. 103, p. 21.

Such is the law of nations, as hitherto understood; but as, by the adoption of the principle that neutral vessels give immunity even to enemy's goods, there is no longer a pretence for the existence of the right to search, unless, as connected with contraband, or an attempt to violate blockades, it may well become the interest of neutrals, if this exception is to remain the rule, not only that the extent to which it is to be applied should be defined, but that their own governments should themselves undertake to enforce the prohibition, and thus remove from belligerents the only apology for violating that nationality which should attach to the ship, in common with the territory of the country to which it belongs. This would accord with Hautefeuille's principle, regarding the prohibition of contraband, as the duty of the neutral and not as the right of belligerent. That course was adopted in the war of 1854–6,

erally prohibited, a neutral could not lawfully engage in that trade during war, upon the principle of what has been called

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by Austria, whose decree of 25th May, 1854, prohibited Austrian vessels from transporting troops belonging to the belligerent powers, and from carrying articles contraband of war. Moniteur Universel, June 9, 1854. By a Swedish ordinance, bearing date the 8th of April, 1854, Swedish sea-captains were forbidden, unless under actual force, and in that case after formal protest, to carry dispatches, troops, or articles contraband of war, for any belligerent power. See Cong. Doc. 33d Cong. 1st Sess. H. R. No. 103, p. 21. It is indeed already established by many treaties that, in the case of vessels under convoy, the declaration of the commander that there is no contraband, on board the vessels, destined for an enemy's port, shall suffice. *Vide infra*, Editor's note to § 29.

"The declaration of Paris" excepts *contraband* as well from the immunity accorded to enemy's property on board of neutral vessels as from that which attaches to neutral property in enemy's ships, and it thus affords an occasion for the continuance of the belligerent right of search. As Lord Colchester remarked in a debate before referred to, "contraband of war was excepted from the arrangement, and how could belligerents know whether a neutral vessel had contraband on board, without stopping and searching her?" The Earl of Derby remarked: "You maintain the principle that neutrals may be searched for contraband of war, and you thereby admit the principle of the violation of the neutral flag, and you continue the danger and inconvenience which result to merchantmen from being overhauled at sea. If you grant one principle you must grant another, and give entire immunity to private property." Hansard's Debates, N. S. vol. cxlii. p. 522. Lawrence on Visitation and Search, p. 12.

Mr. Marcy thus concludes his note of July 14, 1856, to Count de Sartiges on the proposed adhesion of the United States to the "declaration of Paris": —

"As connected with the subject herein discussed, it is not inappropriate to remark, that a due regard to the fair claims of neutrals would seem to require some modification, if not an abandonment, of the doctrine in relation to contraband trade. Nations which preserve the relations of peace should not be injuriously affected in their commercial intercourse by those which choose to involve themselves in war, provided the citizens of such peaceful nations do not compromise their character as neutrals by a direct interference with the military operations of the belligerents. The laws of siege and blockade, it is believed, afford all the remedies against neutrals that the parties to the war can justly claim. Those laws interdict all trade with the besieged or blockaded places. A further interference with the ordinary pursuits of neutrals, in nowise to blame for an existing state of hostilities, is contrary to the obvious dictates of justice. If this view of the subject could be adopted, and practically observed by all civilized nations, the right of search, which has been the source of so much annoyance and of so many injuries to neutral commerce, would be restricted to such cases only as justified a suspicion of an attempt to trade with places actually in a state of siege or blockade.

"Humanity and justice demand that the calamities incident to war should be strictly limited to the belligerents themselves, and to those who voluntarily take part with them; but neutrals abstaining in good faith from such complicity ought to be left to pursue their ordinary trade with either belligerent, without restrictions in respect to the articles entering into it.

"Though the United States do not propose to embarrass the other pending nego-

the "Rule of the War of 1756," in its application to the colonial and coasting trade of an enemy not generally open in time of

tiations relative to the rights of neutrals, by pressing this change in the law of contraband, they will be ready to give it their sanction whenever there is a prospect of its favorable reception by other maritime powers." President's Message, &c., 1856, p. 43.

"Contraband of war" has been applied to the articles excluded from the trade opened with ports of the seceded States of America, under instructions of the Secretary of the Treasury, in pursuance of the proclamation of the President of May 12, 1862, issued in accordance with the act of July 13, 1861. Part IV. ch. 3, § 26, Editor's note, [209, p. 691. The use of the term "contraband of war" in connection with this commerce, like the application of it to fugitive slaves, adopted during the present civil war, is a misnomer calculated to introduce confusion into the international nomenclature. The trade with the opened ports, including the prohibition of certain articles, purports to be based on municipal regulations; while, moreover, among the prohibited articles, are some never before enumerated as "contraband of war," and the admission of which into the list would be at variance with the definition in all our treaties and with the well-settled policy of the United States. Mr. Dayton says, June 12, 1862, "Mr. Chase's circular, as printed in certain New York papers, excludes 'all liquors.' This would embrace ordinary French and other wines, the sole exports of Bordeaux and other towns. Can this have been the intention of the government?" To this Mr. Seward replied, July 10, 1862: "The Treasury regulations concerning imports at New Orleans do not exclude wines, but only ardent spirits, and this temporarily for military reasons." Papers relating to Foreign Affairs, 1862, pp. 350, 371.

But a more serious difficulty has arisen from an attempt to impose exceptional restrictions on the exports from the United States to the British West Indies, alone, of foreign territories. "Her Majesty's government, in communication with the law-advisers of the Crown, are of opinion that it is competent for the United States, as a belligerent power, to protect itself, within its own ports and territory, by refusing clearances to vessels laden with contraband of war or other specified articles, as well as to vessels which are believed to be bound to Confederate ports; and that so long as such precautions are adopted equally and indifferently in all cases, without reference to the nationality or origin of any particular vessel or goods, they do not afford a just cause of complaint." It is, however, objected that "under so vague and indefinite a pretext as that of 'imminent danger of the cargoes coming into the possession of the insurgents,' any kind and amount of arbitrary restriction upon British trade might be introduced and practiced." Mr. Stuart, Chargé d'Affaires, to Mr. Seward, August 1, 1862. To this it was answered: "The exclusive order is applied to the island of Nassau only, because there is no complaint of abuse of neutrality laws elsewhere, and not at all invidiously, or because it is a British possession. The restriction is a measure adopted for the public safety, endangered by insurrection, and not at all as in any sense a measure of trade, and I think it justified on the same grounds with the inhibition of certain exports referred to by the British government. So soon as the abuses which have rendered the order necessary shall have ceased, it will be at once rescinded." Mr. Seward to Mr. Stuart, August 18, 1862.

Earl Russell instructs Mr. Stuart, September 22, 1862: "The position assumed by the United States government is this: that it is entitled to prohibit or place under restrictions equivalent to prohibition, the exportation from New York to Nassau of

peace. The court deemed it unnecessary to consider the principles on which that rule is rested by the British prize courts, not regarding them as applicable to the case in judgment. But the legality of the rule itself has always been contested by the American government, and it appears in its origin to have been founded upon very different principles from those which have more recently been 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 the mother-country 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 principle, that by such employment they were, in effect, incorporated into the French navigation, having adopted the commerce and char-

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articles which are neither in their own nature contraband of war nor made contraband for the purpose of the present hostilities, by any general or public declaration of that government, with a view thereby to prevent British subjects, resident at Nassau, or making that colony a depot for purposes of commerce, from trading in those articles with the so-styled Confederate States.

"The trade between Nassau and the so-called Confederate States is, subject to those limitations which the law of nations has established, as legitimate as the trade between Great Britain and any other part of the world. If contraband articles are shipped for any port of the so-styled Confederate States, they are liable to seizure according to the law of nations; if articles not contraband are shipped for any blockaded place, they may also be seized upon the high seas according to the law of nations. But the liability of the trade between Nassau and the so-styled Confederate States, or any part of it, to be intercepted upon the high seas by a maritime capture, according to the rules of international law, does not render the dealing in the articles which supply that trade, by British subjects within British jurisdiction, less lawful and innocent than if there were no such liability; much less does it justify a belligerent government in superadding to the known belligerent rights of blockade and of maritime capture an embargo within its own ports upon any part of the trade of a neutral nation with one of its colonial possessions, merely because this may possibly tend to cripple or embarrass another lawful trade between that country and the country of the other belligerent. The doctrine of the United States on this subject has always been the same as that of Great Britain, namely, that neutral governments are under no obligation to stop a contraband trade between their subjects and a belligerent power, and that the only penalty of such a trade is the liability of contraband shipments to be captured on the high seas by the other belligerent." Ib. pp. 273, 275, 305.] — *L.*

acter of the enemy, and identified themselves with his interests and purposes. 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. 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.[1] 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 lay 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

[1] Robinson's Adm. Rep. vol. ii. p. 52, The Princessa. Ibid. vol. iv. p. 118, The Anna Catharina. Ibid. 121, The Rendsborg. Ibid. vol. v. p. 150, The Vrow Anna Catharina. Wheaton's Rep. vol. ii. Appendix, p. 29.

powers, until they became her allies or enemies at the close of the war; but its practical importance will probably be hereafter much diminished by the revolution which has since taken place in the colonial system of Europe.[1] [[233]

§ 28. Breach of blockade.

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 more ancient 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. [[234] Thus Grotius forbids the carrying any-

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[1] Wheaton's Rep. vol. i. Appendix, Note III. See Madison's "Examination of the British doctrine which subjects to capture a neutral trade not open in time of peace."

[[233] The rule of the war of '56, for captures under which compensation had been made, in pursuance of the treaty of 1794, was, notwithstanding the decision of an international tribunal, whose authority as a precedent ought to have been binding at least on the parties to the convention, subsequently revived against the United States. Colonial produce, reëxported from their ports, even in accordance with the rule, as announced by Lord Hawkesbury to the American Minister, Mr. Rufus King, in 1801, was captured and condemned in the courts of admiralty. Wait's American State Papers, vol. vi. p. 268. It may be here noted, that in the explanatory declaration of the 20th of October to the 2d section of the 3d article of the treaty of 5th (17th) June, 1801, between Great Britain and Russia, it is said that the freedom of commerce and navigation granted by that article to the subjects of a neutral power, does not authorize, in time of war, a direct trade between the colonies of the enemy and the mother country, but that they are "to enjoy the same advantages and facilities in this commerce as are enjoyed by the most favored nations, and especially by the *United States of America*." Madison, Examination, &c., p. 70.

The rule of '56 was, of course, wholly superseded during the Russian war by the provision in the Order in Council of the 15th of April, allowing neutrals to trade to all ports and places wheresoever situated, that are not in a state of blockade. But, it was on other accounts, also, obsolete. The free trade which England had proffered to the navigation of all the world, including a participation in her colonial and coasting trade, on an equality with her own vessels, does not admit of rules, which governed in a period of monopoly, and when any relaxation, which a belligerent accorded to neutrals, might be deemed not a permanent regulation of trade, but a measure to evade those advantages which a superior military marine placed within the control of his enemy. The "Edinburgh Review" said: "In the case of Russia, as she has no colonies, the rule of 1756 is inapplicable; and indeed, since the colonial trade of England and Spain has become free, the theory on which that restriction was based, falls to the ground." Edinburgh Review, No. 203, art. 6.] — *L.*

[[234] One of the causes alleged by Napoleon I. for his Berlin decree, of the 21st

thing to besieged or blockaded places, "*if* it might impede the execution of the belligerent's lawful designs, and if the carriers

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of November, 1806, was that England "extended the right of blockade to unfortified cities and ports, to harbors and the mouths of rivers; while," as he maintained, "this right, according to reason and the usage of civilized nations, is only applicable to fortified places." Martens, Nouveau Recueil, tom. i. p. 439.

In accordance with these views, the Italian publicist, Luchesi-Palli, whose works, Martens says, is less a treatise of the law than an exposition of its principles, maintains that "the law of nations only permits the blockade of fortified places; and it should not be applied to cities or unfortified commercial ports, roads, or the undefended mouths of rivers. Rightfully, no place can be declared blockaded, where there are no fortifications, where there is no enemy stationed, or no ships of war." Principes du droit Public Maritime, traduits par Galiani, p. 180. On the other hand, the proposition is denied by Hautefeuille, who contends that all places subjected to the sovereignty of one of the belligerents, (which is the case as to the portion of the sea occupied by his fleet,) can be conquered and consequently subjected to blockade. Every vessel acquires for its sovereign the real possession, and consequently the dominion, of the portion of the sea which it occupies and controls. He says that Luchesi-Palli is the only publicist who has defended the decree of 1806, which he regards as inadmissible. He adds: "I have in vain searched for the sources from whence the authors of that decree have drawn it." But a blockade cannot extend to the mouth of a river flowing through several States, nor to a strait whose shores belong to different nations. Droits des Nations Neutres, tom. ii. p. 208, 2me ed.

Besides the language of Grotius being susceptible of a more stringent construction than that applied to it by our author, who in this case follows the translator of Bynkershoek, (Duponceau, p. 83,) Westlake shows, from the Dutch-Swedish treaty of 1667, that the principle involved in the Berlin decree is not wholly without precedent. "Lawful blockade," it is there said, "is only of 'fortresses, towns, or places having military garrisons, so long as it shall happen that they are under seige or attack by an armed force, with the intention of reducing them into the power of such force; and in respect of places situate on the coast, by land as well as by sea.'" Commercial Blockades, p. 6. The declared object of the treaty of the 6th (16th) July, 1667, which will be found in Dumont, (Corps Diplomatique, tom. vii. Part I. p. 37,) was to define contraband. This is done in the preceding articles, by stating not only what things are, but what are not contraband of war; while the words of the 5th article, so far as they are applicable to this subject, in the original, are: Attamen nec pecuniam nec commeatum aut quicquid vitæ per alimentum sustentandæ conducit, ... submitti hinc inde fas esto ad munimenta, oppida vel loca præsidio militari instructa, quamdiu ea ipsa per militem fœderati alterutrius, respectu locorum in oris maritimis sitorum, tam terra quam mari, obsidione cingi vel manu armata assideri continget, animo eadem in potestatem suam redigendi. The same article will be found substantially inserted as the fifth article of the treaty of the 26th November, 1675, between the same powers, (Dumont, vol. vii. Part I. p. 316,) to which, for another purpose, reference has heretofore been made. Part IV. ch. 2, § 10, Editor's note [192, p. 629.

Massé says that a belligerent who attacks his enemy may do it on whatever point he thinks proper, and that the right of blockade applies not only to garrisoned and fortified places, but to cities and unfortified commercial places. Droit Commercial, liv. ii. tit. i. ch. 2, sec. 2, § iv. No. 293. To the same effect is Ortolan, Diplomatie de la Mer, liv. iii. ch. 9, tom. ii. p. 299.

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

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The theory of blockade being confined to fortified places is not even noticed by Phillimore or Wildman, while Manning, speaking of the Berlin decree, says, "The confining of the right of blockade to fortified places, (*places fortes*,) and leaving harbors exempt from such restraint, was entirely new and unheard of, and in opposition to the clear principle of blockade." Manning's Commentaries on the Law of Nations, p. 337. Heffter, citing Hautefeuille, includes, also, all the coasts of the enemy, as subject to belligerent rights. Droit International, § 154. In this conclusion, they accord with our author, who elsewhere says that, "One of the most important of the belligerent rights is that of blockading the enemy's ports, not merely in order to compel the surrender of the place actually attacked or besieged, but as a means, often the most effectual, of compelling the enemy, by the pressure upon his financial and commercial resources, to listen to reasonable propositions of peace. At the same time," he adds, "it cannot be fairly denied that the exercise of this incontestable right, when it is applied to all the ports of an enemy's country, so as entirely to cut off his commercial intercourse by sea with other countries, if the measure be continued for an indefinite length of time, must give rise to considerable uneasiness on the part of those powers whose accustomed trade will be thus seriously affected by it." Mr. Wheaton to Mr. Buchanan, Secretary of State, July 1, 1846. MS.

The restriction of the belligerent right of blockade was, as we have seen, deemed by President Buchanan a necessary concomitant of the doctrine of immunity of private property at sea; whilst confining blockades to places actually besieged was urged by his Secretary of State, as the original theory of blockade. It had been previously suggested by Chief Justice Marshall, when Secretary of State, in his instructions of September 20, 1800, to Mr. Rufus King, at London, that the extension of blockade to towns invested by sea only, was an unjustifiable encroachment on the rights of neutrals. Wait's American State Papers, vol. vii. p. 391. But though the subject of blockade is referred to in several treaties made by the United States, especially in those with the South American States, they contain no provisions in this connection.

"The blockade of an enemy's coast, in order to prevent all intercourse with neutral powers even for the most peaceful purpose," said Mr. Cass, in his instructions given during the Italian war, to conclude maritime conventions, "is a claim which gains no additional strength by an investigation into the foundation on which it rests, and the evils which have accompanied its exercise call for an efficient remedy. The investment of a place by sea and land, with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defence, is a legitimate mode of prosecuting hostilities which cannot be objected to so long as war is recognized as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times. To watch every creek and river and harbor upon an ocean frontier, in order to seize and confiscate every vessel, with its cargo, attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates, if now first presented for consideration." President's Message, 1859–60, p. 31. Mr. Cass to Mr. Mason, June 27, 1859.

Lord John Russell, in the debate of the 18th of February, 1861, refers to this

surrender or peace is already expected to take place."[1] And Bynkershoek, in commenting upon this passage, holds it to be

despatch of Mr. Cass, which had been read to him at the time, by Mr. Dallas. He had answered that, as the war had ceased, it was not advisable to continue the discussion. "It is in fact," he said, "a proposal that, there being two powers, one of which has a very strong army and a weak navy, and the other having an army inferior in numbers, but a superior navy, the power which has the superior navy should forego all the advantages to be derived from the same and allow the contest to be decided by military force alone." Hansard's Parl. Debates, 3d series, vol. clxi. p. 463.

But, Mr. Cass's proposal has found an earnest supporter in Mr. Cobden, distinguished as the negotiator of the commercial treaty between Great Britain and France, as well as by his successful parliamentary efforts in the repeal of the prohibitory corn laws, to which, as having equally their origin in barbarous and ignorant ages, he assimilates the belligerent rights in question: "When I heard it was the intention of the honorable member for Liverpool to bring forward the subject of the exemption of private property from capture at sea, I immediately said that he was mooting a question so intimately connected with that of commercial blockades that the two could not be kept apart. So it turned out in the debate on Mr. Horsfall's motion, (11th March, 1862. See Part IV. ch. 2, Editor's note [192, p. 647.) He was told, of course, that if you exempt private property from capture at sea during war, you must also consent to give up the system of commercial blockades. There is no doubt in the world about it; the two things are utterly incompatible. To exempt a cargo of goods from capture when it happens to be on the ocean, but to say that it may be captured when it gets within three miles of a port, is to assert that which cannot be practically carried into effect in negotiations or treaties with other countries. In addition, therefore, to the question of the exemption of private property, you have to consider the larger question of commercial blockades. I say it is the larger question, because the capture of private property at sea necessarily affects only the merchants and ship-owners of the countries which choose to go to war, whereas a commercial blockade affects neutrals as well, and the mischief is not confined to the merchants and ship-owners, but is extended to the whole manufacturing population. It may involve the loss of life as well as the loss of health, and may throw the whole social system into disorder. It will thus be seen that the question of commercial blockades is one of greater importance to England than that of the capture of private property at sea. The American government were the first to perceive, after they had proposed to Europe to exempt private property from capture at sea, that the proposal involved the question of commercial blockades. They have been the great neutral power of the earth. Hence it happened that whenever a war occurred in Europe it was their commerce, as the commerce of neutrals, which suffered most. They have not shared the enjoyment of the fight, but they have always borne the brunt of the enforcement of the maritime laws affecting neutrals, and therefore they have naturally from the first sought to protect their own legitimate and honest interests by pressing the rights of neutrals in all their negotiations on the subject of international maritime law. On the breaking out of the war in Italy between France and Austria, the American government sent to all their representatives in Europe a despatch on the subject of international maritime law, in which they, for

[1] "*Si juris mei executionem rerum subvectio impediret, idque scire potuerit qui advexit, ut si* OPPIDUM OBSESSUM TENEBAM, *si* PORTUS CLAUSOS, *et jam deditio aut pax expectabatur*," &c. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 1, § 5, note 3.

"unlawful to carry anything, whether contraband or not, to a place thus circumstanced; since those who are within may be

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the first time, broached in a practical form to the European governments the idea of abolishing altogether the system of commercial blockades. There is no doubt, that if, in 1859, the English government, followed as it would have been by the other governments of Europe, had accepted cordially and eagerly, as it was our interest to have accepted it, the proposal or suggestion of the American government, it would have been possible to avoid all that is now happening in Lancashire; and trade, as far as cotton is concerned, would have been free between Liverpool and New Orleans. For you will bear in mind that, though it may be said that the war in America is but a rebellion or a civil war, the European powers recognize the blockade of the Southern ports only as the blockade of a belligerent.

"It has been distinctly intimated to America that we do not recognize their municipal right in the matter; and if they were to proclaim, for example, that Charleston was not to be traded with, and did not keep a sufficient force of ships there, we should go on trading with the town just as if nothing had occurred. It is only upon condition that the blockade shall be effectively maintained as between belligerents that the European powers recognize it at all. Hence there can be no doubt that if the proposal of the American government in 1859 had been cordially accepted by England, it would have been welcomed by the rest of Europe, and have prevented the existing state of things in this district. There can be no doubt that in that case, the American government would have been obliged to carry on the war with the Southern States without imposing a commercial blockade, or, if they had attempted to establish such a blockade, in violation of their international engagements, they would have involved themselves in hostilities with the rest of the world — a policy which, of course, no rational government would ever dream of entering upon.

"We are now suffering from the operation of a commercial blockade — suffering in a way which could not be matched by any other calamity conceivable in the course of nature or the revolutions of men. I cannot conceive anything that could have befallen Lancashire so calamitous, so unmanageable, so utterly beyond the power of remedy or the possibility of being guarded against as that which has happened in the case of the present commercial blockades. You have been trading fifty or sixty years with a region of the earth which during the whole of that time has been constantly increasing its production of raw fibre for your use. You have been increasing your investments of capital, training skilled workmen, preparing in every way for the manufacture and manipulation of that raw material. The cotton was intended for you, not for the people by whom it was grown. You have been making provision for its use, and now all at once, as if a portcullis were let down at the entrance of a castle, this great stream, which has been constantly enlarging for a period of more than half a century, is shut off, and you are deprived of the means on which you have been calculating for the employment and subsistence of your people. Nothing but a commercial blockade could have produced such a calamitous state of things. With the 4,000,000 bales of cotton which will exist in the Southern States at Christmas, and with the prevailing uncertainty as to the result of the war, there is no remedial measure which can be applied."

Having read the passage from Mr. Cass's instructions, already cited in this note, Mr. Cobden thus proceeded: "The particular suggestion of Mr. Cass is this: that in the origin of blockades it was never intended to blockade a whole coast, or to shut out the export and import of articles not contraband of war; and he gives cogent facts and reasons in support of his assertion that in its origin a blockade meant the

compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries.

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investing of fortified places, and their investment by sea and land at the same time. The Americans do not object to that; they do not object to your investing their own arsenals; they do not say that Portsmouth and Plymouth are not to be liable to investment, but the argument is that the peaceful ports of commerce ought not to be shut up in time of war. I ask, what interest have we as a nation in opposing that principle? Why, I think it is easy to show that we, of all people in the world, have the most interest in establishing it. Let us ask ourselves with what country it can be advantageous for England to maintain the system of commercial blockades, supposing we were at war with that country. There are only three countries with which England could possibly have a maritime war of any serious dimensions, viz. France, Russia, and the United States. Take France. Since the discovery of the locomotive and the rail, merchandise intended for the interior of France, which now under ordinary circumstances goes by way of Marseilles, Havre, and other ports, could find a way to enter by Rotterdam, Hamburg, and very soon also, as the lines of railway are completed, by the ports of Italy and even of Spain, and with little addition to its cost, certainly without such an addition as would form an insuperable bar to the French people obtaining and enjoying those commodities. Practically, therefore, a blockade — as an instrument of warfare with France — has lost its force by the introduction of the locomotive and the rail. Now take Russia. There is no doubt that in regard to that country, from which we import so heavily of raw materials, especially from its southern portion, in the Black Sea, the principle of commercial blockade will still hold good in all its force. Therefore, I ask, if you were at war with Russia, would it be the interest of England to enforce the system of commercial blockade as a means of coercing that country, and putting an end to the hostilities? That question is answered by what we saw done during the Crimean war. That war was declared in March, 1854. France and England had both had deficient harvests, and in France especially there was a dearth of food. What was the course then pursued by those countries? Did they instantly avail themselves of the power of blockading the southern ports of Russia? No. Though the war was declared in March, 1854, it was not until March, 1855, that the blockade of the commercial ports of the Black Sea and the Sea of Azoff was declared. We purposely left those ports open for a twelvemonth, in order that England and France might get grain from them, and we got more than half a million quarters of corn from them, to feed our people, while we were at the same time carrying on the most destructive operations of the siege of Sebastopol. That is a practical instance in our own day, and in respect to our own country, in which we applied the principle advocated by Mr. Cass, viz.: that of besieging a military arsenal, and carrying on simultaneously a peaceful intercourse with the enemy's commercial ports. But how was it in the other direction? Bear in mind that of all the exports from Russia, whose chief exports are raw materials, hemp, flax, linseed, tallow, and grain, England takes far more than one half; in the case of some articles she takes even as much as seventy and eighty per cent. Well, if we were at war with Russia, should we enforce a blockade upon her ports? Again, we have an illustration of that in the last war. We professed, it is true, to blockade Cronstadt to prevent the export of raw material, such as flax and hemp, by sea to England. By that means we merely diverted that traffic through Prussia; and in one year, 1855, we brought from Prussia tallow to the amount of £1,500,000 sterling, while in the year before the amount had not been £2,000. Well, but the government knew that those arti-

If, therefore, it should be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise

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cles were coming from the ports of Prussia in the Baltic, and we had a debate on the subject raised in the House of Commons, where a motion was made in regard to this contraband trade, as it was called, in Russian produce. (See Part IV. ch. 1, § 18, Editor's note [175, p. 554.)

"Turn now to the third case. Suppose we were at war with America. Does anybody believe that, if we had been at war with her last year, we should have gone and blockaded the Southern ports, and prevented cotton from coming into Lancashire? Nobody supposes that if we were at war with the United States, we should blockade their ports. I will tell you what we should do. We should have a blockading squadron there, and prize money would flow in great abundance; but you would never attempt hermetically to seal up that territory. The cotton would come out, the rate of insurance would rise, and thus you would get your raw material, but at an increased price. But our imports from America do not consist solely of cotton. It would be bad enough to keep out the cotton, to stop your spindles, and throw your work-people out of employment. But that is not all. You get an article even more important than your cotton from America, — your food. The food imported from America between September of last year and June of this year was equal to the sustenance of between 3,000,000 and 4,000,000 of people for a whole twelvemonth, and if that food had not been brought from America, all the money in Lombard Street could not have purchased it elsewhere, because elsewhere it did not exist. Well, I would ask whether, in the case of war with America, anybody would seriously contemplate our enforcing a blockade in order to keep out those commodities? For nearly a century England has believed that she has had an interest in maintaining to the utmost degree the rights of belligerents, just as America has believed, and rightly so, that she has an interest in maintaining the rights of neutrals. But the circumstances are now changed. We profess the principle of non-intervention. We no longer intend, I hope, to fight the battles of every one on the Continent, and to make war like a game of ninepins, setting up and knocking down the pieces as chance or passion may dictate. We avow the principle of non-intervention, which means neutrality, and we have therefore made ourselves the great neutral power of the world. Two great wars have been carried on within the last three years. One was the war in Italy between France and Austria, and the other is the still more gigantic war in America. During both England has remained neutral. Our business, therefore, is to shape our policy according to the light of modern events." London Times, October 25, 1862, Mr. Cobden's Speech before Manchester Chamber of Commerce.

The same instruction which was addressed by Mr. Cass to Mr. Mason, was sent to the other representatives of the United States in Europe. Being at Vienna at the time that the propositions of his government were presented by our Minister, Mr. J. Glancy Jones, to that of Austria, we had an opportunity of appreciating the enlightened views which Count Rechberg took of these questions and of listening to his assurance that, should they come before a European Congress, they would receive his support.

The proposals of the late administration of the American government, have also an advocate in the English publicist, Mr. Westlake, who, in the paper already alluded to, "Commercial Blockades, considered with reference to Law and Policy," maintained "that the only escape from the perplexities of the present system was to regard commercial blockade as lawful only when the neutral performed an un-

the siege or blockade, which would be doing him an injury, and therefore unjust. And because it cannot be known what articles the besieged may want, the law forbids, in general terms, carrying *anything* to them; otherwise disputes and altercations would arise to which there would be no end."[1]

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, 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

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neutral act and thus put himself in the place of an enemy; and it should only apply to besieged places and to contraband of war, and not to regular commerce as had formerly been the case."] — *L.*

[1] "Sola obsidio in causâ est, car nihil obsessis subvehere liceat, sive *contrabandum* sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et aliâ aliarum rerum penuriâ. Si quid eorum, quibus indigeat, tibi adferre liceret, ego fortè cogerer obsidionem solvere, et sic facto tuo mihi noceres, quod iniquum est. Quia autem scire nequit, quibus rebus obsessi indigeant, quibus abundent, omnis subvectio vetita est, alioquin altercationum nullus omnino esset modus vel finis. Hactenus Grotii sententiæ accedo, sed vellem ne ibidem addidisset, tunc demum id verum esse, *si jam deditio aut pax expectabatur,* . . . . nam nec rationi conveniunt, nec pactis Gentium, quæ mihi succurrerunt. Quæ ratio me arbitrum constituit de futurâ deditione aut pace? et, si neutra exspectetur, jam licebit obsessis quælibet advehere? imo nunquam licet, durante obsidione, et amici non est causam amici perdere, vel quoque modo deteriorem facere." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 11.

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."[1]

What things must be proved to constitute a violation of blockade.

"To constitute a violation of blockade," says Sir W. Scott, "three things must be proved: 1st. The existence of an actual blockade; 2dly. The knowledge of the party supposed to have offended; and, 3dly. Some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade."[2]

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 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.[3] [235

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[1] Wheaton's Hist. Law of Nations, p. 138–148.

[2] Robinson's Adm. Rep. vol. i. p. 92, The Betsey.

[3] The 3d art. sect. 4, of this convention, declares, "That in order to determine what characterizes a blockaded port, that denomination 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."

[235] Sir William Scott seems to have expressed the opinion, in a case before him, in 1811, that a belligerent has no right to interrupt the communications between a neutral government and its representative in a foreign country, through a port, the trade to which would otherwise be illegal; at any rate, if the despatches are carried in a public manner, in vessels commissioned by the State for that purpose, and vested with the character of packets. And he reserves the question, whether a merchant vessel would be protected by carrying papers of such a description, while engaged in a transaction otherwise illegal; such a claim could only, in any event, be raised, he said, on the part of the government, and cannot be set up by the merchant vessel as a ground of defence. Tudor's Leading Cases on Mercan-

The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful block-

tile and Maritime Law, p. 774. Dodson's Adm. Rep. vol. i. p. 104, The Drummond. But the instructions of the French government in the case of the Mexican and Argentine blockades, directed their naval commanders to oppose, even by force, the entry of neutral ships of war into blockaded ports. Ortolan, Diplomatie de la Mer, liv. iii. ch. 9, tom. ii. p. 334, 2me ed. Count Molé, Dispatch, 17th of May, 1838. These instructions Hautefeuille considers entirely correct, inasmuch as the right of blockade extends to vessels of war belonging to neutral powers. Droits des Nations Neutres, tom. ii. p. 219, 2me ed. During the pending civil war in the United States, armed vessels of neutral States have the privilege to enter and depart from the blockaded ports. Lord Lyons to Admiral Milne, May 11, 1861.

Referring, at the commencement of the war between the United States and Mexico, to a statement that, during the French blockade of Vera Cruz, in 1838, British ships of war had been allowed to sail from that port laden with specie, on British account, and to enter it with quicksilver for working the mines, Mr. Wheaton wrote: "Most certainly the right of visitation and search cannot be applied to a public ship of war of another nation, so as to ascertain whether she has on board specie or quicksilver; but it is equally certain that a public ship of war of a neutral power has no right to enter a blockaded port, nor to come out of it, unless she happened to be there at the time when the blockade was first established. In the latter case, I think such ship ought, by analogy to the case of private merchant vessels, (which are always allowed to retire with their cargoes already purchased and delivered before the commencement of the blockade), to be allowed to depart in like manner with the specie already taken on board. Any further indulgence in this respect must be governed by such motives of policy as may guide the conduct of our government, in respect to its desire to conciliate neutral powers, so far as may be consistent with the objects of the war." Mr. Wheaton to Mr. Buchanan, Secretary of State, July 1, 1846. MS.

The section from the maritime convention of 1801, cited in Mr. Wheaton's note 8, was understood to have adopted, as a concession to the Northern powers, in return for their abandonment of more important points of maritime law, the rule of the armed neutralities of 1780 and 1800; which declared that no port should be considered blockaded, unless where the power attacking it should maintain a squadron constantly stationed before it, and sufficiently near to create an evident danger of entering. There is, however, in the convention of 1801, a substitution of the disjunctive for the copulative conjunction; so that instead of requiring, to effect a valid blockade, that the ships of the blockading squadron should be "stationary *and* sufficiently near," that convention only provides that they shall be "stationary *or* sufficiently near." By this minute change, it was contended in Parliament, that it was intended to establish, in their full extent, the principles which Great Britain had maintained on this question of maritime law, and which the article, as it stood in the two declarations of armed neutrality, was calculated completely to subvert. Wheaton's Hist. of the Law of Nations, p. 418. Hautefeuille, Droits des Nations Neutres, tom. ii. p. 264.

To an inquiry made, in 1823, how far the Emperor of Russia would find himself restricted by this treaty, in the adoption of the principles then proposed by the United States, Baron Krudener replied, that subsequent events had annulled every stipulation which might have abridged His Majesty's rights in that respect. Mr. Van Buren to Mr. Randolph, June 18, 1830.

The prohibition on the trade of neutrals with blockaded ports, in the English and French "declarations" of March, 1854, already noticed, applies in terms to an

ade, arises out of the circumstance of the occasional temporary absence of the blockading squadron, produced by accident, as in

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"effective blockade, which may be established with an adequate force against the enemy's forts, harbors, or coasts." No further definition of what shall constitute an *effective blockade* is given. Nor was there anything more definite in the act of the Paris Congress of 1856. Mr. Marcy in his answer to the invitation to the United States to unite in it, said: "The fourth principle contained in the 'declaration,' namely: '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;' can hardly be regarded as one falling within that class with which it was the object of the congress to interfere; for this rule has not, for a long time, been regarded as uncertain, or the cause of any 'deplorable disputes.' If there have been any disputes in regard to blockades, the uncertainty was about the facts, but not the law. Those nations which have resorted to what are appropriately denominated 'paper blockades,' have rarely, if ever, undertaken afterwards to justify their conduct upon principle; but have generally admitted the illegality of the practice, and indemnified the injured parties. What is to be adjudged 'a force sufficient really to prevent access to a coast of the enemy,' has often been a severely contested question; and certainly the declaration, which merely reiterates a general undisputed maxim of maritime law, does nothing towards relieving the subject of blockade from that embarrassment. What force is requisite to constitute an effective blockade, remains as unsettled and as questionable as it was before the congress at Paris adopted the 'declaration.'" Mr. Marcy to the Count de Sartiges, July 28, 1856. President's Message, 1856–7, p. 36. In the debates on Marcy's proposition for the immunity of private property, Lord John Russell remarked: "It is said that we should still retain the power of blockade, but that power of blockade has been limited and restricted by the convention of Paris. It must be an effective blockade, that is, such a blockade that no vessel could with safety attempt to pass through. This is so difficult to attain that during the late war we were for some months without a blockade in the Black Sea, in consequence of conforming to the French rule. The effect, therefore, of your maritime law is to blockade one port and to leave the other ports unblockaded, that is to say, you might do great injury to New York or Boston, but all the other ports along the coast would be able to carry on their commercial operations as usual." Hansard's Parl. Deb. 3d series, vol. cxliv., p. 2084, 9th March, 1857. Sir Charles Napier said: "Double or treble our navy would not be sufficient to blockade the ports of France." Ib. vol. cxlvi. p. 1486, July 14, 1857.

In a note from Lord Lyons at Washington, to his government, after the President's blockade of April, 1861, he states: "I observed to Mr. Seward that it was not easy to understand exactly to what extent of coasts 'the ports within the States mentioned' was applicable. Mr. Seward said, that it was intended to blockade the whole coast from the Chesapeake Bay to the mouth of the Rio Grande. I observed to him that the extent of the coasts between those points was, I supposed, about three thousand miles. Surely the United States had not a naval force sufficient to establish an effectual blockade of such a length of coast. Mr. Seward, however, maintained that the whole would be blockaded and blockaded effectively." Lord Lyons to Lord J. Russell, May 2, 1861. On a subsequent occasion, while declining to give a copy of the instructions, Mr. Seward assured Lord Lyons that "the blockade would be in strict conformity to the principles mentioned by Mr. Buchanan. (See next note.) The proclamation is mere notice of an intention to carry it into effect, and the exist-

the case of a storm, which does not suspend the legal operation of the blockade. The law considers an attempt to take advan-

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ence of the blockade will be made known in proper form by the blockading vessels." Same to Same, May 4, 1861, Parl. Papers, 1861. Correspondence with the United States Government respecting Blockade.

In a discussion in the House of Lords, May 16, 1861, the Earl of Ellenborough said: "Her Majesty's subjects are warned 'not to break any blockade lawfully and actually established by either of the belligerent powers.' Now, the first question I wish to put to the noble Earl is in what sense we are to understand these expressions. We are at present under an obligation to adhere to the declaration on the subject of maritime law agreed to by Her Majesty's plenipotentiaries and those of other powers at Paris. That declaration bears directly on the subject of blockades in these words: — '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.' Now, if these words are to be understood in their strictly literal signification, to establish a lawful blockade would be almost physically impossible. They must receive certain qualifications and explanations. I say impossible, because there is hardly in the whole universe any locality in which ships can remain safely with the power of absolutely preventing access to an enemy's coast. Blockades are carried on by ships at sea. They must be carried on by ships at sea, and under sail, because no ships can carry a sufficiency of coal to enable them to act constantly under steam. No doubt it would be a great facility if they could always act under steam; that would go far to enable them to make the blockade effectual. But I recollect having heard that during the blockade of Toulon the ships employed in that service were driven to the Mediterranean and the Coast of Africa. Such things will occur again; and, according to the strict meaning, a blockade might have ceased to be valid because it ceased to be really maintained to prevent access to the enemy's coast. But I apprehend the words must be understood with necessary qualifications, arising from the circumstances of wind and weather, which command all such operations; and that the real meaning is to prevent access by establishing such a case of danger to those who attempt to violate the blockade as to induce them to desist from attempting to do so. But, if that be the meaning of Her Majesty's Ministers, I confess I think it very much to be regretted that, instead of adopting totally new words, as they have done in this proclamation, they did not warn Her Majesty's subjects against breaking, or endeavoring to break, a blockade lawfully established and effectively maintained. I wish, then, first to know from the noble Earl in what sense we are to understand the words used in this proclamation. Do they intend to convey the exact meaning, with the qualifications I have mentioned, of the declaration made by the powers? If they do not, what further meaning do they contain? Do they go below or beyond the words of that declaration? And why should not the particular words there used be adopted on this occasion?"

Earl Granville.— "With respect to the first question, — what meaning is to be attached to the words — 'a blockade lawfully and actually established' — I apprehend that, although the agreement of Paris is likely to form an epoch in the history of international law, and although it was concurred in by all the nations of Europe and by several American States, yet it does not in itself constitute a change in international law, excepting as regards those powers which signified their acceptance of it. I believe, further, even with respect to those countries which entered into that agreement with us, that what took place at Paris made no change as

tage of such an accidental removal a fraudulent attempt to break the blockade.[1] [[236]

far as blockades, lawfully and actually established, are concerned. That question of international law remains exactly the same as before, with this difference only, that mere paper blockades will not in future be recognized. Before a blockade can be said to be lawfully and actually established, it must be announced in proper form and manner, and the State declaring it must have on the spot such a force as, I do not say, to make it impossible, but, at any rate, to make it very difficult for vessels to obtain egress or ingress. The second question which the noble Earl has put to me is still more difficult to answer in a clear and satisfactory manner; but, I can say, at all events, that the government have followed the course usual on such occasions."

The Earl of Derby said: — "It has been stated that the Northern States have intimated their intention of blockading the whole of the Southern ports. Now, we know, perfectly well, that it is not in the power of the Northern States, if their navy were three times as powerful as it is, effectually to blockade all these ports. There is no doubt they might effectually blockade this, or that, or the other port, and that would be a blockade which we would be bound to recognize; but I do think it is very important that Her Majesty's government should not commit themselves to the doctrine that the United States are to lay down the principle of a universal blockade, that that universal blockade would be recognized by Her Majesty's government, and that all Her Majesty's subjects who might choose to disregard it would be liable to penal consequences. I apprehend that to make them so liable the blockade must be one the validity of which has been recognized by their government. It is important, therefore, that Her Majesty's government should come to a clear understanding with the government of the United States that a mere paper blockade, or a blockade extending over a space to which it is physically impossible that an effectual blockade can be applied, will not be recognized as valid by this country."

Lord Brougham said: "That he entirely concurred in the opinion that it was not necessary that a blockade, in order to be looked upon as effective, should be of such a nature as to render access to any part of the coast impossible, but that it would be sufficient to constitute a real blockade, that it precluded the existence of any reasonable chance of entrance."

In the debate in the House of Lords, on the 10th of March, 1862, Earl Russell maintained the validity of the blockade.

"It might be said, at the commencement that the blockade was too extensive, and it

[1] Robinson's Adm. Rep. vol. i. p. 154, The Columbia.

[[236] The doctrine of Sir William Scott, announced in the text, that a blockade may continue during a temporary absence of the blockading squadron, and which gives to the diplomatic notification of the blockade once made, and even to the pretended notoriety of the fact, an effect independent of the actual presence of the blockading squadron, is controverted, on principle, by the French publicists, who contend that it must cease by an absence, however occasioned; and whatever may be the formalities under which it was instituted — that a nation can only execute its laws within its own jurisdiction — that it is upon the supposition that a part of the sea, within the jurisdictional limits of the enemy, and where their squadron is stationed, has been conquered, and that the blockading squadron has succeeded to the occupation of the former possessors, that its interference with the navigation of neutrals can on principle be maintained. Hautefeuille, Droits des Nations Neutres tom. iii. p. 120. Ortolan, Diplomatie de la Mer, ch. 9, tom. ii. p. 311, 2d edit.] — *L.*

Knowledge of the party.

2. As a proclamation, or general public notification, is not of itself sufficient to constitute a legal blockade,

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was impossible that so extensive a blockade should really be efficient; but we must recollect that we ourselves in our American war instituted a blockade of two thousand miles of coast, and the difference between two thousand miles and three thousand miles, is not so great as to authorize us to make any objection to the blockade on that account. But in a blockade of three thousand miles of coast, although it is such a blockade as we ourselves should have established, and such as the law of nations recognizes, with several large ports and many small ones to watch, there were sure to be many irregularities in the conduct of it. Yet we find, generally speaking, that there has been an intention to station ships off the different ports, and that ships have been stationed there."

After referring to alleged interruptions as to the blockade of Charleston, he remarked: "If any ship had been taken at that time into a prize court it might well have been argued by the owners that there was an interruption, and that no blockade existed; but that does not affect the general question of the blockade of the Southern coast of America. And let it be remembered, above all, that if there were an ineffectual blockade, the last place in which we should hear of it would be in the American prize courts. When a merchant vessel had been taken into one of those courts, it would be quite competent for the owners to plead that there was no effective blockade, and that, therefore, the vessel, not having broken it, could not be legally condemned. No one will say that there are not judges in America quite competent to decide questions of international law, — judges who have inherited the precepts and doctrines of such men as Chancellor Kent and Justice Story, — quite competent to pronounce judgment according to law, and who, I believe, would not have departed from the law in their decisions in such cases. But I do not find that there has been any real discussion in the prize courts of America, except, perhaps, in one or two instances, with respect to the efficiency of the blockade.

"Your Lordships know very well that in 1806 the government of this country announced a blockade extending from Brest to Dunkirk; but during that and other blockades which were instituted on the French coast, there were many coasting vessels which went from one port of France to another, entirely escaping the blockade. But would that have justified either America or any other neutral power in saying, 'This blockade is ineffective, and we will not acknowledge it, and we require you to give up the vessels which you have seized for breach of blockade'? It certainly would not have justified such a course. But there is another consideration. Has the Southern coast had a free and uninterrupted communication with Europe? Have your Lordships heard that cotton has arrived in its usual quantities here, and that the manufactures of Great Britain and France have arrived freely at the ports of the States which are now in a state of civil war? On the contrary, the intelligence which we have received shows that there has been no such uninterrupted intercourse, but that great inconvenience has been suffered by the inhabitants of these Southern States, owing to the existence of that blockade which is said to be ineffective. On the question of the inefficiency of the blockade, it was desirable to consult the law-officers of the Crown; and after having done so, I wrote the despatch of February 15, 1862, to Lord Lyons, stating that 'Her Majesty's government are of opinion that, assuming that the blockade is duly notified, and also that a number of ships is stationed and remains at the entrance of a port, sufficient really to prevent access to it or to create an evident danger of entering or leaving it, and

so neither can a knowledge of the existence of such a blockade be imputed to the party, *merely* in consequence of such a proc-

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that these ships do not voluntarily permit ingress or egress, the fact that various ships may have successfully escaped through it will not of itself prevent the blockade from being an effective one by international law.'" Parliamentary Debates.

The French Minister of Commerce, M. Rouher, addressed to the Chambers of Commerce in September, 1861, a note agreed upon with the Department of Foreign Affairs, in which it is said, "From the moment that we find ourselves in the presence of two belligerents to whom we know not how to deny that character, we find ourselves obliged to recognize in them all the rights which, according to international rules, war confers on those who make it. Consequently we cannot contest with either of them the right to injure the other by all the legitimate and direct means which it possesses, such as that which consists in seizing upon its possessions, besieging its towns, blockading its ports. The natural consequence of the exercise of the law of blockade is to interdict to other powers access to the blockaded places. It is incontestable that those powers have to suffer from the interruption thus put upon their usual commercial relations; but they would have no right to make any reclamation for it, because they are only indirectly affected, and because no obstruction is placed upon that freedom of navigation to which they are entitled, except where such freedom would render absolutely inefficacious the military operations between belligerents rendered legitimate by the law of nations.

"The admission by all the powers of this principle, that the blockade, to be obligatory, must be effective, has remedied the abuse which formerly sprung from the right of excluding neutrals from points that were declared blockaded.

"The effectiveness of the blockade is, to-day, for all the world, the essential condition of its validity. But so soon as there are, at the places to which a belligerent wishes to interdict access, forces sufficient to prevent their being approached without exposure to a certain danger, the neutral is compelled, no matter how prejudicial to him it may be, to respect the blockade. If he violates it, he exposes himself to being treated as an enemy by the belligerent with respect to whom he has deviated from the duties of neutrality.

"It is true that a belligerent may not employ, to annoy his enemy, any means that strike directly at peoples who have remained strangers to the strife; but it is no less true that these latter have always to endure the indirect consequences of the perturbation resulting from the war from the moment that it breaks out.

"Another error of the claimants is to believe that the blockade does not exist until it is notified diplomatically, and that it does not apply to neutral vessels that have quitted their country previously to the notification. A blockade is obligatory from the moment that it is effectively established; being the material result of a material fact, it commences with the real investment of the place, continues so long as that investment remains, and ceases with it.

"It matters little that neutrals are ignorant of the facts. If one of their vessels presents itself at the place, the belligerent has the right to forbid its entrance.

"The general usage is, doubtless, for a government to inform other governments of the measures of blockade to which it has recourse; but this notification, which is not an absolute rule, is of no value by itself; it is only the announcing of an existing fact, which would already produce its effects.

"It is by erroneously attributing to the diplomatic notices of blockade a value and a signification which they have not in themselves, that it might be pretended to

lamation or notification. [237] Not only must an actual blockade exist, but a knowledge of it must be brought home to the party,

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exclude neutrals from an entire territory, the access to which could not in reality be interdicted; and it is for the purpose of rendering these fictitious blockades entirely impossible, that the agreement has been entered into at present not to consider a neutral as entitled to notice of the existence of a blockade except at the blockaded places themselves. This practice, which leaves a belligerent the faculty of acting with all the promptitude often required by operations of war, which permits a military chief to blockade, according to necessity, places distant from his country before he has instructed his government of the fact, has this advantage for the neutral, that it does not impose upon him obligations inevitably onerous, except, at least, under circumstances where he must inevitably submit to them." Moniteur Universel.] — *L.*

[237] "It is a rule of the British law of nations," the South American publicist said, "that if a neutral power submits to the unjust pretensions of one belligerent, thereby prejudicing the other, that other has the right to require that the neutral power should submit to equivalent acts on its part, so that its deference to one, whether voluntary or forced, should not aggravate the calamities for the other, nor place it in a disadvantageous position." Bello, Principios de Derecho Internacional, p. 235.

Mr. Canning, in a note to Mr. Pinkney, United States Minister in London, of the 23d of September, 1808, said: "I have uniformly maintained the unquestionable right of His Majesty 'to resort to the fullest measures of retaliation, in consequence of the unparalleled aggressions of the enemy, and to retort upon that enemy the evils of his own injustice'; and have uniformly contended that 'if third parties suffer from those measures, the demand of reparation must be made to that power which first violates established usages of war and the rights of neutral States.'" Parliamentary Papers, 22d February, 1809, p. 4.

By the British Orders in Council, putting extensive coasts under "paper blockades," and the Berlin and Milan decrees, professedly retaliatory of them, neutrals were punished by the respective belligerents for the aggressions of their adversaries. On the Berlin and Milan decrees were based the "continental system" (*blocus continental*) of Napoleon I., to which Prussia, Denmark, Russia, Austria, and Sweden acceded, and which was declared applicable, as well to Spain, Naples, Holland, and Etruria, as to France and the kingdom of Italy. All these orders and decrees are now admitted by publicists to have been in violation of international law. But even the astute mind of Sir William Scott could, in 1811, find no better reason for condemning American vessels than the acts of France. "This retaliatory blockade," (if blockade it is to be called,) says he, "is coextensive with the principle: neutrals are prohibited to trade with France, because they are prohibited by France from trading with England. England acquires the right, which it would not otherwise possess, to prohibit that intercourse by virtue of the act of France." Edwards's Adm. Rep. p. 321, The Fox. And the same Judge, while passing, in 1814, on another case, which had arisen in 1809, and in which he gives the definition of a legal blockade, declares that "the order of the 26th of April of that year was, amongst others, issued in the way of retaliation for the measures which had been previously adopted by the French government. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships, and forming, as it were, an arch of circumvallation round the mouth of the prohibited port. There, if the arch fails in any one part, the block-

in order to show that it has been violated.[1] As, on the one hand, a declaration of blockade which is not supported by the

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ade itself fails altogether." Dodson's Adm. Rep. vol. i. p. 425, The Anthem. See, for the "continental system," Cussy, Droit Maritime, tom. i. p. 216; tom. ii. p. 234. Manning's Comm. p. 330; Wildman's International Law, vol. ii. p. 184; Martens, Nouveau Recueil, tom. i. p. 433–549; American State Papers, *passim*.

Mr. Wheaton, in transmitting the note of Baron Canitz, of the 25th of June, 1846, acknowledging his note announcing the intention of the United States to establish immediately a vigorous blockade of the ports of Mexico, as well on the Atlantic as on the Pacific, says: "I infer from your despatch, of the 14th of May, that the blockade is intended to *be a strict and efficient one*, that is, to be enforced by adequate naval forces, stationed so near the ports declared to be in a state of blockade as to render it dangerous to approach and enter them. It will, however, doubtless have occurred in your reflections on this important subject, that neutral powers may justly expect the diplomatic notification of the intention to establish such a blockade, to be followed by the necessary measures to give practical effect to that intention. They will not be satisfied with the *notification* unaccompanied by the *fact* of the ports being actually invested." Mr. Wheaton to Mr. Buchanan, July 1, 1846. MS.

In the instructions, given during the war with Mexico, by the Secretary of the Navy, and communicated by the Secretary of State, Mr. Buchanan, to Mr. Packenham, the British Minister at Washington, it is said: "You will employ the forces under your command in the active prosecution of the war, and establish and maintain the blockade of such of the enemy's ports as you may deem proper in the execution of your orders, giving to neutral vessels in such ports twenty days to leave. But a lawful maritime blockade requires the actual presence of a sufficient force situated at the entrance of the ports sufficiently near to prevent communication." After adopting the exception of accidental removal, as given in the text, it is added: "The United States have at all times maintained these principles on the subject of blockade, and you will take care not to attempt the application of penalties for a breach of blockade, except in cases where your right is justified by these rules. You should give public notice that, under Commodore Stockton's general notification, no port on the west coast of Mexico is regarded as blockaded, unless there is a sufficient American force to maintain it, actually present, or temporarily driven from such actual presence by stress of weather, intending to return." Mr. Mason to the Commanding Officer in the Pacific Ocean, December 24, 1846.

If an extensive coast is blockaded, the force must be sufficiently large to operate at the same time on the whole line. Bello, Principios de Derecho Internacional, p. 227. In a case, arising in the war of England and France with Russia, it was held, by the Lords of the Privy Council, that the notice of blockade cannot be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable for a breach of blockade for afterwards attempting to enter the port which is really blockaded. In the same case, it was decided by the Judicial Committee of the Privy Council, reversing the judgment of Dr. Lushington, that inasmuch as the Order in Council relaxed the blockade in favor of belligerents, to the exclusion of neutrals,

[1] Robinson's Adm. Rep. vol. i. p. 93, The Betsey.

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.[1] 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.[2] 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

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the blockade was illegal. In this case, it was also declared that the admiral of the fleet must be presumed to have carried with him sufficient authority to blockade such of the enemy's ports as he might deem advisable. Moore's Privy Council Cases, vol. x. p. 59, The Francisca. In the discussion in the House of Lords, on the blockade of the Southern States of America, already referred to in this note, it was said by Lord Kingsdown, who had given the opinion in the last case, that it was settled by the Judicial Committee during the Crimean war, "that a blockade could not be constituted by drawing a line to prevent ships going to particular ports, if the line included other ports to which they had a right to go; and that, in the case of an effective blockade, a ship, unless it had due notice of the blockade, could not be seized. He believed that the principles laid down by the Judicial Committee would be found applicable to questions likely now to arise."

To an inquiry made by Lord Lyons of the Secretary of State, after the promulgation of the proclamation instituting that blockade, whether it was intended to issue notice for each port, as soon as the actual blockade of it should commence, the reply was, "that the practice of the United States was not to issue such notices, but to notify the blockade individually to each vessel approaching the blockaded port, and to inscribe a memorandum of the notice having been given on the ship's papers. No vessel was liable to seizure, which had not been individually warned. The plan had, I was assured, been found to be in practice the most convenient, and the fairest to all parties. The fact of there being blockading ships present to give the warning was the best notice and best proof that the port was actually and effectually blockaded." Lord Lyons to Lord John Russell, May 2, 1861. Parl. Papers, *loc. cit.* It has been held by the District Courts that previous knowledge of the blockade dispenses with the necessity of a warning. Law Reporter, March, 1862, p. 286, The Revere.] — *L.*

[1] Robinson's Adm. Rep. vol. i. p. 83, The Mercurius.

[2] Ibid. vol. ii. p. 131, The Jonge Petronella. Ib. p. 298, The Calypso.

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.[1]

"There are," says Sir W. Scott, "two sorts of blockade: one by the *simple fact* only, the other by 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 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."[2] And in another case, he says: — "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

[1] Robinson's Adm. Rep. vol. i. p. 332, The Betsey.

[2] Ibid. vol. i. p. 171, The Neptunus.

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." [1]

A more definite rule, as to the notification of an existing blockade, has been 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

[1] Robinson's Adm. Rep. vol. ii. p. 112, The Neptunus, Hempel.

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 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. A neutral vessel might thus lawfully sail for a blockaded port, knowing it to be blockaded; and being found sailing towards such a port would not constitute an attempt to break the blockade, unless she should be actually warned off.[1]

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, in the main circumstance that is essentially necessary to give it legal operation; and that 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,

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[1] Cranch's Rep. vol. iv. p. 185, Fitzsimmons *v.* The Newport Insurance Company. Mr. Merry's Letter to Mr. Secretary Madison, 12th April, 1804. Wheaton's Rep. vol. iii. Appendix, p. 11.

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.[1]

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 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.[2]

Some act of violation.

3. Besides the knowledge of the party, some act of violation is essential to a breach of blockade; as either

[1] Robinson's Adm. Rep. vol. vi. p. 65, The Triheten.

[2] Ibid. p. 112, The Hoffnung.

going in or coming out of the port with a cargo laden after the commencement of the blockade.[1]

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 endeavoring 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 endeavoring 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 taken refuge. And

[1] Robinson's Adm. Rep. vol. i. 93, The Betsey.

in conformity with these principles is the more modern law and practice.[1]

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.[2] 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. [[238] But where a ship

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 11. Robinson's Adm. Rep. vol. i. p. 128, The Welvaart Van Pillaw. Ibid. vol. iii. p. 147, The Juffrow Maria Schroeder.

[2] Robinson's Adm. Rep. vol. i. p. 93, The Betsey.

[[238] As to the rule, not allowing a vessel to depart which has taken her cargo on board after the blockade was known, Mr. Marcy remarks: "In some respects, I think the law of blockade is unreasonably rigorous towards neutrals, and they can fairly claim a relaxation of it. By the decisions of the English courts of Admiralty, — and ours have generally followed in their footsteps, — a neutral vessel which happens to be in a blockaded port is not permitted to depart with a cargo, unless that cargo was on board at the time when the blockade was commenced, or was first made known. Having visited the port in the common freedom of trade, a neutral vessel ought to be permitted to depart with a cargo, without regard to the time when it was received on board." Mr. Marcy to Mr. Buchanan, April 13, 1854. Cong. Doc. The rule to which Mr. Marcy objected is adopted in the treaties of the United States with Chili, of 1832, and with Peru-Bolivia, of 1836. Statutes at Large, vol. viii. pp. 437, 492. But other treaties, as the one with Guatemala of March 3, 1849, Ib. vol. x. p. 862, and that with St. Salvador of January 2, 1850, Ib. p. 895, prohibit any restriction on a vessel that may have entered into a port before it was actually besieged, blockaded, or invested, from quitting with her cargo. Nothing is said as to the time, whether before or after the blockade, that the cargo was taken on board. These treaties also define a blockade, declaring that "those places only are besieged or blockaded which are actually attacked by a belligerent force capable of preventing the entry of the neutral."

According to Hautefeuille, "the neutral vessel, which has entered a port before the blockade, can always leave in ballast, or carrying away the goods shipped before the notice. But it cannot, without being guilty of a violation of the law imposed by the conqueror, take on board merchandise after the commencement of the blockade, even although it was purchased before. The secondary law accepts completely the rules of the primitive law; all the treaties which have provided for the questions arising from blockade have resolved it in that sense. These acts are recent, and almost all of them are treaties made by the United States. Some others, more recent still, permit the neutral which has entered before the blockade to leave with its

was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade.[1] 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.[2]

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

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cargo, without regard to the time when it was laden; at least these acts (the treaty between France and the Republic of Ecuador, 28th of March, 1845, between France and the Republic of Honduras, 22d of February, 1856,) make no mention of this important circumstance." Hautefeuille, Droits des Nations Neutres, tom. ii. p. 216.

At the beginning of the civil war in the United States, Lord Lyons, after a correspondence with the Secretary of State, (in which, in order to avoid all possible mistake, he called Mr. Seward's attention particularly to the point, whether the date of the shipment of the cargo was material,) notified the British consuls, on the 11th of May, 1861, that "neutral vessels will be allowed fifteen days to leave port after the actual commencement of the blockade, whether such vessels are with or without cargoes, and whether the cargoes were shipped before or after the commencement of the blockade."

He subsequently announced to them the receipt of a note from Mr. Seward, under date of the 16th of October, 1861, to the effect, that "the judge of the court of the United States for the Southern District of New York having recently decided, after elaborate argument of counsel, that the law of blockade does not permit a vessel, in a blockaded port, to take on board cargo after the commencement of the blockade; with a view to avoid any future misunderstanding upon this subject, you are informed that the law, as thus interpreted by the judge, will be expected to be strictly observed by all vessels in ports of insurgent States during their blockade by the naval forces of the United States." President's Message, 1861-2, p. 173.] — *L.*

[1] Robinson's Adm. Rep. vol. i. p. 150, The Vrow Judith.

[2] Ib. vol. iv. p. 89, The Potsdam. Wheaton's Rep. vol. iii. p. 183, Olivera *v.* Union Insurance Company.

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. Another distinction taken in argument was, that the vessel had terminated her voyage, and therefore that the penalty would no longer attach. But this was also overruled, because the port into which she had been driven was not represented as forming any part of 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.[1]

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. [[239] 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.[2] 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.[3]

The offence incurred by a breach of blockade generally re-

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[1] Robinson's Adm. Rep. vol. iv. note, The Juffrow Maria Schroeder.

[[239] A recent French writer says that "the validity of a blockade should depend on a simultaneous attack by land, that a port should not be considered as blockaded, unless invested, also, on the land side. Otherwise, while the general commerce of neutrals is interdicted, and they are subjected to the greatest sacrifices, a neighboring State may supply, through rivers, canals, or railroads, with the products of its soil and industry, a city open on all the land sides, and whose port alone is blockaded." Revue des deux mondes, 15 Janvier, 1862, p. 434. Casimér Perier.] — *L.*

[2] Edwards's Adm. Rep. p. 32, The Comet.

[3] Robinson's Adm. Rep. vol. iii. p. 297, The Neutralitet. Vol. iv. p. 65, The Stert.

mains 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 is deemed reasonable, because no other opportunity is afforded to the belligerent cruisers to vindicate the violated law. [240 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.[1] [241

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240 Hautefeuille says that the guilty vessel can only be seized: 1st. At the moment of violating the blockade, by crossing the part of the sea which has been conquered by the blockading sovereign; 2d. In the road or blockaded port, if the investing forces can enter there, either by taking the port, or by penetrating there by force or stratagem and carrying off the vessel; and 3d. At the moment of attempting to go out, that is to say, when crossing the territory of the nation whose law it has violated, even although the departure, in itself, should be innocent. Tom. ii. p. 239. Hence, though he admits that the existence of the right is supported by Aitzema, Bynkershoek, Wheaton, Ortolan, and especially "by the oracle of the English admiralty, during the war of 1803–1814, Sir William Scott," he objects entirely to what he terms *droit de prévention* and *droit de suite*, that is to say, to the right of considering, as guilty of a violation of blockade, every neutral vessel which has sailed for a place declared blockaded after knowledge of the notification and of regarding in *flagrante delicto*, during the whole return voyage to its port of destination, every vessel which has left a blockaded port. Ib. 244.] — *L.*

1 Robinson's Adm. Rep. vol. ii. p. 128, The Welvaart Van Pillaw; vol. vi. p. 387, The Lisette. As to how far the act of the master binds the ship-owner in cases of breach of blockade, see the cases collected in Wheaton's Reports, vol. ii. Appendix, pp. 36–40.

[241 Though a blockade is, in its nature, a belligerent act, the blockade of the Turco-Egyptian fleet, at Navarino, in 1827, was instituted during a period of professed peace. Such was also the case as to the blockade of the ports of the Argentine Republic, commencing in 1838, by England and France, and which was submitted to by other nations, though contraband articles destined for those ports were released, on the ground that, notwithstanding the blockade, France was not at war with that Republic. Hautefeuille, Droits des Nations Neutres, tom. ii. p. 274, 2me ed. The war of France with Mexico, which terminated by a treaty of peace in 1839, was preceded by two years of blockade. In the last case, a question, which it was agreed to refer to the arbitration of a third power, arose, on the conclusion of peace, whether the vessels sequestered during the blockade, and before the declaration of war by Mexico, should be restored. However the point, whether a blockade is to be deemed a pacific remedy, may be settled, as regards the parties immediately concerned, it cannot be sustained as to neutrals, otherwise than as a belligerent meas-

§ 29. Right of visitation and search. **The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of**

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ure. From the right of conquest exercised over the territorial sea arises the right of blockade, which is the right of jurisdiction accorded by the primitive law to the territorial sovereign; a right by virtue of which he excludes all foreigners from passing through his dominions, and the immediate consequence of which is to cut off the place surrounded by the conquered territory from all communication with the foreigners beyond it. The duty of these foreigners, of these neutrals, is to respect the law of the territorial sovereignty; they cannot enter his dominions against his consent, without being exposed to the application of the laws, which they violate. A blockade is, then, an act of war. It is the result of a previous act, which can only take place during war, — the complete conquest and continued possession of a part of the enemy's territory. Ib. tom. iii. pp. 10, 182.

Nor does the law of blockade differ in civil war from what it is in foreign war. Trade between foreigners and a port in the possession of one of the parties to the contest cannot be prevented by a municipal interdict of the other. For this, on principle, the most obvious reason exists. The waters adjacent to the coasts of a country are deemed within its jurisdictional limits only because they can be commanded from the shore. It thence follows that whenever the dominion over the land is lost, by its passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases. (Part II. ch. 4, § 5, Editor's note [102, p. 320.)

During the revolutions of Spanish America, the mother country attempted to enforce against foreigners the exclusive system of her colonial laws, which was ever resisted by the United States. Mr. Monroe, Secretary of State, in a note of the 20th of March, 1816, to the Spanish Minister, having objected to the blockade of the Spanish coast in South America, from Santa Marta to the river Atrato inclusive, and declared that it must be confined to particular ports, and an adequate force stationed at each to support it, Don Onis replied, March 25, 1816: "Not only that part of the coast lying between Santa Marta and the river Atrato, but the whole coast eastward and southward of those points, from the Orinoco to the territory of this Republic, belongs to the Spanish monarchy, and consequently any vessel whatever found near it, or standing towards it, can have no other object than to carry on smuggling, or stir a civil war in the King's dominions. In either case, the law of nations recognized the seizure of the vessels so employed." American State Papers, vol. iv. p. 156.

This view was not acquiesced in by the government of the United States, and, by its instructions, Mr. Erving, Minister at Madrid, declared to the Minister of Foreign Affairs of Spain, September 26, 1816: "The blockade of General Morillo is repugnant to the law of nations, because it extends over several hundred miles of coast, and to an indefinite distance from the shores. Of course, it cannot be enforced as a blockade, but remains a bare pretext for spoliation. A blockade by sea, to be acknowledged as valid by the United States, must be confined to particular ports, each having a force stationed before it, sufficient to intercept the entry of vessels, and no vessel shall be seized, even in attempting to enter a port so blockaded, till she has been previously warned away from that port." Ibid. p. 158.

Mr. Adams, in his instructions, of the 28th of April, 1823, to Mr. Nelson, Minister to Spain, says: "The renewal of the war in Venezuela has been signalized, on the part of the Spanish commanders, by proclamations of blockade unwarranted by the

the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. Even if the right of

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law of nations, and by decrees regardless of those of humanity. With no other naval force than a single frigate, a brig, and a schooner, employed in transporting supplies from Curaçoa to Porto Cabello, they have presumed to declare a blockade of more than twelve hundred miles of coast. To this outrage upon all the rights of neutrality, they have added the absurd pretension of interdicting the peaceable commerce of other nations with *all* the ports of the Spanish Main, upon the pretence that it had, heretofore, been forbidden by the Spanish colonial laws; and on the strength of these two inadmissible principles, they have issued commissions at Porto Cabello, and in the island of Porto Rico, to a swarm of privateers, which have committed extensive and ruinous depredations upon the lawful commerce of the United States, as well as upon that of other nations, and particularly of Great Britain. It was impossible that neutral nations should submit to such a system; the execution has been as strongly marked with violence and cruelty, as was its origin with injustice. . . . . The naval officers of the United States, who have been instructed to protect our commerce in that quarter, have been brought in conflict with two descriptions of *unlawful* captors, the acknowledged and the disavowed pirates from Porto Rico and Porto Cabello, and in both cases the actual depredators have been of the same class of Spanish subjects, and often probably the same persons.

"M. Anduaga (Spanish Minister) attempts by laborious arguments to maintain, to the fullest and most unqualified extent, the right of the Spanish privateers to capture, and of the Spanish Prize Courts to condemn, all vessels of every nation, trading with any of the ports of the Independent patriots of South America, because, under the old colonial laws of Spain, that trade had been prohibited. And, with the consistency of candor at least, he explicitly says that the decrees issued by the Spanish commanders on the Main, under the name of blockades, were not properly so called, but were mere enforcements of the antediluvial colonial exclusions. It is in vain for Spain to pretend that during the existence of a civil war, in which by the universal law of nations, both parties have equal rights with reference to foreign nations, she can enforce against all neutrals, by the seizure and condemnation of their property, the law of colonial monopoly and prohibition by which they had been excluded from commercial intercourse with the Colonies before the existence of the war, and when her possession and authority were alike undisputed. . . . . You will represent to the Spanish government the claims of all the citizens of the United States, whose vessels and other property have been captured by the privateers from Porto Rico and Porto Cabello, and condemned by the courts of those places for supposed breaches of the pretended blockade, or for *trading* with the South American Independents." Cong. Doc. accompanying President's Message, December, 1824, pp. 269–285. The British claims growing out of these orders, and for which *reprisals* were ordered, were provided for, as has been noticed, by a convention, March 12, 1823. Annual Register, 1823, p. 148*. See ch. 1, § 2, Editor's note [168, p. 508.

Nor did the then recent revolutionary origin of Mexico prevent her attempting, when Texas was vindicating her independence, to repeat the ancient policy of the mother country. Without pretending to give the proceeding the character of a blockade, and without the means of doing so by the interposing of a competent force, Mexico, by a decree of the 9th of January, 1836, declared all the ports and harbors on the coast of Texas, from longitude 94° 50′ to 101° 10′ west of London, closed to foreign commerce and the coasting trade. Cong. Doc. 25th Cong. 2d Sess. H. of R. No. 75.

capturing enemy's property be ever so strictly limited, and the rule of *free ships free goods* be adopted, the right of visitation

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In answer to an inquiry made of him, in the House of Commons, on the 27th of June, 1861, Lord John Russell said: "The government of New Grenada has announced, not a blockade, but that certain ports of New Grenada are to be closed. The opinion of Her Majesty's government, after taking legal advice, is that it is perfectly competent to the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but, in the event of insurrection or civil war in that country, it is not competent for its government to close the ports that are *de facto* in the hands of the insurgents, as that would be a violation of international law with regard to blockades. Admiral Milne, acting on instructions from Her Majesty's government, has ordered the commanders of Her Majesty's ships not to recognize the closing of these ports." Parliamentary Debates.

It was probably to meet this proceeding that we find among the propositions of the new Colombian government, as an international American doctrine, "the closing of a port decreed and proclaimed by the sovereign renders illegal commerce with that port." La Cronica, 6 de Octubre, de 1826.

The establishment of a blockade is, of itself, a recognition of a civil war, so far at least as regards neutral or foreign countries, and it was so held by our admiralty courts at the commencement of the pending hostilities.

"The facts set forth by the President in his proclamations of the 19th and 27th of April, with the assertion of the right of blockade, amount to a declaration that civil war exists.

"Blockade itself is a belligerent right, and can only legally have place in a state of war; and the notorious fact that immense armies, in our immediate view, are in hostile array against each other in the Federal and Confederate States, the latter having organized a government and elected officers to administer it, attest the Executive declaration that civil war exists, a sad war, which, if it must go on, can only be governed by the laws of war, and its evils mitigated by the principles of clemency engrafted upon the war code by the civilization of modern times.

"Blockade is a belligerent right under the law of nations where war exists, and is as clearly defined as the belligerent right to levy contributions in the enemy's country. As the Supreme Court hold the latter power to be constitutionally in the President, without an act of Congress, as commander-in-chief of the army and navy, it follows necessarily that the power of blockade also resides with him; indeed, it would seem a clearer right, if possible, because, as chief of the navy, nobody can doubt the right of its commander to order a fleet or a ship to capture an enemy's vessel at sea, or to bombard a fortress on shore, and it is only another mode of assault and injury to the same enemy to shut up his harbors and close his trade by the same ship or fleet. The same weapons are used. The commander only varies the mode of attack.

"I do not find, on examination of the writers on public law, any difference as to belligerent rights in civil or foreign war, and Judge Story, in 7th Wheaton, Santissima Trinadad, as heretofore cited by me, says they are the same. Blockade being one of the rights incident to a state of war, and the President, having in substance asserted civil war to exist, I am of opinion that the blockade was lawfully proclaimed by the Executive." Monthly Law Reporter, July 1861, p. 151, United States District Court for District of Columbia, The Tropic Wind. Judge Dunlop.

In this case the judge refers, as other judges have also done, since the commence-

and search is essential, in order to determine whether the ships themselves are neutral, and documented as such, according to

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ment of the present contest, to the case of Rose *v.* Himely, in order to establish that belligerent rights may be exercised in connection with sovereign or municipal rights, as well with regard to foreigners as to citizens of the Confederate States. The matter relied on for this purpose is a remark in the opinion of Chief Justice Marshall, which was rendered in a totally different sense. "But admitting," he said, "a sovereign who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act." The case under consideration was that of a cargo of an American vessel shipped from a port of St. Domingo, then in possession of the brigands, (revolted negroes,) captured beyond the territorial limits of the island, (more than ten leagues from the coast,) by a French privateer, carried into a Spanish port (in Cuba), and condemned by a court in St. Domingo, under a French municipal ordinance. The real point was, whether a tribunal sitting in a country to punish violations of municipal laws enacted by its sovereign, could take jurisdiction of a vessel not belonging to his subjects, seized upon the high seas for infracting those laws, and carried into a foreign port. The Chief Justice said, "that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign. If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorize. The person who makes this seizure, then makes it on a pretext, which, if true, will not justify the act, and is a marine trespass." Cranch's Reports, vol. iv. p. 421, Rose *v.* Himely.

These views, in conformity with which the judgment was rendered, are entirely opposed to the doctrine for which the case is usually cited. But, under the circumstances, Rose *v.* Himely is not a judicial authority for any purpose, nor is it anywhere referred to by our author. The Chief Justice's opinion was not, it would seem, concurred in by his associates, and it was not recognized in the case of Hudson *v.* Guestier, (Ib. vol. iv. p. 293,) argued at the same term. A majority of the Supreme Court, in the latter case, subsequently decided that even a foreign condemnation for the breach of a municipal regulation, though the seizure is made on the high seas, was valid. Ib. vol. vi. p. 281. But Marshall's decision, though overruled in his own court, is entirely consistent with the views of Lord Stowell in The Louis, where he denies to any State the exercise, on the high seas, beyond its jurisdictional limits of a marine league, of the right of visitation for fiscal or defensive purposes, and with the opinions, to the same effect, of the English civilians, in the international case of The Cagliari. Part II. ch. 2, § 15, Editor's note [81, p. 267. Phillimore also cites and adopts the opinion of Marshall in Rose *v.* Himely, as illustrating the principle of the territorial limit of municipal legislation. International Law, vol. iv. p. 713.

Though a blockade of the ports of the seceding States was established on the recognition of the existence of an insurrection, provision was made by an act passed on the 18th of July, 1861, for closing the ports of the seceded States, not in the power of the Federal government; but, as has been stated, no attempt has ever been made to carry that authority into effect. Part IV. ch. 1, § 14, Editor's note [175, p. 555. No

the law of nations and treaties; for, as Bynkershoek observes, "It is lawful to detain a neutral vessel, in order to ascertain, not

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exception was taken by foreign nations to the right to establish the blockade from the character of the parties, they deeming it a full justification for the acknowledgment of the belligerent rights of the South.

In a despatch of Lord John Russell to Lord Lyons, July 19, 1861, after stating the principles laid down by Judge Dunlop in The Tropic Wind, said: "Her Majesty's government admit that a civil war exists; they admit that whether the Confederate States of the South be sovereign and independent or not, is the very point to be decided; but Her Majesty's government affirm, as the United States affirmed in the case of the South American Provinces, that 'the existence of this civil war gives to both parties the rights of war against each other.' Arguing from these premises, it is impossible for Her Majesty's government to admit that the President or Congress of the United States can at one and the same time exercise the belligerent rights of blockade, and the municipal right of closing the ports of the South. In the present case, Her Majesty's government do not intend to dispute the right of blockade on the part of the United States with regard to ports in possession of the Confederate States; but an assumed right to close any ports in the hands of insurgents would imply a right to stop vessels on the high seas without instituting an effective blockade. This would be a manifest evasion of the necessity of blockade in order to close an enemy's port. Neutral vessels would be excluded when no force exists in the neighborhood of the port sufficient to carry that exclusion into effect. Maritime nations would not submit to this excess under the pretence of the rights of sovereignty. Whether, indeed, the United States treat the Southern prisoners in their hands as rebels or as prisoners of war, is not a matter in which foreign countries can properly interfere. But Her Majesty's government cannot allow the Queen's subjects to be deprived of any of the rights of neutrals. They would consider a decree closing the ports of the South actually in the possession of the insurgent or Confederate States as null and void, and they would not submit to measures taken on the high seas in pursuance of such decree." Parliamentary Papers. North America, No. 1, p. 49.

In the debate of the 10th of March, 1862, Earl Russell said: "There are various questions connected with a blockade which they had to consider. The first was, whether there was sufficient authority for instituting it. Lord Stowell says that a blockade must be the act of a sovereign authority. This was the act of the President of the United States, who on the 19th of April issued a proclamation declaring that the blockade was about to begin, and that act was followed by armed ships of the United States blockading the several ports and warning vessels off the coast. Therefore there can be no question as to the authority by which the blockade exists." Parliamentary Debates.

During the late insurrection in Sicily, under Garibaldi, in August, 1862, a declaration was issued to the effect that His Majesty the King of Italy, had notified to foreign powers the effective blockade of Sicily and the adjacent islands. "On this occasion," it was said, "it is scarcely necessary to add that, during the blockade, the principles of maritime law, sanctioned by the Congress of Paris, the 16th of April, 1856, will be scrupulously observed." Sicily had been previously, by a royal decree of the 17th of the same month, declared in a state of siege. Le Nord, 27 Aout, 1862.

There is no right on the part of a belligerent, in releasing the crew of a neutral vessel, captured for breach of blockade, to exact from them an oath not to embark in a like enterprise, or to impose any other condition. Papers relating to Foreign Affairs, 1862. Mr. Seward to Lord Lyons, January 7, 1862.] — *L.*

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 recognizing the existence of this right.[1] [242]

The international law on this subject is ably summed up by

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 14. Vattel, Droit des Gens, liv. iii. ch. 7, § 114. Martens, Précis, &c., liv. viii. ch. 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.

[242] Hautefeuille questions whether, even as a belligerent right, "search" can be sustained, at all, on principle. That able expounder of the rights and duties of neutrals, who does not confine his investigation to the practice of nations nor to the opinions of previous institutional writers, is unwilling to extend the *droit de visite* beyond a verification of the nationality of the ship, and, when bound to an enemy's port, the nature of the cargo, with reference to contraband, including, in the case of those who reject the principle that the flag covers the merchandise, the nationality of the cargo. He distinguishes between *visite*, which by other French commentators is deemed equivalent to the English *visitation and search*, and *recherche* (search), which he treats under a distinct head. The former he considers a belligerent right, and the latter the exercise of a jurisdictional act of sovereignty. As all the pretence which a belligerent can have to interfere with the unrestricted use of the ocean by neutrals arises from considerations of self-defence, of the right to prevent acts which, in their result, may enure to the benefit of the enemy, he contends that this is satisfied when the regularity of the papers relating to the ship and cargo is ascertained. He denies the right of making inquisitorial searches by opening the hatchways, and interrogating the crew, with a view of discrediting the official papers. Much less does he admit of the seizure, on suspicion, of the vessel, and treating it as an enemy's ship, till the tribunal of the belligerent shall otherwise decide. Droits des Nations Neutres, tit. xi. xii. Lawrence on Visitation and Search, pp. 15, 16.

In ascertaining the nationality of a vessel, it is, Hautefeuille says, the law of the neutral country, and not that of the captor, which is to govern. "This principle was solemnly proclaimed by Portalis, *commissaire* of the French government, near the tribunal of prizes, and adopted by the tribunal itself. The 9th article of the regulations (*réglement*) of 1778, subjects to seizure all neutral vessels which have not on board a register of the ship's company (*rôle d'equipage*); the American ship Pegou had been seized for not being provided with this piece, declared essential by the French law; the treaty concluded in 1778 between France and the United States of America makes no mention of this document, which, moreover, is not required by the American laws. The learned magistrate, in his conclusions, declared that the treaty alone had executory force; that the national law of the ship must be followed in preference to the French *réglement*; and consequently that the *rôle d'equipage* could be supplied by any other piece on board. The tribunal adopted these conclusions. In all doubtful cases, recourse must be had to treaties, if any exist; if there are none, the internal law of the neutral must be applied, to the exclusion of that of the belligerent. This principle controls all the questions which can arise as to the seizure of neutral vessels." Hautefeuille, Droits des Nations Neutres, tit. xiii. ch. 1, sect. 1, § 4, tom. iii. p. 263, 2me ed.] — *L.*

Sir W. Scott, in the case of The Maria, 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, this learned civilian lays down the three following principles of law:—

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* 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 preëxisting, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner 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 commissioned 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 visitation 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, art. 12, which directs, 'That when any ship, met withal by the royal navy or other ship commissionated, shall fight or make resistance, the ship and goods shall be adjudged lawful prize.' A similar article 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." [1]

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 those powers and Great Britain were finally adjusted by the convention of 5th June, 1801. By the 4th 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 8th 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 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." [2] [242

[1] Robinson's Adm. Rep. vol. i. p. 340, The Maria.

[2] The question arising out of the case of the Swedish convoy gave rise to several

[242] As neutral vessels, under the regulations of all the belligerents during the Russian war, gave immunity to enemy's goods, the visitation must have been limited

In the case of The Maria, the resistance of the convoying ship was held to be a resistance of the whole § 30. Forcible resist-

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's Hist. Law of Nations, pp. 390–420.

to an inquiry, with a view to the seizure of such contraband goods, as may be on board of neutral vessels bound to an enemy's port, or having a hostile destination, and to ascertaining the vessel's neutrality; and this is now the case as to all those powers which were signers or adhered to the "declaration of Paris," that is to say, to all maritime States, except the United States, Spain, and Mexico. As to them, where special treaties do not intervene, the law of nations, as previously understood, cannot be deemed to have been changed.

The treaty of 1801 was annulled, in consequence of the second attack upon Copenhagen and the destruction of the Danish fleet; and the Russian government published, the 26th of October, 1807, a declaration, proclaiming "anew the principles of the armed neutrality, the monument of the wisdom of the Empress Catherine." The orders and decrees of the belligerents in the last wars, as well as the "declaration of Paris," are silent as to convoy. The treaties which the United States made with France, of 30th September, 1800; with Colombia, of 3d October, 1824; with Brazil, of 12th December, 1828; with Mexico, of 5th April, 1831; with Chili, of 16th May, 1832; with Peru-Bolivia, of 13th November, 1836; and with Venezuela, of 20th January, 1836; all provide, that, in case of convoy, "the declaration of the commander of the convoy, that the vessels under his protection belong to the nation whose flag he carries, and, when they are bound to an enemy's port, that they have no contraband goods on board, shall be sufficient." Statutes at Large, vol. viii. pp. 188, 316, 395, 420, 438, 493, 478. Ortolan comes to the conclusion that, independently of treaties, neither the ships of war nor privateers of a belligerent have a right to visit vessels under the convoy of a vessel of war of their own nation, but that the declaration of the commander is sufficient. Ortolan, Diplomatie de la Mer, tom. ii. ch. 7; tom. ii. p. 240, 2me edit. Such, also, is the doctrine of the other modern continental text writers. See De Martens, Essai concernant les Armateurs, ch. 2. De Rayneval, De la Liberté de la Mer, tom. i. c. 18. Klüber, Droit des Gens Moderne, tom. ii. sec. 2, ch. 5, § 293. Even Manning, who holds to the old rules of English admiralty law, while he denies that neutrals, under convoy, can claim to be exempted from search, as a matter of right, deems it desirable that it should be accorded to them by agreement. Manning's Commentaries of the Law of Nations, p. 360. Hautefeuille says that the belligerent cruiser, who desires to know the nationality of convoyed vessels, and, when there is occasion, the reality of their neutrality, that is to say, the only two points which the "visit" is intended to prove, should address himself to the convoying vessel, and be satisfied with the verbal declaration, at most, the word of honor of the commander of the escort, attesting that the vessels under his protection are really the property of his sovereign, and that they do not carry to the enemy any contraband of war. This mode of proceeding should be applied to all neutral nations, without exception, unless there is an international con-

ance by an enemy master.

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 visitation 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* 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."[1]

§ 31. Right of a neutral to carry his goods in an *armed* enemy vessel.

The question how far a neutral merchant has a right to lade 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 agitated both in the British and American prize courts, during the last war between Great Britain and the United States. In a case adjudged by the Supreme Court of the United States, in 1815, it was

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vention derogating in this respect from the international usages. The neutral government is directly responsible for the frauds and violations of neutral obligations committed by convoyed vessels under the protection of the flag of the State; it is to it that the injured belligerent ought to address himself to obtain the reparations which it claims. Droits des Nations Neutres, tit. xi. sec. 2, tom. iii. pp. 157, 166. Hautefeuille also discusses the question, whether a neutral merchantman can put itself under the protection of a neutral ship of war, but of another nation, and decides that the protection can be afforded only to merchantmen of its own nation, in this sense, at least, that the declaration of the commander of the escort, by which to exempt from visit, can be complete as to those alone.] — *L.*

[1] Robinson's Adm. Rep. vol. v. p. 232, The Catherina Elizabeth.

determined, that a neutral had a right to charter and lade 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.[1] [[243] 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, upon the ground that the American prize courts might justly have condemned the property.[2] In reviewing its former decision, in a subsequent case adjudged 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 mean time 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 condemned 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

[1] Cranch's Rep. vol. ix. p. 388, The Nereide.

[[243] See dissenting opinion, in this case, of Story, Justice, referred to in Wildman's International Law, vol. ii. p. 126, where on its authority the opposite principle is stated as American Law. This same dissenting opinion will be found cited in the remarks connected with the negotiations of Mr. Wheaton, which resulted in the treaty of indemnity with Denmark, *Vide infra*, § 32, note. The question could not practically arise in France, before the assimilation in the Russian war of the Maritime Codes of the allies, as where the nationality of the cargo followed that of the ship, the lading of neutral goods, on board of an enemy's ship, whether armed or not, would have equally subjected them to capture and condemnation. Ortolan states the contradictory English and American decisions, and Hautefeuille sustains on principle the American against that of Sir William Scott. Diplomatie de la Mer, liv. iii. ch. 7, p. 225, 2me ed. Hautefeuille, Droits des Nations Neutres, tom. iii. p. 420.] — *L.*

[2] Dodson's Adm. Rep. vol. i. p. 443, The Fanny.

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 convoying ship, he shares the fate to which the leader of his own choice is liable in case of capture.[1]

§ 32. Neutral vessels under enemy's convoy, liable to capture.

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 principles upon which the ordinance was grounded were questioned by the United States government, as inconsistent with the established rules of international law. It was insisted that the prize ordinances of Denmark, or of any other particular State, could not make or alter the general law of nations, nor introduce a new rule binding on neutral powers. The right of the Danish monarch to legislate for his own subjects and his own tribunals was incontestible; but before his edicts could operate upon foreigners carrying on their commerce upon the seas, which are the common property of all nations, it must be shown that they were conformable to the law by which all are bound. It was, however, unnecessary to suppose that, in issuing these instructions to its cruisers, the Danish government intended to do anything more than merely to lay down rules of decision for its own tribunals, conformable to what that government un-

[1] Wheaton's Rep. vol. iii. p. 409, The Atalanta.

derstood to be just principles of public law. But the observation became important when it was considered, that the law of nations nowhere existed in the written code accessible to all, and to whose authority all deferred; and that the present question regarded the application of a principle (to say the least) of doubtful authority, to the confiscation of neutral property for a supposed offence committed, not by the owner, but by his agent the master, without the knowledge or orders of the owner, under a belligerent edict, retrospective in its operation, because unknown to those whom it was to affect.

The principle laid down in the ordinance, as interpreted by the Danish tribunals, was, that the fact of having navigated under enemy's convoy is, *per se*, a justifiable cause, not of capture merely, but of condemnation in the courts of the other belligerent; and *that*, without inquiring into the proofs of proprietary interest, or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects. A belligerent pretension so harsh, apparently so new, and so important in its consequences, before it could be assented to by the neutral States, must be rigorously demonstrated by the authority of the writers on public law, or shown to be countenanced by the usage of nations. Not one of the numerous expounders of that law even mentioned it; no belligerent nation had ever before acted upon it; and still less could it be asserted that any neutral nation had ever acquiesced in it. Great Britain, indeed, had contended that a neutral State had no right to resist the exercise of the belligerent claim of visitation and search by means of convoys *consisting of its own ships of war*. But the records even of the *British* courts of admiralty might be searched in vain for a precedent to support the principle maintained by Denmark, that the mere fact of having sailed under a belligerent convoy is, in all cases and under all circumstances, conclusive cause of condemnation.

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 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 preëxisting law of nations, must be considered as an unauthorized measure of retrospective legislation. To visit upon neutral merchants and mariners extremely penal consequences from an act, which they had reason to believe to be innocent at the time, and which is not pretended to be forbidden by a single treaty or writer upon public law, by the general usage of nations, or even by the practice of any one belligerent, or the acquiescence of any one neutral State, must require something more than a mere resort to the supposed analogy of other acknowledged principles of international law, but from which it would be vain to attempt to deduce that now in question as a corollary.

Being found in company with an enemy's convoy might, indeed, furnish a *presumption* that the captured vessel and cargo belonged to the enemy, in the same manner as goods taken in an enemy's vessel are presumed to be enemy's property until the contrary is proved; but this presumption is not of that class of presumptions called *presumptiones juris et de jure*, which are held to be conclusive upon the party, and which he is not at liberty to controvert. It is a slight presumption only, which will readily yield to countervailing proof. One of the proofs which, in the opinion of the American negotiator, ought to have been admitted by the prize tribunal to countervail this presumption, would have been evidence that the vessel had been compelled to join the convoy; or that she had joined it, not to protect herself from examination by Danish cruisers, but against others, whose notorious conduct and avowed principles render it certain, that captures by them would inevitably be followed by condemnation. It followed, then, that the simple fact of having navigated under British 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.

Indeed it was not perceived how it could be so considered, upon the mere ground of its interfering with the exercise of the belligerent pretension of visitation and search, by a State, which, when neutral, had asserted the right of protecting its private commerce against belligerent visitation and search by armed convoys of its own public ships.

Nor could the consistency of the Danish government, in this respect, be vindicated, by assuming a distinction between the doctrine maintained by Denmark, when neutral, against Great Britain, from that which she sought, as a belligerent to enforce against America. Why was it that navigating under the convoy of a *neutral* ship of war was deemed a conclusive cause of condemnation? It was because it tended 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.

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. They could no more be involved in the consequences of a resistance by the belligerent, which is his own lawful act, than is the neutral shipper of goods on board a belligerent vessel for the resistance of the master of that vessel, or the owner of neutral goods found in a belligerent fortress for the consequences of its resistance.

The right of capture in war extends only to things actually belonging to the enemy, or such as are considered as constructively belonging to him, because taken in a trade prohibited by the laws of war, such as contraband property taken in breach of blockade, and other analogous cases; but the property now in question was neither constructively nor actually the property of the enemy of Denmark. It was not pretended that it was actually his property, and it could not be shown to have been constructively his. If, indeed, these American vessels had been armed; if they had thus contributed to augment the force of the belligerent convoy; or if they had actually participated in battle with the Danish cruisers, — they would justly have fallen by the fate of war, and the voice of the American government would never have been raised in their favor. But they were, in fact, unarmed merchantmen; and far from increasing the force of the British convoying squadron, their junction tended to weaken it by expanding the sphere of its protecting duty; and instead of

participating in the enemy's resistance, in fact there was no battle and no resistance, and the merchant vessels fell a defenceless prey to the assailants.

The illegality of the act on the part of the neutral masters, for which the property of their owners had been confiscated, must then be sought for in a higher source, and must be referred back to the circumstance of *their joining the convoy.* But why should this circumstance be considered illegal, any more than the fact of a neutral taking shelter in a belligerent port, or under the guns of a belligerent fortress which is subsequently invested and taken? The neutral cannot, indeed, seek to escape from visitation and search by *unlawful* means, either of force or fraud; but if, by the use of any lawful and innocent means, he may escape, what is to hinder his resorting to such means, for the purpose of avoiding a proceeding so vexatious? The belligerent cruisers and prize courts had not always been so moderate and just as to render it desirable for the neutral voluntarily to seek for an opportunity of being examined and judged by them. Upon the supposition, indeed, that justice was administered promptly, impartially, and purely in the prize tribunals of Denmark, the American shipmasters could have had no motive to avoid an examination by Danish cruisers, since their proofs of property were clear, their voyages lawful, and they were not conscious of being exposed to the slightest hazard of condemnation in these tribunals. Indeed, some of these vessels had been examined on their voyage up the Baltic, and acquitted by the Danish courts of admiralty. Why, then, should a guilty motive be imputed to them, when their conduct could be more naturally explained by an innocent one? Surely, in the multiplied ravages to which neutral commerce was then exposed on every sea, from the sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of these parties might be sufficiently accounted for, without resorting to the supposition that they meant to resist or even to evade the exercise of the belligerent rights of Denmark.

Even admitting, then, that the neutral American had no right to put himself under convoy in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right to defend himself against his *enemy*, as France had shown herself to be, by her conduct, and the avowed principles upon which she had declared open war

against all neutral trade. Denmark had a right to capture the commerce of her enemy, and for that purpose to search and examine vessels under the neutral flag, whilst America had an equal right to protect her commerce against French capture by all the means allowed by the ordinary laws of war between enemies. The exercise of this perfect right could not legally be affected by the circumstance of the war existing between Denmark and England, or by the alliance between Denmark and France. America and England were at peace. The alliance between Denmark and France was against England, not against America; and the Danish government, which had refused to adopt the decrees of Berlin and Milan as the rule of its conduct towards neutrals, could not surely consider it culpable on the part of the American shipmasters to have defended themselves against the operation of these decrees by every means in their power. If the use of any of these means conflicted in any degree with the belligerent rights of Denmark, that was an incidental consequence, which could not be avoided by the parties without sacrificing their incontestible right of self-defence.

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 incontestible 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. So also the right of a neutral to transport his goods on board even of an *armed* belligerent vessel, was solemnly affirmed by the decision of the highest judicial tribunal in the United States, during the late war with Great Britain, after a most elaborate discussion, in which all the principles and analogies of public law bearing upon the question were thoroughly examined and considered.

The American negotiator then confidently relied upon the position assumed by him — that the entire silence of all the authoritative writers on public law, as to any such exception to the general freedom of neutral navigation, laid down by them in such broad and comprehensive terms, and of every treaty made for the special purpose of defining and regulating the rights of neutral commerce and navigation, constituted of itself a strong negative authority to show, that no such exception exists, especially as that freedom is expressly extended to every case which has the slightest resemblance to that in question. It could not be denied that the goods of a friend, found in an enemy's fortress, are exempt from confiscation as prize of war; that a neutral may lawfully carry his goods in an armed belligerent ship; that the neutral shipper of goods on board an enemy's vessel, (armed or unarmed,) is not responsible for the consequences of resistance by the enemy-master. How then could the neutral owner, both of ship and cargo, be responsible for the acts of the belligerent convoy, under the protection of which his property had been placed, not by his own immediate act, but by that of the master, proceeding without the knowledge or instructions of the owner?

Such would certainly be the view of the question, even applying to it the largest measure of belligerent rights ever assumed by any maritime State. But when examined by the milder interpretations of public law, which the Danish government, in common with the other northern powers of Europe, had hitherto patronized, it would be found still more clear of doubt. If, as Denmark had always insisted, a neutral might lawfully arm himself against all the belligerents; if he might place himself under the convoying force of his own country, so as to defy the exer-

cise of belligerent force to compel him to submit to visitation and search on the high seas; the conduct of the neutral Americans who were driven to take shelter under the floating fortresses of the enemy of Denmark, not for the purpose of resisting the exercise of her belligerent rights, but to protect themselves against the lawless violence of those whose avowed purpose rendered it certain, that, notwithstanding this neutrality, capture would inevitably be followed by condemnation, would find its complete vindication in the principles which the public jurists and statesmen of that country had maintained in the face of the world. Had the American commerce in the Baltic been placed under the protection of the public ships of war of the United States, as it was admitted it might have been, the belligerent rights of Denmark would have been just as much infringed as they were by what actually happened. In that case, the Danish cruisers must, upon Danish principles, have been satisfied with the assurance of the commander of the American convoying squadron, as to the neutrality of the ships and cargoes sailing under his protection. But that assurance could only have been founded upon their being accompanied with the ordinary documents found on board of American vessels, and issued by the American government upon the representations and proofs furnished by the interested parties. If these might be false and fraudulent in the one case, so might they be in the other, and the Danish government would be equally deprived of all means of examining their authenticity in both. In the one, it would be deprived of those means by its own voluntary acquiescence in the statement of the commander of the convoying squadron; and in the other, by the presence of a superior enemy's force preventing the Danish cruisers from exercising their right of search. This was put for the sake of illustration, upon the supposition that the vessels under convoy had escaped from capture; for upon that supposition only could any *actual* injury have been sustained by Denmark as a belligerent power. Here they were captured without any hostile conflict, and the question was, whether they were liable to confiscation for having navigated under the enemy's convoy, notwithstanding the neutrality of the property and the lawfulness of their voyage in other respects.

Even supposing, then, that it was the intention of the American shipmasters, in sailing with the British convoy, to escape

from Danish as well as French cruisers, that intention had failed of its effect; and it might be asked, what belligerent right of Denmark had been practically injured by such an abortive attempt? If any, it must be the right of visitation 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. But it would, perhaps, be said, that it might have been opposed and actually defeated, had it not been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic Sea might thus have been effectually protected from Danish capture. And it might be asked in reply, what injury would have resulted to the belligerent rights of Denmark from that circumstance? If the property were neutral, and the voyage lawful, what injury would result from the vessels escaping from examination? On the other hand, if the property were enemy's property, its escape must be attributed to the superior force of the enemy, which, though a *loss*, could not be an *injury* of which Denmark would have a lawful right to complain. Unless it could be shown that a neutral vessel navigating the seas is bound *to volunteer to be searched* by the belligerent cruisers, and that she had no right to avoid search by any means whatever, it was apparent that she might avoid it by any means not unlawful. Violent resistance to search, rescue after seizure, fraudulent spoliation or concealment of papers, are all avowedly unlawful means, which, unless extenuated by circumstances, may justly be visited with the penalty of confiscation. Those who alleged that sailing under belligerent convoy was also attended with the same consequences, must show it, by appealing to the oracles of public law, to the text of treaties, to some decision of an international tribunal, or to the general practice and understanding of nations.[1]

[1] Mr. Wheaton to Count Schimmelmann, 1828.

The negotiation finally resulted in the signature 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." [1] [245

[1] Martens, Nouveau Recueil, tom. viii. p. 350. Elliot's American Diplomatic Code, vol. i. p. 453.

[245 The Danish Commissioners, in their reply, in reference to the vessels under convoy, said: "They first submit to an examination before they are received under convoy, decline to submit to search by the other belligerent, and are defended by the convoy, if of superior force, or endeavor to escape during the contest, as the Americans generally did. If worsted, they still claim their neutrality. Is it neutrality to accord the right of visitation to one belligerent and refuse it to the other? If one belligerent was predominant, neutrals, by putting themselves under its protection, would, always, avoid the visitation of the other." M. de Redtz, whose memoir, prepared for the Danish government, was inclosed in Mr. Wheaton's despatch of April 9, 1830, also thus refers, in this connection, to the use which England made of American vessels to obtain naval stores from Russia. "After having made the purchases in Russia, these vessels assembled on the coast of Sweden, where they met British ships of war, which convoyed them during the remainder of their voyage, or as far as they had any danger to apprehend. Denmark saw, every day, along her coast, and even within the waters to which her jurisdiction extended, numerous convoys protected by English vessels; and it is contended that, if she was able to surprise these convoys, or some of the vessels belonging to them, they should be liberated on the presentation of American papers, declaring the neutral character and destination of the vessels. All the vessels seized were in this category, though it is not denied that forged documents were frequently used. The offence against the belligerent party is committed whenever the contract is concluded with the chief of the convoy; nor is it material whether the master acted on his own suggestion, or in accordance with instructions. That is an inquiry never made, in the case of a vessel breaking a blockade or transporting enemy's troops. The only point to be established is, whether the neutral was voluntarily under enemy's convoy. The order of the 28th of May, 1810, was only an instruction to cruisers; and the right of capture, it was admitted, did not depend on the application of the principle, but on the principle itself." It was also maintained, in defence of some of the captures, "that Denmark and her allies, including Russia, constituted a belligerent corps or association in the war against England. They engaged with each other to prohibit all trade between their States and the common enemy. The neutral who violated the prohibition as to one, violated it as to all, and rendered his property taken in this unlawful commerce liable to confiscation by any of the allied powers. England refuses to substitute for a search of the merchantmen the word of honor of the offi-

cer of a neutral convoy; and contends that such a modification of the right of visit can only be required by virtue of a particular treaty. Can it be expected that the other belligerent should have the courtesy to consider and treat as neutral, vessels which, to escape a visit and to dispute its indubitable right, may employ the whole marine of the enemy?" The memoir refers to the several treaties by which enemy's ships make enemy's goods, as adopted by the United States, and says that if a different principle has been applied in their tribunals, it must be in the case of those nations which have not adopted this rule towards them. It likewise notices the doubts contained in Mr. Erving's note of June 23, 1811, as to the validity of this claim, as well as a passage to the same effect in Mr. Wheaton's note of July 7, 1828; and concludes by asking whether, under those circumstances, it could be expected that the Danish government would admit that the principle which it had adopted was deemed totally unjust and unjustifiable?

As a general proposition, sailing under enemy's convoy has been assimilated to putting neutral merchandise on board of an armed vessel of the enemy, as to the effect of which the English and American courts differ. The Lords of Appeal in England have decided that sailing under enemy's convoy was a conclusive ground of condemnation. See case of The Sampson, Barney, an American vessel sailing with French cruisers, referred to by Judge Story in the case of The Nereide, Cranch's Rep. vol. ix. p. 442. There has been no direct decision on this subject in the United States. In the case of The Nereide, in which it was decided, by a majority of the court, that a neutral cargo, found on board of an enemy's vessel, is not liable as prize of war, the vessel, which was a British armed merchantman, had covenanted to sail under British convoy, though at the time of the capture she was separated from the convoy. Justice Story, in his dissenting opinion, says, "My judgment is, that the act of sailing under belligerent convoy is a violation of neutrality, and the ship and cargo, if caught *in delicto*, are justly confiscable; and further, that if resistance is necessary, as in my opinion it is not, to perfect the offence, still the resistance of the convoy is, to all purposes, the resistance of the association." Ib. p. 445. And in The Atalanta, Wheat. Rep. vol. iii. p. 423, which was a case of neutral property, on board of an armed enemy's vessel, wherein the decision in the case of The Nereide is affirmed, a distinction is made, which is referred to in the text, § 31, p. 858, between such a case and that of putting a vessel under enemy's convoy, unfavorable to the latter.

This negotiation is thus commented on by subsequent text-writers: —

"An interesting discussion, on the principle of convoy, occurred in the last war, on a dispute between the United States and Denmark. We have seen that resistance to search by a *neutral* confiscates his vessel and cargo. On the other hand, resistance to search by an *enemy*, does not entail the confiscation of the neutral goods on board his vessel; the latter resistance violates no duty on the part of the captain, who is right to get away if he can. In 1810, the Danish government issued an ordinance condemning as 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.' Several American vessels were captured, and, with their cargoes, condemned for offending against this ordinance. The Minister of the United States contended that such confiscations were unjust; that the rule laid down by Denmark was an innovation unsupported by any precedent; that the cargoes of the vessels captured were of an innocent nature; and that the joining the British convoy was intended, not to withdraw them from the search of the Danes, but to avoid their being subjected to the decisions of the French prize courts. These latter circumstances would induce

a prize court to regard with all possible lenity of construction the case of such captures; but, as to the principle, I think that the Danish ordinance was in perfect conformity with the law of nations. In this opinion I find I am at issue with Dr. Wheaton, who has given an excellent statement of the American positions in the discussion. He has, however, but very slightly noticed the strong positions of the Danish government, and I hope he will pardon my thinking that he has treated this part of his subject more as an advocate than as a judge. He is, however, an author with whom it would always give me more satisfaction to find that I coincide than that I disagree. In the particular case above stated there may have been hardship; but, as far as principle goes, had the case been different, and had the American ships, instead of having innocent cargoes on board, been laden with contraband of war, or with the property of enemies of Denmark, they might, by the escort of the British convoy, have avoided the detention of Danish cruisers of smaller force, and have thus defeated the clear rights of Denmark. As a general principle, I think that the sailing under the convoy of a belligerent must be regarded as a withdrawal from the search of the other belligerent, as a resistance to his rights, and as entailing confiscation as a consequence of such attempted evasion." Manning's Commentaries on the Law of Nations, p. 369.

See, also, Wildman's International Law, vol. ii. p. 126, which cites, in support of the Danish ordinance, in the correctness of which he erroneously says that the government of the United States acquiesced, the dissenting opinion of Story, Justice, in the case of The Nereide.

Ortolan says: "Apart from the circumstances which caused, in this case, the complete success of the American negotiator, in our opinion, it cannot be said that the fact of a neutral vessel navigating, under the convoy of a belligerent, is not an irregular and even illegal act. Such a convoy cannot, at all events, exempt from 'visit.' But if the neutral joins at sea one or more vessels of war, and navigates in company with these vessels without pretending to any protection on their part, in the sole hope of being able to escape peaceably and by flight from 'visit,' in consequence of the possible recontre and combat between those who are alone belligerents, it is on his part an innocent ruse, which cannot be imputed to him as an offence which alone can cause confiscation. That is precisely the case of the American ships, whose action was moreover excusable from the desire that they had of escaping from the extraordinary rigor of Napoleon's decrees, respecting the continental blockade." Diplomatie de la Mer, tom. ii. p. 245, 2me ed.

Hautefeuille thus refers to the transaction: "In 1810, American, and consequently neutral merchantmen, going to the Baltic, placed themselves under the protection of English, that is to say, belligerent convoy. Denmark considered this act offensive, and made an ordinance, by the terms of which the Americans were declared guilty, and their vessels subjected to confiscation. These vessels were, accordingly, on their return, captured, and declared good prize. Was the conduct of Denmark on this occasion lawful? I think not. The neutral, in placing himself under the protection of belligerent convoy, does not fail in his duty: he does not even violate the neutral character. He exposes himself, without doubt, to be taken with the belligerent convoy, but in that case he could not be subjected to confiscation; to justify himself, it ought to be sufficient to establish his nationality and the innocence of his trade. It appears to me impossible to condemn him for the sole fact of having navigated in company with the vessels of war of one of the parties engaged in hostilities, but who is also the friend of his sovereign.

"The American government made earnest reclamations against the seizure of the ships of its citizens. The affair was not terminated till the 28th of March, 1830.

The convention entered into between the parties, by which Denmark engaged to pay an indemnity to the American owners, presents this remarkable character, — that the Danish government does not depart from its pretensions, and stipulates that this indemnity should not be considered as a precedent, nor serve as a rule for the future.

" The American government was represented in this negotiation by a diplomatist whose opinions I have often cited — Wheaton. This publicist appears to agree that the fact charged on his compatriots subjected them to a legal presumption, which was the cause of their arrest; but he maintains that this presumption ought to have yielded before the proof of their nationality. Besides, they had been seized on their return, in virtue of an edict rendered after the offence complained of was consummated, and which was unknown to them." Droits des Nations Neutres, 2me ed. tom. iii. pp. 162–164.

See, for the constitution of Prize Courts, and American decisions in Prize Cases, Appendix, by Mr. Lawrence, No. 4.

Allusion has been repeatedly made in the preceding pages to the compensation rendered under the 7th article of the treaty of 1794 (Statutes at Large, vol. viii. p. 121) to citizens of the United States by Great Britain for illegal captures and condemnations of their vessels and other property, in the war in which the latter was then engaged. Part IV. ch. 2, § 16, Editor's note [205, p. 680. Ib. ch. 3, § 24, p. 795.

With Spain a convention was entered into, August 11, 1802, for the amicable adjustment, by a mixed commission, of the claims which had arisen from the excesses committed during the late war by individuals of either nation, contrary to the law of nations or the treaty existing between the two countries; but though it was ratified January 9, 1804, by the United States, it was not ratified by Spain till July 9, 1818, nor were the ratifications exchanged till December 21, 1818. By the 10th article of the treaty of February, 1819, this convention was annulled, and Spain having, by the 2d article, ceded Florida to the United States, and the two powers having made a reciprocal renunciation of their claims, which on the part of the United States were declared to be for all injuries mentioned in the convention of the 11th of August, 1802, for unlawful seizures at sea, and in the ports and territories of Spain or the Spanish colonies, and for claims on account of prizes made by French privateers and condemned by French consuls within the territory and jurisdiction of Spain, as well as for all claim of indemnities on account of the suspension of the right of deposit at New Orleans in 1802, the United States agreed to satisfy the claims of their citizens to an amount not exceeding five millions of dollars, the amount and validity of which claims included in the above descriptions were to be ascertained and adjusted by commissioners appointed by the United States, according to the principles of justice, the law of nations, and the treaty of 27th October, 1795. Ib. pp. 198, 254, 260.

The disposition made of the claims against France, existing prior to that date, by the convention of September 3, 1800, has been repeatedly mentioned, and the effect of that treaty on the rights of the claimants, as well as the provisions of the conventions of April 30, 1830, connected with the purchase of Louisiana, and by which 20,000,000 francs, besides 60,000,000 francs paid to France, were to be paid by the United States to their own citizens, for the claims therein mentioned or referred to, will be appropriately discussed in the annotations to the succeeding chapter.

The convention of 1831, negotiated by Mr. Rives,— the delay in fulfilling which by France threatened at one time reprisals if not war on the part of the United States,— terminated, by the payment of 25,000,000 francs, (of which 1,500,000 francs were reserved as indemnity to French citizens, though not deducted from the indem-

nity to American citizens, for reclamations against the United States,) all claims preferred against France for unlawful seizures, captures, sequestrations, confiscations, or destruction of their vessels, cargoes, or other property. In this indemnity were of course comprised, though the language of the treaty was general, the claims growing out of the Berlin and Milan decrees and the other proceedings connected with the enforcement of the continental system of Napoleon I., so far as they affected the neutral rights of American citizens. Ib. p. 430.

This convention was followed by one with the King of the Two Sicilies, of October 14, 1832, by which 2,115,000 Neapolitan ducats were agreed to be paid for depredations, confiscations, and destruction of the vessels and cargoes of the merchants of the United States, "inflicted by Murat during the years 1809, 1810, 1811, and 1812." Ib. p. 442.

The treaty with Naples, it cannot fail to be noticed, presents the strongest possible recognition, expressed on its very face, of the obligation of a country to be answerable for the acts of a *de facto* government, whatever the title under which the authority may have been assumed.

The Danish convention was the pioneer treaty for indemnities resulting from maritime spoliations growing out of the "continental system." That the success of the negotiation was, in a great degree, to be attributed to the personal character and special qualities of Mr. Wheaton cannot be doubted by any one who reads the passages which we have cited from eminent publicists. An American senator ascribes the result to the fact that President Jackson, disregarding, in his case, the mischievous system which treats all public offices, at home and abroad, as mere rewards for partisan services, and distributes them without inquiry as to the peculiar qualifications of the candidates, "did not change the negotiator — did not substitute a raw for an experienced minister." Benton's Thirty Years in the Senate, vol. i. p. 603. And it is due to the reputation of all the persons connected with this matter, to mention here, what is stated more in detail in the "Introductory Remarks" to the last edition of this work, p. lxxxix, on the authority of the late Attorney-General Butler, that in his advice to President Van Buren not only to retain in place Mr. Wheaton, who then held at Berlin an inferior diplomatic rank, but to appoint him Envoy Extraordinary and Minister Plenipotentiary at that Court, he was efficiently aided by the Ex-President. That it should have required any effort to prevent the substitution, for the most accomplished *diplomate* of the nation and the highest living authority on international law, of some unknown individual, alike ignorant of the languages and usages of Europe and of the great principles of which Wheaton's treatise was the embodiment, would scarcely be credited by any one not familiar with the party-politics of America. But the sequel, which showed that even the world-wide fame of our author could only obtain for him a respite from that decapitation which, whatever their merits, is sure to attend all the public servants of the United States, and which he met at the hand of one of their early successors, may enable us, in some degree, to appreciate the obligations which the country owes, for what they enabled Mr. Wheaton to accomplish, to Presidents Jackson and Van Buren — to both of whom, moreover, it should be remembered that he, before going abroad, was politically opposed.] — *L.*

CHAPTER IV.

TREATY OF PEACE.

§ 1. Power of making peace dependent on the municipal constitution.

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. [246 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 King has, by the express terms of the constitutional charter, power to declare war, to make treaties of peace, of alliance, and of commerce; but the real power of making both peace and war resides in the Chambers, which have the authority of granting or refusing the means of prosecuting hostilities. [247

[246 See Part IV. ch. 1, § 5, Editor's note, [170, p. 513.

[247 By the French Constitution of January 14, 1852, the President was the commander of all the forces by sea and by land. He had the power of declaring war, making treaties of peace, of alliance, and of commerce, and he had solely

§ 2. Power of making treaties of peace limited in its extent.

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 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.[1]

The duty of making compensation to individuals, whose private property is thus sacrified 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 do-

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the initiative of all laws. The *projets* of laws were prepared by the Council of State and discussed by them, in the name of the government, before the *Corps Législatif* and the Senate. The *Corps Législatif* discussed and voted the *projets* of laws and the taxes, and no law could be promulgated. without being submitted to the Senate. By the *Senatus-Consulte* of November 7th (10th), 1852, on the reëstablishment of the imperial dignity, in the person of the Emperor Napoleon III., the Constitution was maintained in all matters, in which it was not inconsistent with the *Senatus-Consulte;* and by a *Senatus-Consulte* of December 25th (30th), 1852, it was expressly provided that treaties of commerce, made by virtue of the 6th article of the Constitution, should have the force of law, in modifying the existing tariffs. Annuaire des deux mondes, 1851–2, p. 952. Ib. 1852–3, pp. 887, 891. This power was exercised by the Emperor, in carrying out, through a commercial treaty with England of January 23, 1860, which abandoned prohibitions, and substituted for high duties on the remaining articles a tariff which could not exceed thirty per cent., in return for equivalent stipulations on the part of England, the principle of the economical reforms suggested in his famous letter of January 5, 1860, to the Minister of State. The British treaty, so far as regarded the French sanction of it, contained only the ratification clause usual in all cases, while the 20th article declared: "The present treaty shall not be valid unless Her Britannic Majesty shall be authorized, by the assent of her Parliament, to execute the engagements contracted by her in the articles of the present treaty." Annual Register, 1860, p. 227. By the previous Constitution of November 4, 1848, ch. v. § 53, the President had the power to negotiate and ratify treaties, but it was expressly provided that "no treaty is definitively made till after it has been approved by the general assembly." The Constitution of January 14, 1852, substitue *fait* for *négocie et ratifie*. Tripier, Code Politique, pp. 329, 388.] — *L.*

[1] *Vide ante*, Part III. ch. 2, § 7, p. 457.

main; 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.[1]

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 Mezeray, 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 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

[1] 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's Comment. on American Law, vol. i. p. 178, 5th ed.

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 is 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 is believed that, according to the general understanding of French public jurists, the assent of the Chambers, clothed with the forms of a legislative act, is 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 regal 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.

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 ancient Germanic Constitution; the dismemberment of its territory was contrary to the fundamental laws and maxims of the empire; and such is believed to be the actual constitution of the present Germanic Confederation. 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 Luneville, 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. [248

§ 8. 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

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[248 As in the cases to which our author has referred, the law of necessity, superinduced by military conquest, leaves no alternative. Before it all municipal codes succumb. But, apart from these considerations, the same reasoning which deduces the right of the Federal government, from the power to make war and to make treaties, to acquire foreign territory, also concedes that of alienating territory. Part I. ch. 2, § 24, Editor's note [39, p. 99. In the sole case which has practically occurred, the adoption of a conventional line for the settlement of the northeastern boundary, the Secretary of State, Mr. Webster, announced to the Governors of Maine and Massachusetts the arrival of Lord Ashburton as a special minister, and the proposition on the part of the British government for such an adjustment, and invited their coöperation. He referred to the duty of the two parties, after the failure of the Netherlands arbitration, to institute another according to the spirit of the treaty of Ghent and other treaties, and stated that "without the concurrence of the two States, whose rights are more immediately concerned, both having an interest in the soil and one of them in the jurisdiction and government, the duty of this government will be to adopt no new course, but in compliance with treaty stipulations, and in furtherance of what has already been done, to hasten the pending negotiations as fast as possible in the course hitherto adopted." Webster's Works, vol. vi. p. 272.

Commissioners, on the part of Maine and Massachusetts, were appointed, and the treaty of August 9, 1842, (Statutes at Large, vol. viii. p. 554,) was only concluded with their concurrence. The treaty, indeed, contained a stipulation for payments from the United States to these States, the responsibility for which we have seen was disavowed by Lord Ashburton, (Part I. ch. 2, § 24, Editor's note, [42, p. 102,) and the propriety of introducing them into a convention with a foreign power, whatever may have been the rights of the States as to a cession of their territory by the Federal government, may well be questioned.] — *L.*

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 forever the assertion of the claim in any mode.[1]

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, unless actually confiscated, in the mean time, in the rigorous exercise of the strict rights of war, contrary to the milder practice of recent times. 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 license. In all these cases, the remedy may be asserted subsequently to the peace.[2] [249

[1] Vattel, Droit des Gens, liv. iv. ch. 2, §§ 19–21.

[2] Kent's Comment. vol. i. p. 168, 5th ed.

[249 "A state of war abrogates treaties previously existing between the belligerents, and a treaty of peace puts an end to all claims for indemnity for tortious acts committed under the authority of one government against the citizens or subjects of another, unless they are provided for in its stipulations. President's Message. Annual Register for 1847, p. 407]. Thus the treaty of the 6th of February, 1853, for the adjustment of private claims of citizens of the United States on the government

§ 4. *Uti possidetis* the basis of every treaty of peace,

The treaty of peace leaves everything in the state in which it found it, unless there be some express stipulation to the contrary. The existing state of possession

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of Great Britain, and of subjects of Great Britain on that of the United States, was limited to such as arose subsequently to the treaty of peace of the 24th December, 1814. Statutes at Large, vol. x. p. 988.

Mr. Gallatin having been applied to in 1827, to advocate a claim for indemnity of an American citizen on the British government arising out of the capture and condemnation of vessels and cargoes in 1809, and consequently prior to the war of 1812, wrote to the Secretary of State: "You will perceive by the inclosed copy of the Treasury answer that this is one of the numerous cases of vessels condemned by the British courts either under illegal decrees or under false pretences, and for which no indemnity was obtained by the treaty of peace. You may remember that at Ghent we made a kind of protocol for the purpose of preserving the rights of the United States and of their citizens, notwithstanding that omission. The claim may at any time be made, though certainly not with any expectation that it will be entertained by Great Britain. I am not aware that this has ever been done. However desirous to be useful to our citizens, I would not venture on a step of this kind before the subject had been fully examined and the President had decided thereon." Mr. Gallatin to Mr. Clay, April 3, 1827, MS.

We have repeatedly referred to difficulties with France, in 1798–9, As to the character to be ascribed to them in view of their legal consequences, — the Supreme Court, premising that "Congress had raised an army, stopped all intercourse with France, dissolved our treaties, built and equipped ships of war, and commissioned private armed ships, enjoining the former and authorizing the latter to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to recapture vessels found in their possession," declared that a public war, though an imperfect war, existed between the two nations, and that they were enemies to one another. The court accordingly awarded salvage of one half, as for a recapture from an enemy, in the case of an American vessel, captured by a French privateer and recaptured by a public armed American ship. Dallas's Rep. vol. iv. p. 37, Bos *v.* Tingy. The act of March 2, 1799, since repealed by the act of March 3, 1800, (Statutes at Large, vol. ii. p. 16,) declared "that for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken from the *enemy* within twenty-four hours, the owners are to allow one eighth part of the whole value for salvage, &c., and if above ninety-six hours, one half." Ib. vol. i. p. 716. The previous act of June 28, 1798, had declared that "whenever any vessel, the property of, or employed by, any citizen of the United States or person resident therein, &c., shall be recaptured by any public armed vessel of the United States, the same shall be restored to the former owner or owners on their paying and allowing, as and for salvage, to the recaptors, one eighth part of the value of such vessel." Ib. p. 574. It will be noticed that the term *enemy* is not here used, and the question with the court was which act applied. The controversy turned on whether France was an *enemy* of the United States, within the meaning of the law. See further, as to the effect of this war in extinguishing prior claims, Webster's Works, vol. iv. p. 162. Benton's Thirty Years in the Senate, pp. 487, 494–509. Cong. Globe, 1854–5, p. 372. Ib. Index, p. 120.

As the right of capture, of making a prize, is a direct emanation from the right of war, it follows that there is no possibility of exercising this right of prize against the

is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered unless the contrary be expressed.

vessels of a nation, unless the government of the captor has declared war against the State to which the captured vessel belongs and issued orders to cruise against the vessels of that nation. De Pistoye et Duverdy, Traité des prises, tom. i. p. 29.

In a case, arising under the treaty of 1819, with Spain, the Supreme Court held, "That where one of the parties to a treaty, at the time of its ratification, annexes a written declaration explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty, and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged." Howard's Rep. vol. xvi. p. 650, Doe et al. *v.* Braden.

By the second article, as originally proposed, of the convention of September 30, 1800, for "terminating the differences" between the United States and France, between whom, as stated, actual hostilities then existed, it was stipulated that the parties would negotiate further, respecting the treaties of alliance and of commerce of 1778, and of the consular convention of 1788, and upon "the indemnities mutually due and claimed." This article the Senate, in ratifying the treaty, expunged; and, at the same time, notwithstanding the perpetual character of its first article, which, as is usual at the close of a war, declared that there should be "a firm, inviolable, and universal peace between the French Republic and the United States," they limited the duration of the whole treaty, without an exception even of that article, to eight years. The First Consul, in ratifying it, added as a proviso, "that by this retrenchment the two States renounce the respective pretensions, which are the object of the said article." In this form the ratifications were exchanged in Paris. Mr. Madison, Secretary of State, wrote to Mr. Livingston, Minister to France, 18th December, 1801, "I am authorized to say, that the President does not regard the declaratory clause as more than a legitimate inference from the rejection by the Senate of the second article." Cong. Doc. 19th Cong. 1st Sess. No. 122, p. 703. President Jefferson, however, deemed it advisable to submit the convention anew to that body. The Senate, taking the same view of it as he did, resolved that they considered the convention duly ratified, and returned the same to the President for the usual promulgation. Statutes at Large, vol. viii. p. 194. The treaty thus stood, it is conceived, when promulgated, as respects the subject of the second article, precisely as it would have done, if that article had never been contained in it; and, moreover, by the express declaration of both governments, its omission was tantamount to a renunciation of the pretensions to which it refers, whatever the effect, in other respects, of the limitation, as to the duration of the treaty, might be. This also accords with the principles on which the negotiation proceeded, that is to say, if the treaties were regarded as abrogated, and all claim for indemnities extinguished, it would be a recognition of a preëxisting state of war, and of the new treaty as a treaty of peace. Part IV. ch. 3, § 6, Editor's note, [213, p. 713.

But the expunging of the second article did not affect the other provisions of the treaty. By the third article, the public ships that had been captured were to be mutually restored. By the fourth article, it was agreed that "property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications, (contraband goods destined to an enemy's port excepted,) shall be mu-

country or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance

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tually restored," &c. The proofs, on both sides, to be required in reference to vessel and cargo, are minutely prescribed in the treaty; and it is added: "This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned, contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained, the property so condemned shall, without delay, be restored or paid for."

The fifth article would seem to be confined to matters of contract, which are not extinguished by a state of war, but are revived at peace. "Art. 5. The debts contracted by one of the two nations with individuals of the other, or by the individuals of one with the individuals of the other, shall be paid, or the payment may be prosecuted, in the same manner as if there had been no misunderstanding between the two States. But this clause shall not extend to indemnities claimed on account of captures or confiscations."

Complaints very soon arose of the non-performance, by France, of the stipulations of these articles, particularly of the fourth article. In a note, 29th Thermidor, year 9, (17th August, 1801,) from M. Talleyrand, Minister of Foreign Affairs, to the Commissary of the Government, near the Council of Prizes, he tells him, "The two nations have guaranteed, the one to the other, the restitution — 1. Of national ships; 2. Of armed or unarmed ships that shall be known to belong to their citizens, according to the proofs specified in the fourth article, and that without any exception, restriction, or reserve; 3. Of all property forming part of the cargo of said ships, with the only exception of merchandise specified by the thirteenth article, under the denomination of contraband of war, and which shall be destined for the enemy. You will, therefore, solicit the Council to apply, as soon as possible, the provisions of the convention of American prizes, in all that relates to them." Cong. Doc. 19th Cong. 1st Sess. No. 102, p. 555.

The claims under this (fourth) article, as well as those under the fifth, continued to be pressed upon the French government, during the period intervening between the ratification of the convention of 1800 and the conclusion of the negotiations for the purchase of Louisiana. By one of the conventions of 30th April, 1803, connected with that transaction, 20,000,000 francs were set aside, for the payment of American claims; and it would seem, from the diplomatic correspondence of that period, that it was expected that it would exceed the amount for which France was justly liable, and be applicable to all subsisting claims. The matter, however, became involved in almost inextricable confusion, by the terms used in the treaty, and the looseness with which it appears to have been drawn. By "Art. 1. The debts due by France to citizens of the United States, contracted before the 8th of Vendemiaire, ninth year of the French Republic, (30th September, 1800,) shall be paid according to the following regulations, with interest at six per cent., to commence from the periods when the accounts and vouchers were presented to the French government." It was declared, by the second article, that "the debts provided for, &c., are those whose result is comprised in the conjectural note, (a,) annexed to the present convention, and which, with the interest, cannot exceed the sum of twenty millions of francs. The claims comprised in the said note, which fall within the exceptions of the following articles, shall not be admitted to the benefit of this provision." "Art. 4. It is expressly agreed that the preceding articles shall comprehend no debts but such as are due to citizens of the United States, who have been and are yet creditors of

of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until

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France, for supplies, embargoes, and for prizes made at sea, in which the appeal has been properly lodged, within the time mentioned in the said convention of the 8th Vendemiaire, ninth year, (30th September, 1800.) Art. 5. The preceding articles shall apply only, first, to captures, of which the Council of Prizes shall have ordered restitution; it being well understood that the claimant cannot have recourse to the United States, otherwise than he might have had to the government of the French Republic, and only in case of the insufficiency of the captors; second, the debts mentioned in the said fifth article of the convention contracted before the 8th Vendemiaire, an 9, (30th September, 1800,) the payment of which has heretofore been claimed of the actual government of France, and for which the creditors have a right to the protection of the United States; the said fifth article does not comprehend prizes whose condemnation has been or shall be confirmed. Art. 10. The rejection of any claim (by the American commissioners appointed under the convention to examine the claims) shall have no other effect than to exempt the United States from the payment of it; the French government reserving to itself the right to decide definitively on such claim, so far as it concerns itself." Statutes at Large, vol. viii. p. 212.

It will be seen, by a reference to the two conventions, that the language of the one of 1803 does not, in terms, describe the claims for which, after the abrogation of the second article, France remained liable to the United States, under the treaty of 1800. The conjectural note, though not printed in the Statutes of the United States with the treaty to which it was annexed, will be found in Cong. Doc. 19th Cong. 1st Sess. No. 102, at p. 760. It is principally composed of claims for supplies received by the French government, most of which were cases of contract, and for losses sustained at Bordeaux, in consequence of the embargo of 1793, which latter are not embraced within the language of the fifth article of the convention of 1800; though, as a right to an indemnity against a foreign State attaches to the property, and passes by cession, they may be included in the term "debts," as employed in the fourth article of that of 1803. See Peters's Rep. vol. i. p. 215, Comegys *v.* Vasse. The subject was involved in additional obscurity, by the reference in the preamble of the latter convention, in connection with the fifth article, to the second or abrogated article of the convention of 1800, as still subsisting. It would seem, from the contemporaneous correspondence, that many of the cases provided for, though included in the second article, were also within the scope of the fifth, and, therefore, not extinguished by the annulling of the former article. Mr. Livingston, in a letter of 17th April, 1802, to the Minister of Exterior Relations, had said: "The whole of the fifth article, taken together, amounts to an express stipulation to pay every debt due to individuals, except such as they might claim for indemnities for captures and condemnations, and must have been so construed, had the second article continued in the treaty. On its being erased, the fifth article stands alone as a promise to pay, with the single exception of indemnities for captures and confiscations." Ib. p. 717.

The difficulty of rendering the two conventions consistent with one another may well be conceded, after the following admission of one of the American plenipotentiaries: "Your instructions," says Mr. Livingston, 3d May, 1804, to the Secretary of State, "to negotiate a new explanatory treaty, proceed upon the idea, that the convention does not include all the *bonâ fide* debts provided for by the convention of

the treaty of peace, by its silent operation, or express provisions, extinguishes his title forever.[1]

Morfontaine, (30th September, 1800.) Whatever inaccuracy there may be in the expression, it was certainly the intention to make it coextensive, except so far as to preclude foreigners and foreign property from its provisions. The first article shows clearly that this was the object of the treaty; nor do I think that the subsequent words control, though they certainly somewhat obscure, the sense. The fact was, I had drawn the convention with particular attention; it did not exactly meet with Mr. Monroe's ideas, to whom the subject was new; this produced some modifications, and these, again, which would have fully answered our purposes, were struck out by Mr. Marbois's wish to give a preference to debts that had a certain degree of priority in the French bureau. The moment was critical; the question of peace or war was in the balance, and it was important to come to a conclusion before either scale preponderated. I considered the convention as a trifle, compared with the other great object; and I was ready to take it under any form." Ib. p. 817. As intimated in the preceding extract, Mr. Livingston had been directed, January 31, 1804, "to adjust with the French government a provision for comprehending, in the convention of 1803, the claims still remaining under the convention of 1800. Should the French government refuse to concur in any proposition that will restore the latitude given to claims, as defined by the first convention, and which is narrowed and obscured by the text of the last, it will be proper to settle with the government, if it can be done, such a construction of this text, as will be most favorable to all just claims," &c. Ib. p. 790. This arrangement was declined; the French Minister of Exterior Affairs, in his note to Mr. Livingston, 6th September, 1804, declaring, that, "in adhering to the dispositions of the treaty, from which his Imperial Majesty will not deviate, any explanatory convention would be superfluous; and the intention of His Imperial Majesty is, to keep from all future question an affair completely terminated. The convention of the year xi., (1803,) foresaw the whole case; the whole of the American claims are to be placed to the account of the Federal government; a list of them has been made. The liquidation of the articles of which it is composed shall be decided before the rest; if it does not reach the sum of twenty millions, other claims will be comprehended therein, but none shall be which exceed this sum, because it is at this point that the two governments are agreed to stop." Ib. p. 830.

The following statement is from a work originally published by the French negotiator of the treaty, the Marquis de Marbois, in 1828: —

"The convention of the 30th of September, 1800, had for its object the securing of reciprocal satisfaction to the citizens of the two States, and the preventing, as far as possible, of anything that could for the future affect their good understanding. We there find the principle, the wisdom and legality of which only one nation in the world disputes, 'that free ships make free goods, although they are the property of the enemies of one of the contracting parties.'

"A special promise had been given to pay the debts arising from requisitions, seizures, and captures of ships made in time of peace; but the execution of the agreement had not followed the treaty. For two years and a half, the Minister of

[1] 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.

The restoration of the conquered territory to its original sovereign, by the treaty of peace, carries with it the restoration of

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the United States had been reiterating his reclamations, and demanding in vain the reparation of these losses. The cession of Louisiana afforded the means of realizing promises that had been so long illusory. The Americans consented to pay eighty millions of francs, on condition that twenty millions of this sum should be assigned to the payment of what was due by France to the citizens of the United States.

"The two (American) ministers fixed this condition of an indemnity at twenty millions of francs, and they probably expected that they would be required to state the grounds of this estimate, in order that they might be discussed and a reduction effected. But no opposition was made, and it was instantly agreed that this amount should be deducted from that of the eighty millions for the captures improperly made. The intention of extinguishing all former claims was sincere on both sides. The round sum of twenty millions was evidently an estimate formed on reasonable conjecture, and could not be an absolute result established by documents. But the American negotiators agreed, that if there was any difference, the amount rather exceeded than fell short of the claims; and the French plenipotentiary gave assurances, that in no case should this excess be claimed by France. Thus the respective demands were easily agreed to. A mutual frankness, which smoothed all the difficulties from which the most simple negotiations are not always exempt, was the only address employed by the ministers of either party." Marbois's History of Louisiana, translated by Lawrence, p. 303.

If any claims reserved by the treaty of 1800, and not included in that of 1803, were still obligatory on France, they would have been embraced in the general terms of the convention of the 4th of July, 1831, the first article of which declares, without any limit as to date, the object of the French government, in agreeing to pay the indemnity therein stipulated, to be, "to liberate itself completely from all the reclamations preferred against it by citizens of the United States, for unlawful seizures, captures, sequestrations, confiscations, or destruction of their vessels, cargoes, or other property." And as this fund was to be distributed by the American government "among those interested, in the manner and according to the rules which it shall determine," it rested with them to make the application. Statutes at Large, vol. viii. p. 430. The language of the act of July 13, 1832, is, that the commissioners appointed under it are "to receive and examine all claims which are presented to them under the convention, which are provided for by the said convention, according to the provisions of the same, and the principles of justice, equity, and the law of nations." Ib. vol. iv. p. 574. The statement of the commissioners of the classes of cases allowed by them will show that no claims, pretermitted in the convention of 1800 or existing at the conclusion of that of 1803, were admitted by them; and they thought it necessary particularly to note the allowance of some claims "for property captured, after the signature and before the ratification of the convention of 1800," because, they say, "that convention (of 1803) had limited the indemnity to cases arising before the 30th of September, 1800." Cong. Doc. Senate, 24th Cong. 1st Sess. No. 161. It has been contended, by those interested in claims supposed to have been omitted in the treaty of 1800, that the circumstances connected with the expunging of the second article, to which France had already acceded, had given them an equity, as against their own government; and two acts of Congress, providing for the ascertainment of claims of American citizens, for spoliations committed by France prior to the 31st of July, 1801, have been passed, though in both instances they

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 postliminii* 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.[1]

§ 5. From what time the treaty of

A treaty of peace binds the contracting parties from the time of its signature. Hostilities are to cease be-

failed to receive the sanction of the President, or to obtain the constitutional majority to enact them, notwithstanding his objection. The first *veto* was interposed by President Polk, on 8th of August, 1846. Senate Journal, 29th Cong. 1st Sess. p. 514. The other was by President Pierce, on 17th February, 1855. Journal H. R. 33d Cong. 2d Sess.] — *L.*

[1] Vattel, liv. iii. ch. 14, §§ 209, 212, 216. Robinson's Adm. Rep. vol. vi. p. 43, The Purissima Conception. Ib. p. 138, The Sophia.

tween them from that time, unless some other period be provided in the treaty itself. 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; 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 *civiliter*, 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; and it is bound in justice to indemnify its officers and subjects who act in ignorance 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, even against the actual wrong-doer, after a lapse of a great length of time.[1]

peace commences its operation.

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, 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

[1] Robinson's Adm. Rep. vol. i. p. 121, The Mentor.

from his own government would be sufficient, in such a case, to affect the captor with the legal consequences of actual knowledge. 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. 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.[1]

§ 6. In what condition things taken are to be restored.

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 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

[1] Valin, Traité des Prises, ch. 4, §§ 4, 5. Emérigon, Traité d'Assurance, ch. 12, § 19. Merlin, Répertoire de Jurisprudence, tom. ix. tit. Prise Maritime, § 5. Kent's Comment. vol. i. p. 172, 5th ed.

fortifications, and reëstablished 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.[1]

§ 7. 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.[2]

§ 8. Disputes respecting its breach how adjusted.

Treaties of peace are to be interpreted by the same rules with 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 recently been assumed, in several instances, by the five 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, by which a suspension of hostilities between Holland and Belgium was enforced, and

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[1] Vattel, Droit des Gens, liv. iv. ch. 3, § 31.

[2] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 15; lib. iii. cap. 19, § 14. Vattel, liv. iv. ch. 4, §§ 47, 48, 54.

terms of separation between the two 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.[1]

[1] Wheaton's Hist. Law of Nations, pp. 538–555.

APPENDIX.

APPENDIX.

BY MR. LAWRENCE.

No. 1.

NATURALIZATION AND EXPATRIATION.

(See Part II. ch. 2, §§ 1 and 5, pp. 160, 172.)

ARISTOTLE defines a citizen to be one who is a partner in the legislative and judicial power, who shares in the honors of the State, while he who has no part in them is a mere sojourner and alien. λέγεται μάλιστα πολίτης ὁ μετέχων τῶν τιμῶν . . . ὥσπερ μέτοικος γάρ ἐστιν ὁ τῶν τιμῶν μὴ μετέχων. Aristotle de Repub. lib. iii. cap. 5, D. In some of the Grecian States particular privileges were granted to aliens, such as the right of marriage, the right of acquiring landed property, immunity from the tax imposed on resident aliens. The class which possessed these privileges combined were called ἰσοτελεῖς. They bore the same burdens with the citizens, and could plead in the courts, or transact business with the people, without the intervention of a προστάτης. According to Niebuhr, the rights referred to, and which were generally expressed by the word ἰσοπολιτεία, were the result of relations entered into by treaty between two perfectly equal and independent cities, mutually securing to their citizens all those privileges which a resident alien could not exercise at all, or only through the mediation of a guardian. The privileges enjoyed by a freeman of a city, in virtue of its isopolity, were also conferred on individuals in unconnected States by the relation of προξενία. Such persons enjoyed the same rights and privileges as the isopolites. But these did not extend to the assembly of the people. History of Rome, vol. ii. p. 38. Nor were they citizens, according to Aristotle's definition, recurring to which, "we find the essential properties of Athenian citizenship to have consisted in the share possessed by every citizen in the legislature, in the election of magistrates, in the δοκιμασία, and in the courts of justice." Smith, Dictionary of Greek and Roman Antiquities, p. 289.

The particular rights included in the *civitas Romana* were some of a political nature, appertaining to the *jus publicum*, since the participation in the government of the State depended on them. Such were the *jus suffragii* and the *jus honorum*. Others, especially the *jus commercii* and the *jus connubii* belonged to the *jus privatum*, and were essential to citizenship. And it may be here remarked that it is the possession of the *jus suffragii* at least, if not also of the *jus honorum*, that is the principle which governs, at this day, in defining citizenship in the countries deriving their jurisprudence from the civil law.

The right of Roman citizenship was acquired, 1st, by birth, when the parents, or, at least, the one whose condition the child followed, were Roman citizens; 2d, by affranchisement under certain circumstances; 3d, by a special concession granted originally by the people and Senate, afterwards by the Emperor, sometimes in favor of entire populations or cities, and sometimes in favor of individuals. It was lost by the withdrawal of it from entire populations as well as from individuals as a punishment, and by individuals, also, as a consequence of the loss of personal liberty essential to citizenship. And there is enumerated among the causes of its forfeiture, without *maxima capitis diminutio*, voluntary renunciation, which includes the acceptance of the right of citizenship in a foreign State, as being incompatible with retaining the rights of Roman citizenship.

At first there was no intermediate degree between the *cives Romani* and those who had not the right of citizenship, the *peregrini;* for though the plebeians occupied a subordinate position to the patricians, they yet made part of the *populus*, properly so called; and, according to Savigny, the notion of *civis* and *civitas* had its origin in their union. In later times there were certain degrees among the *peregrini*. There was a distinction between those who did not participate in the right of citizenship and in the *jus civile*, which depended on it, but only in the *jus gentium* and others, to whom was conceded a greater or less participation in the *jus civile*, especially in the private advantages which it conferred. To the *Latini colonarii* was granted the *commercium* and not the *connubium;* but when the republic had passed to a pure monarchy, as the right of citizenship lost its importance for individuals, and the *jus civile* and *jus gentium* became assimilated and almost merged into one, the right of Roman citizenship was more liberally granted, until under Caracalla, and more completely still under Justinian, all the free subjects of the Roman empire obtained the right of citizenship. Marezoll, Lehrbuch des Institutionen des römischen Rechtes, §§ 74, 75.

To come down to modern times, Wolff says, "The members of the civil society or every one of those who form it are called *citizens;* he who is not a member of our civil society is called a *foreigner*, and a foreigner who is permitted to dwell and carry on business in another country than his own is called an *inhabitant*." Institutions du Droit, &c., 3me partie, sect. 2, ch.

1, § 974, tom. ii. p. 140. According to Vattel, "Citizens are the members of the civil society; bound to this society by certain duties and subject to its authority, they equally participate in its advantages. Inhabitants as distinguished from citizens are foreigners, who are permitted to establish their residence in the country. Bound by their abode in the country to the society, they are subject to the laws of the State while they remain in it, and ought to defend it, since they are protected by it, although they do not participate in all the rights of citizens. A nation or the sovereign who represents it may grant to a stranger the quality of citizen, by admitting him into the body of the political society; this is called naturalization. Droits des Gens, liv. i. ch. xix. §§ 212, 213, 214.

According to the constitutional jurists, other than those of England and the United States, the right of voting, or of at least being eligible as an elector, is the test of citizenship. The Dutch publicist, Thorbecke, says, in a discourse, delivered at the Hague, entitled "Des droits du citoyen d'aujourd'hui," which was translated into French in 1848 for M. Fœlix's review: — "What constitutes the distinctive character of our epoch is the development of the right of citizenship (*droit de cité*). In its most extended, as well as in its most restricted sense, it includes a great many properties (*facultés*). The right of citizenship is the right of voting in the government of the local, provincial, or national community, of which one is a member. In this last sense, the right of citizenship signifies a participation in the right of voting in the general government, as a member of the State." Rev. Fr. & Etr. tom. v. p. 383.

This doctrine is in accordance with the general system of the continent of Europe, which, moreover, admits the right of every person, when he attains his majority according to the law of his domicile of origin, to choose another domicile. Any restrictions, which may in those States be imposed on emigration, have professedly for their object to prevent their citizens leaving their country, without the fulfilment of their obligations to their native land.

On the other hand, the feudal allegiance, still claimed by the institutions of England, attaches for life to every man born on the soil, or, rather, as Lord Coke has it, under allegiance to the king. And independently of statute, it only attaches in that way. Not only was an act of Parliament required to give in England the rights of subjects to the children of Englishmen born abroad, but it was requisite to remove by a statutory declaration (25 Edward 3, St. 2) the doubt as to whether the king's child, if born in a foreign country, could inherit the crown. Mr. Westlake says the doubt was perfectly logical, "for if allegiance to a foreign prince were entailed by mere birth in his dominions, then surely one who owed such allegiance could not be a fit sovereign for England." Private Intern. Law, § 13, p. 11.

Naturalization may be effected, First, by annexation of territory either

through conquest and cession or by the voluntary merger of a State with another. The principle is also applied, according to the feudal system, on the ground of a common allegiance, when the same sovereign possesses the crown of two countries, though they may not constitute one kingdom.

Naturalization by conquest was the consequence of that change in the law of war, by which the conqueror, instead of gaining captives and slaves and absolute rights of property, obtained dominion and subjects. This was the law soon after the arrival of the Normans in England, and was certainly understood to be so, as early as the reign of Henry the Second, when the people of Ireland became his subjects from his conquest of the island. Lord Coke mentions, in his report of Calvin's case, among the ways by which the denization of an alien may be effected, that of conquest. "As if the King and his subjects should conquer another kingdom or dominion, as well *ante-nati* as *post-nati*, as well they which fought in the field, as they which remained at home for the defence of their country, or employed elsewhere, are all denizens of the kingdom or dominion conquered." Coke's Rep. Part VII. fol. 6. Lord Mansfield, in a case in Cowper's Rep. p. 204, (Campbell *v.* Hall,) runs over the history of the conquests made by the crown of England, in order to confirm and illustrate his judicial doctrines, beginning with that of Ireland and ending with that of New York. In all those cases of conquest, the previous aliens became subjects of the crown by subsequent conquest, and, of course, were virtually naturalized by the act and operation of law. "By such operation of law, it is not too much to assert," said Chalmers, in 1814, "that there had been acquired to the British Empire, since the commencement of the present reign, forty millions of subjects." Chalmers's Colonial Opinions, p. 663.

The point decided in Calvin's case was, that a Scotchman, born after the accession of King James to the throne of England, was a subject, and might maintain an action for real estate in England, which an alien could not do. 7 Coke's Rep. fol. 2. This was, of course, before the union between England and Scotland, and rested entirely on their having the same king.

"It was held," says Hallam, "by twelve judges out of fourteen, in Calvin's case, the *post-nati*, or Scots born after the King's accession, were natural subjects of the King of England. This is laid down and irresistibly demonstrated by Coke, the Chief Justice, with his abundant legal learning. It may be observed that the high-flying creed of prerogative mingled itself intimately with this question of naturalization; which was much argued on the monarchical principle of personal allegiance to the sovereign, as opposed to the half-republican theory that lurked in the contrary proposition.

"There are many doubtful positions scattered throughout the judgment in this famous case. Its surest basis is the long series of precedents, evincing that the natives of Jersey, Guernsey, Calais, and even Normandy and Guienne, while these countries appertained to the kings of England,

though not in right of his crown, were never reputed aliens." Constitutional History of England, ch. i. vol. i. p. 418, note.

Coke said, in that case, that even the local and temporary allegiance of foreign parents make a natural subject, "for if he hath issue here, that issue is a natural born subject." And it is to be observed that it is neither *cœlum* nor *solum*, but *ligeantia* and *obedientia* that make the subject born; for if enemies should come into the realm and possess a town or fort and have issue there, that issue is no subject of the King of England, though he be born upon his soil, for that he was not born under the liegeance of a subject, nor under the protection of the King. There are three incidents to a subject born: First, that the parents be under the actual obedience of the King; second, that the place of his birth be within the King's dominions; and, third, the time of his birth; for he cannot be a subject born of one kingdom, that was born under the liegeance of the king of another kingdom, albeit afterwards one kingdom descend to the king of the other. Coke's Reports, fol. 6, 18. Hence, also, the children of an ambassador, born in a foreign country during his mission, are not subjects of the country to whom their parent is accredited.

Lord Bacon, who was the Solicitor-General at the time, and whose argument in Calvin's case has been preserved, thus anticipated the remedy for the inconvenience that might result from a common citizenship, arising from the allegiance of peoples of very different interests to the same sovereign. "The reason," it is said, "stayeth not within the compass of the present case; for although it were some reason that Scotsmen were naturalized, being people of the same island and language, yet the reason which we urge, which is, that they are subjects to the same king, may be applied to persons every way more estranged from us than they are; as in future time, in the king's descendants, there should be a match with Spain, and the dominions of Spain should be united with the crown of England, by our reason," say they, "all the West Indies should be naturalized; which are people not only *alterius soli* but *alterius cœli*." Lord Bacon's answer was: "For the naturalization of the Indies, we can readily help that, when the case comes; for we can make an act of Parliament of separation if we like not their consort." Bacon's Works, vol. xv. p. 218.

This was accordingly done on occasion of the accession of the House of Hanover. By the act of settlement, it was provided that "after that limitation shall take effect, no person born out of the kingdoms of England, Scotland, and Ireland, or the dominions thereunto belonging, (although he be naturalized or made a denizen, except such as are born of English parents,) shall be capable to be of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments, from the crown to himself, or to any other or others in trust for him.

Hallam's Cons. Hist. ch. xv. vol. iii. p. 181. Blackstone declares: "As to any foreign dominions which may belong to the person of the King by hereditary descent, by purchase, or other acquisition, as the territory of Hanover, and His Majesty's other property in Germany; as these do not in any wise appertain to the crown of these kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatever." Blackstone's Commentaries, vol. i. p. 110. During the whole period that the German possessions of the kings of England, from the accession of George I. to the death of William IV., were vested in the same sovereign, there was no community of rights between his British and German subjects.

It was further said in Coke's report of Calvin's case: "So albeit the kingdoms of England and Scotland should by descent be divided and governed by several kings; yet was it resolved, that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural-born subjects and no aliens: for that naturalization, due and vested by birthright, cannot, by any separation of the crowns, afterwards be taken away; nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such a matter *ex post facto*. As in that case, upon such an accident, our *post-natus* may be *ad fidem utriusque regis*, as Bracton saith." Ib. Coke's Rep. fol. 27.

This subject became one of great practical importance in connection with the separation of the American Colonies.

The Courts of the United States and England were alike agreed in rejecting the idea of a double allegiance, the only difference between them being as to the period at which the independence of the United States should date; the former basing it on the Declaration of Independence of July 4, 1776, and the latter on the definitive treaty of peace of September 3, 1783. The recognized doctrine is that, by the separation of the two countries, Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively; and that those persons became aliens in respect to the government to which they did not adhere. Kent's Commentaries, vol. ii. p. 60, and cases there cited.

As to the effect of the renunciation of sovereignty over a country, as regards its inhabitants, an authority already referred to, while adhering to the doctrine of indefeasible allegiance, as long as the sovereign retains the territory on which it is based, says: "The King certainly cannot, by any special act, disfranchise a particular subject; yet the King, by authority of that high trust wherewith he is invested by the constitution of making war and peace, may relinquish by treaty the subjection of many subjects; for, if it were otherwise, by the understanding of the law of nations, treaties

of peace could never be made between belligerent powers. Hence, we may infer, as Lord Chancellor Egerton intimated in giving judgment in Calvin's case, that the true correlatives are sovereignty and subjection: if the subjection be withdrawn, and so admitted, the sovereignty is gone; if the sovereignty be removed, then is the subjection gone; and the subjection being gone, the people owing no subjection are no longer subjects, for they are all correlatives, which cannot exist without each other. Chalmers, p. 667.

There have been, in the United States, several cases of collective naturalization, by annexation of territory. By the third article of the first convention of April 30, 1800, with France, for the cession of Louisiana, it is provided that the inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted, as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of the rights, advantages, and immunities of citizens of the United States. Statutes at Large, vol. viii. p. 202. A provision to the same effect is to be found in the 6th article of the treaty of 1819, with Spain, for the purchase of the Floridas. Ib. p. 256. By the 8th article of the treaty of 1848, with Mexico, those Mexicans who remained in the territories ceded, and who did not declare their intention, within one year, to continue Mexican citizens, were to be deemed citizens of the United States. Ib. vol. ix. p. 930. By the annexation of Texas, under a resolution of Congress, of March 1, 1845, and its admission into the Union on an equal footing with the original States, December 29, 1845, all the citizens of the former Republic became, without any express declaration, citizens of the United States. Ib. vol. v. p. 798; vol. ix. p. 108.

Pothier thus lays down the principle, in reference to the acquisitions which had been made by France before the French Revolution: "When a province is united to the crown, its inhabitants must be regarded as Frenchmen, whether they were born before or after the union. There is every reason to think that the foreigners, who are established in these provinces, and who have there obtained, according to the laws in force, the rights of citizenship, must, after the annexation, be considered citizens equally with the native inhabitants of those provinces, or, at least, with foreigners naturalized in France." And applying the same principle in the case of loss of territory, he says, "When a province is dismembered from the crown, when a conquered country is restored by the treaty of peace, the sovereignty over the inhabitants is changed. Citizens at the time of the conquest, or since the conquest, or if born since the union, citizens by their birth till the dismemberment of the province, become foreigners." Traité des Personnes, Part I. tit. 2, sect. 1.

The treaty of the 26th of April, 1798, for the incorporation of the republic of Geneva with the French republic, declares the Genevese who

inhabited the city and territory of Geneva, as well as those who are in France or elsewhere, native born Frenchmen, (*françois nés*). Martens, Recueil de Traités, tom. vii. p. 249. The treaty for the annexation of Mulhausen declares the citizens and inhabitants of Mulhausen and its dependencies native born citizens, (*françois nés*). Ib. p. 237.

It is not, however, understood that these special declarations varied the condition of the inhabitants of those small republics from that of the numerous countries and provinces, which were incorporated with France between 1789 and 1814. These relations, established as to Geneva and Mulhausen, were applicable to all the annexations. They were "the immediate consequence," says Fœlix, "of every union of territory, according to the existing law of nations, and since it is no longer the custom, even after the conquest of a country, to reduce its inhabitants to a condition inferior to that of the conquering country." Revue de droit François et étrang. tom. ii. p. 328. Naturalisation Collective.

The difficulties which arose as to the political position of the inhabitants of these provinces were not incident to their annexation, but many grave questions have grown out of their retrocession by France, in 1814–15, to their former sovereigns.

By the 17th article of the treaty of 30th of May, 1814, and the 7th article of the treaty of 20th of November, 1815, which provide, the first for the reduction of the limits of France to those of 1792, and the latter for the boundaries of 1790, with specified modifications, it is declared that "in all the countries which shall change masters, as well in consequence of the treaty as of the arrangements that may result from it, there shall be granted to the inhabitants, as well natives as foreigners, of whatever condition or nation they may be, a period of six years, from the exchange of the ratifications, to dispose, if they think proper, of their property, (the treaty of 1814 says, acquired before or since the existing war,) and to retire to whatever country they think proper." Martens, Nouveau Recueil, tom. ii. pp. 9, 689.

There is a marked difference between this article and the provision usually made in the case of ceded territory. In principle, when a territory is detached from one State to be added to or united with another, it is usual to leave to the inhabitants the means of not losing their nationality. They are allowed a fixed period, within which, if they establish themselves in the provinces retained by the State to which they belonged, they will not be considered as having ever ceased to belong to it. Pothier *in loc. cit.* In 1814, less regard was shown for the inhabitants of the provinces which had been united to France since 1791. The idea appears to have been to consider this union (*pour non avenu*) as an event that had never happened, in order to efface all its consequences, — facilitating a little, by the law of 14th October, 1814, the conditions of naturalization

for the persons who should desire to *become* Frenchmen. Fœlix, Droit Inter. tom. i. p. 84, 3me edit. note par Demangeat.

M. Fœlix states a question as to the legal position of the individual, under these treaties, who enjoys the privilege of changing, to use, as he says, an English term, his allegiance. He thinks that the loss of the primitive nationality cannot immediately take place, when the individual does not at once acquire another nationality. Until he possesses that, he continues, according to the order of things, with reference to other nations, and at least with regard to his primitive country, to be considered a member of that nation. There would be a contradiction to maintain in our civilized Europe that, in the interval, the individual was not the subject of any sovereign, the member of any nation, a cosmopolite, and completely independent in the midst of populations united in civil societies. Fœlix, Naturalisation Collective, *loc. cit.* The condition of an alien, who has declared his intention to become a citizen of the United States is, during his probationary term, not unlike that here presented.

Secondly. A collective naturalization may, also, take place, of a class of persons, natives of the country or otherwise, and who, without any act on the part of the individuals, may be made citizens.

In the United States, it is incorrect to suppose that *alien*, as opposed to *citizen*, implies *foreigner* as respects the country. Indians are the *subjects* of the United States, and therefore are not, in mere right of home birth, citizens of the United States. Nor can they become citizens under the existing naturalization laws; but they may be made citizens by some competent act of the general government, by treaty, or otherwise. "The moment it comes to be seen that the Indians are the domestic subjects of this government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the government. This distinction between *citizens* proper, that is, the constituent members of the political sovereignty, and *subjects* of that sovereignty, who are not therefore citizens, is recognized in the best authorities of the public law. See Puffendorf de jure naturæ, lib. vii. cap. 23. For the same reason, a slave, it is clear, cannot be a citizen." Opinions of Attorneys General, vol. vii. p. 749. Mr. Cushing, July 5, 1856.

By the treaty of September 27, 1830, provision is made for such heads of families of the Choctaws as desire it, to remain and become citizens of the United States. Statutes at Large, vol. vii. p. 335. There is, also, a provision in the treaty of December 29th, 1835, with the Cherokees, in reference to such individuals and families as are averse to a removal west of the Mississippi, and are desirous to become citizens of the States where they reside. Ibid. p. 483. By the act of March 3, 1843, it is provided that, on the completion of certain arrangements for partitioning the lands of the tribe among its members, "the Stockbridge tribe of Indians,

and each and every of them, shall be deemed to be, and from that time forth are hereby declared to be citizens of the United States to all intents and purposes, and shall be entitled to all rights, privileges, and immunities of such citizens." See Statutes at Large, vol. v. p. 647.

The decree of 9th December, 1790, declaring Frenchmen the descendants of persons expatriated on account of their religion, which is still in force, may be deemed to belong to this class. They are, however remote the emigration of their ancestors, declared Frenchmen, and in all respects in the same category as native-born citizens. Such was the decision of the Chamber of Deputies in 1824 and 1828, on occasion of Benjamin Constant, Roman, and Odier. De Beaudant, de la Naturalisation, p. 5.

Thirdly. Distinct from the implied national character arising from domicile, and which may exist for commercial purposes, without a person ceasing to be bound by his allegiance to the country of his birth or adoption, all the countries of Christendom, with more or less restrictions, accord the rights of naturalization to foreigners, on the fulfilment by them of certain conditions.

Before the adoption of the Constitution, aliens were naturalized by the several States. By the Constitution of the United States, Congress have power to establish a uniform rule of naturalization; and this power is recognized by the Supreme Court, as being exclusive of that of the individual States. Kent's Commentaries, vol. i. p. 424. Wheaton's Rep. vol. ii. p. 269, Chirac *v.* Chirac. Ib. vol. v. p. 49, Houston *v.* Moore. The only distinctions made by the Constitution between a native and a naturalized citizen are that no person, except a natural-born citizen or a citizen of the United States at the time of the adoption of the Constitution, is eligible to the office of President or Vice-President, (art. 2, § 1,) and that no one can be a Representative who has not been seven years a citizen, or a Senator who has not been nine years a citizen. Art. 1, §§ 2, 3. By art. 4, § 2, the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

The following is the substance of the laws passed by Congress in pursuance of this provision of the Constitution: By the act of March 26, 1790, it is provided that any free white alien who had resided two years within the United States may become a citizen, on application to any court of record of the State where he had resided one year, making proof to the satisfaction of the Court that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the Constitution of the United States; and the minor children of such persons so naturalized, and the children of citizens that may be born out of the United States, were to be considered citizens. This act requires no abjuration of former allegiance. Statutes at Large, vol. i. p. 103. The act of January 29, 1795, requires a preliminary declaration of inten-

tion to become a citizen, and to renounce all foreign allegiance, particularly to the prince or State of whom the applicant was a subject or citizen, three years before admission, and a residence, at the time of admission, of five years within the United States, and of one year within the State. This act also requires that the alien should renounce any title of nobility, and that the court admitting him should be satisfied of his good moral character, that he was attached to the principles of the Constitution, and well disposed to the good order and happiness of the same. The aliens, then, residing in the United States, might become citizens on a residence of two years, one of which was in the State where applying, according to the law previously in force, and on complying with the other requirements of the new act. There are the same provisions as before, as to the minor children of naturalized citizens, and the children of citizens born abroad. Ib. p. 414. By the act of June 18, 1798, no alien could become a citizen, unless he had declared his intention five years before his admission, and proved a residence of fourteen years in the United States, and five years in the State where he applied. This law contained a saving in favor of those who became residents during the operation of the previous laws, and who were still to be admitted according to the terms required by them. No alien, a subject or citizen of a State at war with the United States, at the time of his application, could be admitted to become a citizen. The declaration, renunciations, and proofs established by the former act are retained. Ib. p. 566. By the act of April 14, 1802, and which is the law now applicable in ordinary cases, a free white person may become a citizen by declaring, at least three years before his admission, his intention, and on the court being satisfied that he has resided, at the time of his admission, five years in the United States, and one year in the State where the court sits, and that he has complied with the other conditions of abjuration, &c., which are the same as prescribed in the act of 1795. Minor children, whose parents had been naturalized citizens, and children of citizens that had been born out of the United States, were not to be deemed aliens. Ib. vol. ii. p. 153. By the 12th section of the act of March 3, 1813, "for the regulation of seamen on board the public and private vessels of the United States," five years continuous residence was required for naturalization. Ib. p. 811. But this provision was repealed, June 26, 1848. Ib. vol. ix. p. 240. By the act of May 26, 1824, minors who shall have resided in the United States three years next before they are twenty-one years of age, after a residence of five years, including the three years of minority, may, without having made the previous declaration, be admitted by taking the oath of abjuration, &c., as in other cases. Ib. vol. iv. p. 69. And, to meet a supposed defect in the act of 1802, by the act of February 10, 1855, persons heretofore born or hereafter to be born out of the United States, whose fathers were, or shall be at the time of their birth, citizens of the United

States, shall be deemed citizens, but the rights of citizenship shall not descend to persons, whose fathers never resided in the United States; and a woman, who might be naturalized under existing laws, who is married, or who shall be married, to a citizen, shall be deemed a citizen. Statutes at Large, vol. x. p. 604. By an act of July 17, 1862, any alien of the age of twenty-one, who had enlisted or shall enlist in the regular or volunteer forces of the United States, and has been or shall be honorably discharged, may be admitted, upon his petition, and he shall not be required to prove more than one year's residence within the United States, previous to his application. Statutes at Large, 1861–2, p. 397.

It will be perceived, by comparing the provisions of these naturalization laws with those of the principal countries of Europe, that our requirements are more severe than theirs; while, with us, not only is an oath of allegiance to the United States necessary, but, — what is omitted in the naturalization law of England, and of many other countries, — an abjuration of all other princes and States, and especially of the one of which the applicant was a subject or citizen.

The following decisions under these statutes have been rendered by the Supreme Court of the United States, viz.: — The various acts on the subject of naturalization submit the decision upon the right of aliens to courts of record. They are to receive testimony; to compare it with the law; and to judge both on the law and the fact. If their judgment is entered on record in legal form, it closes all inquiry, and like other judgments, is complete evidence of its own validity. The act of March 22, 1816, (Statutes at Large, vol. iii. p. 259,) which requires the certificate of report and registry and of declaration of intention to be recited in the decree, does not apply to aliens who arrived in the United States prior to 18th June, 1812. Peters's Rep. vol. iv. p. 393, Spratt *v.* Spratt. It need not appear by the record of naturalization that all the requisites prescribed by law for the admission of aliens to the right of citizenship have been complied with. Cranch's Rep. vol. vii. p. 420, Starke *v.* The Chesapeake Insurance Company. A certificate by a competent court that an alien has taken the oath prescribed by the act respecting naturalization, raises the presumption that the court was satisfied as to the moral character of the alien, and of his attachment to the principles of the Constitution of the United States, &c. The oath, when taken, confers the right of a citizen. It is not necessary that there should be an order of court admitting the applicant to become a citizen. Ib. vol. vi. p. 176, Campbell *v.* Gordon. In a note of Mr. Marcy, Secretary of State, March 6, 1854, it is said: — "Although, in general, it is not the duty of the Secretary of State to express opinions of law, and doubts may be entertained of the expediency of making an answer to your inquiries an exception to this rule, yet I am under the impression that every person born in the United States must be considered a citizen of the

United States, notwithstanding one or both of his parents may have been alien at the time of its birth. This is in conformity with the English common law, which law is generally acknowledged in this country. And a person born of alien parents, it is presumed, would be considered a natural-born citizen of the United States, in the language of the Constitution, so as to make him eligible to the Presidency."

But in view of the military draft proposed in August, 1862, on account of the Southern insurrection, under the head of aliens, it was declared, by the government at Washington, that all foreign born persons are exempt who have not been naturalized, or who are born here of foreign parents who have not become citizens, and who have not voted, nor attempted to vote, in any State or Territory of the United States, also all parties who have only taken out their first papers. Papers relating to Foreign Affairs, 1862, p. 283, Mr. Seward to Mr. Stewart, August 20, 1862.

It is difficult to say, after the title of citizenship is established, what are the rights which it confers in the United States. The privilege of suing and being sued in the Federal courts, in controversies with citizens of other States, is one in which the naturalized citizens only participate with foreigners; while the provisions for common citizenship intended to be secured throughout the Union, are liable to be contravened by the local constitutions and laws of the several States. The right of holding real estate is not necessarily connected with citizenship; and in France and other countries it is possessed by foreigners without naturalization, a privilege which has, also, in the United States, been accorded by treaty stipulations to citizens and subjects of other countries. In those States which retain the rule of the feudal law, after all reason for its existence has ceased, special acts are habitually passed to enable aliens to acquire and hold land, or the right is granted to all on condition of their declaring their intention to become citizens.

The late learned Attorney-General, who is so frequently cited by us, denies that in the United States, the terms *citizen* and *elector* are convertible; or that, according to the practice in this country, there is any inseparable connection between the fact of the exercise of the advantages of suffrage, and the fact of citizenship. He remarks, moreover, "There is a phrase, in the Constitution of the United States, 'The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.' What that means, if it means anything, it is very hard to say. But most assuredly it does not mean that a citizen of the State of Ohio, as such, has the right to vote and be voted for in the State of Kentucky." Mr. Cushing, Jan. 7, 1857. Opinions of Attorneys General, vol. viii. p. 302.

Though the power of naturalization be nominally exclusive in the Federal government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws.

The qualification of voters, even in elections under its provisions, are not

prescribed in the Constitution of the United States. By it, it is provided that the electors for the House of Representatives in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. Art. i. § 2. That the Senate shall be composed of two senators from each State chosen by the legislature thereof, § 3; and that each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives, to which the State may be entitled in Congress. Art. ii. § 1.

Under the articles of Confederation of 1778, for which the present Constitution was substituted, *citizen* was used as synonymous with *free inhabitant*, it being stipulated that "the *free inhabitants* of each of these States . . . . shall be entitled to all the privileges and immunities of *free citizens* in the several States." Art. iv.

It would seem to have been assumed at the time of the adoption of the Federal Constitution, that citizenship was, under the State constitutions then in force, a requisite for the electors of the State legislature, who are, either directly, or through these legislatures, made the electors of the two houses of Congress, as well as of those special electors to whom, under the theory of the Federal Constitution, the choice of the President was to be confided. But even then, in some of the States, persons of African descent, since declared by the Supreme Court never to have been citizens of the United States, within the meaning of the Constitution, were permitted to vote, and such was the case in New Hampshire, Massachusetts, New York, New Jersey, and North Carolina. Howard's Reports, vol. xix. p. 573. Dred Scott *v.* Sandford. Dissenting opinion of Curtis, J.

By defining in the Constitution itself the disabilities of naturalized citizens, it may be inferred that their equality with native citizens, in all other respects, was perfect. But, according to some of the existing State constitutions, persons born in foreign countries, and who have never been admitted to the rights of citizenship, are from mere residence made voters, and, in others, a class of native-born subjects, contra-distinguished from citizens, whom every department of the Federal government, at least till the present year, had pronounced incapable of being incorporated into the political community, have been allowed to share with native citizens in the elective franchise. In a case, in Pennsylvania, brought to ascertain political rights, it was decided that a negro or mulatto was not entitled, under the term *freeman*, as used in the State Constitution of 1790, to exercise the right of suffrage. Watt's (Pennsylvania) Reports, vol. vi. p. 553, Hobbs *v.* Fogg. On the other hand, in Rhode Island, persons of that class, denied by the supreme tribunal of the Union to possess the quality of "citizens of the United States," and to whom the local laws forbid the right of *connubium*, (Rhode Island Rev. St. p. 312,) are permitted to vote, under

an extraordinary construction put on the clause of the State constitution, giving the right of suffrage in terms to "every native male citizen of the United States of the age of twenty-one years," possessing certain qualifications of residence, &c. In the latter State, moreover, the great mass of naturalized citizens, though possessing the qualifications deemed sufficient in the case of the colored voters, are wholly disfranchised.

By the Constitution of Illinois, art. 2, § 27, and the same provision is to be found in that of Michigan and other north-western States, it is provided that "in all elections all white male inhabitants above the age of twenty-one years, having resided in the State six months preceding the election, shall enjoy the right of an elector."

In a speech in the Senate of the United States, April 2, 1836, on the admission of Michigan into the Union, and which involved alien suffrage, Mr. Calhoun said: — "Nothing is more difficult than the definition or description of so complex an idea as a citizen; and hence, all arguments resting on one definition in such cases, almost necessarily lead to uncertainty and doubt. But, though we may not be able to say with precision what a citizen is, we may say, with the utmost certainty, what he is not. He is not an alien. Alien and citizen are correlative terms, and stand in contra-distinction to each other. They, of course, cannot co-exist. They are, in fact, so opposite in their nature that we conceive of the one but in contradistinction to the other.

"The Constitution confers on Congress the authority to pass uniform laws of naturalization. This will not be questioned; nor will it be, that the effect of naturalization is to remove alienage. To remove alienage, is simply to put the foreigner in the condition of a native-born. To this extent the act of naturalization goes, and no further.

"When Congress has exercised its authority by passing a uniform law of naturalization, (as it has,) it excludes the right of exercising a similar authority on the part of the State. To suppose that the States could pass naturalization acts of their own, after Congress had passed a uniform law of naturalization, would be to make the provision of the Constitution nugatory.

"Whatever difference of opinion there may be as to what other rights appertain to a citizen, all must at least agree, that he has the right to petition, and also to claim the protection of his government. These belong to him as a member of the body politic, — and the possession of them, is what separates citizens of the lowest condition from aliens and slaves. To suppose, that a State can make an alien a citizen of the State, — or can confer on him the right of voting, would involve the absurdity of giving him a direct and immediate control over the action of the general government, from which he has no right to claim protection, and to which he has no right to present a petition. That the full force of the absurdity may be felt, it must be borne in mind that every department of the general gov-

ernment is either directly or indirectly under the control of the voters in the several States. The Constitution wisely provides, that the voters for the most numerous branch of the legislatures in the several States shall vote for the members of the House of Representatives; and, as the members of this body are chosen by the legislatures of the States, and the Presidential electors either by the legislatures or voters in the several States, it follows that the action of the general government is either directly or indirectly under the control of the voters in the several States. Now, admit that a State may confer the right of voting on all aliens, and it will follow as a necessary consequence, that we might have among our constituents persons, who have not the right to claim the protection of the government, or to present a petition to it.

"But a still greater difficulty remains. Suppose a war should be declared between the United States and the country to which the aliens belong. They, as alien enemies, would be liable to be seized under the laws of Congress, and to have their goods confiscated and themselves imprisoned or sent out of the country. The principle that leads to such consequences cannot be true; and I venture nothing in asserting that Carolina, at least, will never give it her sanction. She never will assent to incorporate, as members of her body politic, those who might be placed in so degraded a condition, and so completely under the control of the general government." Calhoun's Works, vol. ii. pp. 498–500.

The anomaly here referred to is obviated in the Constitution of the Confederate States, so far as regards the House of Representatives, by requiring that "the electors in each State shall be citizens of the Confederate States." Art. 1, sect. 2.

The free people of African blood, in common with all other persons not "white," are excluded from the general naturalization law; and long before the decision in the Dred Scott case, (Howard's Rep. vol. xix. p. 406,) they had been, by repeated decisions of the State courts, declared not to be citizens of a State, within the meaning of the word citizen in the Constitution of the United States, and therefore not entitled to the privileges and immunities of citizens of other States. Not to recur to the slaveholding States, an opinion to that effect was pronounced by the Chief Justice of Connecticut, in a case which arose on a statute passed in 1833, against establishing literary institutions in that State for the instruction of colored persons belonging to other States and countries, "which," the preamble states, "would tend to the great increase of the colored population of the State, and thereby to the injury of the people." Connecticut Reports, vol. x. p. 340, Crandall *v.* State, Chief Justice Dagget's Charge. The Attorney-General, Mr. Wirt, gave an opinion that free persons of color in Virginia are not citizens of the United States within the intent and meaning of the acts regulating the foreign and coasting trade, so as to be

qualified to command vessels. Opinions of Attorneys General, vol. i. p. 506. Mr. Wirt to the Secretary of the Treasury, Nov. 7, 1821. But Mr. Legaré, though the words "citizen of the United States" were used in the statute, advised the Secretary of the Treasury, March 15, 1843, that free colored persons are entitled to the benefits of the preëmption act of 4th of September, 1841, (Statutes at Large, vol. v. p. 455). He considered the object of the law to have been only to exclude *aliens*, in the proper acceptation of the term — men born and living under the *legiance* of a foreign power. "Free people of color," he said, "enjoy universally (while there has been no express statutable provision to the contrary) the rights of denizens. How far a political *status* may be acquired is a different question, but his civil *status* is that of a complete denizenship." Ib. vol. iv. p. 147.

In 1842–3 measures were adopted by Massachusetts to vindicate the rights of her free colored inhabitants to the privileges and immunities, in South Carolina, of citizens of the United States, by testing in the Federal courts the validity of those police regulations excluding free negroes from other States and countries, which are referred to as being a subject of discussion with Great Britain, in the Editor's note [42, p. 102. And in a declaration from the legislature of Massachusetts in 1845, it is made a serious charge against South Carolina that she did not join issue with Massachusetts upon the question, who are the citizens of each State entitled to enjoy the privileges and immunities referred to in the Constitution? "The Constitution," it says, "assigns to the judicial power of the United States the power of deciding controversies between two or more States, between a State and citizens of another State, or between citizens of different States. Massachusetts has taken every measure in her power to induce South Carolina to submit this question of the validity of those laws, so far as they apply to her citizens, to that power. If Massachusetts be wrong or right, she has no reason, from the constitution of that final tribunal, to expect a scruple of partiality in her favor to weigh in arrest of judgment; but whether wrong or right, she has offered, and does offer, to abide by the award, whatever it may be." Documents accompanying Governor's Message, 1845, p. 70.

In answer to an application to the State Department for passports for persons of color, Mr. Thomas, Assistant Secretary of State, wrote under the date of November 4, 1856, "I am directed by the Secretary (Marcy) to inform you that the papers transmitted by you do not warrant the department in complying with your request.

"A passport is a certificate that the person to whom it is granted is a citizen of the United States, and it can only be issued upon proof of this fact. In the papers which accompany your communication there is not satisfactory evidence that the persons for whom you request passports are

of this description. They are represented in your letter as 'colored,' and described in the affidavits as 'black,' from which statements it may be fairly inferred that they are negroes. If this is so, there can be no doubt that they are not citizens of the United States."

The Supreme Court, in the Dred Scott case, December Term, 1856, after holding that the plea to the jurisdiction, overruled by the Circuit Court, was properly before them, decided that free negroes of the African race, whose ancestors were brought to this country and sold as slaves, were not citizens within the meaning of the Constitution of the United States, and that consequently the special rights and immunities guaranteed to citizens do not apply to them; and that, not being "citizens" within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States. But the error of the court below, in entertaining jurisdiction, does not take away that of the Supreme Court to examine into and correct any other errors into which the Circuit Court may have fallen. The Supreme Court, therefore, went into an examination of the whole case. Some of the points decided, as the unconstitutionality of any act of Congress to prevent a citizen of the United States from taking his slaves into a territory of the Union, however important their political bearing, affect rather the rights of the slaveholder than the *status* of the free negro. The court decided that the plaintiff himself acquired no title to freedom by being taken by his master to a State where slavery was not permitted, and brought back to Missouri. The *status* or condition of a person of African descent must depend upon the laws of the State where he resides. Howard's Reports, *loc. cit.*

The present Attorney-General has given an opinion directly reversing, on a similar state of facts, that of Mr. Wirt, above alluded to. He declares a free person of color to be a citizen of the United States, and competent, according to the acts of Congress, if otherwise qualified, to be master of a coasting-vessel. He agrees with Mr. Cushing in denying that the right of suffrage is a test of citizenship as well as to the difficulty of ascertaining the meaning of the term. While waiving the question whether a slave is a citizen, he says that the Constitution uses the word *citizen* only to express the political quality of the individual and his relations to the nation, to declare that he is a member of the body politic and bound to it by the reciprocal obligation of allegiance, on the one side, and protection on the other. In endeavoring to avoid a direct collision with the Supreme Court, he would confine the effect of the Dred Scott case to the precise facts on which the plea in abatement was based. Mr. Bates to Secretary of Treasury, March 29, 1862.

Nor is it only with Indians and negroes that the conflict of races exists in the United States. Since California has become a part of our territory there have been large immigrations from China, of a class not to be

confounded with the "coolies," whom England and France have substituted for the Africans in their tropical possessions, and the importation of whom is prohibited by our laws. Part II. ch. 2, § 15. Editor's note [84, p. 273. Excluded from the general naturalization law, no attempt has been made by special legislation to give to them the rights of citizenship.

The condition of the free colored inhabitants of the United States may, perhaps, be deemed to be embraced in Vattel's denomination of *perpetual inhabitants*. "They are those who have received the right of perpetual residence. They are a kind of *citizens* of inferior order, and are subject to the society, without participating in all its advantages." Droit des Gens, liv. i. ch. 19, § 213.

But though free colored persons of African descent nowhere enjoy equal political privileges with the whites, in several of the States they are admitted to the elective franchise, either on equal terms with them, or, as in New York, on a freehold qualification.

It is, however, proper to state in this connection that the same decision of the Supreme Court of the United States (Dred Scott case) which denied to a party a privilege of suing as a citizen of Missouri entitled to the rights of a citizen of the United States, in the Federal courts, because his ancestors were imported from Africa and sold as slaves, declared that a State may put a foreigner or any other description of persons upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and its laws.

It might seem that an analogous case to the provisions of the Constitutions of Illinois and other States, giving resident foreigners the right of suffrage, is to be found in the privileges enjoyed as early as 1698 by denizens in England, who were permitted to vote in the election of members of Parliament. Westlake, Private International Law, § 20, p. 20. But in that case the privilege was not personal, but according to the whole analogy of the English institutions, "in respect of their tenements," that is, connected with the land, which, according to the feudal system, was entitled to be represented. Of an opposite character with the extension of suffrage to those who are not citizens is the virtual disavowal of the national right of naturalization, by the disfranchisement of naturalized citizens or superadding to the distinctions between them and native citizens, which the Constitution alone can create, special qualifications for the exercise of political rights.

By the Constitution of Rhode Island, (art. ii. § 2,) a discrimination is made between native and naturalized citizens, the latter only being required to have a freehold qualification for the exercise of the elective franchise.

It is not supposed that naturalization dispenses with any of the qualifications, as residence, property, &c., which a State may think proper to establish, in order to confer the right of voting, but it is believed that such qualifications, whatever they may be, must apply equally to all classes of citizens in the State, whether native or naturalized.

If the individual States can disfranchise naturalized citizens, (and if they can superadd requirements from them not demanded of native, it is obvious that they may exclude them altogether from voting,) or if they can admit to the elective franchise those who are not citizens, thereby neutralizing the votes of citizens, not only the federal power over naturalization becomes a nullity, but in the latter case a minority of actual citizens, by the aid of aliens, may control the government of the States, and, through the States, the government of the Union.

Since the act of Parliament, of 1844, 7 and 8 Vict. c. 66, in every or nearly every country in Europe the executive branch of the government possesses the power of naturalization. Before the passage of that statute, not only were special acts of Parliament ordinarily required in each case of naturalization, but, owing to a provision originating in the Act of Settlement, of 12 William III. c. 3, and reënacted 1 Geo. I. c. 4, no naturalization bill could be presented to either house of Parliament, unless it contained a clause declaring that the petitioner should be incapable of filling any public office whatever, or of sitting in Parliament, or in the Privy Council. It was, however, sufficient, in order to meet the requirements of the statute that the clause should have been originally inserted, and it might have been subsequently struck out; though in the naturalization of foreign princes and princesses, it was usual, previously, to pass a law specially suspending the operation of the clause. Thus, in the naturalization of the late Prince Albert, the consort of the present queen, no restrictions were imposed, and he was only required to take the oaths of allegiance and supremacy. By the act of 7 Anne, c. 5, all foreign Protestants might have been naturalized; but this act was repealed by 10 Anne, c. 5, except as regards the children of English parents born abroad. That statute, however, as well as the old one of 25 Ed. III. required both father and mother to be subjects; but by the act of 4 Geo. c. 2, ch. 21, it is only necessary that the father should be a natural-born subject. Indeed, the necessity of the mother's original allegiance was abolished by a *dictum* in Bacon's case, Croke Charles, p. 102, where it was said that the wife, though foreign by birth, "is *sub potestate viri* and *quasi* under the allegiance of our king." Westlake, Private Intern. Law, § 13, p. 11. Naturalization was also accorded by the king's proclamation, with the restrictions as to holding office contained in the cases passed on by Parliament, to those who had served, in time of war, two years on board a king's ship, and under certain provisions, to those engaged in the whale fishery.

By the above act of 7 and 8 Vict. c. 66, the provisions in previous acts were repealed, which required that "no person shall be thereafter naturalized, unless in the bill exhibited for that purpose, there shall be a clause or particular words inserted to declare that such person shall not thereby be enabled to be of the Privy Council or a member of either House of Parliament, or to take any office, either civil or military, or to have any grant

of lands, tenements, or hereditaments, from the crown, to himself or any other person in trust for him, and that no bill of naturalization shall hereafter be received in either House of Parliament, unless such clause or words be first inserted." That act further provided that every person born of a British mother may hold real or personal estate; that alien friends may hold every species of personal property, except chattels real; that subjects of a friendly State may hold lands, &c., for the purpose of residence, &c., for twenty-one years; that aliens may become naturalized, upon obtaining a certificate, as hereinafter mentioned, and taking the prescribed oath to disclose conspiracies against the crown, to defend the succession to the crown, as limited to the house of Hanover, and renouncing allegiance unto any other person claiming or pretending a right to the crown of the British realm; but the oath does not contain any abjuration, by the new subjects, of their original sovereign or country. It would seem, indeed, that in accepting a foreigner as a British subject, England looks, according to the practice in the feudal times, to the allegiance which he owes while within the realm only, thereby respecting the rule of her own jurisprudence, which declares that "the natural-born subject of one prince cannot by any act of his own, by swearing allegiance to another, put off or discharge his natural allegiance to the former." Stephen's Blackstone's Comm. vol. ii. p. 421.

On the feudal principle, *vasallus mei vasalli non est vasallus meus.* Eschbach, Étude du Droit, 2me partie, § 174. The same lord might be *suzerain* of certain fiefs, which he had conferred, and a vassal for others. Bouillet, Dictionnaire Biographique, p. 610. This may explain how the King of Hanover, a foreign sovereign, sits in the House of Lords, as well as the application, in 1848, of Lord Brougham, without contemplating a renunciation of his rights as a British peer, to be made a citizen of the French republic. Martens, Nouveau Receuil, par Murhard, tom. xi. p. 437. The certificate of naturalization is to be obtained on presenting a memorial to the Secretary of State for the Home Department, and it may give all the rights and capacities of a natural-born citizen, except those of being a member of the Privy Council, or of either House of Parliament. The act also declares, that all who have been naturalized before the act was passed, and who have resided during five consecutive years in the United Kingdom, shall enjoy all the rights, as conferred on aliens by that statute; that women married to natural-born subjects are to be deemed naturalized. For sitting in Parliament or the Privy Council the assent of the Queen and the two Houses of Parliament is necessary; but it was remarked by Lord Brougham, at the time of the passage of this act, that that consent would never be refused, except for good and sufficient reasons; whereas, under the old legislation, a special law must have preliminarily suspended the effect of the prohibitory clause contained in the Act of Set-

tlement, or the bill of naturalization must have been thus amended, after its introduction.

In the Colonies, even during the restrictions on naturalization in England, there were always greater or less facilities accorded. Before our Revolution, all foreign Protestants and Jews, upon their residing seven years in the American colonies, were naturalized as if born in the United Kingdom, with the exception of holding offices; and that even more liberal enactments were not made was, in the declaration of American Independence, assigned as one of the grounds of separation. It is there stated, as a subject of complaint against the King of Great Britain, that "he has endeavored to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands."

By the act of July 27, 1847, (10 and 11 Vict. c. 83,) "all acts, statutes, and ordinances heretofore made and enacted by the legislatures of any of Her Majesty's colonies and possessions abroad, for imparting to any person or persons the privileges or any of the privileges of naturalization to be, by any such person or persons exercised or enjoyed within the respective limits of such colonies respectively, shall, within such limits, have, and be taken, and reputed to have had, from the time of the enactment thereof respectively, all such and the same force and effect, as doth by law belong to any other law, statute, or ordinance, made or enacted by any such respective legislatures." All laws hereafter to be made by the local legislatures are to have the like effect, but to be subject to allowance or disallowance by Her Majesty. Mr. Westlake holds, though with some hesitation, that the effect of this legislation will be naturalization unrestricted as to geographical limits. Private International Law, § 25, p. 25.

A great difficulty has arisen with respect to the legal *status* of liberated Africans who reside and acquire property in the British territory at Sierra Leone. An act of the legislature of Sierra Leone, (June 8, 1852,) "to secure and confer upon liberated Africans the civil and political rights of naturalized British subjects," was disallowed by the crown. Phillimore's International Law, vol. iii. p. 354.

In France, there has always been a distinction, since naturalization was made a subject of legislation, between the character of a Frenchman, enjoying merely civil rights, and that of a citizen, the attributes of whose character were the possession of political rights. The Code Civil says, liv. i. tit. i. § 7: "The exercise of civil rights is independent of the quality of citizen, which is only acquired and preserved in conformity with the constitutional law." § 8. Every Frenchman shall enjoy civil rights. The Code, § 9, regards as a Frenchman every person born in France, of a foreign father, who, within a year after his majority declares his intention to

claim the quality of a Frenchman, by complying with the provisions as to residence, and also, § 10, every child of a Frenchman born in a foreign country. § 12. A foreign woman, who marries a Frenchman, follows the condition of her husband. § 13. All the civil rights may, also, be enjoyed, so long as he resides there, by a foreigner admitted by the authority of the sovereign to establish his domicile in France. And Pailliet says, writing under the charter of Louis XVIII., "The rights of a citizen, or, in other words, political or municipal rights, consist in the action which the *charte* accords to Frenchmen who have the quality of citizen, to concur by their votes in the formation of the Chamber of Deputies, and of being eligible to it. Every Frenchman does not enjoy political and municipal rights. To enjoy them it is not sufficient to be a Frenchman; it is necessary to be, moreover, a citizen." Manuel de Droit François, p. 9.

The system of naturalization, as it existed in France in 1848, though founded on a series of laws, decrees, and ordinances, derived from a legislation of various sources, formed a complete theory. According to the principles of the ancient French law, the right of naturalization depended solely on the will of the king. The declaration of the 6th of August, 1790, invited all the people of the world to enjoy, under a free government, the sacred rights of humanity. It was in this sense that all the laws during the Revolution respecting naturalization were conceived. The 3d article of the Constitution of the 22 frimaire, year 8, (13th December, 1799,) is the point of departure of the present laws. By it a foreigner, of the age of twenty-one, who has declared his intention to establish himself in France, might become, after a residence of ten years, a Frenchman. Tripier, Code Politique, p. 167. The 13th article of the Code Napoleon, as interpreted by the *avis* of the Council of State of 20 prairial, year 11, required the previous authorization of the government to establish a domicile capable of giving rights to naturalization, and the decree of 17th March, 1809, rendered necessary the direct intervention of the authorities, by requiring that the naturalization should be pronounced by the chief of the government. The organic *Senatus-Consulte* of 19th February, 1808, had conferred on the chief of the executive power the right of naturalizing directly those who, though not uniting the conditions fixed by the Constitution, had nevertheless particular titles to be assimilated to citizens; and it established a naturalization extraordinary as to the conditions required, as opposed to the naturalization conferred by the Constitution of the year 8, and the decree of 1809.

By the ordinance of 4th June, 1814, conformably, it states, to the ancient French constitutions, no foreigner could sit in the Chamber of Peers, or Deputies, unless, in consequence of important services rendered to the State, he had obtained letters of naturalization verified by the two Chambers. This was termed *grande naturalisation*.

In 1848 there were two kinds of naturalization, one of common right, ordinary or extraordinary, the other exceptional, and above both of them a special qualification (*habilitation*) necessary for all, who were not Frenchmen by birth or reputed as such, in order to obtain the right of eligibility.

By a decree of the 28th (31st) March 1848, the Minister of Justice was authorized to grant naturalization to all foreigners who should ask it, who had resided in France five years, and should produce evidence from the Mayor of Paris, or prefect of police, or the *commissaires* of the government in the departments, that they are worthy of being admitted to the enjoyment of the rights of French citizens. This decree, which conferred all political rights, including eligibility to the National Assembly, besides shortening the term, changed *domicile* into simple *residence*. The preamble referred to the part which many foreigners had taken in the glorious events of February. In virtue of this decree, which was abrogated by the ministerial decree of the 29th of June, 1848, twenty-five hundred naturalizations had been accorded. Tripier, Codes François, p. 1412. The law of the 3d (11th) December, 1849, restored the principle of the decree of March 17, 1809, placing naturalization under the direction of the government, prescribing the period of ten years' residence, but leaving with the government, as in the case of the *Senatus-Consulte* of 1808, the power of reducing the term, which might be limited to one year. It also adopted the principle of the ordinance of 1814, and provided that no naturalized foreigner could be eligible to the National Assembly, but in virtue of a law. It likewise enacted that the dispositions of the law of the 14th of October, 1814, concerning the inhabitants of the departments united to France, would no longer be applicable. But it was declared that the preceding dispositions would not affect the rights of eligibility to the National Assembly acquired by foreigners naturalized before the promulgation of the present law. By the law of the 22d (25th) March, 1849, a person born in France of a foreign father may, even after the year succeeding his majority, make the declaration prescribed by the 9th article of the code, in case he has served in the French armies, or has satisfied the law of recruitment without taking advantage of his claims to be a foreigner (*sans exciper de son extranéité*). By the law of 7th (12th) February, 1851, every individual born in France of a foreign father who was himself born there, is to be deemed a Frenchman, unless within a year after his majority, as fixed by the French law he claims the quality of foreigner by a declaration made, either before the municipal authority of the place of his residence, or before the diplomatic or consular agents accredited in France by the foreign government. The 9th article of the code is applicable to the children of a naturalized foreigner, although born in a foreign country, if they were minors at the time of the naturalization. With regard to the children born in France or abroad, who had already attained their majority, the 9th

article of the code is applicable to them during the year which shall follow that of the naturalization. Tripier, Codes François, pp. 15, 16.

Between the 24th of February, 1848, and the 3d of December, 1849, there was but one kind of naturalization, carrying with it the concession, without distinction, of all civil and political rights, and this was admitted to apply to all who had been naturalized since 1814, as well as to those naturalized under the decree of the 28th of March. The organic law of 2d (21st) of February, 1852, declares, art. 12, electors, without condition as to taxes, all Frenchmen who have attained the age of twenty-one years, and who enjoy civil and political rights, and by art. 26, all electors aged twenty-one years are eligible without condition of domicile. Tripier, Code Politique, pp. 427, 432. A simple naturalization was deemed sufficient, October 11, 1854, to raise Prince Poniatowski to the rank of Senator; article 1st of the law of the 3d of December, 1849, which required a special naturalization to sit in the National Assembly, having been abrogated by the provisions of the Constitution, or not being deemed applicable to the present legislative bodies. Beaudant, De la Naturalisation, pp. 1, 20.

By the Constitution of Belgium, art. 5, naturalization is accorded by the legislative power. The *grande naturalisation* alone assimilates a foreigner to a Belgian, for the exercise of political rights. Ordinary naturalization confers on a foreigner all the civil and political rights attached to the quality of a Belgian, with the exception of the political rights, for the exercise of which the constitution or the laws require the *grande naturalisation*. The *grande naturalisation* can only be granted for eminent services and will always be the object of a special law; the admission of several foreigners to the ordinary naturalization may be disposed of in the same act. Ordinary naturalization is only accorded, except in case of the naturalization of the father, to those who are twenty-one years of age, and have resided five years in Belgium. There are special provisions in reference to the proceedings before the Chambers, in order to obtain the naturalization, as well as to the subsequent formalities before the municipalities. Code Civil Belge, pp. 1, 314.

In the kingdom of the Netherlands, the power of conferring naturalization rests with the crown, by the 9th and 10th articles of the Fundamental Law of 1815.

In Russia, naturalization is acquired by taking an oath of allegiance to the Emperor; but naturalized strangers may, at any time, renounce their naturalization and return to their country. Phillimore on International Law, vol. i. p. 352.

By the Constitution of the Swiss Confederation of 1848, every citizen of a canton is a Swiss citizen. He can, under this title, exercise political rights for federal and cantonal affairs in any canton in which he is established. He can only exercise these rights on the same conditions as the

citizens of the canton, and as to the affairs of the canton after a residence whose duration is determined by the legislation of the canton, and which cannot exceed two years. No one can exercise political rights in more than one canton. Foreigners cannot be naturalized in a canton, unless they are free from every obligation to the State to which they belong. Texte officiel de la Constitution fédérale Suisse, p. 13.

In Sardinia, even before the annexation of the other countries of Italy, Italians, though they did not by their origin belong to the States of the King, enjoyed peculiar privileges. They became entitled to participate in the quality of electors, on fulfilling the conditions required by the civil code, to acquire civil rights. Those foreigners who were not Italians could only become electors by obtaining naturalization according to law. Manuale del Cittadino degli Stati Sardi, p. 79.

In the Constitution of Spain, which was adopted in 1837, under the head of Spaniards are enumerated, Art. 1: 1st, All persons born in the dominions of Spain; 2. The children of a Spanish father or mother, even though they were born out of Spain; 3, Foreigners who have obtained letters of naturalization; 4, Those who, without having obtained letters of naturalization, have secured a residence in any town of the monarchy (*hayan ganado vecindad en cualquier pueblo de la monarquia*). A law will determine the rights which foreigners shall enjoy, who obtain letters of naturalization, or have gained a residence. No new law has been passed in conformity with the Constitution, though one was proposed in 1848, but was not approved by the deputies. In the absence of a new law, that of 1715 remains. There are four kinds of naturalization: 1st, The absolute, which allows the enjoyment of all ecclesiastical and secular rights without limitation; 2dly, The second is for everything secular, with the limitation of whatever may affect ecclesiastical matters; 3d, gives a privilege to obtain a certain amount of ecclesiastical rent, prebendary, or other positions named, but not anything beyond them; 4th, applies only to secular, to enjoy honors and offices like natives, with the exception of all that are prohibited. For the three first, the precedent consent of the government is necessary. The naturalization of the 4th class may, by a royal decree of September 22, 1845, be made without the courts, and by the Council of State, on a previous declaration of profession of the Catholic religion, proof of good moral and political conduct, and of the applicant's having exercised a business or trade, but this is not so essential as the time of residence implied in it. Cos-Gayon, Diccionario de Derecho Administrativo Español, pp. 262, 269.

In the States of the Germanic Confederacy, no German can be treated as an alien. Encyclop. Amer. Alien, 175.

In the Austrian dominions the stranger acquires rights of citizenship by being employed as a public functionary. The superior administrative

authorities have the power of conferring these rights upon an individual, who has been previously authorized, after ten years' residence within the empire, to exercise a profession. Mere admission into the military service does not bring with it naturalization. The wife of an Austrian citizen acquires citizenship by her marriage.

In Prussia, the stranger acquires the right of citizenship by his nomination to a public office; and by a recent law (1842) the superior administrative authorities are empowered to naturalize, with certain exceptions, any stranger who satisfies them as to his good conduct and means of existence. The wife of a Prussian citizen, also, acquires citizenship by her marriage.

In Bavaria, by the law of 1818, the *jura indigenatus* are acquired in three ways: 1. By the marriage of a foreign woman with a native. 2. By a domicile taken up by a stranger in the kingdom, who, at the same time, gives proof of his freedom from personal subjection to any foreign State. 3. By royal decree. Phillimore, International Law, vol. i. p. 352.

Cicero said that ever since the Roman State began, no one was compelled to leave it or to remain in it against his will. This is the immutable foundation of our liberty, that every man is the master of his rights of citizenship, and may resign or keep them as he pleases. "Ne quis invitus civitate mutetur, neve in civitate maneat invitus. Hæc sunt enim fundamenta firmissima nostræ libertatis, sui quemque juris et retinendi et dimittendi esse dominium." Cic. pro Balbo, c. 13.

The grand distinction between those States that recognize and those that do not recognize the right of expatriation arises from the obligation of the subject being in the one case based on territoriality, of which the feudal law is the exponent; while in the other, where the jurisprudence is derived from the Roman law, it is origin or nationality which has a personal and invisible character, that constitutes the community of positive law. And although, from its nature, it appears to be removed from every arbitrary influence, it is nevertheless susceptible of extension by the adoption, with free consent, of individuals. Savigny, Droit Romain, liv. iii. § cccxvi.

"An Englishman," says the most recent English commentator, "who removes to France or to China, owes the same allegiance to the King of England there as at home, and twenty years hence as well as now. The natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into those straits and difficulties of owing service to two masters. In certain cases, he may forfeit his rights as a British subject, by adhering to a foreign power, but he remains always liable to his duties; and if in the course of such employment he violates the laws of his nationality, he will be exposed to punishment when he comes within the reach of her tribunals." Stephen's Blackstone's Comm. vol. ii. p. 410.

In citing, in the Commentaries, Calvin's case for the obligation of natural allegiance, it is in the same place said that "this is a tie, which cannot be severed or altered by any change of time, place, or circumstance, not by anything but the united concurrence of the legislature." It may, perhaps, be permitted to inquire, in the interests of humanity, whether any advantage can accrue to Great Britain, from keeping thousands of natives of her soil exposed to the embarrassments of a double and conflicting allegiance or citizenship. They include many who are diffusing over less cultivated regions the blessings of an advanced English civilization, and the emigration of all of them from a redundant population was confessedly for the common benefit. Do not all the reasons which operate in the case of a cession of territory apply to them?

One of the most eminent of the English civilians, Dr. Twiss, in his recent work, admits "that natural allegiance, or the obligation of perpetual obedience to the government of the country, wherein a man may happen to have been born, which he cannot forfeit, or cancel or vary by any change of time, or place or circumstance, is the creature of civil law, and finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law." "Extra territorium jus dicenti impune non paretur." Law of Nations, vol. i. ch. ix. § 160, p. 231.

The preceding remarks, with respect to the necessity of legislative action in England, are still more applicable to the United States. While Congress has ever proffered a participation in political rights to the people of all countries, and the Executive has gone to an extent the correctness of which may be well questioned, in sustaining reclamations on behalf of naturalized citizens, even in the country of their origin, and has declined to interfere for an American who had invested himself with a foreign nationality, the judiciary, the legitimate arbiter of the constitutional question, has refused to sanction expatriation depending on the volition of the party.

The naturalization law of the United States proceeds on the principle that every individual has a right to change his allegiance, and such has been the language of our diplomatic communications, in accordance with the doctrine of the publicists, that whenever a child attains his majority, according to the law of his domicile of origin, he becomes free to choose his nationality. In an instruction from Mr. Cass to the minister at Berlin, July 8, 1859, it is said: "The right of expatriation cannot at this day be doubted or denied in the United States. The idea has been repudiated ever since the origin of our government, that a man is bound to remain forever in the country of his birth, and that he has no right to exercise his free will and consult his own happiness by selecting a new home. The most eminent writers on public law recognize the right of expatriation. This can only be contested by those who, in the nineteenth century, are still devoted to the ancient feudal law with all its oppression. The doctrine

of perpetual allegiance is a relic of barbarism which has been gradually disappearing from Christendom during the last century."

But the Supreme Court have not admitted the distinct right of expatriation, independently of an act of Congress to authorize it. On this point, Chancellor Kent remarks: "From an historical review of the principal discussions in the Federal courts, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States, without the permission of government to be declared by law; and that as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered." He adds: "The naturalization laws of the United States are, however, inconsistent with this general doctrine; for they require the alien who is to be naturalized to abjure his former allegiance, without requiring any evidence that his native sovereign has released it." Kent's Comm. vol. ii. p. 49. Judge Story says: "It is beside the purpose of these Commentaries to enter into any consideration of the subject of expatriation, as it does not properly belong to any constitutional inquiry. It may be stated, however, that there is no authority which has affirmatively maintained the right, (unless provided for by the laws of the particular country,) and there is a very strong current of reasoning on the other side, independent of the known practice and claims of the nations of modern Europe. Comm. on the Constitution, vol. iii. p. 3, note 1. The learned commentator has not here evinced his usual accuracy. In all countries, where the English common law does not prevail, the presumption in accordance with the uniform doctrine of the publicists, is in favor of the existence of the right of expatriation. The principle is, in nowise, affected by requiring the emigrant not to leave his native land, without discharging antecedent obligations. The extreme pretensions of the American government, assumed on that point by the last administration, it is readily conceded, cannot be maintained.

In a criminal case, in 1799, Chief Justice Ellsworth refused to receive evidence of the naturalization elsewhere of an American citizen, and maintaining that the common law of this country remained the same as before the Revolution, he considered allegiance unchangeable. In answer to the argument that we naturalized a foreigner, he said: "We do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations the fault and the folly are his own. But this implies no consent of the government that our own citizens should expatriate themselves." Wharton, State Trials, p. 654. The commentator adds, in reference to this case, "Whatever may be the popular feeling on the subject, the question, so far as judicial decision extends, seems settled in accordance with the view expressed by Chief Justice Ellsworth in the text, as well as that hinted by

Justice Wilson in Henfield's case, viz.: that no citizen of the United States can throw off his allegiance, without the consent of Congress." Ib. p. 655.

Mr. Cushing, though holding that "the doctrine of absolute and perpetual allegiance — the root of the denial of any right of emigration — is inadmissible in the United States," nevertheless, in citing Chancellor Kent's conclusions, says: "It is a significant fact, at all events, that on so many occasions when the question presented itself, not one of the judges of the Supreme Court has affirmed, while others have emphatically denied, the unlimited right of expatriation from the United States." The following are the cases in the United States Court examined by Mr. Cushing: Dallas's Reports, vol. iii. p. 383, Talbot *v.* Jansen; Cranch's Reports, vol. ii. p. 82, note, The United States *v.* Williams; Ib. pp. 64, 119, Murray *v.* Schooner Charming Betsey; Peters's C. C. Reports, vol. i. pp. 159, 161, United States *v.* Gillies; Wheaton's Reports, vol. vii. pp. 283, 347, The Santissima Trinidad; Peters's Reports, vol. iii. pp. 99, 125, Inglis *v.* Sailors' Snug Harbor; Ib. pp. 242, 247, Shanks *v.* Dupont. It should be added that in the State courts there has been a greater disposition to concede the right of expatriation, than has been manifested in the Federal tribunals. Mr. Cushing, October 31, 1856. Opinions of Attorneys General, vol. viii. p. 157.

The Supreme Court of the United States remarked on an occasion involving matters connected with our peculiar system of government, that "neither is it necessary to examine the English decisions referred to by counsel. It is true that most of the States have adopted the principle of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquests in war, or any other subject, where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide." Howard's Reports, vol. ix. p. 618, Fleming *v.* Page.

There is, it is believed, as great a difference between the territorial allegiance claimed by an hereditary sovereign on feudal principles, and the personal right of citizenship participated in by all the members of the political community, according to American institutions, as there is between the authority and sovereignty of the Queen of England, and the power of the American President; and the inapplicability of English precedents is as clear in the one case as in the other. The same view, with

particular application to naturalization, was early taken by the American commentator on Blackstone. Tucker's Blackstone, vol. i. part 2, appendix, p. 96.

Judge Daly says that "on the question of the right of a naturalized citizen to expatriate himself, and renounce his allegiance to this country, there is diversity of opinion. The more recent opinions are, that he may, if he changes his domicile. It was held in New York, that he could not expatriate himself, if he continued to reside in this country. The case was that of an Englishman naturalized here, and who being afterwards appointed consul for Spain, took an oath of allegiance to the King of Spain, and claimed to be a Spanish subject. It was held that he remained subject to the duties and obligations of a citizen of the United States." Daly on Naturalization, p. 26.

In this connection it may be proper to refer to an opinion of the last Attorney-General of the United States, in the case of a native Bavarian naturalized in this country, who desired to recover his *status* as a Bavarian. "There is," he says, "no statute or other law of the United States which prevents either a native or naturalized citizen from severing his political connection with this government, if he sees proper to do so, in time of peace, and for a purpose not directly injurious to the interests of the country. There is no mode of renunciation prescribed. In my opinion, if he emigrates, carries his family and effects with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government, this would imply a dissolution of his previous relations with the United States; and I do not think we could or would afterwards claim from him any of the duties of a citizen. At all events, the fact of renunciation is to be established, like other facts for which there is no prescribed form of proof, by any evidence which will convince the judgment. It is for the authorities of Bavaria to determine, first, whether they will admit Mr. Amthor to the privileges enjoyed by a native subject of their king, without an express renunciation of his American citizenship. If this be decided in the negative — that is to say, if they demand from him an express renunciation — they may take it, and cause it to be authenticated in what form they please. They may demand an oath of abjuration as a test of his sincerity, or as a necessary part of his title to the future protection of the Bavarian government. Whatever satisfies them, ought to be satisfactory to us, since, in all similar cases, we prescribe our own rules for the admission of Bavarian subjects as citizens of the United States." Mr. Black, August 17, 1857.

Even in the case of the naturalization of a subject of a country, England, for example, which refuses the liberty of expatriation, the original tie is preserved only in the interest of the nation to which the individual belonged, and without affecting, with reference to his adopted country, the

validity of the naturalization required there. Fœlix, Droit Internat. Privé, liv. i. t. i. tom. i. p. 55, 3me ed.

The French code prescribes, liv. i. t. i. c. 2, § 17, that the quality of Frenchmen is lost: 1st. By naturalization in a foreign country. 2d. By the acceptance of office from a foreign government, without the permission of the State. And 3d. By fixing his residence abroad without the intention of returning. By the 18th section, however, it is provided that it may be at any time recovered, on due application to the government, on a Frenchman's returning to France, with the authorization of the government, and fixing his residence there, and renouncing the foreign functions; and his child may also obtain the right, by complying with the terms prescribed in other cases. The law is the same in Belgium. Code Civil Belge, p. 17.

In Prussia the law is similar, and in all the German States emigration is permitted, with the express leave from the government. This permission cannot be granted to males between seventeen and twenty-five years of age, unless they produce a certificate from the commission for recruiting the army, testifying that they do not propose to expatriate themselves for the sole purpose of evading their military obligations. (Section 17 of the law of 31st of December, 1842.) This certificate serves also as a guide when it is required to determine if there is reason to grant to minors authority to emigrate with their parents.

By the terms of the law of 3d of September, 1814, every Prussian subject who has attained the age of twenty-five years is obliged to serve in the army. In consequence, in each year all the young men of that age must present themselves at a certain time before the military commission of the circle in which they are domiciled, to be examined as to their fitness to render service, and be designated, the case happening, to the detachment in which they are to be incorporated. This obligation to present themselves for service is not extinguished by time. Whoever does not appear at the point indicated, is held to serve at a more advanced age; and if he can be got hold of, is enrolled under the flag before any other. Service in the army, in active employ, lasts three years. During the two years following, the soldier is dismissed on leave, and belongs to the reserve; thenceforward he is not called into service until a war, or an increase of the active force requires it. After the expiration of these two years, the soldier passes for seven years into the first levy of landwehr, (land-guard,) which, in time of peace, musters only annually for some weeks of drill. These seven years completed, the soldier becomes a member, for seven years longer, of the second levy of the landwehr, which is only called out in time of war. Whoever evades the duties of the landwehr is obliged to take part therein at a later time, and his more advanced age does not exempt him from such call.

Soldiers belonging to the army in active service, or to the reserve,

do not obtain leave to expatriate themselves until they have been dismissed.

On the other hand, the service in the first or second levy of the landwehr does not prevent the person who may still be subject to such service from disengaging himself from the ties which bind him to his native land; one exception alone is made to this regulation, which is when the landwehr is called into active service. Whoever leaves Prussia without permission, and thereby evades service either in the army, in active service, or the landwehr, incurs a penalty of from 50 to 1000 crowns, or incurs an imprisonment of one month to one year. (§ 110 of the Penal Code of April 14, 1851.) But the payment of the penalty or the infliction of the punishment of imprisonment does not dispense with the obligation to render the military service. This obligation continues until he who may have neglected his duty discharges it completely. Cong. Doc. 36th Cong. 1st Sess. Senate Ex. Doc. No. 38, p. 127. Memorandum, Baron Schleinitz, January 6, 1859.

In Austria, emigration is not permitted without the consent of the proper authorities; but the emigrant who has obtained permission, and who quits the empire, *sine animo revertendi* forfeits the privileges of an Austrian citizen. A case of emigration by consent was that of the Lombards, who, in consequence of political events, obtained permission to leave the Austrian territories, in order to become naturalized in Sardinia, and the subsequent confiscation of their property in Lombardy, in 1853, was made a subject of interposition by the government of Great Britain with that of Austria. The decree of the Emperor of Austria, of 1832, as to unlawful emigrants, who lose all their civil and political rights at home, and which was the case of the Hungarians who escaped after the events of 1848–9, is noticed in Mr. Marcy's note to Mr. Hulsemann, respecting Koszta, cited in the notes. The same rule applies in Prussia as in Austria with regard to emigration.

In Bavaria, citizenship is lost: 1st. By the acquisition, without the special permission of the king, of the *jus indigenatus*, in another country. 2d. By emigration. 3d. By the marriage of a Bavarian woman with a foreigner.

In Wurtemburg, citizenship is lost by emigration authorized by the government, or by the acceptance of a public office in another State. Phillimore on International Law, *loc. cit.*

In Russia, the quality of a subject is lost by a residence abroad; by voluntary expatriation, without the intention of return; by disappearance. Every individual subject to the capitation tax is considered to have disappeared who, during ten years, has not been heard of in the place of his domicile. Rev. Etr. et Fr. tom. iii. p. 267.

In Spain, the quality of Spaniard is lost by acquiring naturalization in

a foreign country, and by entering into the employment of another government without the consent of the king. Cos-Gayon, Diccionario de Derecho Administrativo Español, p. 360; Constitucion de la Monarquia Española, art. 1, § 4.

After the prescribed forms of naturalization are complied with, it becomes an interesting question as to the obligation imposed on the government of the adopted citizen to protect him beyond its own territorial limits. Where the tie that connects him with the country of his origin has been dissolved by consent, there can be no conflicting claims. But where the obligations of allegiance are deemed indefeasible, or where the naturalized citizen, even in countries where expatriation is recognized, has not complied with the requisites for emigration, cases supposed to demand the interposition of the American government have arisen.

The English annals contain a case, which occurred in 1746, of a native of Great Britain, who had received his education from his early infancy in France, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king. He was taken in arms against the King of England, for which he was indicted and convicted of high treason. He was not, however, executed but pardoned upon condition of his leaving the kingdom and continuing abroad during his life. Christian's Blackstone, vol. i. p. 370.

As regards the right of the adopted country to protect, on board of its merchant vessels at sea, as if actually within its territory, its naturalized citizens, — it rests on principles of general application, and the attempt to violate the immunity, which the national flag afforded, by the impressment of seamen from them under the pretence, whether true or false, of their being Englishmen, was one of the most efficient causes of the War of 1812, between the United States and Great Britain. During that war great excitement prevailed in consequence of the menaces of the enemy to execute the naturalized citizens of British origin who might be taken prisoners, the barbarity of which was not a little aggravated by the fact that military service was exacted from natives of the United States domiciled in Canada. The retaliatory measures of the American government, in selecting as hostages an equal number of British soldiers, was followed by putting in close confinement American officers to double the number of the latter to answer for the safety of the last-mentioned soldiers. The whole matter was, however, settled without any sanguinary results, by including all parties in the cartels of mutual exchange. Annual Register, 1813, p. 190]. Ib. 1814, p. 182]. On this occasion the rights of our naturalized citizens were ably vindicated by Mr. Wheaton, on the authority of Vattel and Bynkershoek, in the columns of the New York National Advocate, of which journal he was then the editor.

In the later discussions which have taken place between the British and

American governments, the practical application of the doctrine of indefeasible allegiance would seem to be confined to cases of return to Great Britain, and not to operate upon their assumed obligations to their adopted country. In a note of Lord Palmerston, of August 16, 1849, to Mr. Bancroft, Minister in London, it is said: "It is well known that by the laws of Great Britain no restraint can, except in very special cases, be placed upon the perfect liberty of every British subject to leave the realm, when and for whatever period of time he chooses. So long as the emigrant remains in the United States, or in any other country, he is amenable to the laws of the country in which he resides; and it cannot therefore be said, as suggested in Mr. Bancroft's note, that the British crown, by permitting its subjects to emigrate to the United States, is sending among the United States not only people to be provided for by sharing in the opportunities for industry, but 'subjects' who may get arms and still serve Her Majesty, or that England is planting garrisons in all the territories of the Union."

He, however, adds: "That natural-born subjects of Great Britain, who may have become naturalized in a foreign country, but who return to the United Kingdom, are as amenable as any other of Her Majesty's subjects to any laws which may be in force, either of a permanent or of a temporary nature; and the maxim, '*ignorantia legis non excusat*,' must apply to them as well as to those who may be permanently resident within the United Kingdom." Cong. Doc. 36th Cong. 1 Sess. Senate Ex. Doc. No. 38, p. 167.

In enclosing from Berlin to the Secretary of State, July 29, 1840, a correspondence with a naturalized citizen of the United States, born in Prussia, and claiming to be exempt from military service on his return to his native country, Mr. Wheaton said: "As it did not appear to me that his claim could be sustained, I had no hesitation in declining to interfere in the manner requested." To the party, he wrote: —

"In reply, I have to state that it is not in my power to interfere in the manner you desire. Had you remained in the United States, or visited any other foreign country (except Prussia) on your lawful business, you would have been protected by the American authorities, at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But, having returned to the country of your birth, *your native domicile and national character revert*, (so long as you remain in the Prussian dominions,) and you are bound in all respects to obey the laws exactly as if you had never emigrated." Ib. p. 7.

These views were sanctioned in the instructions of Mr. Everett to Mr. Barnard, of the 14th of January, 1853, in which it is said: —

"If a Prussian subject chooses to emigrate to a foreign country without obtaining the 'certificate' which alone can discharge him from the obligation of military service, he takes that step at his own risk. He elects to

go abroad under the burden of a duty which he owes to his government. His departure is of the nature of an escape from her laws, and if at any subsequent period he is indiscreet enough to return to his native country, he cannot complain if those laws are executed to his disadvantage. His case resembles that of a soldier or sailor enlisted by conscription, or other compulsory process, in the army or navy. If he should desert the service of his country, and thereby render himself amenable to military law, no one would expect that he could return to his native land and bid defiance to its laws, because in the mean time he might have become a naturalized citizen of a foreign State." Ib. p. 54.

Mr. Everett's note was accompanied by one from Mr. Webster, when Secretary of State, June 1, 1852, to the effect that if a government of a country does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully claim their services, when found within its jurisdiction.

A distinction, which is scarcely consistent with the prohibition issued by our government, in 1862, against the emigration of American citizens liable to military draft, was made by the Secretary of State under Mr. Buchanan, between the contingent liability of those naturalized citizens who left the country of their origin before the age of military service, without the consent required by law, and those who escaped after they were actually enrolled. He claimed that the former were, irrespective of the obligations arising from the contingent liability, which in the interim had become complete, entitled, even in their native country, to the full protection of American citizens.

"I confine," said Mr. Cass, in his note of July 9, 1859, to Mr. Wright at Berlin, "the foreign jurisdiction in regard to our naturalized citizens to such of them as 'were in the army or actually called into it' at the time they left Prussia; that is, to the case of actual desertion or a refusal to enter the army after having been regularly drafted and called into it by the government to which at the time they owed allegiance." Ib. p. 135.

On a previous occasion the Prussian government had said: "If your government desires to avoid for the future similar collisions to that which has been brought about by the conduct of young Meyer, a simple means of attaining that end presents itself; it is only never to receive as citizen a Prussian by origin, if he is not able to produce a permit of emigration. When any individual obtains naturalization in a foreign country, the government of his native country can never acknowledge that this fact, of itself, releases him from the obligations which were imposed upon him before his naturalization. I will add, that in cases like this, in which Meyer finds himself, it is much less a question of retaking an individual to enroll him in the army, than to maintain the respect due to the law, and to insure its execution. And if the government of His Majesty proposes to exe-

cute the law against a Prussian subject on Prussian territory, I desire to persuade myself that the government of the United States has too much respect for its own dignity to be willing to oppose itself thereto." Baron Manteuffel to Mr. Fay, October 22, 1852, Ib. p. 49. Though neither Prussia nor the other German governments admitted the reasoning of the American secretary, yet it has been usual, while reserving the right, not to enforce regulations, against the remonstrance of the United States, at variance with the new obligations assumed, even irregularly, by their *ci-devant* subjects; but discharges have been granted, in such cases, as matter of favor, on the application of the American legation.

In this connection it may be stated that it is not the policy of Prussia, nor, it may be added, of the other German States, that those of her subjects who have emigrated with her consent shall return even temporarily to their country. She has ever denied the pretension asserted by Mr. Cass, that such persons, when become naturalized here, have the absolute right under the general terms in the treaty of 1828, applicable to citizens of the United States, to "sojourn and reside" in the Prussian dominions. Baron Manteuffel wrote to Mr. Wright, November 9, 1857: "In general, the Prussian government does not like that its former subjects, when they have withdrawn from the duties which attach them to their native country, should make a prolonged residence in it. Oftentimes, such individuals, after having withdrawn themselves from the duties which are obligatory on them as Prussian subjects, return to their native country in order to enjoy those rights which do not fairly belong to them. This is a reason that permission to sojourn in Prussia is not ordinarily granted to such individuals except on conditions more restrictive than those imposed on other foreigners, who have never belonged to Prussia. The government of the king has, incontestably, the right to decide for itself, if it is proper or not to allow a foreigner a residence in Prussia, and it cannot recognize any obligation to cause a formal judicial inquiry to be made or depositions under oath to be taken to justify its resolution in sending away a foreigner." Department of State, MS.

A similar discussion, respecting the obligations of a naturalized citizen of the United States, who had emigrated before the period of military service, to be subjected to its performance on his temporary return to his native country, took place between the American and French governments prior to any case for its practical application. Count Walewski, in a note to Mr. Calhoun, Chargé d'Affaires, in answer to one addressed to him at Mr. Cass's order, by Mr. Mason, the late Minister at Paris, November 25, 1859, said: "If, in effect, the Frenchman, before emigrating and causing himself to be naturalized in a foreign country, has not satisfied the obligation of military service, evidently he may be prosecuted in France, in case of his return even though the return should be only accidental. Besides, he might, dur-

ing his absence, have been sentenced for contumacy, and his presence in France would impose, as well on the public authority as himself, the duty of clearing off this contumacy." Ib. p. 214.

Mr. Faulkener, Minister of the United States at Paris, April 7, 1860, addressing Mr. Thouvenel, in reference to the case of a naturalized citizen (Michel Zeiter) in the position above described, says: "Our doctrine is that the naturalized emigrant cannot be held responsible upon his return to his native country for any military duty, the performance of which has not been actually demanded of him prior to his emigration. A prospective liability to service in the army is not sufficient. The obligation of contingent duties depending upon time, sortition, or events thereafter to occur, is not recognized. To subject him to such responsibility, it should be a case of actual desertion or refusal to enter into the army, after having been actually drafted into the service of the government to which he, at the time, owed allegiance."

In France, the cognizance of a case of this description, instead of being, as in Prussia, a matter of administration, belongs to the judiciary. Mr. Faulkener sent to Mr. Cass, June 16, 1860, a copy of the judgment of the tribunal of the first instance of Wissembourg, Bas Rhin, in the case of the above individual, "from which," he says, "it will be seen that he has been discharged from all further claims to the performance of military service in the French army. By reference to the judgment of the tribunal, you will see that his discharge is distinctly placed upon one of the grounds assumed by me in my communication to Mr. Thouvenel, of 2d of April, to wit, that having become a naturalized citizen of the United States, he had *ceased to be a Frenchman*, and, therefore, owing no further allegiance to France, he could not be required to perform military service in her behalf. The court having adjourned the case, in order that Zeiter might get the attestation of the Consul of the United States at Paris, that he had really acquired the character of an American citizen, on the 2d of June, 1860, decided that he had, by his nationality in a foreign country, lost the quality of a Frenchman." Department of State, MS.

The following communication from the Captain-Generalcy of Cuba to the Consul-General of the United States at Havana, will illustrate the application of the Spanish law: —

"There appears in the *expediente* of the affair, in a manner which leaves no doubt that Gavino de Liaño was born in Spain; that at an early age he went to the United States, where he became naturalized, without the permission of the Spanish government; and that on his coming, at a later day, to the island of Cuba, he fixed his residence at the said town of Sagua la Grande.

"In this understanding, and considering the article 45th of the royal decree of 17th of November, 1852, in which it is definitely established that Span-

iards obtaining letters of naturalization in a foreign country, without the authorization of Her Majesty's government, shall, when they return to Spain be subject to the same obligations as if they had never been naturalized in another country, I could not, in strict law, fail to apply to the young man, Gavino de Liaño, the sovereign command which has foreseen the case in which he finds himself." Cong. Doc. *ut supra*, p. 229.

The position of persons whose dissolution of connection with the country of their origin, as the result of their emigration before the consummation of their naturalization in the United States, is somewhat anomalous. That the mere declaration of intention required by the act does not impose the duty of citizenship, has been, as already stated, conceded by the American government, in their not including such persons in the list of their militia, liable to be drafted into the service of the United States, for the suppression of the existing insurrection, and we have seen that it is not permitted to our legations abroad to grant them passports, (Part III. ch. 1, §§ 10, 11, Editor's note [126, p. 391.) And, in the country of his birth, such a person is under the same embarrassments. In Prussia, the mere grant of a permission to emigrate is an act of denationalization.

The case of Koszta, independently of the claim of American domicile, and of the absence of all conflicting rights of territory on the part of his former sovereign, stood on peculiar grounds, as connected with the protection accorded to Franks, without regard to their particular nationality, by the ministers and consuls of Christian powers in Turkey, (Part II. ch. 2, § 1, Editor's note [74, p. 229.) It led, however, to so many untenable reclamations from semi-naturalized citizens, as to render necessary explicit declarations from the department of State. The intention of protecting foreigners from punishment of offences, or relieving them from obligations incurred, before emigration, was distinctly disavowed.

The protection which a country affords to the persons who are clothed with its nationality, does not extend to defend those of them who have emigrated in violation of the laws of the country of their origin, or without complying with their provisions, against the authorities of their own country, in case of their voluntary return to it. Mr. Marcy wrote to Mr. Jackson, Chargé d'Affaires at Vienna, on the 10th of January, 1854: "I have carefully examined your despatches relating to the case of Simon Tousig, and regret to find that it is one which will not authorize a more effective interference than that which you have already made in his behalf. It is true he left this country with a passport issued from this department; but as he was neither a native-born nor naturalized citizen, he was not entitled to it. It is only to citizens that passports are issued.

"Assuming all that could possibly belong to Tousig's case, — that he had a domicile here and was actually clothed with the nationality of the United States, — there is a feature in it which distinguishes it from that of Koszta.

Tousig voluntarily returned to Austria, and placed himself within the reach of her municipal laws. He went by his free act under their jurisdiction, and thereby subjected himself to them. If he had incurred penalties or assumed duties while under these laws, he might have expected they would be enforced against him, and should have known that the new political relation he had acquired, if indeed he had acquired any, could not operate as a release from these penalties. Having been once subject to the municipal laws of Austria, and while under her jurisdiction violated these 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. Every nation, whenever its laws are violated by any one owing obedience to them, whether he be a citizen or a stranger, has a right to inflict the penalties incurred upon the transgressor, if found within its jurisdiction. The case is not altered by the character of the laws, unless they are in derogation of the well-established international code. No nation has a right to supervise the municipal code of another nation, or claim that its citizens or subjects shall be exempted from the operation of such code, if they have voluntarily placed themselves under it. The character of the municipal laws of one country does not furnish a just ground for other States to interfere with the execution of these laws, even upon their own citizens, when they have gone into that country and subjected themselves to its jurisdiction. If this country can rightfully claim no such exemption for its native-born or naturalized citizens, surely it cannot claim it for those who have at most but inchoate rights of citizens.

"The principle does not at all interfere with the right of any State to protect its citizens, or those entitled to its protection, when abroad, from wrongs and injuries, — from arbitrary acts of oppression or deprivation of property, as contradistinguished from penalties and punishments incurred by the infraction of the laws of the country within whose jurisdiction the sufferers have placed themselves. I do not discover any principle in virtue of which this government can claim, as a matter of right, the release of Tousig. He has voluntarily placed himself within the jurisdiction of the laws of Austria, and is suffering, as appears by the case as you present it, for the acts he had done in violation of those laws while he was an Austrian subject." Cong. Doc. 33d Cong. 1st Sess. H. R. Ex. Doc. No. 41.

No. 2.

RIGHT TO WRECKS, OR *DROIT DE NAUFRAGE.*

(Part II. ch. 4, § 6, Editor's note [102, p. 320.)

THE right *to wrecks — droit de naufrage* — is not mentioned by our author among the national proprietary rights. In speaking of those rights arising from bordering on the sea, Vattel says: "It is necessary to mention the right to shipwrecks, the unhappy fruits of barbarism, and which almost everywhere disappeared with it. Justice and humanity cannot allow of it, except only in the case where the proprietors of the effects saved from a wreck cannot be certainly known. In this case these effects belong to the first possessor, or to the sovereign, if the laws give him a right to them." Liv. i. ch. xxiii. § 293. Hautefeuille says that "feudal lords and even the greatest sovereigns were not ashamed to count the fruits of what they termed the right of shipwreck among the sources of their revenues. They divided with their subjects the product of rapine and often of murder. In France, by the ordinances of 1465 and 1469, the results of shipwrecks were classed among the revenues of the State." Droit Maritime International, p. 112.

In England, shipwrecks were declared to be the king's property by the prerogative statutes of 17 Edward II. c. 11, and they were so, long before, at the common law. They were, at first, absolutely lost to the owner. But the rigor of that law had been, by St. West. 13 Edw. I. c. 4, mitigated by declaring that if anything escaped alive, it was not a real wreck, and by giving the owner a year to reclaim his property. Wrecks are now enumerated among the sources of the public revenue. Stephen's Blackstone's Commentaries, vol. ii. p. 547; Kent's Comm. vol. ii. p. 321.

The *droit de naufrage*, that is to say, the right of the State, or of the public treasury, to appropriate the property coming from wrecks or the effects thrown overboard to save the ship when the owner is known, is now generally rejected from the European law of nations. It has been said by French jurists to be contrary to the law of nations for civilized States to profit by the accident of shipwreck, or to deliver up to the just punishment of the laws the unfortunates (*proscrits ou émigrés*) escaped from the waves. This proposition is based on the principle announced in the consular *arrêté* of 18 Frimaire, year 10th, on occasion of the shipwreck at Calais. Devilleneuve et Gilbert, Jurisprudence du 19me Siècle, tom. iii. p. 391. On the other hand, Massé says, that the laws of war permitting the parties to fight with unequal arms, no principle of law prevents a bellig-

erent from seizing an enemy whom the tempest puts in his power at the moment that he was, perhaps, preparing to accomplish a hostile act, or when the neutral has placed himself in a position, in which he may be reputed as an enemy. It is the law of war, which is exercised by the captor. The shipwreck is only the occasion for the exercise of this right, not the foundation of it. The French legislation, adds Massé, as to vessels stranded or shipwrecked, is conformable to these principles. This is to be deduced from the 26th article of title 9 of the ordonnance of 1681, from an ordonnance of the 12th of May, 1696, and from the 14th article of the *réglement* of the 26th of July, 1778, confirmed by the articles 19th and 20th of the *arrêté* of the consuls of the 6th Germinal, year 8th, which subject wrecks to the same regulations as ordinary prize-vessels on the coasts of the French possessions. Le Droit Commercial dans ses rapports avec le droit des gens, tom. i. N°. 358. This opinion of Massé is approved by M. Vergé in his notes to the Précis du Droit des Gens of Martens, tom. i. p. 416.

But the owner of shipwrecked goods, who reclaims them, can only obtain restitution by paying the expenses of the salvage, and on the condition of the reclamation being made within a year and a day of the time that the disaster is known to him. Martens, Précis du Droit des Gens, § 155. Pinheiro Ferreira, in commenting on this limitation, says that it cannot apply to what may have been received by the public treasury. The rights of the treasury are to be distinguished from those of the inhabitants, who have participated, or are supposed to have participated, in saving the property. After allowing to the latter a greater or less share of what has been saved, the government secures the rest and keeps it in *dépôt* during a greater or less time, according to the nature of the property. But wherever the right of property is respected, the treasury, after having proceeded to the sale of the objects which cannot be retained longer, will hold their value at the disposal of those who shall make proof of property at any time; for none of the reasons, on which the right of prescription is founded, are applicable in such cases. The government retains a small amount for the expense and responsibility of keeping the property or the money. The English law would seem to be less favorable to the unfortunate parties than is here contended for. By the 17th and 18th Vict. c. 104, § 475, which contains very copious enactments in reference to salvage for services rendered, it is provided, as to *wreck found*, that, if no owner establishes his claim before the expiration of a year, and no person other than Her Majesty is proved to be entitled to the same, in default of such owner, the wreck is to be sold by the receiver, (an officer appointed by the act,) and the proceeds thereof, after payment of all expenses and the salvage, if any, are to be paid into the exchequer, as part of the consolidated fund of the United Kingdom. Stephen's Blackstone's Commentaries, vol. ii. p. 551.

Pinheiro Ferreira maintains that the exorbitant contracts obtained from persons exposed to shipwreck, under the influence of terror, are not valid. It is for the local authorities to decide the question according to the laws of the country, which are supposed to be based upon the principles of an equitable justice. Ib. note, p. 449. It has been decided in France that the 27th article of the ordonnance of the marine of 1681, which accords the third part of the shipwrecked effects to the salvors, is only applicable to effects found on, or taken from the bottom of the sea, and not to effects saved from a vessel near the shore where she stranded. But that among the shipwrecked effects ought to be included the vessel itself threatened with the immediate danger of sinking, and having on board only dead or dying persons, incapable of doing anything for their safety. In that case those who have found and saved her are entitled to one third of the value. The law of the 6th (22d) August, 1791, which appropriates to the *caisse des invalides de la marine* the proceeds from stranded vessels is applicable only to the case, where the vessel has stranded in consequence of an accident, and not to where she has been stranded to introduce prohibited merchandise, in which last case the seizure, on account of the customs, belongs to the State. Devilleneuve et Gilbert, *loc. cit.*

By the Constitution of the United States, the judicial power of the Federal courts extends to all cases of admiralty and maritime jurisdiction. It applies to acts done on the sea, or on waters of the sea, where the tide ebbs and flows, even without any claim of exercising the rights of war. Judge Story specially enumerates "cases of salvage for meritorious services performed in saving property, whether derelict, or wrecked, or captured, or otherwise in imminent hazard from extraordinary perils." Story's Commentaries on the Constitution, vol. iii. p. 530, § 1663. And as the extension of this jurisdiction to the lakes and waters connecting them, by the act of the 26th of February, 1845, (Statutes at Large, vol. v. p. 726,) has been decided to be consistent with the Constitution, (Howard's Reports, vol. xii. p. 443, Propeller Genesee Chief *v.* Fitzburgh,) the powers of the Federal government would seem to be competent to the entire matter. The judiciary act of September 24, 1789, § 9, Statutes at Large, vol. i. p. 76, is sufficiently comprehensive to give the district courts, to whom is confided "the exclusive original cognizance of admiralty and maritime jurisdiction," authority over the whole subject; and they are in the constant habit of making decrees for civil salvage, the amount of which is governed by their discretion. There has, however, been no general law, regulating the matter, passed by Congress, and the laws of several States, proceeding on the idea of a concurrent jurisdiction with the admiralty on the shores, between high and low water mark, and in bays, havens and creeks, have not only provided for the appointment of wreck-masters and for the disposition of wrecks, but for the ascertainment of the salvage. See New York Revised Statutes, pt. i. ch. 20, title 12, vol. i. p. 690, marginal paging.

Chancellor Kent says, "By the colony laws of Massachusetts and Connecticut, *wrecks* were preserved for the owner; and, if found at sea, they are supposed now to belong to the United States, as succeeding, in this respect, to the prerogative of the English crown. But, if discovered on the coasts, or in waters within the jurisdiction of a State, they are, by statutes in the several States, to be kept for the owner, if redeemed within a year, and if not, they are to be sold, and the net proceeds, deducting costs and salvage, appropriated to public uses." Kent's Commentaries, vol. ii. p. 359. The right over *wrecks* was exercised by Congress in a special case, at an early day. By the act of April 14, 1792, in cases where the absence of a consul or vice-consul, under the Consular Convention with France, required the attention of a proper officer to the saving of the wreck of any French vessel, the duty is made to devolve on the judge of the district where such wrecks should happen; and by the same act, which is the only provision on that subject as to American consuls, it is made the duty of the consuls of the United States abroad, as far as the laws of the country will permit, to take proper measures for saving the ships and cargoes stranded on the coasts of their consulates. Statutes at Large, vol. i. pp. 254, 255. United States Consul's Manual, § 570, p. 235, 2d ed.

An act of March 3, 1825, makes liable to forfeiture any vessel that may transport to a foreign country any property taken from a wreck, from the sea or from any of the keys or shoals on the coast of Florida, within the jurisdiction of the United States, and it requires such property to be brought to a port of entry of the United States. Ib. vol. iv. p. 132. The act of May 23, 1828, establishing a Southern judicial district, in the Territory of Florida, provided that, when the judge shall have determined the rate of salvage it shall be paid in kind, and the goods remaining shall not be removed from the public storehouses or otherwise disposed of within nine months, unless by order of the owner. Ib. p. 292. And the act of the 23d of February, 1847, establishing a court at Key West, requires that vessels regularly employed in the business of wrecking shall be licensed by the judge. Ib. vol. ix. p. 131. Mr. Attorney-General Johnson gave an opinion, June 20, 1849, referring specially to the decision in the case of The United States *v.* The Amistad, (Peters's Reports, vol. xv. p. 518,) and which would seem to be sustained by the current of English authorities, that salvage for services rendered to merchantmen, whether foreign or American, by the officers and crew of a vessel in the naval service, were to be compensated, as if rendered by the private marine. Opinions of Attorneys General, vol. v. p. 116. Mr. Cushing, July 8, 1856, did not consider salvage demandable by the officers and crews of public ships, without the consent of the government, and he was of opinion that their receiving it was, moreover, against public policy. He advised the Secretary of the Treasury that he had power, by standing regulations, to forbid

the demand of it by any public ship, under the orders of his Department. Ib. vol. vii. p. 756. It was granted by Dr. Lushington, in 1844, on the ground that otherwise there would be an indisposition on the part of the government steamers "to undertake the rescue of British merchantmen in distress." Notes of Cases, 1844–6, p. 144, The Iodine.

The rigor with which the right of shipwreck was applied, led to early negotiations to mitigate, if not to abrogate, it by treaty. Hautefeuille says that from 1163 the foreigners who were connected with Denmark by special treaties were protected from the spoliation by the payment of a very considerable duty on the objects saved. One of the earliest of these treaties was concluded, in 1268, with Venice, by Louis IX., who had abolished it in France by ordinance in 1255. There is a treaty of 1478, between Edward IV. and Maximilian, Duke of Austria, and one of 1264, between the King of Tunis and the republic of Pisa, between a Saracen prince and a Christian State. This affords Mr. Hautefeuille an opportunity to say that he has had repeated occasion to remark, that "the Mussulmans are not the last to adopt liberal principles in maritime international matters." Droit Maritime International, pp. 114, 173. This position can scarcely find support in the history of the Barbary States; for it was not till the absorption of Algiers into the French possessions, in 1830, that the unfortunate mariners of the Mediterranean could be deemed wholly safe, either in their persons or their property. France herself had not been exempted, though she had consented to compromise her dignity by purchasing, by a tribute, the rights of humanity for her shipwrecked subjects. The intercourse with Algiers, interrupted during the wars of the French Revolution, was renewed, in 1817, by a treaty, with the condition of an annual payment (*redevance*) of 200,000 francs. This treaty having been broken by the Dey in 1826, France had consented to revive it by the payment of all arrearages, and of other reclamations, when a gross insult to her consul, at a public reception, induced the government of Charles X., in avenging the outrage, at the same time to put an end to those nests of pirates, who had been for three centuries the dishonor of Europe. Malte-Brun, Géographie Universelle, tom. i. p. 161. Their policy had been to treat all people as objects of plunder, reducing captives to slavery, unless they had special treaties with them.

The United States had scarce come into existence as a nation before a war, according to the principles of the Barbary States, was made on them by the capture of their vessels by the cruisers of Morocco and Algiers. This would seem to have been anticipated, as a necessary condition of independence; for the eighth article of the treaty of 1778 provides that France shall use her good offices and interposition with the powers on the coast of Barbary for the benefit, convenience, and safety of the United States and of their subjects and their vessels

and effects "against all violence, insult, attacks, or depredations, on the part of the said princes, and States of Barbary and their subjects." One of our ministers in Europe, in discussing the alternative of war or peace with them, asked of the Congress of the Confederation, "As long as France, England, Holland, the Emperor, &c., will submit to be tributary to these robbers, and even encourage them, to what purpose should we make war upon them?" Mr. Adams to Mr. Jay, Secretary of Foreign Affairs, Dec. 15, 1784, Diplomatic Correspondence, 1783–9, vol. ii. p. 152. And the same minister, in giving an account of an interview with the Tripoline Ambassador in London, says that "His Excellency replied, on being asked how there could be war between two nations when there had been no hostility, injury, insult, or provocation on either side, that Turkey, Tripoli, Tunis, Algiers, and Morocco were the sovereigns of the Mediterranean, and that no nation could navigate that sea, without a treaty of peace with them." Same to Same, February 17, 1786, Ib. vol. iv. p. 490. The ambassador had previously caused it to be intimated to Mr. Adams that "Tripoli would make peace with the United States, for a tribute of one hundred thousand dollars a year."

A tariff, communicated in a message of President Washington to Congress, December 30, 1790, shows the rates of ransom of the American prisoners at Algiers, some of whom had been there since 1785. It varied from fourteen hundred to six thousand dollars, according to the position of the parties. Wait's American State Papers, vol. x. p. 61. Nor, under such circumstances, can it be deemed a mere formality, when a treaty, which is called a treaty of peace, stipulating for an annual tribute to the Dey, was made, Sept. 5, 1795, that there should be an express clause, Art. 6, declaring that, "if any vessel belonging to the United States shall be stranded on the coast of the Regency, they shall receive every possible assistance from the subjects of this Regency: all goods saved from the wreck shall be permitted to be reëmbarked on board of any other vessel, without paying any duties at the custom-house." By the terms of Article 12, American citizens and their property were only protected in case they had a passport; "as this Regency," it is declared, "know their friends by their passports." Statutes at Large, vol. viii. pp. 134, 135. Nor was this treaty any longer of avail, when the existence of a war, in 1812, between the United States and England, induced the Dey to suppose that more could be made by hostilities than from tribute. The American consul was compelled to leave Algiers, in July of that year. Wait's Am. State Papers, vol. ix. p. 127.

On the termination of the war with Great Britain, Congress took measures to protect American commerce against "the predatory warfare of the Algerines," (Statutes at Large, vol. iii. p. 230,) which resulted in the treaty of 30th June, 1815. This treaty, in express terms, abolished tribute of every

kind. It, as well as the subsequent one of December 22, 1816, contained a provision more extensive than in the old treaty with regard to wrecks, while they both provided that "the crew shall be protected and succored till they can be sent out of the country." Ib. vol. viii. pp. 224, 225, 244. Great Britain, also, on the restoration of general peace, directed her attention to the Barbary States. In 1815, an arrangement was made with Tunis and Tripoli, and in the subsequent year, Lord Exmouth, after the bombardment of the city, made a treaty with the Dey of Algiers, compelling him to conform to the practice of civilized nations. Annual Reg. 1816, p. 92]. A treaty had been concluded by the United States with Morocco, as early as January, 1787, in which provision is made as to vessels cast on the shore, leaving them at the disposition of their owners, under the particular protection of the government. Statutes at Large, vol. viii. p. 101. This was also the case in that made with Tripoli, November 4, 1796, and in the one made after intervening hostilities, June 4, 1805. Ib. pp. 154, 215.

There is a similar provision contained in the treaty with Tunis, August, 1797, and which stipulates that the proprietor of the effects shall pay the costs of salvage to those who have been employed. Ib. p. 158. Art. xiii. of this treaty provides that "if among the crews of merchant vessels of the United States there shall be found subjects of our enemies, they shall not be made slaves, on condition that they do not exceed a third of the crew; and when they do exceed a third they shall be made slaves. The present article only concerns the sailors and not the passengers, who shall not be in any manner molested." Ib. p. 159.

It may be remarked that in none of these treaties is there authority over wrecks given in express terms to the consuls. Nor is it to be found in the articles, on that subject, in the treaties with other non-Christian powers, as with Siam, concluded March 20, 1833, (Ib. p. 458,) where the clause is similar to the one last mentioned. In the treaty with the same power, of May 29, 1856, Ib. vol. xi. p. 685, there is no provision on the subject. The treaty with Muscat of 23d September, 1833, provides, moreover, for entertaining the escaped persons at the expense of the Sultan, it being added, "for the Sultan can never receive any remuneration whatever for rendering succor to the distressed." Ib. vol. viii. p. 459. There is the same silence as to consular authority in this matter, in the treaty with Borneo, of June 23, 1850, Ib. vol. x. p. 910; in the compact with Lew Chew, July 11, 1854, Ib. p. 1101; in the treaty with Japan, March 31, 1854, Ib. vol. xi. p. 597; all which, however, contain provisions for the case of wrecks and shipwrecked persons. There is no provision as to wrecks, in the treaty with Persia, December 13, 1856. Ib. p. 709. Nor is there any reference to the consuls in that connection in the treaty of July 3, 1844, or in that of June 18, 1858, with China, and the former of which provides for the adoption of measures of protection and relief by the government, (Ib. vol. viii. p. 598,)

and the latter of which, besides providing for the preservation and restoration of wrecked property, makes special provision as to merchant vessels plundered by pirates within the Chinese waters. Treaties, 1862, p. 180.

Among the treaties concluded by the United States with Christian powers, the clause with respect to the jurisdiction of consuls over wrecks, as it was contained in the consular convention with France, of 1788, or, as it is established by the eleventh article of the treaty of the 23d of February, 1853, inserted entire, Part II. ch. 2, § 11, Editor's note [73, page 121, is not to be found except in a few recent cases, as in the one with the Hawaiian Islands, of December 20, 1849, Statutes at Large, vol. ix. p. 981; with New Granada, of May 4, 1850, Ib. vol. x. p. 903; with the Netherlands, of 23d of January, 1855, Ib. 1153; with the ci-devant kingdom of the Two Sicilies, Ib. vol. xi. p. 649. The treaty of June 10, 1846, of the United States with Hanover, declares that "the ancient and barbarous right to wrecks shall remain entirely abolished, with respect to the property belonging to the citizens or subjects of the high contracting parties, and that if the vessels of either party are wrecked, stranded, or otherwise damaged on the coasts of the other, the same assistance shall be rendered as would be due to the inhabitants of the country, the dues of salvage to be the same." Nothing is said as to the intervention of the consul. Statutes at Large, vol. ix. p. 859. There is, in general, in the treaties with the States of Europe and America, a stipulation for reciprocal assistance, but the fact of the abolition of the right of wreck, as referred to in the treaty with Hanover, has been assumed.

Hautefeuille says that it is to the consul of the nation that it, in preference, belongs, to take care of the rights of the absent. Histoire, &c., p. 297. And De Cussy says, "The greatest number of the treaties of commerce and navigation which have been concluded within two hundred years, contain clauses relative to the shipwreck of vessels and their salvage, the direction and superintendence of which are now generally abandoned to the consul of the nation to which the shipwrecked vessels belong. It would be easy to mention from one hundred and thirty to one hundred and forty treaties of this nature." He gives, as an example of these treaties, the one made between France and Russia, of the 16th of September, 1846, and which provides that "all the operations relative to the salvage of shipwrecked vessels, stranded or abandoned, shall be directed in the two countries by the respective consuls, &c.;" for which it makes provision, substantially, as in the treaty between France and the United States. Phases et Causes, Célèbres du Droit Maritime des Nations, tom. i. p. 180. So far as regards the non-Christian countries, the power of the consuls of the United States will scarcely be questioned. It may, it is presumed, be sufficiently deduced from the very extensive rights which are recognized in the office, and from the privileges accorded by the treaties to other nations, and of which we enjoy, either by

express stipulation or by usage, the benefit. In Christian States, the American consuls have the authority, so far as depends on their own country, by the act of Congress, (Statutes at Large, vol. i. p. 255,) heretofore cited, but, except in the few cases of treaty stipulation, their intervention depends on the local law and the right, as far as may accrue to them, of participating in the privileges accorded in the respective localities to other consuls. By the consular regulations of the United States, when any American vessel is wrecked within his jurisdiction, the consular officer is to give immediate notice to the Department of State, naming the vessel and her owners or master, and when there is no impediment from the laws of the country. all proceedings in relation to property wrecked are to be the same as those prescribed in the case of property of intestates. United States Consular Manual, §§ 573, 574, p. 236, 2d ed. The right of foreign consuls to take charge of the wrecks has been recognized by the Federal legislature only in a single instance, and in furtherance of the old French treaty. There is no legislation in this matter, in reference to consuls of powers with which we have no treaties regulating it, nor even with regard to the existing consular convention with France.

No. 3.

THE CASE OF THE TRENT.

(Part IV. ch. 3, § 25, Editor's note [230, p. 807.)

In an early part of our annotations, (Part I. ch. 2, § 10, Editor's note, [72, p. 217,) we took occasion to point out the distinction between the British claim of impressment, to take, under their municipal law, seamen, from on board American vessels, and the right of Captain Wilkes to arrest, *jure belli*, from the British mail steamer Trent, the Commissioners from the Confederate States to England and France. That vessel, having left Havana on the 7th of November, 1861, for St. Thomas, with the mails for England, under charge of a commander in the navy, and with numerous passengers, including Messrs. Mason and Slidell, and their secretaries, was stopped on the succeeding day, as Captain Wilkes states, at the entrance of the Bahama Channel, and about nine miles from the island of Cuba, by the American steamship of war San Jacinto, which had been watching in the neighboring waters, during several days, for the departure of The Trent. The Confederate commissioners and their secretaries were taken from the mail steamer, which was allowed to proceed on her voyage,

and were carried to the United States, where they were imprisoned in a military fortress. As soon as intelligence of this occurrence reached London, Lord Russell, in a despatch of November 30, 1861, assuming that the individuals named had been taken from on board a British vessel, the ship of a neutral power, while such vessel was pursuing a lawful and innocent voyage, that this was an act of violence which was an affront to the British flag and a violation of international law, instructed Lord Lyons to demand their liberation and their delivery to him, in order that they might again be placed under British protection, and a suitable apology for the aggression which had been committed.

This note made no reference to the presumed public character of the parties arrested, nor to the legal grounds on which the demand was based. It was, however, said that the law officers of the Crown placed the irregularity of Captain Wilkes' course on his failure to send the vessel into port, and submit the question to the prize court. London Times, November 28, 1861.

The importance attached to this case will now fully appear from the second note to Lord Lyons, of the same date with the preceding one, and which was not communicated to the American government, though subsequently laid before Parliament. "Should Mr. Seward ask for delay in order that this grave and painful matter should be deliberately considered, you will consent to a delay not exceeding seven days. If, at the end of that time, no answer is given, or if any other answer is given except that of a compliance with the demands of Her Majesty's government, your lordship is instructed to leave Washington with all the members of your legation, bringing with you the archives of the legation, and to repair immediately to London.

"If, however, you should be of opinion that the requirements of Her Majesty's government are substantially complied with, you may report the facts to Her Majesty's government for their consideration, and remain at your post till you receive further orders.

"You will communicate with Vice-Admiral Sir A. Milne immediately upon receiving the answer of the American government, and you will send him a copy of that answer, together with such observations as you may think fit to make.

"You will also give all the information in your power to the Governors of Canada, Nova Scotia, New Brunswick, Jamaica, Bermuda, and such other of Her Majesty's possessions as may be within your reach." Parliamentary Papers, 1862, North America, No. 5, p. 3.

Before the action of the government at Washington could be known, France, Austria, and Prussia instructed their ministers at Washington to sustain the views of the British government, and their communications were followed by others of like import from Russia and Italy. A

considerable space was even given to the matter in the speech of the Queen of England, at the opening of Parliament, in February, though she announces that "that question has been satisfactorily settled by the restoration of the passengers to British protection, and by the disavowal by the United States government of the act of violence committed by their naval officer." Le Nord, 8 Février, 1862.

The French Minister of Foreign Affairs said: "If, to our deep regret, the Cabinet of Washington were disposed to approve of the conduct of the commander of The San Jacinto, it would be either by considering Messrs. Mason and Slidell as enemies, or as seeing in them nothing but rebels. In the one as in the other case, there would be a forgetfulness, extremely annoying, of principles upon which we have always found the United States in agreement with us.

"The United States have admitted with us, in the treaties concluded between the two countries, that the freedom of the flag extends itself over the persons found on board, should they be enemies of one of the two parties, unless the question is of military people actually in the service of the enemy. Messrs. Mason and Slidell were, therefore, by virtue of this principle, which we have never found any difficulty in causing to be inserted in our treaties of friendship and commerce, perfectly at liberty under the neutral flag of England. Doubtless it will not be pretended that they could be considered as contraband of war. That which constitutes contraband of war is not yet, it is true, exactly settled; the limitations are not absolutely the same for all the powers, but, in what relates to persons, the special stipulations which are found in the treaties concerning military people, define plainly the character of those who only can be seized upon by belligerents; but there is no need to demonstrate that Messrs. Mason and Slidell could not be assimilated to persons in that category.

"There remains, therefore, to invoke, in explanation of their capture, only the pretext that they were the bearers of official despatches from the enemy. But this is the moment to recall a circumstance which governs all this affair, and which renders the conduct of the American cruiser unjustifiable. The Trent was not destined to a point belonging to one of the belligerents; she was carrying to a neutral country her cargo and her passengers, and moreover it was in a neutral port that they were taken on board.

"If it were admissible that under such conditions the neutral flag does not completely cover the persons and merchandise it carries, its immunity would be nothing more than an idle word; at any moment the commerce and the navigation of third powers would have to suffer from their innocent and even indirect relations with the one or the other of the belligerents. If the Cabinet of Washington would only look on the two persons arrested as rebels, whom it is always lawful to seize, there would be, in such a case, misapprehension of the principle which makes a vessel a portion of the

territory of the nation whose flag it bears, and violation of that immunity, which prohibits a foreign sovereign, by consequence, from the exercise of his jurisdiction. It certainly is not necessary to recall to mind, with what energy, under every circumstance, the government of the United States has maintained this immunity, and the right of asylum which is the consequence of it.

"Not wishing to enter upon a more deep discussion of the questions raised by the capture of Messrs. Mason and Slidell, I have said enough, I think, to settle the point that the Cabinet of Washington could not, without striking a blow at the principles which all neutral nations are alike interested in holding in respect, nor without taking the attitude of contradiction of its own course up to this time, give its approbation to the proceedings of the commander of The San Jacinto. In this state of things, it evidently should not, according to our views, hesitate about the determination to be taken." M. Thouvenel to M. Mercier, December 3, 1861.

Count Rechberg writes: "Without having the intention to enter here upon an examination into the question of right, we nevertheless cannot but acknowledge that according to the notions of international law adopted by all the powers, and which the American government itself has often taken as the rule of its conduct, England could not, in any wise, in the present case, refrain from reclamation against the affront given to the flag, and from asking proper reparation for it." Count Rechberg to Chevalier Hülsemann, Austrian Minister at Washington, December 18, 1861.

Count Bernstoff instructs the Prussian Minister at Washington: "The warlike measures which President Lincoln has taken by sea against the Southern States, which have separated from the Union, were calculated, immediately upon their occurrence, to inspire in His Majesty's government the apprehension that it might easily give occasion to the legitimate interests of neutral States being thereby injuriously affected.

"This apprehension has been, unfortunately, entirely justified by the violent capture and carrying away of Messrs. Mason and Slidell from on board the neutral mail steamer Trent by the commander of the North American war ship San Jacinto.

"This occurrence, as you will easily believe, has created the greatest sensation in England, as in the whole of Europe, and has not only placed the Cabinets, but also public opinion, in a state of the most extreme expectation.

"Although England is certainly alone immediately affected by that act, still one of the most important and generally recognized rights of neutral flags is at the same time called in question.

"It is not requisite that I should now enter into an explanation of the points of law precisely involved. Public opinion in Europe has pronounced itself with rare unanimity, and in the most decided manner, in favor of the

injured party. We ourselves have only hitherto hesitated to acquaint you with our views upon the transaction, because, in the absence of reliable intelligence, we doubted whether the captain of The San Jacinto had been guided in the course he adopted by instructions received from his government or not.

"We still at present prefer to believe the latter supposition correct. Should, however, the former prove to be the actual state of the case, we should feel ourselves compelled to ascribe a more serious importance to the matter, and to regard in it, to our great regret, not an isolated fact, but rather an open threat of the rights appertaining to all neutrals." Count Bernstoff to Baron Gerolt, December 25, 1861.

The following, written subsequent to the adjustment, is from Prince Gortchakoff's despatch to M. De Stoeckl, the Russian Minister at Washington. It is dated St. Petersburg, Jan. 9, 1862.

"The Federal government will not doubt the keen interest with which we have followed the various phases of the recent incident which has held in anxious suspense the attention of the two worlds.

"His Majesty, the Emperor, has not presumed too much on the wisdom of the Cabinet of Washington in being convinced that at this serious juncture it will only consult its sentiments of justice and conciliation, and the interests of the country.

"It is with the most profound satisfaction that His Imperial Majesty has seen his anticipations confirmed by the determination which has just been taken by the Federal government.

"Although it has only reached our knowledge at present through the medium of the journals, our august master has been unwilling to delay the transmission to the President of the sentiments with which His Majesty appreciates this manifestation of moderation and equitable spirit — all the more meritorious in that it was rendered difficult by popular impetuosity.

"I need not add, that in remaining faithful to the political principles which she has always defended, even when these principles were turned against herself, and in abstaining from taking advantage, in her turn, of doctrines which she had always repudiated, the American nation has given a proof of political honesty which will acquire for it an incontestable claim to the esteem and gratitude of all governments interested in seeing the peace of the seas maintained, and the principles of right prevail over force, in international relations — in the repose of the world, the progress of civilization, and the well-being of humanity."

It appears from Lord Russell's instructions to Lord Lyons, that these documents were all communicated to the British government before being presented to that of the United States.

Baron Ricasoli also wrote to M. Bertinatti, the Italian Minister at Washington, Turin, January 20, 1862: "I need not tell you with what

satisfaction the government and people of Italy have received the news of the happy solution of a question which, for a moment, put in doubt the peace of the world. You are not ignorant that the royal government has always been attached to the principles of the freedom of the sea. Knowing the bold and persevering efforts which the government at Washington had made for fifty years past to defend the rights of neutrals, we hesitated to believe that it desired to change its character all at once, and become the champion of theories which history has shown to be calamitous, and which public opinion has condemned forever. By continuing to remain attached to principles whose defence has constituted one of the causes of the glory of North America, Mr. Lincoln and his ministry have given an example of wisdom and moderation which will have the best results for America as well as for the European nations." Papers relating to Foreign Affairs, 1862, p. 580.

The American Secretary of State, in reply to Earl Russell's demand, as contained in his note of the 30th of November, after declaring that Captain Wilkes acted on his own suggestion, and without any direction or even foreknowledge on the part of the government, and making some modifications in the statement of facts in connection with the arrest, as presented in the British note, says: "That, at the time the transaction occurred, an insurrection was existing in the United States, which this government was suppressing by the employment of land and naval forces; that, in regard to this domestic strife the United States considered Great Britian as a friendly power, while she had assumed for herself the attitude of a neutral; and that Spain was considered in the same light, and had assumed the same attitude as Great Britain. It had been settled by correspondence that the United States and Great Britain mutually recognized, as applicable to this local strife, these two articles of the Declaration made by the Congress of Paris in 1856, namely: "That the neutral or friendly flag should cover enemy's goods, not contraband of war; and that neutral goods, not contraband of war, are not liable to capture under an enemy's flag. These exceptions of contraband from seizure were a negative acceptance, by the parties, of the rule hitherto everywhere recognized as a part of the law of nations, that whatever is contraband is liable to capture and confiscation in all cases." He says that Mr. Mason and Mr. McFarland were citizens of the United States and residents of Virginia, and Mr. Slidell and Mr. Eustis, also citizens of the United States, residents of Louisiana; that Mr. Mason was proceeding to England and Mr. Slidell to France, as Ministers Plenipotentiary, under pretended commissions from Jefferson Davis, who had assumed to be "President of the insurrectionary party in the United States," and that the other gentlemen were going as secretaries of legation was well known at Havana at the time that they embarked, and that the fact that these persons had assumed such characters has been since

avowed by the same Jefferson Davis, in a pretended message to an unlawful and insurrectionary Congress. It was, as he thinks, rightly presumed that these ministers bore credentials and instructions, and such papers are, in the law, known as despatches. He deems it, also, proper to state, that the owner and agent, and all the officers of The Trent, including Commander Williams, had knowledge of the assumed characters and purposes of the persons before named when they embarked on that vessel.

"The act of Captain Wilkes was undertaken as a simple, legal, customary, and belligerent proceeding to arrest and capture a neutral vessel engaged in carrying contraband of war for the use and benefit of the insurgents. The question is, whether this proceeding was authorized by, and conducted according to the law of nations." To establish this point, Mr. Seward cites Vattel and the opinions of Sir William Scott, as given in our author's text, and concludes this part of the case by saying: "I trust that I have shown that the four persons who were taken from The Trent by Captain Wilkes, and their despatches, were contraband of war." He then assumes that there was nothing in the employment in which the vessel was engaged to give her any special immunity. "The Trent, though she carried mails, was a contract or merchant vessel — a common carrier for hire. Whatever disputes have existed concerning a right of visitation or search in time of peace, none, it is supposed, has existed in modern times about the rights of a belligerent in time of war to capture contraband in neutral or even friendly merchant vessels, and of the right of visitation and search, in order to determine whether they are neutral, and are documented as such according to the law of nations. I assume in the present case, what, as I read the British authorities, is regarded by Great Britain herself as true maritime law, that the circumstance that The Trent was proceeding from a neutral port to another neutral port does not modify the rights of the belligerent captor."

Mr. Seward thinks that it cannot be doubted that Captain Wilkes exercised the right of search in a proper manner, and that he had a right to capture the contraband of war found on board of her, and that he was influenced by proper motives in not sending the steamer into an American port, but concedes that he was guilty of an irregularity in not doing so, which, if not waived by Great Britain, might authorize a reclamation on her part. The Secretary of State, as has been stated elsewhere, finally places his acquiescence in the British demand on considerations connected with the complaints heretofore made by the United States, as to the impressment of seamen from their vessels. Mr. Seward to Lord Lyons, December 26, 1861.

Lord Russell, in his instruction to Lord Lyons of the 11th of January, 1862, which expressed his satisfaction at the settlement of the matter, deferred an examination of the questions of law discussed by Mr. Seward.

In his subsequent despatch, of the 23d of January, 1862, he says that we must discard from our minds the allegation that the captured persons were rebels. The only ground on which foreign governments can treat the subject is to consider them as enemies of the United States at war with its government. He denies that the persons named and their despatches were contraband of war. He asserts, on the authority of Vattel, book 3, ch. 7, § 118, that "a neutral nation continues, with the two parties at war, in the several relations nature has placed between nations," citing Sir William Scott's opinion in the case of The Caroline, as it is given in Wheaton's text, and which decided that the carrying of despatches from the French ambassador, resident in the United States, to the government of France, was no violation of neutrality of the United States in the war between Great Britain and France. And also quoting from our author in another place, (Part III. ch. 1, § 4, p. 377,) to establish the extension of the exemption to cases where the *de facto* government of one of the belligerents is not recognized by the other belligerent or the neutral, he says: "It appears to Her Majesty's government to be a necessary and certain deduction from these principles, that the conveyance of public agents of this character from Havana to St. Thomas on their way to Great Britain and France, and of their credentials or despatches (if any) on board The Trent, was not and could not be a violation of the duties of neutrality on the part of that vessel, and, both for that reason and also because the destination of these persons and of their despatches was *bonâ fide* neutral, it is in the judgment of Her Majesty's government clear and certain that they were not contraband."

The explicit limitation of contraband to arms and munitions of war and military persons made, independently of treaty, by Great Britain, for the first time as it is believed, in this despatch, was fully examined in our note [229, p. 801, where will be found the definition of Bynkershoek at length, with the note of his translator, Duponceau, showing that on the insertion or omission of the clause left out in the new British definition, and which contains the articles ordinarily termed *ancipitis usus*, the whole controversy as to the extent of contraband of war has ever turned. Lord Russell remarks, that it is of the very essence of the definition of contraband that the articles should have a hostile and not a neutral destination; and he quotes Lord Stowell, (Robinson's Adm. Rep. vol. iii. p. 167, The Imina,) that "goods going to a neutral country cannot come under the description of contraband, all goods going there being equally lawful." He denies the relevancy of Mr. Seward's citations from Sir William Scott, in reference to stopping the ambassador of an enemy on his passage. He says that Sir William Scott only names Vattel, and that the example given by him is the seizure of a French ambassador, (the case of the Maréchal Belle-Isle, noticed Part III. ch. 1, § 20, p. 419,) when passing through the domin-

ions of Hanover during war between England and France, by the King of England, who was sovereign of Hanover. Vattel, liv. iv. ch. 7, § 85.

"The rule," he assumes, "to be collected from these authorities is, that you may stop an enemy's ambassador in any place of which you are yourself the master, or in any other place where you have a right to exercise acts of hostility.

"The other dictum of Sir William Scott, in the case of The Orozembo, (Robinson's Adm. Rep. vol. vi. p. 430,) related to the case of a neutral ship which, upon the effect of the evidence given on the trial, was held by the court to have been engaged as an enemy's transport to convey the enemy's military officers, and some of his civil officers whose duties were intimately connected with military operations, from the enemy's country to one of the enemy's colonies, which was about to be the theatre of those operations, the whole being done under color of a simulated neutral destination.

"In connection with this part of the subject, it is necessary," he says, "to notice a remarkable passage in Mr. Seward's note, in which he says, 'I assume, in the present case, what, as I read British authorities, is regarded by Great Britain herself as true maritime law, that the circumstance that The Trent was proceeding from a neutral port to another neutral port does not modify the right of the belligerent capture.' If, indeed, the immediate and ostensible voyage of The Trent had been to a neutral port, but her ultimate and real destination to some port of the enemy, Her Majesty's government might have been better able to understand the reference to British authorities contained in this passage. It is undoubtedly the law, as laid down by British authorities, that if the real destination of the vessel be hostile, (that is, to the enemy or the enemy's country,) it cannot be covered and rendered innocent by a fictitious destination to a neutral port. But if the real terminus of the voyage be *bonâ fide* in a neutral territory, no English, nor indeed, as Her Majesty's government believe, any American authority can be found, which has ever given countenance to the doctrine that either men or despatches can be subject, during such a voyage, and on board such a neutral vessel, to belligerent capture as contraband of war.

"It is to be further observed that packets engaged in the postal service, and keeping up the regular and periodical communications between the different countries of Europe and America, and other parts of the world, though in the absence of treaty stipulations they may not be exempted from visit and search in time of war, nor from the penalties of any violation of neutrality, if proved to have been knowingly committed, are still, when sailing in the ordinary and innocent course of their legitimate employment, which consists in the conveyance of mails and passengers, entitled to peculiar favor and protection from all governments in whose service

they are engaged. To detain, disturb, or interfere with them, without the very gravest cause, would be an act of a most noxious and injurious character, not only to a vast number and variety of individual and private interests, but to the public interests of neutral and friendly governments.

"In view, therefore, of the erroneous principles asserted by Mr. Seward, and the consequences they involve, Her Majesty's government think it necessary to declare that they would not acquiesce in the capture of any British merchant ship in circumstances similar to those of The Trent, and that the fact of its being brought before a prize court, though it would alter the character, would not diminish the gravity of the offence against the law of nations which would thereby be committed." Parliamentary Papers, 1862, North America, No. 5, p. 33.

A remarkable circumstance connected with a transaction calculated to occupy a place among the *causes célèbres* of international law, was the different view taken of it by the jurists and statesmen of the United States from that which was adopted with so much unanimity by those who direct the affairs of the European continent. When the seizure of the Southern commissioners was first announced, there was an entire accordance in the opinions voluntarily rendered by those eminent publicists whose names so frequently appear in these annotations, Everett and Cass, who had presided over the foreign affairs of the Union, and Ex-Attorney General Cushing, from whose labors we have so largely borrowed. They all sustained the course of Captain Wilkes, who, moreover, was congratulated by the Secretary of the Navy for the great public service which he had rendered in "the capture of the rebel emissaries;" and he was told that his forbearance "in omitting to capture the vessel must not be permitted to constitute a precedent hereafter for infractions of neutral obligations." Mr. Welles, Secretary of the Navy, to Capt. Wilkes, Nov. 30, 1861. This order, it is presumed, on a matter involving our international relations, could scarcely have been given without consulting the Attorney-General, the law officer of the government, as well as the minister specially charged with the Department of Foreign Affairs.

It is believed that for the opposite conclusion arrived at by American and Continental jurists, there is a ready solution in the former basing their arguments on the authority of adjudications, ever heretofore recognized as binding interpretations of the law of nations, both by the admiralty courts of the United States and of England; while the statesmen of France and of the other powers, who proffered their counsels, relied on those theoretical principles which, equally with them, we have desired to see incorporated into the code of international law, but which can only be obligatory, when sanctioned by conventions, which England has ever refused to enter into with us. And it may be here remarked that no American lawyer or statesman ever supposed that Mr. Mason and Mr. Slidell were or could have been ar-

rested because they were deemed rebels by the government at Washington, or that Captain Wilkes, whatever sanction the English practice of impressment might have afforded, attempted to enforce on board of a British vessel on the high seas, the municipal laws of the United States. However adroitly Mr. Seward may have employed M. Thouvenel's suggestion, the case of The Trent, as we have elsewhere explained, (Editor's note, [72, p. 217) has no connection with the English pretension of impressing seamen from on board of our merchantmen.

It is on former treaties between the United States and France, or on conventions binding only on the parties to them, that M. Thouvenel, who, alone of the ministers, who interposed on the recent occasion, professedly discusses the question of law, founds his reasoning. It is true that by the commercial treaty between France and the United States, of 1778, abrogated in the *quasi* war of 1798, and in that of 1800, which expired by its own limitations in 1808, there was a provision extending the same liberty to persons on board a free ship as to goods, "with this effect that although they be enemies to either party, they *are not to be taken out* of that free ship, unless they are soldiers and in actual service of the enemy." It may be here noted that this clause is not inserted in the 24th article of the convention of 1778, or in the 13th article of the treaty of 1800, which define contraband, but is deduced as a corollary from the principle that "free ships make free goods," which it was the object of the 23d article of the former treaty and of the 14th of the latter to establish. Statutes at Large, vol. viii. pp. 12, note, 26, 184, 194.

The same provision was contained in the 17th article of the commercial treaty of Utrecht, 1713, between France and Great Britain, (Dumont, Corps Dip. tom. viii. p. 348,) and in the 20th article of the commercial treaty of 1786 between the same powers. That treaty was limited in duration, and there is no similar provision in the treaty of commerce of January 23, 1860, or in any other treaty between those powers. Martens, Recueil de Traités, tom. iv. pp. 163, 180. Annual Register, 1860, p. 210.

Many treaties have been concluded both by France and the United States with other powers, containing a similar clause. That these conventions, which, of course, are only binding on the contracting parties, are not merely declaratory of the law of nations, but introduce changes in it, seems to be the view of France herself, as shown by her treaty of the 2d of January, 1858, with San Salvador. The 19th article, besides incorporating in terms the four articles of the "declaration of Paris," which are wholly silent on this subject, provides "that the freedom of the flag shall, also, secure that of the persons, and that individuals belonging to an enemy, who shall be on board a neutral vessel, shall not be made prisoners, unless they are military men, and at the time engaged in the service of the enemy." The clause is qualified by declaring that the *contracting*

parties will not apply these principles, except to those who shall equally acknowledge them. Martens, par Samwer, Nouveau Recueil, tom. xvi. part 2, p. 177.

So far as the United States and England are concerned, there is no subsisting treaty relating to the subject, and the only one which ever existed between them, at all bearing on it, was that of 1794. It contained no article as to persons, nor could it well have done so, without encountering the inadmissible British municipal pretension of the impressment of seamen from neutral merchantmen, but it extended contraband to include naval stores, and admitted the right of detention, on giving compensation, in the case of provisions. This article was limited to twelve years. Statutes at Large, vol. viii. pp. 125, 129. Hautefeuille, in an essay condemning the arrest, admits that "in the absence of all special treaties, England remains, as regards the United States, subject to general laws, and that the Americans may find, in the conduct of their mother-country, precedents analogous to the boarding of The Trent." Questions de Droit Maritime International, &c. It has been repeatedly stated, as well in our annotations as in the text, that, as the United States at one time formed a component part of the British empire, in the absence of any conventional stipulation to the contrary, the law of nations, as interpreted by their courts, at the time of the separation, was our law, and a case is cited by him in which, though our author says the American government had aimed, in its diplomatic negotiations, to limit the catalogue of contraband to munitions of war, the Supreme Court appeared disposed to adopt all the principles of Sir William Scott, as to provisions becoming contraband under certain circumstances. Part IV. ch. 3, § 26, p. 809.

"It needs hardly an argument to show," says the successor of Judge Story, in the chair of law of Harvard University, "that the questions arising in the case of The Trent are to be considered and determined as questions wholly between the United States and Great Britain, and upon the principles and usages which have been promulgated, sanctioned, acknowledged, and claimed as suitable and proper principles to determine the rights and to regulate the intercourse of those two nations; and not mainly by any principles which are of general authority and application throughout Christendom." Parker, International Law, Case of The Trent, p. 7. And we are reminded by the same writer, that the passages cited by Lord Russell from Vattel are not the only ones pertinent to the subject. After saying, in another place, that a sovereign who hinders another from sending or receiving ministers, does him an injury, Vattel adds (liv. iv. ch. 5, § 64): "But this is to be understood only in a time of peace; war introduces other rights. It allows us to cut off from an enemy all his resources, and to *hinder him from sending ministers to solicit assistance.*" Ib. p. 49. The same principle as is here given by Vattel is to be found in Grotius,

and, though not referred to in this discussion, is cited in the text of this work, Part IV. ch. 1, § 16, p. 557. Speaking of ambassadors as ordinarily free from reprisals, Grotius adds, "but not those sent to an enemy." De Jur. Bel. ac Pac. lib. iii. c. 2, § 7.

A French *annuaire*, to which we have frequently referred for contemporary facts, says, in reference to the attention which the question of public law here involved, occasioned in the cabinets of Europe, "If the examination had been confined to English precedents, there would have been no difficulty in finding acts analogous to that of The San Jacinto. It was easy to recall that, in the 18th and 19th centuries, Great Britain, arming herself with the abusive principle that the interest of the belligerent should be the measure of the rights of neutrals, had exercised a despotism over the seas, which had aroused against her all the maritime powers of the globe. On the other hand, the questions raised by the affair of The Trent did not enter in any manner into the declaration of the Congress of Paris. The matter of discussion was the right of visit, the transmission of enemy's despatches, the definition of contraband of war, *the privilege accorded or denied to belligerents to seize their enemies, or persons of their own nation, even under a neutral flag;* and if we only consulted the doctrines of the former English jurisprudence, those several points might occasion numerous controversies. Annuaire des deux mondes, 1861, p. 42. And it may in this connection be remarked that, while Europe seemed so unanimous in condemning the course of Captain Wilkes, the proposed international code of Spanish America, while recognizing the principles of the declaration of Paris, inserts a provision that, "Besides the articles qualified as such, are to be held as contraband of war the commissioners of every description sent by belligerents, and the despatches of which they are the bearers." La Crónica, 6 de Octubre, 1862.

The archives of his department might have supplied the French Minister of Foreign Affairs with a precedent, in which England was concerned, that went far beyond the act which he deemed a case for extraordinary intervention, — a precedent where there was no doubt as to the violation of neutral rights, or as to the diplomatic character of the party proposed to be arrested. In August, 1795, a British ship of war took her station within the jurisdiction of the State of Rhode Island, where the commander alleged to the American authorities that he been ordered to go, in order to take the despatches of M. Fauchet, who had been the accredited Minister of France to the United States, and was about returning home, and to watch the motions of the French frigate Medusa, then lying in the harbor of Newport, in which he was to embark. An American packet, on board which M. Fauchet had taken passage at New York for Newport, the whole voyage between which two places is within the jurisdiction of the United States, was, at the entrance of Newport harbor, and within two miles of the light-

house, arrested by men from the British ship of war, and the officer demanded M. Fauchet and his trunks, of which they knew the exact number. Happily, M. Fauchet had left the vessel that morning, at an intermediate place between New York and Newport. But his trunks were overhauled, as well as those of M. Pichon, the late French secretary of legation, who was on board. The papers of the latter were taken from his trunk to The Africa, as well as those of the minister which had been left on board, he having landed his despatches when he went ashore at Stonington. What added to the offence was, that the British consul at Newport was on board of the ship of war, and took part in the proceeding. M. Fauchet, in transmitting from Newport, August 4, 1795, the affidavits of the passengers to his successor, M. Adet, says: "I shall express to you but one affecting sentiment, which is, that in a free State, with a government in which England has just acquired a friend, there is no safety for myself or my papers; for in a word, as it was from a public packet-boat, in a neutral port, that I was to have been carried off, there is no reason why I should not be taken on the highway, or in an inn, if it could be done with impunity."

The Secretary of State communicated, August 10, 1795, the circumstances of the affair to the British Minister, Mr. Hammond, who replied the next day, that he had "no information whatsoever respecting the subject," and being about to leave the country, he consigned the matter to Mr. Bond, who remained as Chargé d'Affaires. No satisfactory explanation having been received in reference to the conduct of the commander of The Africa, or of that of the consul, on the contrary, the former having committed further aggressions against the United States, and having grossly insulted the Governor of the State, Mr. Pickering informed Mr. Bond, September 5, 1795, that "Captain Howe will be required to remove from a station within the jurisdiction of the United States, where he continues to violate their rights. He will be required to liberate three seamen whom, within that jurisdiction, he has unlawfully seized, and after forty-eight hours from the time the requisition of the President shall be communicated to him, all intercourse between the ship under his command and the United States will be forbidden. I am further to inform you that Mr. Moore, His Britannic Majesty's Vice-Consul for Rhode Island, having coöperated with Captain Howe in the injuries heretofore referred to against the government of the United States and the chief magistrate of one of them, the President has thought fit to revoke the exequatur heretofore granted to him, who is no longer to exercise the functions or power of a vice-consul within the United States. These proceedings of Captain Howe and Mr. Moore are considered by the President as the unauthorized acts of individual officers, and they will not interrupt the harmony and good understanding which it is the disposition of the government to cultivate and maintain between the two nations." The determination of the President was the

same day communicated to Mr. Adet; and he was further told that a full statement of the conduct of Captain Howe would be transmitted to the Minister of the United States at London, to be laid before the British government for the purpose of obtaining reparation.

In the instructions which were accordingly given under the date of the 12th of September, 1795, after stating the grounds of complaint and saying that while we were waiting for explanations from Captain Howe, fresh injuries were received, seamen were forcibly taken by him, on the supposed ground of their having been originally British subjects, from an American vessel, within the jurisdiction of the United States, the minister is ordered "to press for such reparation for the violations of the sovereignty and dignity of the United States, as the nature of the case authorizes the President to demand. What this should be, it is unnecessary to suggest. The President relies that His Britannic Majesty will duly estimate the injuries and insults proved to have been committed by Captain Howe against the United States, and to inflict upon him such exemplary punishment as his aggravated offences deserve, — as the violated rights of a sovereign State require, — and as it will become the justice and honor of His Majesty's government to impose."

A further instruction of the 14th of September says: "The last aggression was on the first instant, when the French frigate Medusa sailed from Newport, and in an hour and a half or two hours The Africa got under way and pursued her. She having escaped, The Africa resumed her old station. The Medusa had on board Mr. Fauchet and suite, and the President's declaration, that no armed vessel of any belligerent should leave a port of the United States within twenty-four hours after the sailing of another with whose nation the first was at war, had long been published and communicated to the ministers of all the belligerent powers. No answer appears to have been received to the communication made November 5, 1795, in pursuance of the preceding instructions by Mr. Deas, who was temporarily charged with our affairs at London. Mr., afterwards President, J. Q. Adams, then Minister at Berlin, who had been sent to London, during the vacancy of the mission, had, December 5, 1795, an interview with Lord Grenville, at which Sir William Scott was present. Lord Grenville said that an order had been issued by the Lords of the Admiralty for the purpose of hearing what Captain Howe had to say in his justification, and that he supposed that he would maintain that the transaction took place at such a distance from the American coast as put it altogether out of the territorial jurisdiction of the United States. That that could not be the case, Mr. Adams undertook to explain from his personal knowledge of the place where the event occurred; but it seems to have been assumed by both ministers that the violation of neutral waters was the only point involved.

Among the causes of complaint by France against the United States, stated in a summary under date of March 9, 1796, is "the impunity of the outrage committed on the republic in the person of its minister, the citizen Fauchet, by the English ship of war Africa, in concert with the vice-consul of that nation." Mr. Monroe, in his note of March 15th to M. De la Croix, states the measures adopted by the United States, and expresses the confidence "that such satisfaction as the nature of the insult required has doubtless either been given or is still expected." This subject is noticed, and for the last time, so far as the printed despatches go, in Mr. Pickering's instructions of January 16, 1797. Our minister in England was reminded of the affair, that the demand of satisfaction might be renewed, it being understood that The Africa was returned to England. Cong. Doc. 37th Cong. 3d Sess. Senate Ex. Doc. No. 4. The relations between the United States and France, which shortly after led to hostilities, probably prevented the matter being further pursued.

In accepting the friendly interposition of France, Earl Russell, so far from recognizing the doctrine of M. Thouvenel's argument, avoids responding to the application which is implied in the note of the French Minister to the impressment question, as referred to by Mr. Seward.

No internal regulation of Great Britain, to which we were not a party since our separation from her, could, of course, affect our international laws, much less could the present question be decided by a declaration of a principle of maritime law made after the happening of the event. Not to recur to the surprise with which the definition of contraband in Lord Russell's despatch was received by Continental publicists, as well as our own, it appears from the answer of the Foreign Office also given in the note, that, so late as May, 1859, in the opinion of the British government, even coal might become contraband; while in any case where such a question might arise, the authority of the prize court of the captor is fully recognized. We have also seen how unsettled were the views of the highest judicial authorities of England, in reference to what constituted contraband, as expressed in the House of Lords, after the commencement of hostilities in America. It would seem that the utmost that England could ask of a State situated with reference to her as the United States by their common origin are, was to recognize the adjudications of their own tribunals, as they were when we constituted one nation; and most especially should we be deemed to have acted with extreme courtesy towards our ancient metropolis, when we receive as authority every decision of her courts, and every parliamentary or diplomatic declaration, of which it was possible for us to have been apprised, down to the happening of the contingency in question. It was of course impossible to conjecture what change of policy she might thereafter adopt.

On the receipt in the United States of the intelligence of the arrest of Mr. Mason and Mr. Slidell, connected as it was with reports as to the

place where it was made and the antecedent circumstances attendant on watching the British steamer in the ports of Cuba, the only doubt which existed as to its regularity was, whether the neutrality of territorial waters had not been violated. The following note, addressed by the writer of these remarks to the Representative in Congress from his district, on the first intelligence of the occurrence, and published by the latter, accords substantially with the views, more elaborately expressed by the distinguished statesmen heretofore alluded to, and with, it is believed, the general sentiment of American jurists:—

"When I saw you, I supposed that Messrs. Slidell and Mason had been taken from the British steamer in neutral waters. In such case their seizure would have been as objectionable as if made on the land, and a gross violation of neutral rights. There is only one view which, supposing that the seizure was made beyond the marine league, would seem to justify a complaint from England, or from Spain, as the case may be. I know not how the facts are. Not only must a search not be made in neutral waters, but a belligerent has no right, even as against another belligerent, to make the neutral waters, by watching the enemy therein, subservient to the purposes of war.

"Even at sea, no nation, whether in peace or war, has a right to execute its municipal laws on board of the ships of another country, and, consequently, no arrest could there be made of the Confederate Commissioners for high treason. An attempt by England to search our ships, in order to impress her seamen, was the principal cause of the war of 1812. But though, as we contend, there can be no visitation or search in peace, during a war the right exists, limited, where the flag covers the goods, to cases of contraband, including the carrying of despatches and the transportation of troops, and other acts aiding the enemy. The carrying of enemy's despatches, except perhaps incidentally, as in postal steamers, or from ministers actually accredited in a neutral country, is even a ground for confiscating the vessel itself. Though the United States have not in all respects avowedly conceded belligerent rights to the Confederate States, yet the blockade, so far at least as regards foreigners, can be maintained only by the fact of the existence of a civil war. The British and French proclamations of neutrality fully recognize such war. Our cruisers, therefore, possess, *on the high seas*, the legitimate right to search neutral merchant vessels for contraband, &c., and even to capture them for a violation of neutrality, and as between us and England, to search them for enemy's property. Nor does the character assumed by Messrs. Slidell and Mason affect the case. Even were the Confederate States recognized by the powers to whom these ministers were sent, the United States would have a perfect right to obstruct their passage. In the opinion of Lord Stowell, though the point was not necessary to the decision of the case before him, there is no differ-

ence in *principle* in carrying officers of the enemy, whether they be in the civil or military service. Moreover, if to carry a veteran general would subject a neutral to confiscation, the injury, which might accrue to the cause of the United States, by the arrival in Europe of these commissioners, would authorize in their case the most extreme measures consistent with the rules of international law. But, as their seizure was made, *jure belli*, and under circumstances that would not have justified an arrest for a municipal offence cognizable in our courts, it follows that they cannot with propriety be arraigned for high treason, or any other crime, depending on allegiance to the United States; but that they are entitled to the privileges of prisoners of war." Mr. Lawrence to Hon. W. P. Sheffield, Nov. 18, 1861.

General Cass wrote: "The boarding of The Trent by Captain Wilkes to ascertain her true character and what she had on board in violation of the law of nations was undeniably a lawful act. The authorities from the most approved writers on the law of nations, and which have been published in the journals of the day, maintain the legality of the capture of the rebel ambassadors and their despatches, and the example of England in various cases involving the same principle, and which have been similarly quoted, proves her acquiescence in the doctrine and her practical adherence to it." National Intelligencer, December 3, 1861.

"The belligerent seizures of enemy despatches and military persons," said Mr. Cushing, "although not precisely in point as cases, are yet the common corollaries of the same principle as the arrest of enemy ambassadors. To argue the contrary would be to make the law of nations a mere collection of detached facts, instead of a system of doctrines and principles. The transportation of insurgent ambassadors not only comprehends within it the contraband act of transporting despatches, but comprehends also the entire question of indirect military aid to the insurgents in all its possible relations, together with the entire question of political aid. The insurgent ambassador is a personage far more consequential than a body of soldiers: he goes abroad to negotiate, not loans only, or purchase of arms, but alliances, which are soldiers, arms, and money altogether, and in which, if successful, he effects more than is effected by a hundred of those petty skirmishes and trivial combats, which are the salient features of all civil wars. Hence it was that, in the war of our Revolution, the American Minister, Mr. Laurens, was exchanged against a British commander-in-chief." Mr. Cushing to the Mayor of New York, Dec. 6, 1861.

In the case of the Maréchal Belle-Isle, also, the same rule was applied as to military persons in the actual service of the enemy. As we have before stated, though in no military capacity, but arrested on his way as ambassador from France to Berlin, he was ransomed according to the usage then prevailing, and under a subsisting cartel, as a prisoner of war.

As to articles of contraband, the rule does not confine their destination exclusively to the enemy's port, but includes all cases where they are attempted to be conveyed indirectly for the enemy's use. That is the principle of the law of nations, which does not rest on technicalities. The case of The Commercen, cited in Mr. Wheaton's text, is authority in point, that, where the object was to aid the enemy in his military operations, "the destination to a neutral port could not vary the application of the rule. It was only doing that indirectly, which was directly prohibited." And in a case, during the Mexican war, of illegal trade with the enemy, it was decided by the Supreme Court of the United States, on the authority of Sir William Scott, in Robertson's Admiralty Reports, vol. iv. p. 82, The Jonge Pieter, that the interposition of a neutral port would not render the transaction legal. Howard's Reports, vol. xviii. p. 114, Jackson *v.* Montgomery. It is obvious that if the right to stop an enemy's ambassador be conceded at all, it could only have application to a voyage to a neutral country, to the place where the hostile operations against the belligerent were to be enacted. Mr. Cushing says, *loc. cit.* "Nor is it important here that The Trent was proceeding from one neutral port to another. The responsibility of transporting persons contraband of war cannot be evaded by subdividing a voyage, and interposing intermediate neutral *termini*."

As respects the omission of Captain Wilkes to send the vessel in for adjudication, it in no wise affects the principle involved. Without adverting to the explanations, on that point, furnished by him, and to which Mr. Seward refers, it may be asserted that even where the exception from the immunity of the flag is fully admitted, as in the case of military persons in the actual service of the enemy, it would not be necessary in arresting them to send the neutral ship to a foreign port, if the captor was willing to waive the claim for the confiscation of the vessel. In fact, the treaties which speak of the subject, and which we have already cited, expressly refer to the *taking out of the ship* the persons not within the immunity of the flag, and where such treaties exist, Hautefeuille says, it is not even admissible to send in a neutral vessel having them on board, but it is the duty of the belligerent to take them on board of his own vessel. Even with reference to contraband articles, if the neutral will abandon them, and the cruiser will take them on board of his ship, the former may pursue his voyage. They do not by this means become prize of war, but being a subject of prize jurisdiction a regular condemnation by the appropriate admiralty tribunal is required, as in the case where the ship is sent into port. This provision is made, says Hautefeuille, by several treaties, among which were those of 1778 and 1800 between France and the United States, and is deemed to be for the benefit of the neutral. Droits des Nations Neutres, &c., tom. iii. p. 226, 2d edit. Now, no process can be taken out in admiralty against persons liable to seizure by belligerents in

neutral vessels. If liable to seizure at all, whether ambassadors or generals, they are prisoners of war, entitled to the same consideration as if they had been taken on the field of battle. If any error has been committed, for which the laws of the country into which they are carried, will not, through a proceeding like our writ of *habeas corpus*, or from their being unable as alien enemies to sue, afford the remedy, their case must be left to diplomatic reclamations. But if no mistake has been made as to the liability of the commissioners to seizure, it is assuredly no ground of complaint that the American commander remitted the claim to which he might have been entitled from the confiscation of The Trent, in consequence of the employment in which she was engaged.

As to the neutral owners, it was clearly a benefit, even if they had not subjected themselves to the condemnation of the vessel and cargo, to allow the voyage to continue. Nor would it have been for the advantage of the Confederate Commissioners that their property on board should have been condemned as prize of war, to which it was liable, there being no treaty between us and England giving immunity to enemy's property in neutral ships, and the settlement by correspondence of that question stated to have been made between the two governments, being, as we have repeatedly observed, of no possible validity, without the assent of the Senate or the action of Congress. Nor is it probable that had the capture been made by Captain Wilkes and the vessel sent into port, the admiralty courts would have paid more respect to the agreement by correspondence, to which Mr. Seward alludes, than to the modification which he assumed to make in regard to the law of blockade, by permitting vessels in port to depart with cargoes laden after the notification, and which were nevertheless condemned.

That no especial immunity to exemption from search attached to the peculiar employment in which The Trent was engaged is conceded by Hautefeuille, who on this occasion was one of the most decided opponents of the conclusion to which we have arrived. In an essay expressly devoted to this subject, he says: "We must at the same time dismiss altogether the proposition put forward by some English writers, that packet-boats belong to the class of ships of war, and are consequently exempted from the right of search. This pretension cannot be admitted. Mail packets trade, convey goods, and it may be affirmed that almost all which during the last eight or ten months have left the ports of Great Britain, bound for the Northern States, have been laden with arms and ammunition, and contraband of war of every kind, and especially with saltpetre. They have largely profited by the fact that the Southern Confederate States possess no marine, and could not repress acts so contrary to international law." Question Maritime International.

In this connection, it may be remarked that this is not the first occasion

in which the United States have had to complain of the employment of British mail steamers to the prejudice of American belligerents. The case referred to in the following correspondence was far less strong in one respect than that which we have been considering, inasmuch as the person in question was wholly without any actual official character; while on the other hand, there was connected with the breach of neutrality an abuse of indulgences granted by the American government in allowing the continuance of the postal intercourse with an enemy's port in their military occupation.

On the 8th of October, 1847, Mr. Bancroft wrote to Lord Palmerston: "In consequence of instructions from the American government, I called at the Foreign Office a few days ago to represent to your lordship the conduct of Captain May, of the British mail steamer Tevoit, who, unmindful of his duty as a neutral, and using improperly the extraordinary privilege which the American government has granted to British mail steamers ever since the commencement of the present war with Mexico, in the month of August last, brought from the Havana to Vera Cruz, General Paredas, late President of Mexico, the author of the war of Mexico against the United States, and their avowed and embittered enemy. By the principles of British law, according to the opinion of Sir William Scott, (6 Robinson's Reports, 430,) Captain May has rendered The Tevoit liable to confiscation, or the President of the United States might effectually prevent similar aid to the enemy by withdrawing from these steamers the privilege of entering the port of Vera Cruz. But I am confident Her Majesty's government will render such steps unnecessary by adopting efficient measures to prevent for the future such violations of their neutrality. If Captain May, or any of his officers implicated in this serious charge, are officers in the British service, I feel bound to ask for their dismissal, or punishment in such other way as may clearly manifest that the British government has disapproved their conduct."

To this demand the following reply was returned by Lord Palmerston: "In answer to your letter of the 8th inst., complaining of the conduct of Captain May of the British mail steamer Tevoit, in having conveyed General Paredas from the Havana to Vera Cruz, in the month of August last, I have the honor to state to you that the Lords Commissioners of the Admiralty having investigated the circumstances of this affair, Her Majesty's government have informed the directors of the Royal Mail Steam Packet Company, to whom the steamer Tevoit belongs, that the directors are bound to testify, in a marked manner, their disapproval of Captain May's conduct, in having thus abused the indulgence afforded to the company's vessels by the government of the United States; and the directors of the company have accordingly stated to Her Majesty's government that they will immediately suspend Captain May from his command; and that they

publicly and distinctly condemn any act on the part of their officers which may be regarded as a breach of faith towards the government of the United States, or as an infringement or invasion of the regulations established by the United States officers in those parts of Mexico which are occupied by the forces of the United States."

No. 4.

CONSTITUTION OF PRIZE COURTS. AMERICAN PRIZE CASES.

THE constitution of Prize Courts is an anomaly in jurisprudence. Deriving their authority from one nation, they pass irrevocably on the title to the property belonging to the citizens or subjects of another. Tribunals exclusively of the belligerents, they pronounce on the rights of neutrals, who have no other appeal from the admiralty courts in the last resort than to the justice of the sovereign of the captor, through the diplomatic interposition of their own government.

In England the common law courts, whatever protection they may have given to the rights of property as well as of person, have from an early day recognized the conclusiveness of foreign prize decisions on the question of title. A case in the King's Bench, which occurred in 1683, (34 Car. ii.) while declaring the absence in such cases of jurisdiction in the court, points out the only remedy for the party aggrieved. Trover having been brought by the original owner, an English denizen, for a Dutch built ship taken in the war between the Dutch and French, as a Dutch prize, and condemned in the French admiralty court, the chief question was, whether the sentence should be examined by the common law courts. "It was resolved that it shall not, because, though it be in another king's dominions, we ought to give credit to it, or else they will not give credit to the sentences of our courts of admiralty. And the defendants are at no prejudice. The way is, if they find themselves aggrieved, to petition the king, who will examine the case, and, if he finds cause of complaint, will send to his ambassador residing with the prince or State where the sentence was given, and upon failure of redress, will grant letters of marque and reprisal." Sir Thomas Raymond's Reports, p. 473, Hughes *v.* Cornelius.

Tetens, a Danish publicist of the early part of the present century, says that "in their origin, courts of admiralty were a species of military courts,

but that when we consider the number and importance of their trials, their complicated character in a great many cases, where the circumstances obscure the facts and the law, it will be found that tribunals of justice, fully organized and subjected to forms, like those of the courts which judge civil causes, are required." These tribunals, he says, are established by governments at war, and from which neutrals are excluded, such, he contends, in considering the question as to mixed tribunals, is the proper course. As a question of right, a government is certainly not obliged to yield to another a portion of its sovereign power — that of judging its own subjects, who are in its own territory, which is the position of the captors. Considérations sur les Droits Réciproques des Belligérans, &c., p. 159. This principle was, however, earnestly contested by another Danish publicist, Hubner, (De la Saisie des Batimens Neutres, tom. ii. part. 1, ch. 1). He contended for the incompetency, according to the primitive law of nations, of the courts of the capturing State, since neither the persons nor the property of the neutral, carried by force into the belligerent ports, can thereby become subject to the jurisdiction of the local tribunals. He proposed to remedy the defects of the ordinary prize jurisdiction by the establishment of a mixed commission consisting of judges jointly appointed by the capturing State and by the neutral power, whose subjects are parties to the controversy. Wheaton, History of the Law of Nations, p. 226. On this point Klüber (Droit des Gens, § 296,) remarks, that this question is debatable even under the natural law of nations, and he refers, for different views of the case, to Galiani, liv. i. ch. 9, § 8, Lampredi, tom. i. § 14, and to Nau, Völkerseerecht, § 216. According to the latter authority, formerly, treaties often gave the jurisdiction to the admiralty tribunals of the neutral States. But, (as De Steck, Essais, &c., p. 82, says,) the modern usage, on the contrary, most generally acknowledges the jurisdiction of the belligerent State, either because it is in some measure founded on the seizure, (*forum arresti*,) or founding it on the principle that the proprietor of the prize, in his character of claimant, ought to prosecute the defendant before his own tribunals. But neither of these motives is applicable, when the prize has been conducted into the port of a third party; then, Martens says, (Essai concernant les Armateurs, ch. 2, §§ 36, 37,) the jurisdiction of the belligerent State is often contested, even by a third party.

To return to Tetens. The neutral government or magistrate becomes in his turn a competent judge in a prize case, when a captor has entered with his prize into a port of the neutral territory of which the party, claiming against the seizure of the vessel or of the merchandise, is the subject. This proposition, it may be recollected, is not admitted by our author in its full extent. He says that such a regulation was contained in the maritime ordinance of Louis XIV. of 1681, and that such a condition may be expressly annexed by the neutral State to the privilege of bringing bel-

ligerent prizes into its ports, but is not implied in a mere general permission to enter them. 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. Part IV. ch. 2, § 14, p. 671.

Tetens confines to a claimant, who is a subject of the country, the right of recovering the goods illegally seized from him, and which are in the territory of his sovereign, but he claims it for him in all cases in which there are no express conventions to the contrary. He says that a belligerent power cannot, unless there are special conventions to that effect, establish councils or tribunals of prizes in neutral countries, and if a neutral accords such privilege it should be granted equally to all the belligerent parties. This mode of judging prizes, at all events, is not calculated to make the sentences respected as legal, except as regards the subjects of the government which shall have authorized them. For its legality it is requisite that such a procedure shall be generally recognized and approved by the other belligerent. If it is not, it follows that the opposite belligerent is not obliged to acknowledge the captor as the rightful possessor of the prize adjudged to him; so that if this prize passes by sale into the hands of a neutral, the new possessor will not be acknowledged or recognized as the legitimate owner.

It is, Tetens says, an essential point in the formation of councils of prizes that there should be an appeal from a first tribunal to a superior one, and furthermore a recourse to the government itself. He maintains that such causes should not be left to be decided in the last resort by a single chamber, as in regard to the current affairs of police. In general, recourse to the government should be left free to claimants. The justice or injustice of the sentences of these tribunals may depend on the sense of treaties and conventions, as, for example, what ought to be reputed contraband. Recourse must then be had to the authentic interpretation, which can only, according to him, be within the province of the government. Considérations, &c., *loc. cit.*

The treaty of 1786 between France and England recognizes the right of the belligerent to adjudge in prize cases, by stipulating for "such orders as shall be necessary and effectual that the judgments and decrees, covering prizes in courts of admiralty, be given conformably to the rules of justice and equity, and to the stipulations of this treaty, by judges who are above all suspicion and who have no manner of interest in the cause of dispute." Phillimore, International Law, vol. iii. p. 547. Wildman gives numerous references to treaties, with similar provisions, most of which are of the 17th century. Wildman, International Law, vol. ii. p. 354. Most of the treaties of the United States with the States south of them provide that "in all cases the established courts for prize causes in the country to

which the prizes may be conducted shall alone take cognizance of them." Statutes at Large, vol. viii. p. 316, &c.

In France, at first the judgment of prizes was vested in the officers of the Admiralty or in the High Admiral personally. In 1659 a commission to assist the Admiral, the Duke de Vendôme, was formed, with an appeal to the Council of State. This was the true origin of the Council of Prizes. In 1672, the rights of the High Admiral were secured to the Count Vermandois, but his minority not allowing him to preside over the Council of Prizes, the judgments ceased to be entitled with the name of the Admiral, and his successor, the Count de Toulouse, being also a minor, it was not till 1695, when he attained his majority, that it was ordered that the officers of the admiralty tribunals in the ports of the kingdom should exclusively make the preliminary examinations concerning prizes, and stranded vessels, until the definitive judgment, and that they should be judged in the first instance by the Count de Toulouse, and the commissioners named and chosen by His Majesty as his Council, and by appeal to the Royal Council of Finances, on the report of the Secretary of State for the Department of the Marine. From that time the judgments were always rendered in the name of the Admiral, and he was present also at the Royal Council of Finances.

From the first establishment of the Council of Prizes, the cognizance of prize matters was confided to this council, to the exclusion of all other judges, and the appeal from their judgments had been expressly reserved, first to the Council of State, and then to the Royal Council of Finances, and this course is affirmed in the *réglement* of July 19, 1778, but it did not prevent various attempts of the Parliaments to assume jurisdiction by appeal or otherwise, though they were always defeated by the decrees of the Council of State. The last Council of Prizes, before 1789, was created July 19, 1778, to judge the prizes made from the English during the American war.

By a decree of July 14, 1793, the convention gave to the tribunals of commerce the right of pronouncing on maritime prizes, and ordered that the preliminary examinations formerly within the competency of the Admiralty should be made by justices of peace. On the 18 Brumaire, year 2, the National Convention decided that all disputes respecting the validity or invalidity of prizes should be decided, administratively, (*voie d'administration*,) by the Provisional Executive Council. This authority was suppressed, 12 Germinal, year 2, and the committee of public safety became substituted, 4 Floréal, year 2, to the Executive Council. Its judgments, rendered administratively (*par voie d'administration*) without any fixed forms of procedure, except the report of the Committee of Marine, afforded little guaranty of their correctness. The National Convention, before its final adjournment, passed, 3 Brumaire, year 4, a special law for the

administration of prizes, giving the preliminary examinations to the justices of the peace, and the decision as to their validity to the tribunals of commerce. After it had been warmly debated whether the question of prizes should be decided *par voie d'administration*, or be regarded as a matter for the jurisdiction of the tribunals, the Council of Five Hundred passed, 29 Germinal, year 4, a resolution, which was adopted by the Council of Ancients, 8 Floréal, which carried appeals from the tribunals of commerce, in matters of prize, to the tribunals of the departments.

The matters in which neutrals had any interest were to be communicated to the *commissaire* of the Executive Directory, and if he thought it necessary, he should refer the subject to the Minister of Justice, who after consulting the Executive Directory should answer the *commissaire*, and the *commissaire* should be bound to give his conclusions in writing. The consuls and vice-consuls in the foreign ports, where prizes should be brought, were to pronounce judgment as the tribunals of commerce, and appeals from them were to be taken to certain of the departmental tribunals. This system worked so badly that, in the year 8, Cambacérès, the Minister of Justice, being consulted by the consuls, felt justified to say: "That privateering had become a system of robbery, (*brigandage*,) because the laws applicable to it were insufficient or bad; and that complaints of merchants and foreign ministers were raised on all sides, but that the government, though penetrated with the justice of those complaints, had always been without the power of causing what was right to be done."

The decree of the consuls, of 26 Ventose, year 8, established a Council of Prizes at Paris, to take cognizance of all disputes as to the validity or invalidity of the prizes, and as to the condition (*qualité*) of the ships stranded or wrecked. It was to consist, besides the *commissaire* of the government and the secretary, of a president and eight members named by the First Consul, and its decisions required the assent of five members. In each port there was a magistrate charged with the preliminary examinations of the cases, and commissions called to judge them in particular cases. If the prizes were carried into the colonies, there was a jurisdiction there analogous to the commissions in the ports, whose decisions, as well as those of the consular commissions in neutral ports, were subject to appeal to the Council of Prizes. The article as to consular jurisdiction in neutral States was carefully drawn, and the *commissaires des relations commerciales*, (the title given to such agents abroad during the consular government,) were to conform themselves entirely to the treaties concluded between France and the powers where they were established.

When the Council of Prizes was revived it was the sovereign judge of the validity or invalidity of prizes, and the supreme arbiter as to the fate of the vessels shipwrecked or stranded. After the establishment of the continental blockade, questions of customs (*de douane*) became connected

with most of the cases of prize, and the functions of the Council of Prizes were greatly increased, but, on the other hand, when, in 1806, the contentious jurisdiction (*juridiction contentieuse*) was organized in the Council of State, the decree of the 11th of June, 1806, attributed to the Council of State, the cognizance, by appeal, of the prize decisions. The appeals were examined by the *commission du contentieux* and decided on in the general assembly of the Council of State. However, from 1810 the appeals from the decisions of the Council of Prizes ceased in fact to be examined by the Council of State, the Emperor having reserved to himself, personally, the cognizance of affairs of this kind, and in virtue of a notice given by the grand judge, the papers were withdrawn from the archives of the Council of State.

At the general peace, the duration of the Council of Prizes was limited to the 1st of November, 1814, and by an ordinance of the 9th of January, 1815, the *comité du contentieux* of the Council of State was substituted to the Council of Prizes, to examine the pending cases and prepare the decision to be definitely adopted by the Council of State in general assembly. And in the ordinance authorizing reorganization of the Council of State under the government of the Restoration, it was declared that the *comité du contentieux* shall exercise the functions previously assigned to the Council of Prizes. The government of the Empire judged cases of prizes on simple written memoirs. Louis Philippe, by an ordinance of the 2d February, 1831, had established the publicity of the debates before the Council of State, but by a subsequent ordinance of September 9, 1831, the Council of State was directed to continue to decide upon the validity of maritime prizes, conformably to the regulations anterior to the ordinance of the 2d of February, and this was the rule during the continuance of the monarchy of 1830.

By the imperial decree of the 18th July, 1854, which refers to the declaration of the 27th of March, made to the Senate and Corps Legislatif, relative to the state of war existing with Russia, the declaration of March 24th, as to neutrals, letters of marque, &c., and the convention concluded the 10th of May with Great Britain, relative to the judgment of prizes in case of joint captures, a Council of Prizes, composed of a counsellor of State as President, six members, and a *commissaire* of the government, to give his conclusions on every case, was established at Paris to decide on the validity of all maritime prizes made in the course of the then war, the decision of which belonged to French authority. It was to decide likewise as to the disputes respecting wrecked or stranded vessels, whether of neutrals or enemies, and upon maritime prizes brought into the ports of the colonies.

This decree did not refer to the law of the 26 Ventose, year 8, in virtue of which the last Council of Prizes was established, but the reëstablishment of the Council of Prizes is derived from the principle of the article of the

Constitution which confers on the Emperor the right of declaring war and of making treaties of peace, alliance, and commerce.

By the terms of this decree the maritime prizes within the cognizance of French authority were submitted to the Council of Prizes to be decided on in the first instance, without any distinction between those which were brought into the ports of France and those that were carried into the colonies or into neutral ports. The inferior jurisdictions in the ports, as constituted by the decree of the 6 Germinal, year 8, being formally abrogated, it is a necessary consequence that it was intended also to proscribe the colonial and consular commissions. Captures made by pirates are likewise within the exclusive functions of the Council of Prizes, and the case of wrecks is also within their cognizance to decide whether they are enemy or neutral. As in the case of the former Council of Prizes, the sittings of the Council were to be private, but the examination was to be made on the simple memoirs furnished by the parties. This is understood to be founded on the idea that political considerations cannot be made the object of a public discussion, and with a view to international relations, it is provided that the decisions of the Council should not be executory till eight days after they were communicated to the ministers of foreign affairs and of marine and the colonies.

It is also provided that from decisions of the Council of Prizes appeals may be taken to the Council of State, either by the *commissaire* of the government or by the parties interested.

The commentators to whom we are in a great measure indebted for the preceding notice of the French prize courts, remark as to the last Imperial Council of Prizes, what sufficiently distinguishes it from an independent court, that "it is not an ordinary tribunal. The law of war and peace being a prerogative essentially reserved to the executive power, the law of prize, which flows directly from it, ought to be under the guidance of the same power or of a council fully initiated in the views of the government. In fact, as Cambacérès said in his report to the consuls, "The guardianship of the treaties being confided to the government, it is easily conceived that a false interpretation of a treaty may have the disastrous effect of making us lose an ally to give him to our enemies." De Pistoye et Duverdy, Traités des Prises, tom. ii. pp. 140–345.

In England, prize is altogether a creature of the crown. No man has or can have any interest in a prize but what he takes as the mere gift of the crown, and, in the case of a portion of the Swedish convoy, it was decided, in 1804, that the power of the crown to direct the release of property seized as prize, before adjudication, and against the will of the captors, was not taken away by any grant of prize conferred in the Order of Council, the proclamation, or the Prize Act. Robinson's Admiralty Reports, vol. v. p. 173, The Elsebe.

In England, the only maritime courts were the Court of Admiralty and the Court of Appeal, though, in the possessions beyond the seas, there were also established courts with jurisdiction over maritime causes, (including those relating to prize) under the denomination of Courts of Vice-Admiralty. The Court of Admiralty is held before the Judge of Admiralty. who sat properly as the deputy of the Lord High Admiral, while an officer of that description was in use, and by 20 and 21 Vict. c. 77, § 10, provision is made for this office being united with that of Judge of Probate, and held by the same person. The Judge of the Admiralty has a special commission from the Crown to adjudicate on prize of war, and power to decide on questions of booty of war (prize on shore). From the sentence of the Admiralty Judge, the appeal used to lie to the Court of Delegates, and, from the Vice-Admiralty Court, either to the Court of Admiralty in England or to the sovereign in council. But, in case of prize vessels taken in time of war, in any part of the world, and condemned in any Courts of Admiralty or Vice-Admiralty as lawful prize, the appeal lay to certain commissioners, consisting chiefly of the Privy Council, and called Lords of Appeal. By the 2d and 3d Will. IV. c. 92, the appellate jurisdiction of the delegates was transferred to the sovereign in council. And by 3 and 4 Will. IV., all appeals in prize suits, and all other proceedings in the Courts of Admiralty or Vice-Admiralty, or in any other court abroad, which might then be made to the High Court of Admiralty of England, or to the Lords Commissioners in Prize Causes, were directed in future, also, to be made to the sovereign in council, and not to the High Court of Admiralty in England, or such Commissioners as aforesaid. And by the latter statute, and by the 6 and 7 Vict. c. 38, and 7 and 8 Vict. c. 69, the Privy Council may refer all such appeals to the Judicial Committee. This Judicial Committee was established by 3 and 4 Will. IV. c. 41, amended and extended by 6 and 7 Vict. c. 38, 7 and 8 Vict. c. 69, 8 and 9 Vict. c. 30, and 14 and 15 Vict. c. 83. By this committee, practically, all the judicial authority of the Privy Council is now exercised. They hear the allegations and proofs, and make their report to Her Majesty in council, by whom the judgment is finally rendered. This Judicial Committee consists, by statute, of the Lord President, the Lord Chancellor, and such of the members of the Council as shall, from time to time, hold certain judicial offices enumerated in the act; and all persons, members of the Council, who shall have been President thereof, or Chancellor of Great Britain, or shall have held any of the so enumerated offices, and any two other persons, being members of the Council, may be appointed to be members of the Committee. But no matter can be heard, or report made, unless in the presence of at least three members of the Committee, exclusive of the Lord President for the time being. Stephen's Blackstone's Commentaries, vol. iii. p. 429, vol. ii. p. 470.

During the war of the Revolution, Congress, by a resolution of the 25th of November, 1775, recommended to the several legislatures in the United Colonies, to erect courts of justice, or to give jurisdiction to the courts then being, for the purpose of determining concerning the capture of British property, and to provide that all trials in such case be held by a jury, under such qualifications as to the respective legislatures should seem expedient, and that an appeal should be allowed to Congress, or to such persons as they should appoint, for the trial of appeals. On the 30th of January, 1777, Congress resolved that a Standing Committee, to consist of five members, be appointed, to hear and determine upon such appeals. By the articles of Confederation, of the 9th of July, 1778, and ratified by all the States on the 1st of March, 1781, the United States were vested with the sole and exclusive power of establishing courts for hearing and determining fully appeals in all cases of captures. Such a court was established by the style of the Court of Appeals in cases of capture, and, on the 24th of May, 1780, the cognizance of appeals then pending before Congress or the Commissioners of Appeals, consisting of members of Congress, was referred to the Court of Appeals thus established. The records and proceedings of this court are deposited in the office of the clerk of the Supreme Court of the United States. Wheaton on Captures, p. 272. The legislative power over captures and the judiciary in the last resort are clearly vested in Congress by the Confederation. But the judiciary power in the first instance, not being delegated, is as clearly reserved to the Admiralty Court of the particular States within which captures are made. Captures made on the high seas must fall within the jurisdiction of the State into which it shall please the captor to carry them. The Madison Papers, vol. i. p. 91. Mr. Madison to Mr. Edward Randolph, May 1, 1781. It has been decided that the District Courts, hereafter to be mentioned, had jurisdiction to carry into execution a decree of the late Congressional Court of Appeals in prize cases. Dallas's Reports, vol. iii. p. 86, Penhallow *v.* Doane's Adm.

By the present Constitution of the United States, the judicial power which is vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, establish, extends, in terms, to "all cases of maritime and admiralty jurisdiction." Art. iii. sec. 1, §§ 1, 2.

In the carrying out of this provision by the Judiciary Act of 1789, (Statutes at Large, vol. i. p. 77,) the District Courts, one at least of which is established in every State, have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, with appeals from final decrees, where the matter in dispute exceeds three hundred dollars, exclusive of costs, to the next Circuit Court, (composed generally of a Justice of the Supreme Court and the District Judge,) to be held in the district, and from thence to the Supreme Court, when the amount in controversy is of

the value of two thousand dollars. It was decided by the Supreme Court, in 1794, that every District Court of the United States possesses all the powers of a Court of Admiralty, whether considered as an Instance or as a Prize Court; and, in the same case, it was decided that no foreign power can of right institute or erect any court of judicature, of any kind, within the jurisdiction of the United States, but such only as may be warranted by and be in pursuance of treaties; it was therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted, is not of right. Dallas's Reports, vol. iii. p. 12, Gloss *v.* The Sloop Betsy.

It has been held by the District Judges, during the pending hostilities with the so-called Confederate States, that the District Courts are permanent prize tribunals, which, on the breaking out of a war, take cognizance of captures on the ocean, by virtue of their general jurisdiction, and without any special authority being imparted for the occasion. Law Reporter, April, 1862, p. 342, The Amy Warwick.

From the grant of jurisdiction in the Constitution to the judiciary, of "all cases of maritime and admiralty jurisdiction," the decision of prize cases stands on a very different footing from what it does in France and England, and, indeed, in every other country not having a similar organic law with that of the United States. The Supreme Court being equally, as the Executive and the Judiciary, independent in all its functions, its judgments cannot be controlled by either of the coördinate branches of the government. In France, even the most enlightened of her legislators have advocated making all such questions matters of administration, and the first Napoleon professedly reserved to himself the ultimate adjudication to be rendered in reference to the relations between France and the country of the neutral vessel. The Council of Prizes, established in 1854, was a temporary tribunal; its proceedings were not to be carried into execution, without being communicated to ministers of State, and the ultimate sentence, on appeal, was to rest with the Council of State.

The recent organization of the judicial committee of the Privy Council is calculated to increase the confidence of foreigners in the character of their decisions, but the right exists in the sovereign to interpose effectively in any part of the proceedings, to arrest them before condemnation, and the tribunal that renders the final decree holds a direct political relation to the executive government.

The reports of the Supreme Court of the United States show that, while every facility is afforded for receiving suggestions from the President in matters affecting our international relations, they do not allow any intimations from the Executive to influence their deliberations, adverse to the law that they are sworn to administer. In such cases, as in determining on the constitutionality of the acts of the legislature, they exercise an independent judgment.

In the United States, the course is, when it is claimed by a foreign minister that a seizure made by an American vessel of war was a violation of the sovereignty of his government, and he satisfies the President of the fact, the latter may, where there is a suit depending for the seizure, cause the Attorney-General to file a suggestion of the fact in the cause, in order that it may be disclosed to the court. Such was the course pursued in the case of The Exchange, a cause in which the sovereign right claimed by the Emperor of the French, and the political relations between the United States and France, were involved. It was heard in preference to other causes before it on the calendar, but was decided on its merits, and not withdrawn from the jurisdiction of the court. Cranch's Reports, vol. vii. p. 116. The same course was adopted in the case of La Jeune Eugénie, captured by The Alligator, and which was claimed by the French Minister as a violation of the sovereignty of the King of France. In that case, the Attorney-General, in advising the government to follow the course established by precedent, said: "I cannot conceive any step more mild and inoffensive in its character, which the Executive, in discharging its constitutional trust towards foreign nations, could adopt, than that proposed. There is nothing mandatory in its character. It is therefore, no interference with judicial authority and independence; it is, in truth, as it is called, a suggestion merely of the true character of the case, as it has been presented by the minister of a foreign sovereign; of the official demand of the vessel by that minister, in the name of his sovereign, as not amenable to our tribunals; and the expression of the Executive opinion, that th demand is supported by the law of nations. Courts do not receive it as an order, but as a mere suggestion. They do not treat it as an order; they treat it as a plea to the jurisdiction of the court, discussing its merits, and disposing of it according to their own judgment, with the same freedom with which they would dispose of a plea." Opinions of Attorneys General, vol. i. p. 505. Mr. Wirt to the Secsetary of State, November 7, 1821.

Nor has this interposition always prevailed with the court. In a case of extreme delicacy, which arose from a demand of the Spanish Minister, and is still the subject of diplomatic negotiation, the decision of the Supreme Court was not in accordance with the suggestion of the Executive. The matter involved the case of slaves, who, being transported from one port of Cuba to another, rose and killed the captain and one of the crew. The negroes intended to go to the coast of Africa, but, being ignorant of navigation, the vessel was brought, by two Spaniards, part-owners, who were on board, and who remained alive, to the coast of the United States, and was there taken possession of and recaptured from the negroes, and brought into New London, by the officers of a government vessel engaged in the coast survey. Claims were preferred, which ulti-

mately, when the case came before the Supreme Court, had resolved themselves into demands of the negroes for freedom, and of the Spanish Minister, presented by the United States through the Attorney-General, for their surrender to him, in pursuance of a subsisting treaty. There was no question as to the proprietary interest in the vessel and cargo. Justice Story, in rendering the opinion of the court, said that, on the part of the United States, it had been contended, 1st. That due and sufficient proof concerning the property had been made to authorize the restitution of the vessel, cargo, and negroes to the Spanish subjects, on whose behalf they are claimed, pursuant to the treaty with Spain of the 27th of October, 1795. 2dly. That the United States had a right to intervene in the manner they have done, to obtain a restitution of the property, upon the application of the Spanish Minister. The United States simply confine themselves to the right of the Spanish claimants to the restitution of their property, upon the facts asserted in their respective allegations. The ship, cargo, and negroes were duly documented as belonging to Spanish subjects, but the court held that, although public documents of the government, accompanying property found on board the private ship of a foreign nation, certainly are to be deemed *primâ facie* evidence of the facts which they purport to state, they are always open to be impugned for fraud. Justice Story, deeming the question as to the documents open, and having established to his satisfaction that the negroes were not slaves, but kidnapped Africans, who were by the laws of Spain itself entitled to freedom, and were kidnapped and illegally carried to Cuba, and illegally detained on board of The Amistad, declared that, upon the merits of the question, there did not seem to be any ground for doubt that these negroes ought to be deemed to be free, and that the Spanish treaty interposed no obstacle to the just assertion of their rights. He then stated that the view which had been taken of the case upon the merits, under the first point, rendered it wholly unnecessary to give any opinion upon the other point, as to the right of the United States to intervene in this case. Peters's Reports, vol. xv. pp. 587–597.

The following notice of the American prize decisions is taken from the Editor's "Introductory Remarks" to the last edition of this work, pp. xxxv. *et seq.*: —

"In a review by Mr. Wheaton of one of the volumes of the Reports of Judge Story's Circuit Decisions, and which included many prize cases, he thus gives a history of American prize law to the time of the war of 1812: 'Among the leading principles of law, developed and settled during the war of the Revolution, and which have ever since been recognized as a part of the prize code of this country, are the following: — The exclusive jurisdiction of the Court of Admiralty over all the incidents of prize and its right to entertain a supplemental libel for distribution of the prize

proceeds after condemnation. (Dallas's Rep. vol. ii. p. 37.) That an ally is bound by the capitulation made by another ally with the inhabitants of a conquered country, by which their property is exempted from capture. (Ib. p. 15.) But that an ally is not bound by a mere voluntary suspension of the rights of war against a part of the enemy's dominions, by a co-belligerent, not growing out of a capitulation. (Ib. p. 17.) The distinction between a perfect war and an imperfect war, or partial hostilities. (Ib. p. 21.) That in a perfect war nothing but a treaty of peace can restore the neutral character of any of the belligerent parties; and consequently that the British proclamation of 1781, exempting from capture all Dutch ships carrying the produce of Dominica according to the capitulation by which that island had surrendered to the French, did not restore back to a Dutch ship her original neutral character, so as to protect her cargo from capture by American cruisers under the ordinance of Congress of April 1, 1781, by which the United States temporarily adopted the principles of the armed neutrality, which had been formed in Europe the preceding year. (Ib. pp. 18–21.) That the rule recognized by this ordinance of *free ships, free goods*, did not extend to the case of a fraudulent attempt by neutrals, to combine with British subjects to wrest from the United States and France the advantages they had obtained over Great Britain by the rights of war in the capitulation of Dominica, by which all commercial intercourse between that island and Great Britain was prohibited. That Congress did not mean by their ordinance to ascertain in what cases the rights of neutrality should be forfeited in exclusion of all other cases; for the instances not mentioned were as flagrant as the cases particularized. (Ib. p. 23.) That the papers which a vessel is directed to sail with, by the municipal law of her own country, are the documents which a prize court has a right to look for as evidence of proprietary interest; though not conclusive evidence. (Ib. p. 11.) The fraudulent blending of enemy's and neutral property in the same claim involves both in the same condemnation. (Ib. p. 33.) The domicile of a party is conclusive as to his national character in a prize court. (Ib. p. 42.) The municipal laws of any particular country cannot change the law of nations: as between captor and captured, the property is devested instantly on the capture; but a neutral claimant is not barred until a final condemnation in a competent prize court. All other municipal regulations of salvage extend only to the citizens of the country making those regulations. (Ib. p. 37.) The authority of the prize court to make distribution of the prize proceeds where there is no agreement between the owners, officers, and crew of the capturing vessel. (Ib. p. 37.) And its authority to decree a sale where the *res* in litigation is perishable. (Ib. p. 41.) The conclusiveness of sentences of condemnation upon the property. (Ib. p. 41.) The simplicity of the prize proceedings upon the papers found on board, and the examina-

tion of the captured persons. (Ib. p. 40.) That the omission of the captors to bring in all the captured persons and papers will not forfeit their rights of prize, unless a fraudulent omission. (Ib. p. 33.) And lastly, the illegality of trade by a citizen with the enemy.' (Cranch's Rep. vol. viii. p. 102.)

"Mr. Wheaton very happily contrasts our system of admiralty courts, as at present organized, with those of other countries. 'The subjects of foreign States have had reason to rejoice that the decisions of their rights have been vested in the same pure hands, with which the people of this country have intrusted their dearest privileges. Nor does the experience of other countries give us or them any reason to regret that our prize jurisdiction is not placed in a cabinet council, or judges removable at the pleasure of such a council. Even that highly gifted and accomplished man, (Sir W. Scott,) has been compelled to avow that he was bound by the King's instructions; and we know that his decrees are liable to be reversed by the privy council, from which those instructions emanate.[1] So, also, in France, both under the royal and imperial governments, the prize jurisdiction has been almost constantly vested in the Council of Prizes,—a board composed of members removable at the pleasure of the crown—a mere commission created at the breaking out of every war, and dissolved on its termination. During the anarchy of the Revolution, it was exercised by judges, many of whom were notoriously concerned in privateers, the fruits of whose plunder from innocent neutrals they were to adjudge. The rapacity and injustice of the French and British Courts of Vice-Admiralty, in the colonies, are notorious.' (North American Review, vol. viii. p. 256.)

"Even while the United States, after the achievement of their independence, were at peace with all the world, controversies between the assured and the underwriters presented questions requiring the application of the principles of the law of nations, and in that way the law of blockade, of commercial domicile, and other points affecting the international code, as well as the innovations which the belligerents were attempting to introduce

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[1] The Orders in Council, in reference to neutral trade, which Lord Chancellor Campbell in 1847 declared to be "contrary to the law of nations and to our own municipal law," gave rise to discussions in the British Courts of Admiralty as to the obligatory force of the King's instructions. Sir W. Scott appeared, at one time, to regard the text of these instructions as binding on his judicial conscience, (Robinson's Adm. Rep. vol. ii. p. 202,) and at another, he held it indecorous to anticipate the possibility of their conflicting with the law of nations, (Edwards's Adm. Rep. p. 604); while Sir James Mackintosh declared that if he saw in such instructions any attempt to extend the law of nations injuriously to neutrals, he should disobey them, and regulate his conduct by the known and generally received law of nations. Hall's Law Journal, vol. i. p. 218, The Minerva.

into maritime law, were judicially considered. The court, also, in the decision of the cases, growing out of the war of 1812, reported before Mr. Wheaton's connection with them, had declared that, as the United States at one time formed a component part of the British Empire, their prize law was, as understood at the time of the separation, the prize law of the United States, though no recent rules of the British courts were entitled to more respect than those of other countries; yet that, where there were no reasons to the contrary, they should regard the decisions of the English Courts of Admiralty. (Cranch's Reports, vol. ix. p. 191, Thirty Hogsheads of Sugar *v.* Boyle.)

"In the case of The Nereide, (Ib. p. 388,) they had not only affirmed the rule, that the goods of an enemy in the vessel of a friend were prize of war, and that those of a friend in the vessel of an enemy were to be restored, to be a part of the law of nations, but they also decided that the stipulation in the treaty of 1795, with Spain, that 'free ships shall make free goods,' does not imply the converse proposition that 'enemy ships shall make enemy goods.' In the same case, they differed from Sir William Scott, and recognized the right of a neutral to carry his goods in an armed vessel of the enemy. And in the case of The Adeline, (Cranch's Reports, vol. ix. p. 244,) it was decided, that the law of France denying restitution upon salvage after twenty-four hours' possession by the enemy, the property of persons domiciled in France should be condemned as prize by our courts, on recaption, after being in possession of the enemy that length of time.

"The volumes of Wheaton, who was the reporter of the Supreme Court from 1816 to 1827, contain decisions, declaring the property of a citizen engaged in trade with the enemy liable to capture and confiscation as prize of war, under whatever circumstances it might be carried, whether between an enemy's ports and the United States or between such port and any foreign country, (Wheaton's Reports, vol. i. p. 74, The Rugen); that the sailing under an enemy's license was sufficient of itself to subject to confiscation, without regard to the object of the voyage or port of destination, (Ib. p. 440, The Hiram; Ib. vol. ii. p. 143, The Ariadne; Ib. vol. iv. p. 100, The Caledonia); that a citizen of the United States, who had acquired a domicile abroad, but had returned to the United States and become a redintegrated American citizen, could not, *flagrante bello*, acquire a neutral domicile, by again emigrating to his adopted country, (Ib. vol. ii. p. 77, The Dos Hermanos); that the stipulation in a treaty, 'free ships make free goods,' although they should belong to enemies, contraband excepted, does not exempt the goods belonging to citizens of the captor's country engaged in trade with an enemy, (Ib. p. 247, The Pizarro); that the property of a house of trade in an enemy's country is confiscable, notwithstanding the neutral domicile of one or more of the partners, (Ib. vol. i. p. 169,

The Antonia Johanna); that there can be no restitution, on payment of salvage to the original owner, where a vessel, captured and condemned, was recaptured by an American privateer, the original title being extinguished by the condemnation. (Ib. vol. iii. p. 79, The Star.)

"The Supreme Court also decided that it is the exclusive right of governments to acknowledge new States arising in the revolutions of the world, and until such recognition by our government, or that to which the new State belonged, courts of justice are bound to consider the ancient order of things as remaining unchanged, (Ib. p. 324, Gelston *v.* Hoyt)[1]; that in case of the Spanish American governments, the government of the United States having recognized the existence of a civil war between Spain and her colonies, the courts of the United States were bound to consider as lawful those acts, which were authorized by the law of nations, and which the new governments may direct against their enemies, and their captures were to be regarded as other captures *jure belli*, the legality of which cannot be determined in the courts of a neutral country. (Ib. vol. iv. p. 53, The Divina Pastora; Ib. vol. vii. p. 377, The Santissima Trinidad.)

"The court likewise decided, in reference to the acts declaring the slave-trade piracy, passed by the United States and Great Britain, that the right of visitation and search did not exist in time of peace, and that a vessel engaged in the slave-trade, though it was prohibited by the country to which it belonged, could not be seized on the high seas, and brought in for adjudication in the courts of another country. (Ib. vol. x. p. 67, The Antelope.)

"But it is by the important adjudications defining the limits of the Federal and State jurisdictions, that the judicial administration of Marshall, who presided during the whole period, was distinguished. That the repeal or alteration, by a State, of the charter of a private corporation, which a college was declared to be, was a violation of the constitutional prohibition to pass any law impairing the obligation of contracts, (Ib. vol. iv. p. 518, Dartmouth College *v.* Woodworth); that it was competent for Congress to establish a national bank, which could not be taxed by any individual State, (Ib. p. 316, McCulloch *v.* The State of Maryland; Ib. vol.

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[1] In the case of the Rhode Island controversy, in 1842, the same rule was adopted in relation to conflicting claims to the government of a State of the Union. The Chief Justice (Taney) said: "No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But, whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it." Howard's Rep. vol. vii. p. 47, Luther *v.* Borden.

ix. p. 738, Osborn *v.* The Bank of the United States); and that no State could grant a right for the exclusive use of its navigable waters, (Ib. vol. ix. p. 1, Gibbons *v.* Ogden); nor pass a bankrupt or insolvent law, affecting preëxisting contracts, or contracts between citizens of different States, (Ib. vol. iv. p. 122, Sturges *v.* Crowninshield; Ib. vol. xii. p. 213, Ogden *v.* Saunders), are among the decisions to be found in Wheaton's Reports; while — what connects these adjudications immediately with the treatise to which these remarks are introductory — the faith of international obligations was upheld, not only by establishing the appellate jurisdiction of the Supreme Court, in the case where the validity of a State law was called in question, but by asserting, what is the distinguishing feature between our existing institutions and those of the old Confederacy, the power to carry into full effect the judgment, without the aid of the State court. (Ib. vol. i. p. 305, Martin *v.* Hunter.")

ADDENDA

TO THE EDITOR'S NOTES.

Note [6, page 8.

[A new treaty of commerce was concluded with Great Britain, April 29, 1861, the 21st article of which corresponds with the same article of the American treaty. The 20th article provides that it shall have its execution in all possessions of the Sultan in Europe or in Asia, in Egypt and in the other parts of Africa belonging to the Sublime Porte, in Servia and in the United Principalities of Moldavia and Wallachia. Annual Register 1861, p. 282.] — *L.*

Note [15, page 89.

[This same view of the title of the United States to the territory within the limits of the original States has, also, been taken by the Supreme Court. "It has never been admitted by the United States that they acquired anything by way of cession from Great Britain by the treaty of 1783. It has been viewed only as a recognition of preëxisting rights, and on that principle the soil and sovereignty, within their acknowledged limits, were as much theirs at the declaration of Independence as at this hour. By reference to the treaty it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession, or relinquishment of right on the part of Great Britain." Wheaton's Reports, vol. xii. p. 527. Harcourt *v.* Gaillard.] — *L.*

Note [16, page 43, line 27.

[On that same occasion Lord John Russell said: "The Attorney-General and Solicitor-General, the Queen's Advocate and the Government, have come to the opinion that the Southern Confederacy of America, according to those principles, which seem to be just principles, must be treated as a belligerent." Hansard's Parl. Deb. vol. cxlii. p. 1563. Annual Register 1861, p. 114.

Same note, page 44, line 17.

British and Foreign State Papers, 1824–5, p. 912. Mr. Canning wrote to Lord Granville, June 22, 1826: "If we hold with Mr. Villèle that the inability of the Greek government to keep its population in order justifies an appeal to that government, and reprisals in case of the fruitlessness of such an appeal; and if we further hold with Austria (and I fear *now* with France), that the Greek government is itself a mere insurrection, without national rights or national duties, then the government to which appeal is to be made is the Turkish government itself. If the piratical practices of some Greek ships is visited upon the Greek government, then the Greek government itself, being only one great act of piracy, the Porte is responsible for its consequences. Stapleton, Canning and His Times, p. 476.] — *L.*

Note [19, page 48, line 21.

[The principle on which Great Britain meant to act with respect to the revolted colonies of Spain, was settled in the case of Buenos-Ayres. In a cabinet minute of July 23, 1824, it is said: "The long period which has elapsed, not only since that State declared its separation from Spain, but since a single Spanish soldier has existed within its territory; the total absence of any particular party in favor of the mother-country, the settled state of the government, and its consequent capacity to maintain any political relations which may be contracted with it, the extent of the commerce of Buenos-Ayres with this country, the number of your Majesty's subjects actually established in that State, and the importance of fixing the character of this extensive commercial intercourse by some formal diplomatic arrangements; all these considerations have satisfied your Majesty's servants that they but perform their duty in humbly advising your Majesty that the time is arrived for taking some decisive step towards the establishment of relations with Buenos-Ayres. Your Majesty's servants, therefore, humbly propose that a full power should be sent to Mr. Parish to negotiate a commercial treaty with Buenos-Ayres. Such a treaty, *when ratified by your Majesty*, would amount to a diplomatic recognition of the State with which it had been concluded; and Mr. Parish might, in that case, remain at Buenos-Ayres with the character of your Majesty's Minister Plenipotentiary." Canning and His Times, p. 399. In August, 1823, Consuls and Consuls-General had been appointed by the British government to the principal stations in Mexico, Colombia, Peru, Chili, and Buenos-Ayres. Annual Register, 1823, p. 146]. — *L.*

Note [21, p. 55.

[The Parliament of Turin decided, June 19, 1861, upon the fusion into a common debt for the kingdom of Italy of the general public debts of the former separate States. Almanach de Gotha, 1862, p. [51]. — *L.*

Note [23, p. 61.

[Since the revolution of 1862, Great Britain has proposed to the provisional government the abandonment to Greece of the protectorate of the Ionian Islands. Le Nord, 8 Janvier, 1863. See, further, *Addenda* to note [38.] — *L.*

Note [24, p. 64, line 6.

[The proclamation was made at Jassy and at Bucharest, December 23, 1861, of the union of the Principalities into one State under the name of Roumania, and the first common legislative assembly was held February 5, 1862. Almanach de Gotha, pp. 962, 966.] — *L.*

Note [24, p. 65, line 29.

[Difficulties having arisen from the occupation of the citadel of Belgrade, which became the subject of a conference of the representatives at Constantinople of the signers of the treaty of Paris, a firman was issued, in accordance with the protocol of the 4th of September, 1862, confining the Mussulmans to the limits of the fortresses. Le Nord, 18 Octobre, 1862.] — *L.*

Note [24, p. 66.

[This declaration of the Turkish Plenipotentiaries induced the protest of the 19–31 May, 1856, from Prince Daniel to the ministers of the powers that had signed the treaty of Paris. Ali Pacha, he said, asserts that the Porte considers Montenegro one of his provinces. This cannot be sustained. The Montenegrins have a better right to pretend to half of Albania and all Herzegovine, since my predecessors, independent princes of Montenegro, Dukes of Zete formerly possessed those territories, whilst the Turks have never possessed Montenegro. Le Nord, 2 Septembre, 1862.

The campaign of 1862 resulted unfortunately for the Montenegrins. By a convention, to which they were compelled to accede, a road is to be opened through the territory, and five or six block-houses are to be occupied by Turkish troops, who, in case of necessity, may be reinforced. There is no question in this document of the recognition of the sovereignty of the Porte. Fuad Pacha said that there was no occasion for the acknowledgment of that which the Porte always possessed of right, and which he now possessed in fact.

The terms imposed by the Porte on Montenegro having induced a remonstrance from Russia, a correspondence took place between that power and England. In it, however the views of the latter may have since been affected by the events now (January, 1863,) going on in Greece, the then British policy, so adverse to the Christian provinces claimed to be under the suzerainté of Turkey, is developed. Lord Russell, in a note

to the diplomatic representative of England at St. Petersburg, under date of September 30, 1862, says that since Turkey has been admitted to make part of the European system, she ought to participate in all the advantages and obligations which belong to an independent State. It is not just when treaties are silent to intervene without necessity or provocation in an insurrection in Turkey, that has been sustained by a neighboring prince; such is the case in Herzegovine, where an insurrection broke out, as to Montenegro, by whom the insurrection has been fomented and sustained. If the Prince of Montenegro was a vassal, the Sultan had the right to reduce him to obedience, and to impose on him such conditions of peace as might secure his obedience for the future. He assimilates the conditions demanded by the Porte to those imposed by the English government on the Highlanders, after the suppression of the rebellion for the overthrow of the Hanoverian dynasty, and when good roads were made over the mountains of Scotland, and forts established to keep the rebels in obedience. If, on the other hand, the Prince of Montenegro was an independent prince, the Sultan had a right to impose such conditions as would prevent the renewal of this aggression on his part.

On the more general question, he says: "If the *Slave* and Greek subjects of the Sultan revolt, and the insurrection is repressed, the weight of his authority will become more oppressive; privileges will be withdrawn, and the sums destined for the construction of roads and bridges, and for the introduction of improvement, will be withdrawn for the maintenance of an imposing military force. But if the chimerical idea, cherished in certain provinces of overturning the Ottoman power, is realized, the Greeks and the *Slaves* will be embroiled in contests; each province will claim the supremacy; civil war will ravage the countries where the authority of the Sultan is overturned, and an appeal will be made to the great powers of Europe to put an end to anarchy, by partitioning the Turkish provinces among them. But the European powers will find it difficult to accomplish this task without giving rise to new conflicts, and probably to a general war. Such are the views which induce the British government, while sincerely desirous to ameliorate the situation of the Christian subjects of the Porte, to refuse all coöperation for the realization of the projects known in Greece under the name of the 'grand idea,' projects which as well with the Greeks as the *Slaves* tend to the dissolution of the bonds of obedience in the Ottoman Empire, and are more or less in relation with the criminal intrigues of which Turkey is feeling the effects in Servia, and which do not aim less at the overthrow of every monarchy in Europe than at the destruction of the integrity of the Ottoman Empire.

Prince Gortschakoff in his despatch of the 28th September, 1862, to Baron Brunow in London, among other things says: "I will incidentally observe that England has always professed political doctrines tending to

the acknowledgment of governments *de facto*, that is to say, of those whose existence is manifested by facts sufficiently notorious and of sufficient duration to prove their vitality. According to this doctrine, it appears to us that the English government should not dispute to Montenegro a right to that independence, which that country has maintained for more than a century with an indomitable energy, unless it admits that the principle in question only ceases to be applicable when it has reference to the reducing of a Christian State under Turkish dominion. The preservation of the Ottoman Empire, he remarked, is for Russia, for all the great powers an essential principle of the European equilibrium. But in presence of the elements of disorder and contention bequeathed to these countries from past ages, such a result cannot be attained in a solid and durable manner except by a system of government which would tend to conciliate to the Sultan the affections and gratitude of his Christian subjects by giving to their wants and to their wishes a legitimate satisfaction, and by endowing them to that effect with the conditions of existence indispensable to a happy and prosperous social life." Le Nord, 30 Octobre, 1862.] — *L.*

Note [38, page 94, line 23.

[This negotiation had been, at the instance of England, renewed by the Danish note of the 26th of October, 1861, proposing as a basis the autonomy of Holstein, which offer identical notes of Austria and Prussia of the 5th of December, rejected, as not meeting the whole case. These communications, as well as the Danish despatch of the 26th of December, and the Austrian and Prussian answer of the 8th of February, 1862, preceded the note of the 14th of February, (protesting against the continuation of the Rigsraad as the collective representative of the kingdom proper, and of Schleswig,) and the Danish answer of the 12th of March.

Since our annotations passed through the press, further papers on this subject have been published. Austria and Prussia, whose relations in other respects are so divergent, could not agree on the form of an identical note, in answer to the Danish one of the 12th of March, but their communications of the 26th of August tended to the same results. They virtually required that the constitution and collective representations, which were, three years before, abolished for Holstein, should likewise be abolished for Schleswig, and that the *statu quo ante* 1848, should be re-established there. The answer, November 6, of Denmark to Prussia, declares that the German powers, instead of occupying themselves with the affairs of the Duchy of Schleswig, which are not within the competence of the Diet, would do better to give their attention to an arrangement, which would render definitive the provisional administration, — separation of Holstein and Lauemberg from the rest of the Danish monarchy. To

Austria, M. Hall endeavors to demonstrate that the conventions of 1851–2 cannot bind Denmark, as regards Schleswig. Although the Danish ministry communicated in 1851, to the German powers, the intentions of the sovereign on the subject of Schleswig, it did not thereby contract engagements of an international character. Le Nord, 24 Octobre, 17 Novembre, 1862. In the mean time, Lord Russell addressed a note, of the 24th of September, 1862, to the British Minister at Copenhagen, which concluded with the following propositions: 1. Holstein and Lauemberg shall have all that the German Confederation asks for them. 2. Schleswig shall have the power of governing herself, and of not being represented in the Rigsraad. 3. A normal budget shall be adopted by Denmark, Holstein, Lauenburg, and Schleswig, the credit to be demanded by the four representative bodies, a council of States, two thirds Dane, one third German, to determine its apportionment. 4. The extraordinary expenses to be sanctioned by the Diet and by the separate Parliaments of Holstein, Lauenburg, and Schleswig. These suggestions, though Russia and France advised Denmark to come to a settlement, were equally unsatisfactory to her with the direct propositions of the German powers. Ib. 20 Novembre, 1862. Russia said that there was no difficulty, except the general constitution of 1855, which Lord Russell deems no longer to have any force. In approving, as in accordance with his own views, the proposition of England, Count Rechberg insists that the conflict with Denmark is exclusively of federal resort, and that the two great courts act in this matter not in their quality of great powers, but in virtue of the special mandate of the Diet. Ib. 25 Novembre, 1862.] — *L.*

Note [88, page 95, line 30.

[Two matters are now menacing the existence of the Zollverein. The refusal of several of the States to accede to the treaty of commerce concluded by Prussia, on behalf of the Zollverein, with France, and the objection of Prussia to the admission of Austria to the Zollverein. These questions are intimately connected with federal reform, on which, as it has been seen, the views of Austria and Prussia are wholly antagonistical.

Austria asked the opening of a conference for her admission to the Zollverein, agreeably to the terms of the treaty of February 19, 1853. This was resisted by Prussia, who opposes engagements contracted with France. She refuses to enter into any negotiations with Austria, till the French treaty becomes an accomplished fact, and is put into execution by the unanimous adhesion of the Zollverein. All changes of duties must be by unanimous consent; and Austria has declared that there are several provisions in the tariff which in the interest of her industry she cannot accept.

Contrary to previous usage, by which the treaties made by Prussia for the Zollverein were signed and exchanged, leaving the adhesion of the other members of the Zollverein to be subsequently given, the French treaties were only *paraphés* the 29th of March. Prussia wished out of respect for her confederates to sign them in concert with the governments of the Zollverein, after having asked their consent. A delay of four weeks had been fixed, which was prolonged to four months. Saxony, Saxe-Weimar, and Baden had announced their adhesion, and in view of the policy of adjournment adopted by the other States, it was determined by Prussia to sign the treaties on the 2d of August, in the same sense as is ordinarily done at the conclusion of a treaty, that is to say, reserving the accession of the governments of the Union. If this accession does not take place, neither Prussia nor France will be bound. To the present time (December, 1862,) no great progress has been made in obtaining the adhesion of the middle and minor States. On the contrary, opposition to the French treaties with the incorporation of Austria into the Zollverein, which is deemed incompatible with them, was connected, in the popular parliament at Frankfort, with the Austrian project of federal reform, and Count Bismarek had informed the Cabinets of Stutgardt and Darmstadt that the absolute refusal of these States to adhere to the treaties in question, will be considered by Prussia as a declaration that they do not wish to remain in the Prussian Union after the time now fixed for the expiration of the Zollverein. Le Nord, Novembre 21, 1862.] — *L.*

Note [38, page 97.

[A *projet* has been brought forward, by Austria and the Middle States before the Diet, of a Parliament near the Diet to be composed of a certain number of delegates, chosen in the chambers of the Confederate States, and to be divided into an upper and lower house. The high assembly, composed, as it now is, of Envoys of Sovereign Powers to have the character and attributes of the Executive Power. This is opposed by Prussia, who insists that no such change can be made without the assent of every individual State. Le Nord, 15 Aout, 1862. In a circular addressed by Count Bernstoff to the Prussian legations in Germany, it is said, that, in spite of the proposition of reform presented to the German Diet by Austria and other States, their government does not lose sight of the establishment of a federal restricted State, under the military and diplomatic direction of Prussia. That she will not permit the extension of the competency of the Diet to questions of public international law. She did not think that a federal reform could be made on the basis of the actual Diet, and that she will never make to that assembly a proposition of that nature. Ib. 31 Aout, 1862.

Federal reform has, also, become the basis of popular national associations. The *National-verein*, at its late meeting at Coburg, declared that the sole condition of realizing the legitimate demands of the nation was to put into execution the federal constitution of March 28, 1849. Le Nord, 18 Octobre, 1862. On the other hand, a Parliament for an extended Germany, composed of five hundred members, which met at Frankfort, October 28, adopted the Austrian projet of reform and voted against the French treaty and for the admission of Austria into the Zollverein with all her non-Germanic possessions. Ib. 1 Novembre, 1862.] — *L.*

Note [41, page 101, line 7.

[The opinions of Heron and Kant which render homage to the wisdom that dictated the establishment of our Federal tribunal, by proposing to extend its principle to the settlement of all international disputes, have been elsewhere noticed; (Part I. c. 1, § 10, Editor's note [3, p. 20,) as has also the high encomium pronounced on the system by M. de Marbois. (Editor's note [41, p. 100.) Phillimore takes the same view of the federal powers of the Supreme Court. Speaking in reference to civil war, he says: "The jurisprudence of the United States of North America on this subject is remarkable. The records of their Supreme Court may be said, with few exceptions, to furnish almost the only example of the disputes of States submitted to formal trial and decision before judges, in the same manner as the affairs of private individuals. This peculiarity is owing to the particular relation in which the Executive of the Union stands to the different States which compose the Union, and the now established right of the Supreme Court to decide public disputes arising between State and State, and also those disputes in which the great corporation of the United States has an interest. It has been truly said that 'a suit in a court of justice between such parties and upon such a question is without example in the jurisprudence of any country.'" International Law, vol. iii. p. 740.] — *L.*

Note [43, p. 108.

[The views of Mr. Calhoun as to the unalterable character of the existing Constitution of the United States, unless the change be made in conformity with its own provisions, have been stated in the note. And we have seen the principle for which President Lincoln contended in his Inaugural Address, that "Perpetuity is implied in the fundamental law of all national governments," applied to the most important Confederate government of the Old World. The claim of the right to secede, put forth by Austria, in 1851, because her non-Germanic possessions were not admitted into the Confederation, received no countenance from the great powers, who had at the Congress of Vienna taken part in its organization. And the idea of

Prussia, not yet abandoned, of virtually dissolving the Constitution of the Diet by creating within the great Confederation a more intimate alliance of the German States by a confederacy, under her influence, and from which Austria should be excluded, is elsewhere regarded as a revolutionary measure.

Nor was it, if we are to recognize the validity of the doctrines referred to, till the ratification by Rhode Island, in May, 1790, that the Federal Constitution of 1787 could be considered as the legitimate successor of the government, established by the articles of Confederation as finally sanctioned in 1781. By a clause in the 13th and last of those articles, to which all the original States were parties, it was declared that "the articles of this Confederation shall be inviolably observed by every State and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every State." The Constitution, notwithstanding, says: "Art. VII. The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States, so ratifying the same."

Nor was it through inadvertency that this discrepancy occurred. In the outline of the debates, which were secret, made by Mr. Madison, it appears that Mr. Gerry objected to striking out from the ratification clause, "the approbation of Congress," and he said that if nine out of thirteen States can dissolve the compact, six out of nine will be just as able to dissolve the new one hereafter. Mr. Hamilton concurred with Mr. Gerry as to the indelicacy of not requiring the approbation of Congress. He thought it improper to allow nine States to institute a new government on the ruins of the existing one. Mr. Wilson declared it to be worse than folly to rely on the concurrence of the Rhode Island members of Congress in the plan. The Madison Papers, vol. i. pp. 1536–1540.

At an earlier day, Mr. Wilson hoped that the power to ratify the Constitution was not to be defeated by the selfish opposition of a few States; (Ib. p. 797) and Mr. Gorham declared that if the last article of the Confederation is to be pursued, the unanimous concurrence of the States will be necessary. But will any one say that all the States are to suffer themselves to be ruined, if Rhode Island should persist in her opposition to great measures? Ib. p. 1180.

Rhode Island was never represented in the Convention, and the assent of other States was doubtful. North Carolina, indeed, did not accede, till after considerable delay, in November, 1789. The formula, referring to each State by name, adopted in the articles of the Confederation and in our first treaties with France, the Netherlands, Sweden, and Great Britain, and which had also been followed in the original draft of the Constitution, was necessarily abandoned when a unanimous ratification was dispensed

with. The terms "We, the People of the United States" were consequently substituted for "We, the People of New Hampshire," &c.

Judge Tucker, in his Commentaries on Blackstone, published in 1803, says: "But although by this act the seceding States, as they may not be improperly termed, subverted the former Federal government, yet the obligations of the articles of Confederacy, as a treaty of perpetual alliance, offensive and defensive, between all the parties thereto, no doubt, remained; and if North Carolina and Rhode Island had never acceded to the new form of government, that circumstance could never have lessened the obligation upon the other States to perform those stipulations, on their parts, which the States, who were unwilling to change the form of the Federal government, had by virtue of those articles a right to demand and insist upon." Tucker's Blackstone's Commentaries, vol. i. appx. p. 73.

It would seem that there are in the different constitution of society at the North and South, owing to the character of the labor employed in the two sections, causes of alienation, which more than counterbalance associations based on community of race, language, religion, and even pecuniary interest. The civil war has assumed more gigantic proportions than at the time of the preparation of our note; and its fury is still (February, 1863,) unabated. The hundreds of thousands of American citizens sacrificed on the fratricidal altar, with the thousands of millions of treasure whose expenditure must impose on the country a mortgage of its resources for unborn generations, have as yet effected no definitive results.

The provisional government of the so-called Confederate States was superseded by the permanent Constitution, which had been adopted in March, 1861, and went into operation February 22, 1862. It follows the plan, as did the provisional one, of the Federal Constitution. Among the variations is a recognition of the existence of slavery, which in our Constitution is only implied. The word "slave" is used in connection with representation, and with the return of fugitives from labor; while in formalizing the principle of the Dred Scott case for the territories, it is declared that "the institution of negro-slavery, as it now exists in the Confederate States, shall be recognized and protected by Congress and by the territorial government; and the inhabitants of the several Confederate States and territories shall have the right to take to such territories any slaves lawfully held by them in any of the States or territories of the Confederate States." The citizens of each State have, also, secured to them in every State the right of transit and sojourn with their slaves and other property. While, on the other hand, not only is the importation of negroes of the African race, from any foreign country other than from the slave-holding States or territories of the United States, forbidden, but Congress is required to pass such laws as shall effectually prevent the same; and they

may pass laws to prevent the introduction of slaves from any State not a member of, or territory not belonging to, the Confederacy. There is an express prohibition against granting bounties from the treasury or imposing any duties or taxes on importations from foreign countries to promote or foster any branch of industry. And Congress are prohibited from appropriating money for any internal improvement intended to facilitate commerce, except for lights, beacons, and buoys, and other aids to navigation upon the coasts and the improvement of harbors, and the removing of obstructions in river navigation; in all which cases, such duties shall be laid on the navigation facilitated thereby as may be necessary to pay the costs and expenses thereof. There is also a provision by which the States are allowed to lay a duty of tonnage, subject to certain conditions, on sea-going vessels for the improvement of the rivers and harbors navigated by such vessels. The post-office, after March, 1863, is to be paid for out of its own revenues.

The anomaly, now existing in the United States, by which the President and Congress may be chosen through the votes of aliens, is guarded against by requiring that the electors for the House of Representatives of the Confederate States in each State shall not only have the qualifications requisite for the most numerous branch of the State legislature, but that they shall be "citizens of the Confederate States."

The provisions, as to the Executive, remain essentially the same as in the Constitution of the United States, except that the principle of the construction of the framers of the latter instrument requiring the concurrence of the Senate to displace from as well as to appoint to office is sanctioned. Federalist, No. 77. The Confederate Constitution gives the President the power to remove, at his pleasure, the principal officer in each of the executive departments, and all persons connected with the diplomatic service; but in other cases the removal shall be reported to the Senate, together with the reasons therefor. Congress may, also, grant to the principal officer of each of the executive departments a seat on the floor of either house, with the privilege of discussing any measure appertaining to his department. The principle, however, in which the Constitution of the United States differs from that of England and most constitutional governments, while it accords with the Imperial Constitution of France, in making the President solely responsible, without any power in Congress, except by withholding appropriations, to compel a change of ministers in accordance with public sentiment, is maintained. The President is rendered still further independent of the people, by extending the tenure of his office from four to six years.

The provision as to the election of members of Congress is the same in both Constitutions; though it is presumed to be within its terms for either Congress to require the elections, which are now held a year in advance in a majority of the States of the Federal Union, to be made in them

all only after the termination of the services of the previous house. This would avoid the apparent absurdity of having two Congresses in existence at the same time, — one representing the actual sentiments of the people, wholly powerless, while the other, against whom their constituents may have pronounced, possesses all the legislative authority of the nation. There is no means provided, in either Constitution, however important a reference to the ultimate sovereign power may be, for any appeal to the people, during the prescribed term of office of the President or of the Congress. Moore, Rebellion Record, vol. ii. p. 321.] — *L.*

Note [44, page 111.

[There are twenty-two Cantons. The number of members of the Council of States is not increased by the division of Basle, Unterwald and Appenzel, but each of these demi-Cantons elects one member to the Council of States. The members of the Federal Council are named for three years, by the two councils in joint assembly, and are chosen from *among all the Swiss citizens eligible to the National Council.* The Federal Council is renewed entire after every renewal of the National Council. In case of a vacancy during the three years, the place is supplied for the remainder of the term, at the first session of the Federal Assembly. The Federal Council is presided over by the President of the Confederation. It has a Vice-President, and both the President and Vice-President are named for a year from among the members of the Council. The retiring President cannot be elected President or Vice-President for the following year, and the same member cannot be elected Vice-President for two successive years. It requires four members to be present at any deliberation of the Federal Council. The members of the Federal Council have a consultative voice in the two sections of the Federal Assembly, as well as the right of making propositions there on the subjects under deliberation. Besides the attributes already mentioned in our note, it presents projects of laws, or decrees (*décrets ou arrêtés*) to the Federal Assembly, and gives its advice on the propositions adopted by the Councils of the Cantons. It provides for the execution of the laws, and decrees (*décrets et arrêtés*) of the Confederation and of the Federal tribunal, as well as of the transactions or arbitral sentences on the differences between the Cantons. It makes the nominations which the constitution does not confide to the Federal Assembly or Federal tribunal, or which the laws do not delegate to an inferior authority. It names commissioners for missions at home and abroad. It examines the treaties of the Cantons with one another, or with foreign powers, and if it approves them, they take effect; for though the making of treaties of alliance and commerce belongs to the Confederation, the Cantons are per-

mitted to conclude, with foreign States, treaties on matters of public economy, and the relations growing out of neighborhood and locality. The official relations between the Cantons and foreign governments, or their representatives, take place through the Federal Council; though the Cantons may correspond directly with the inferior authorities or *employés* of a foreign State, on the subjects above-mentioned. The Cantons, also, while interdicted from making a political alliance with one another, have the right of concluding conventions on the subjects of legislation, administration, or justice, which must, however, be submitted to the Federal authority. The Council administers the finances of the Confederation, and superintends all functionaries and employés of the Federal administration. The affairs of the Federal Council are distributed by departments among its members. This distribution has only in view the despatch of business. The decisions emanate from the Federal Council. Practically the Council divide among themselves the different departments, which elsewhere would be filled by Ministers of State constituting the Cabinet.

The Federal tribunal is composed of eleven members, besides *suppléans*, the number of which is determined by law. They are named for three years by the Federal Assembly, and the tribunal is renewed entire after every renewal of the National Council. Vacancies occurring during the term, are supplied in the same way as in the case of the Federal Council. Every citizen eligible to the National Council, may be elected to the Federal tribunal. Texte officiel, &c. pp. 19, 22.

The writer of these notes happening to be in Berne in the summer of 1859, at a time of the election of President and Vice-President, had an opportunity in somewise to examine the operation of a system professedly modified from the institutions of the United States. He was assured by those members of the legislature most competent to give an opinion, that, while the elective judiciary was regarded as a defect in their Constitution, their organization of the Executive was deemed a very happy substitute for our periodical elections of a President, concentrating in himself the whole patronage of the Union. It also afforded the means of meeting sectional or other difficulties by the distribution among the Protestant and Catholic Cantons of the members of the Federal Council.] — *L.*

Note [46, page 124.

[Mr. Canning writing, in 1823, to Sir H. Wellesley, at Vienna, with a view of emphatically expressing the dissent of England to the interference of any other powers, by force or by menace, in the internal concerns of independent States, says: "The specific engagement to interfere *in France*, in the specific case of an attempt upon the throne of that kingdom,

by or in behalf of any branch of Bonaparte's family, is the single exception of which I am aware; and it is an exception so studiously particularized as to prove the rule. The rule I take to be, that our agreements have reference wholly to the state of territorial possession settled at the peace; to the state of affairs between nation and nation, and not (with the single exception above stated) to the affairs of any nation within itself." He further said: "The allies have no right, under the alliance, to call upon us to aid or abet a forcible interference in the internal affairs of any country, for the purpose or under the pretext of putting down extravagant theories of liberty. But *we have a right to call upon them* as they upon us, to check the aggression of State against State, and to preserve the territorial balance of Europe." Stapleton, Canning and his Times, pp. 374–376.

Writing, December 31, 1823, to Sir William A'Court, at Madrid, Mr. Canning said: "While I was yet hesitating what shape to give to the declaration and protest, which ultimately was conveyed in my conference with Prince de Polignac, and while I was more doubtful as to the effect of that protest and declaration, I sounded Mr. Rush, (the American Minister here,) as to his powers and disposition to join in any step which we might take to prevent a hostile enterprise on the part of European powers against Spanish America. He had no powers, but he would have taken upon himself to join with us, if we would have begun by recognizing the Spanish American States. This we could not do; but I have no doubt that his report to his government of this *sounding* (which he probably represented as an overture) had a great share in producing the official declarations of the President." Mr. Canning's biographer says: "This letter shows exactly the share which Mr. Canning had in originating that part of the Message of President Monroe, which is so often confounded with what is called the 'Monroe doctrine.' Mr. Canning maintained that foreign powers had no right, directly or indirectly, to interfere, forcibly, between Spain and her American colonies, and that they had consequently no right to aid Spain in her attempts to reconquer them. The 'Monroe doctrine' is essentially different. The 'doctrine is that the unoccupied parts of America are no longer open to colonization from Europe.' This doctrine Mr. Canning resolutely denied, affirming, in opposition, not only that Spain had a perfect right to make whatever unaided efforts she chose, and was able to make, to regain the lost dominion over the revolted colonies, but that the United States had no right to take umbrage at the establishment of new colonies from Europe in any such unoccupied parts of the American Continent.'" Ib. pp. 395–6.]— *L.*

Note [48, page 129.

[It is perfectly understood that the treaty of July, 1827, and the independence of Greece with a restricted territory, was a matter of compromise which was arranged by the Duke of Wellington, in a special mission to St. Petersburg. Mr. Canning, in mentioning to Lord Granville his appointment, January 13, 1826, says: "I hope to save Greece, through the agency of the Russian name upon the fears of Turkey, without a war, which the Duke of Wellington is the fittest man to deprecate." There was quite a reason for immediate action in the fact that an agreement had been entered into by the Porte with the Pacha of Egypt, that, whatever part of Greece Ibraham might conquer, should be at his disposal. The Pacha's plan for disposing of his conquest was to remove the whole Greek population, carrying them off into slavery in Egypt or elsewhere, and to repeople the country with Egyptians and others of the Mahometan religion. Stapleton, Canning and his Times, p. 473.

The protocol signed at St. Petersburg, was exclusively between England and Russia. The American Minister at London, with whose passport Capo d'Istria left England when on his way to assume the Presidency of Greece, says: "It was afterwards communicated to France, who was not well pleased with it, still less with its having been made without her being consulted. She, however, concluded to accede and become a party to it." Mr. Gallatin to Mr. Clay, 21st October, 1826. MS. In communicating to his government, on the 14th of July, 1827, the treaty of the 9th of that month, he further states: "The public articles are almost the transcript of the protocol signed at St. Petersburg in April, 1826, between Count Nesselrode and the Duke of Wellington. The substance of the secret articles had been agreed on in Paris, in October last, as I informed you at the time. And it is generally understood that the delays have taken place here. The constant, and it may be said the exclusive object of this government, has been to prevent a war between Russia and Turkey. Anticipating the change which the accession of the Emperor Nicholas would cause in the policy of the Cabinet of St. Petersburg, this ministry, seeing that it could not prevent its interference in the affairs of Greece, saw no other way but to unite with Russia for the purpose of restraining her, and the Duke of Wellington was sent with instructions to that effect. Austria and Prussia had been invited to accede to the treaty, but declined, it is said, on account of the secret articles, though Austria was probably averse to the whole." Same to Same. MS.

Both the protocol and treaty, as concluded, provided for the *suzeraineté* of the Porte and for the payment of a tribute, to be permanently fixed. British and Foreign State Papers, 1826–7, p. 629. The following extracts are taken from despatches of the period from the Legation at London.

"In addition to the usual embarrassment of dealing with a power that

scarcely recognizes the ordinary law of nations, and with which it is not always easy to determine whether you are at peace or war, the allies have the most contradictory interests. Should their mediation prove abortive, the course to be pursued remains very uncertain. The secret article of the treaty of July last is singularly worded, owing, as far as can be learned, to the inability of the three powers to agree definitively on ulterior measures. Indeed, the policy of this country's interfering at all in the affairs of Greece is here considered very questionable, and only to be defended on the ground that the intervention of Russia was inevitable, and that England, by participating in the proposed mediation, might prevent any special advantage being reaped by the other States. Apprehension of the effect which the liberation of the Morea from the Turkish yoke may have on the future maritime power of Russia is quite a predominant feeling." Mr. W. B. Lawrence, Chargé d'Affaires, to Mr. Clay, October 13, 1827. Again, a despatch on the receipt of the intelligence of the battle of Navarino, says: "To the people of the United States, whose sympathies have always been enlisted on the side of the Greeks, the intelligence of the destruction of the Egyptian and Turkish squadrons cannot fail to afford unalloyed gratification. In this country, however, as I have learned from personal intercourse, as well as from the tone assumed by many of the public prints, the satisfaction is very far from general. The impressions which I have heretofore communicated respecting the opinions entertained of the policy of England's interference in the affairs of the East have been greatly strengthened within the last few days. All parties seem more apprehensive of the effects which the defeat of the Turks may have in advancing the power of Russia, than rejoiced at the success of an enterprise in which the nation is embarked. I dined on Sunday at Prince Esterhazy's. Before dinner the Prince took me into his cabinet and read to me several despatches from his Court, the purport of which was that Austria and Prussia would act in concert in inducing a settlement of the affairs of the East. Of this, as we have no Minister at Vienna, he requested me to inform my government, and, at the same time, to assure you that no war would result from the recent event." Same to Same, Nov. 14, 1827. MS.

By the treaty of London, of the 20th of November, 1852, it was agreed that the princes of the House of Bavaria, called by the convention of 1832 and by the Hellenic Constitution to succeed to the throne of Greece, in case King Otho should die without direct legitimate posterity, cannot ascend the throne without conforming to the 40th article of the Hellenic Constitution, which declares that every successor of the crown of Greece must profess the religion of the Oriental Orthodox Church. Lesur, Annuaire, 1852, p. 176. The Bavarian dynasty has since been put aside without any effort to sustain it. A revolution was effected in October, 1862, by the departure of the King and Queen and the establishment of

a provisional government. The real cause was not so much the maladministration of internal affairs, objectionable as that was, as a desire to advance the policy of extending the territory, so as to embrace others of the Greek nationality not within the restricted limits of the present kingdom. But the proclamation of the provisional government declares their mission to be to preserve the monarchical constitutional government, and always to profess, in an unmistakable manner, their gratitude towards the protecting powers; to preserve amicable relations with other States; and to convoke, without delay, the National Assembly, in the mean time observing order and tranquillity, and maintaining the laws of the country. Le Nord, Octobre et Novembre, 1862.

We have seen in the despatch of Lord Russell, expressed in the case of Montenegro, (Addenda, p. 979) what were, so late as the 30th of September, the views of the British government as to the *grande idée* of the Greek and Slavonic populations of the East. The vacancy in the throne of Greece had, however, no sooner been announced than popular sentiment throughout that country was directed to Prince Alfred, the second son of the Queen of England. Though the protocol of London of February, 1830, between the three protecting powers, excluding at the first election of a sovereign any members of these reigning families from the Greek throne may not have in terms applied to the present state of things, the motive for adopting the rule remained the same. The report of the French Minister to the Emperor, which precedes the diplomatic documents in the *livre jaune* of 1863, states that the government of His Majesty did not hesitate to conform to it, and that the Cabinets of London and St. Petersburg also agreed to notify the provisional government of Greece that they would regard the protocol as applicable to the election of a new sovereign. But England, before disavowing officially Prince Alfred's being a candidate, insisted that Russia should equally decline as to the Duke of Leuchtenberg, and as that power delayed the required explanations, the English government announced its intention to consider itself as freed from its engagements. France ultimately succeeded in inducing a reciprocal renunciation, in the event of the election of Prince Alfred or of the Duke of Leuchtenberg. And the three Cabinets have agreed besides to unite in the designation of the prince who shall be recommended to the suffrages of the Greeks. England subsequently caused a memorandum to be presented, (January, 1863,) by her Minister at Athens, to the provisional government. In it, it is said, that if the new assembly of representatives would remain faithful to the declaration made by the provisional government, on occasion of the departure of King Otho, to maintain the constitutional government, and to abstain from every aggression against the neighboring States, and if it chooses a sovereign against whom no well-founded objection can be raised, Her Majesty will see, in this conduct, a promise

of future liberty and prosperity for Greece. In such case Her Majesty, with a view of giving more strength to the Greek monarchy, would be disposed to announce to the Senate and Representatives of the Ionian Isles her desire to see those islands united to the Greek monarchy, and to form with Greece a united State; and if the Ionian legislature expresses the same desire, Her Majesty will take measures to obtain the concurrence of the powers who were parties to the treaty in virtue of which the Ionian Isles were placed, as a distinct and separate State, under the protectorate of the British crown. Mr. Elliot added, "After the communications which have been addressed to me on this subject, I must take care to have it understood that the election of a prince, who would be the symbol and precursor of revolutionary troubles, or the adoption of an aggressive policy towards Turkey, would totally prevent the abandonment by Her Majesty of the protectorate of the Ionian Isles." Le Nord, 8 Janvier, 1863. The last accounts (February) announce the consent of the Duke of Saxe-Coburg-Gotha to accept the crown.] — *L.*

Note [53, page 142, line 24.

[The *non possumus* of the Pope has hitherto (January, 1863,) arrested all attempts to conciliate conflicting interests. The policy of France, as developed in the letter of the Emperor Napoleon of the 20th of May, 1862, to his late Minister of Foreign Affairs, published in the "Moniteur Universel" of the 25th of September, was affirmed anew by the Circular of the 18th of October, of M. Drouyn de l'Huys to the diplomatic representatives of France.

In it, after stating the obstacles which had hitherto prevented the accomplishment of his efforts, and declaring that it was, notwithstanding, the duty of statesmen to study to reconcile two causes which passions alone present as irreconcilable, Napoleon discusses the matter in the interest of the two parties concerned: "Italy, as a new State, has against her all those who hold to the traditions of the past; as a State which has called revolution to her aid, she inspires distrust in all men of order. She has at her doors a formidable enemy, whose armies and ill-will, easy to be understood, will still for a long time be for her an imminent danger. These antagonisms, already so serious, become more so, by resting on the interests of the Catholic faith. A short time ago, it was the Absolutist party which alone was adverse to Italy. Now, the greater part of the Catholic populations of Europe are opposed to her, and this hostility is not only an obstacle to the friendly intentions of the governments attached by their faith to the Holy See, but it arrests the favorable dispositions of Protestant or schismatical governments, which are obliged to have regard to a considerable fraction of their subjects. Thus, everywhere, it is the religious idea which

checks the public sentiment for Italy. Her reconciliation with the Pope would smooth for her many difficulties, and rally to her thousands of her adversaries.

"On the other side, the Holy See has an equal, if not a stronger interest that this reconciliation should be effected; for if the Holy See has zealous supporters among all fervent Catholics, it has opposed to it everything that is liberal in Europe. The interests of the Holy See, of religion, require, then, that the Pope should be reconciled with Italy; for that would be to be reconciled with modern ideas, to retain within the pale of the Church two hundred millions of Catholics, and to give to religion a new lustre by showing faith seconding the progress of humanity.

"The Pope, brought to a sound appreciation of things, would comprehend the necessity of accepting everything that can attach him again to Italy; and Italy, yielding to the counsels of a wise policy, would not refuse to adopt the guaranties necessary to the independence of the Sovereign Pontiff, and to the free exercise of his power. This double end would be attained by a combination, which, maintaining the Pope as master at home, would remove the barriers that now separate his States from the rest of Italy. In order that he should be master at home, independence must be secured to him, and his power freely accepted by his subjects. We may hope that it would be so, when, on the one side, the Italian government would engage with France to acknowledge the States of the Church and the established boundary, and, on the other, when the government of the Holy See, returning to ancient traditions, would consecrate the privileges of the municipalities and provinces, so that they may, thus to speak, govern themselves; for then the power of the Pope, moving in a sphere elevated above the secondary interests of society, would be free from that responsibility which is always burdensome, and which a strong government alone can sustain. The general indications which precede are not an *ultimatum*, which I have the pretension to impose on the two disagreeing parties, but the basis of a policy, which I deem it my duty to endeavor to make prevail through our legitimate influence and our disinterested counsels."

The propositions of detail, which were given in M. de Thouvenel's instructions of 31st of May, 1862, to the French Ambassador at Rome, are thus repeated in that Minister's despatch of June 24th:

"First. The maintenance of the territorial *statu quo*, the Holy Father resigning himself under all reserves to exercise his power only over the provinces which he retains, while Italy would enter into an engagement with France to respect those which the Church still possesses. The Sovereign Pontiff, consenting to aid in this compromise, the Emperor's government would endeavor to cause the powers which signed the general act of Vienna to participate in it.

"Second. The transfer to the charge of Italy of the greater part, if not the whole, of the Roman debt.

"Third. The establishment, to the profit of the Holy Father, of a civil list destined to compensate for the resources which he would no longer find in the reduced number of his subjects. In assuming the initiative of this proposition towards the European powers, and more particularly towards those belonging to the Catholic faith, France should, for her part, engage to contribute, in the proportion of a yearly payment (*rente*) of three millions, to the indemnity offered to the Chief of the Catholic Church.

"Fourth. The granting by the Holy Father of reforms, which, by rallying around him his subjects, would consolidate in the interior of the State a power already protected abroad by the guarantee of France and of the European powers."

M. Lavalette thus states the refusal of the Roman government: "The Holy Father, His Eminence (Cardinal Antonelli) said to me, cannot consent to anything which directly or indirectly sanctions, in any manner whatever, the spoliations of which he is a victim. He cannot alienate, directly or indirectly, any portion of territory which constitutes the property of the Church and of the entire Catholic world. His conscience forbids it, and he is determined to maintain peace before God and man. The Holy Father cannot consent that a part of his provinces should be guaranteed, for it would be in fact, if not in law, an abandonment of the rest." Le Nord, Septembre, 1862.

The only reference to the Roman question in the speech at the opening of the Corps Legislatif, 1863, was in the following paragraph: — "In the East the national desire of the Danubian Provinces to form only one people could not find us insensible, and our concurrence has contributed to cement their union. We have supported whatever was well founded in the complaints of Servia, Montenegro, and of the Christians of Syria, without disregarding the rights of the Ottoman Porte. Our arms have defended the independence of Italy without compounding with revolution — without impairing, beyond the field of battle, our good relations with our adversaries of the day — without abandoning the Holy Father, whom our honor and our past engagements obliged us to sustain." The Emperor had previously declared his policy was "abroad, to favor within the limits of right and treaties, the legitimate aspirations of the people towards a better future."] — *L.*

Notes [53, page 159, and [168, page 509.

[Mr. Cass, Secretary of State, wrote to Mr. Dodge, October 2, 1858, as to a report that a naval and military armament is about to be sent to attack Mexico by Spain, with a view to gain important political ascendency there, by taking advantage of the distracted condition of the country: "You are

aware of the position taken by the United States, that they will not consent to the subjugation of any of the independent States of this continent to European powers, nor to the exercise of a protectorate over them, nor to any other direct political influence to control their policy or institutions. Recent circumstances have given to this determination additional strength, and it will be inflexibly adhered to whatever may be the consequences." Department of State MS. The dissolution of the tripartite convention, in reference to Mexico, by the withdrawal of England and Spain, was alluded to, in a note to a subsequent portion of this treatise. Part IV. ch. 1, § 2, Editor's note [168, p. 509. Since the war devolved on France alone, it has assumed larger proportions, the importance of which is not a little enhanced by the present state of affairs in the United States, of which, indeed, it is avowedly one of the results.

Mr. Seward wrote to Mr. Dayton, at Paris, August 23, 1862: "The position of the United States, in regard to the war between France and Mexico, has been taken and will be maintained. This government, relying on the explanations which have been made, regards the conflict as a war involving claims by France, which Mexico has failed to adjust to the satisfaction of her adversary, and it avoids intervention between the belligerents."

Mr. Dayton, in a note of October 23, 1862, enclosed to Mr. Seward a copy of a letter of the Emperor Napoleon to General Lorencez, then commanding the expedition in Mexico, in which he says, "It is contrary to my interest, my origin, and my principles to impose any kind of government whatever on the Mexican people; they may freely choose that which suits them best." The Secretary of State wrote, November 10, 1862, to Mr. Dayton, "It is hardly necessary to inform you that this government has not attached any such importance to the speculations of the European press as to apprehend that the government of France combines any hidden design against the United States with the military operations it is carrying on in Mexico." Papers relating to Foreign Affairs, 1862, pp. 400, 404.

But it seems from an intercepted despatch of Mr. Benjamin, Secretary of State for the Confederate States, to Mr. Slidell, their Commissioner in Paris, October 17, 1862, and published by the government at Washington, that the evidence of an attempt to withdraw Texas from the Southern Confederacy was deemed sufficient to lead to the expulsion from the Confederate States of the French Consul at Galveston, and that a similar measure had been contemplated as to the Consul at Richmond. Mr. Benjamin says: —

"In endeavoring to account for such a course of action on the part of the French government, I can only attribute it to one or both of the following causes.

"1st. The Emperor of the French has determined to conquer and hold

Mexico as a colony, and is desirous of interposing a weak power between his new colony and the Confederate States, in order that he may feel secure against any interference with his designs on Mexico.

"2d. The French government is desirous of securing for itself an independent source of cotton supply, to offset that possessed by Great Britain in India, and designs to effect this purpose by taking under its protection the State of Texas, which, after being acknowledged as an independent Republic, would, in its opinion, be in effect as dependent on France and as subservient to French interests as if a French colony.

"It is more than probable that both these considerations would have weight in the counsels of the French Cabinet, and we are not without suspicion that the tortuous diplomacy of Mr. Seward may have had some influence in inspiring such designs. The desire to weaken the Confederacy, to exhibit it to the world as 'a rope of sand,' without consistence or cohesion, and therefore not worthy of recognition as an independent member of the family of nations, would afford ample motives for the adoption of such a course by the Cabinet of the United States, which is driven to a diplomacy of expedients in the desperate effort to avert the impending doom which awaits the party now in power in Washington."

He, however, proceeds to say:

"One other suggestion occurs to me, which you may receive as purely conjectural on my part. It is known to me personally that at the date of the annexation of Texas to the United States, Mr. Dubois de Saligny, the present French Minister in Mexico, and who was at that time French Chargé d'Affaires to the Republic of Texas, was vehemently opposed to the annexation, and was active in endeavoring to obstruct and prevent it. Even at that date the despatches of M. Guizot, which I had an opportunity of reading, were filled with arguments to show that the interests of Texas were identical with those of France, and that both would be promoted by the maintenance of a separate nationality in Texas. The intrigue now on foot, therefore, accords completely with a policy in regard to Texas that may be almost said to be traditional with France; and it is not impossible that the movement of the consular agents here has received its first impulse from the French legation in Mexico, instead of the Cabinet of the Tuileries." Journal of Commerce, Jan. 16, 1863.

The views of the Emperor are thus stated in a letter addressed by him to General Forey, appointed to the command of the Mexican expedition, under date of July 3, 1862, and recently published in the French official journal: —

"The object to be attained is not to impose upon the Mexicans a form of government which they dislike, but to aid them in their endeavors to establish, according to their inclinations, a government which might have some chance of stability, and which would insure to France the redress of

grievances of which she had to complain. It is obvious that if they prefer a monarchy it is the interest of France to support them in that view.

"There will not be wanting people who will ask you why we lavish men and money for the establishment of a regular government in Mexico. In the present state of the civilization of the world, the prosperity of America is not a matter of indifference to Europe, for it is she who feeds our manufactories and gives life to our commerce. We have an interest in this — that the Republic of the United States be powerful and prosperous; but we have none in this — that she should seize possession of all the Mexican Gulf, dominate from thence the Antilles, as well as South America, and be the sole dispenser of the products of the New World. We see now by sad experience how precarious is the fate of an industry which is reduced to seeking its chief raw material in one market alone, to all the vicissitudes of which it has to submit. If, on the other hand, Mexico preserves its independence, and maintains the integrity of its territory; if a stable government is constituted with the assistance of France, we shall have restored to the Latin race on the other side of the ocean its strength and prestige; we shall have established our beneficent influence, which by presenting immense openings for our commerce, will procure us the materials indispensable to our industry. Mexico, thus regenerated, will always be favorable to us, not only from gratitude, but also because her interests will be in harmony with ours, and she will find a powerful support in her good relations with the European powers. To-day, then, our pledged military honor, the exigency of our policy, the interests of our industry and of our commerce, all make it our duty to march upon Mexico, and boldly plant there our flag; to establish either a monarchy, if it is not incompatible with the national sentiment of the country, or at all events, a government which promises some stability." Moniteur, 16 Janvier, 1863.

A manifesto of the Mexican Congress, of the 27th October, 1862, while acknowledging the noble and loyal conduct of the representatives of England and Spain at the time of the rupture of the convention of La Soledad, says that the Mexican Republic accepts the unjust and devastating war which France has made upon it. She will do as every sovereign and independent State ought to do. The war waged on Mexico is a war declared against the American continent. Peru and Chili have so understood it; the United States of the north and the other republics of this continent must likewise so understand it. The case of Mexico is an experiment. It is a door, which, once opened, will give access to all the rest of the American continent. Le Nord, 13 Decembre, 1862.

Resolutions were introduced by a Senator from California, and discussed in the Senate of the United States, (February, 1863,) though without any final action on them, in relation to the French operations in Mexico. After charging the attempt of France to subject Mexico to her authority by armed

force to be a violation of the rules of international law, as well as a violation of the faith of France, pledged by the tripartite treaty of the 31st of October, 1861, (and which was communicated, in a note from the plenipotentiaries of the three governments to that of the United States,) and of the assurances repeatedly made to our Minister in France; they declared that the attempt to subject Mexico to French authority was an act not merely unfriendly to this republic but to free institutions everywhere, and that it is regarded as not only unfriendly but hostile, — that it is the duty of this republic to require of the government of France that her forces should be withdrawn from the territories of Mexico, — that it is the duty of this republic now, and at all times, to lend such aid to the republic of Mexico, as may be required to prevent the forcible interposition of any of the States of Europe in the political affairs of that republic; that the President be requested to cause to be communicated to the government of Mexico the views now expressed by the two houses of Congress, and be further requested to cause to be negotiated such treaty or treaties between the two republics as will best tend to make these views effective. Congressional Globe, 1862–3, p. 371.] — *L.*

Note [57, page 169.

[It was decided, in 1859, by the Supreme Court of the United States, that the treaty with Würtemberg did not include the case of a citizen of the United States dying at home and disposing of property within the State of which he was a citizen, and in which he died: "We concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in the treaty. It has been suggested in the argument of this case, that the government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the States. The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration." Howard's Rep. vol. xxiii. p. 447, Frederickson *v.* The State of Louisiana.

It was decided by the State Court in Louisiana that the French treaty had no effect on the succession of a person who died before its conclusion — the law there imposing a tax of ten per cent. on all property in the State on any person not domiciled there and not being a citizen of any State or territory of the Union. The Supreme Court of the United States, in affirming the judgments, say: "The treaty does not claim for the United States the right of controlling the succession of real or personal property in a State, and its operation is expressly limited to the States of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force; and as there is no act of the legislature of Louisiana repealing this law and accepting the provisions of the treaty, so as to secure to her citizens similar rights in France, this court might feel some difficulty in saying that it was repealed by this treaty, if the State court had not so expounded its own law, and held that Louisiana was one of the States in which the proposed arrangements of the treaty were to be carried into effect." Howard's Reports, vol. xix. p. 7, Prevost *v.* Greneaux.

The treaty with Venezuela, August 27, 1860, provides for the disposal of personal property by sale, donation, testament, or otherwise; but as to real estate, it is said where "it would by the law of the land descend on a citizen, were he not disqualified by alienage, the longest time which the laws of the country in which it is situated will permit shall be accorded to him to dispose of the same; nor shall he be subjected, in doing so, to higher or other dues than if he were a citizen of the country where such real estate is situated." Treaties of United States, 1861–2, p. 210.] — *L.*

Note [59, page 177.

[Treaties frequently contain a proviso, as the following one in the treaty of August 27, 1860, with Venezuela: "The citizens of each of the high contracting parties, residing or established in the territories of the other, shall be exempt from all compulsory military service by sea or by land, and from all forced loans or military exactions or requisitions; nor shall they be compelled to pay any contributions, whether higher or otherwise, than those that are or may be paid by native citizens." Treaties of the United States, 1861–2, p. 208.] — *L.*

Note [70, page 207.

[The point involved in the case of the seamen of The Atalanta, is, perhaps, not stated with sufficient clearness in the note. Mr. Cushing agrees with M. Baroche, that it was not the object of the Consular Convention to confer on the consuls of either nation the jurisdiction of crimes in the ports of the other; nor in his argument is exterritorality for merchant ships in the territorial waters either claimed or conceded. The true question was,

whether, when a crime has been committed on the *high seas*, on board an American ship, that crime being of the sole competency of the United States, and the ship is compelled by the contract of destination, by stress of weather, or by the crime itself, to touch at a French port, in such case, the criminal may be forcibly withdrawn from the ship by the local authorities, or by the order of the government. It did not distinctly appear of what nationality these men were; but it was implied by the tenor of the discussion on both sides that they were neither citizens of the United States nor citizens of France.] — *L.*

Note [78, page 219.

[An edition of "The United States Consul's Manual," by Mr. Abbot, of the State Department, has just been published, January, 1863. The treaty of August 27, 1860, with Venezuela, gives power to the consuls and vice-consuls to sit as judges and arbitrators, in differences between masters and crews, without the interference of the local authorities; unless their assistance should be required, or the conduct of the crew, or of the captain, should disturb the order or tranquillity of the country. The consuls are also authorized to require the assistance of the local authorities for the arrest and imprisonment of the deserters from the ships of war and merchant vessels of their country. Treaties, 1861–2, p. 262.] — *L.*

Note [78, page 239.

[Venezuela is to be added to the States with which the United States have treaties of extradition. The delivery is to be when the fact of the commission of the crime is so established as to justify their apprehension and committal for trial, if the crime had been committed in the country where the person so accused shall be found; in all of which the tribunals of said country shall proceed and decide according to their own laws. The crimes are designated in the treaty. Treaties of the United States, 1862, p. 223.] — *L.*

Note [112, page 848.

[A proposition has been made for the capitalization of the Scheldt tolls. England has admitted it in principle, and the Cabinets of Brussels and the Hague actively pursue its realization. Le Nord, 15 Aout, 1862.] — *L.*

Note [114, page 368.

[The following note from Mr. Thayer, Consul-General of the United States, at Alexandria, in Egypt, to the Editor, dated January 1, 1863, gives the most recent accounts of the great work alluded to in the notes: —

"On page 135 of your very interesting Introduction to Wheaton's

'Elements' you mention his despatch in favor of reopening the water communication by way of Egypt and the Red Sea.

"Recent personal observation has convinced me that the great work will be done; and probably within three or four years, and that the objections to the feasibility of it are unfounded.

"I do not think it possible for an unprejudiced man to take the journey along the works on the Isthmus without coming to this conclusion.

"In fact the question of practicability is already resolved. The ancients built a navigable canal from the Red Sea to Lake Timsah (rather more than half the distance across the Isthmus); and the French company have brought the waters of the Mediterranean to the same point. It was on the latter part that I have sailed.

"The works on the line are on a vast scale and admirably organized. A great number of steam-dredges and more than 20,000 Arabs are incessantly digging.

"The funds of the company seem to be quite adequate, and the total estimate for finishing the canal is 200,000,000 francs. The Viceroy is warmly interested in favor of the enterprise. Within twelve months, it is believed, a preliminary canal, or *rigole de service*, will unite the two seas, carrying the coal for the Indian steamers, — now transshipped around the Cape of Good Hope, or by the expensive route (by rail) across Egypt. The great maritime canal will follow."] — *L.*

Note [115, page 874.

[A self-constituted mission to the French Republic, in 1798, on the part of Dr. Logan, of Philadelphia, led to the passage of the act of Congress of the 30th of January, 1799, subjecting to fine and imprisonment any citizen of the United States holding correspondence with a foreign government or its agents, with intent to influence the measures of such government in relation to disputes or controversies with the United States. Statutes at Large, vol. iii. p. 612. Hildreth's History of the United States, 2d series, vol. ii. p. 280.] — *L.*

Note [119, page 881.

[New regulations were issued by Earl Russell, September 15, 1862, respecting the nomination, qualification, and examination of candidates for the place of *unpaid attachés*, who are hereafter to be termed simply *attachés*. The designation of *paid attachés* is abolished, and commissions as Second Secretaries are to be granted to paid attachés, and commissions as Third Secretaries to unpaid attachés, on the completion of their probationary term, which is of four years, during which period the attachés must have been employed for six months in the foreign office, and must also have resided at one of Her Majesty's embassies, or missions abroad, or been actually

employed in the foreign office, for a further period of three years. To the attachés is granted, on completion of their probation, a salary of £150 a year. Candidates must be prepared to undergo an examination before the Civil Service Commissioners within six months after their nomination, if they elect to undergo only one examination, (which single examination will, in that case, exempt them from any further examination, previously to receiving their commissions as Secretaries,) or within three months, if they prefer to undergo two examinations, as heretofore. The works on maritime and international law, on which the candidates are required to be examined, are "Wheaton's Elements of International Law," and the first volume of "Kent's Commentary." Among other qualifications required, are a knowledge of the French and German languages, and of the political history of Europe from 1660 to 1860, inclusive, and of the most important international transactions during that period. Regulations of Foreign Office.

In Italy, there are three departments in the Ministry of Foreign Affairs, the foreign office, the legations, and the consulates. The candidates for admission as voluntary attachés, are required to be between the ages of eighteen and twenty-eight, and to have secured to them an income of 6000 livres, besides having passed an examination for the Doctorate (*Magistero,*) or have pursued their studies in the military or naval academy necessary for admission as sub-lieutenant or midshipman. They are examined by a commission on the civil law, penal law, commercial and canonical law, the elements of international law and political economy, history and geography, foreign languages, besides French. The written essays will be both in French and Italian. Regolamento del Servizio interno del ministero degli Esteri.]—*L.*

Note [119, page 383.

[A question of precedence between ambassadors and royal persons is referred to in a letter from Mr. Canning to Lord Granville, of July 8, 1825. The rule there maintained is that ambassadors shall have precedence over all but crowned heads. Stapleton, Canning and his Times, p. 608.]—*L.*

Note [120, page 384.

["The private communications of foreign ministers with the King of England is wholly at variance with the spirit and practice, too, of the British Constitution. I should be very sorry to do anything at all unpleasant to the king; but it is my duty to be present at every interview between His Majesty and a foreign minister." Stapleton, Canning and his Times.]—*L.*

Note [125, page 389.

[The incident here related referred to the communication made on 1st of January, 1825, of the intention of the British government to recog-

nize the independence of Mexico. Mr. Canning's letter to Lord Granville, thus proceeds: "Might he state to me *verbally* that he was ordered to state, without reference to his despatch? Undoubtedly, I was prepared to hear anything that he had to say to me. I must afterwards take my own way of verifying the exactness of my recollection. He then proceeded to pronounce a discourse. I instantly wrote down the substance of what I understood him to have said to me, and sent him my memorandum, with a letter requesting him to correct any inaccuracies. The result is, that I have a document in spite of all their contrivance. Yesterday, the same scene with Esterhazy, who had not seen Lieven in the interval, and therefore came unprepared. He too made me a speech, and to him I immediately sent a memorandum of what I understood him to have said. I have not yet received his answer.

"To-day Maltzahn came evidently prepared; for he produced no paper, but set off *at score*.

"This rather provoked me, (for he is the worst of all) but I was even with him. For whereas with the others I merely listened and put in no word of my own, I thought it a good opportunity to pay off my reserve upon Maltzahn; and accordingly said to him a few as disagreeable things as I could upon the principle of legitimacy as exemplified in the readiness of the allies to have made peace with Bonaparte in 1814, and failing Bonaparte to have put some other than Louis XVIII. upon the throne; and also in the general recognition of Bernadotte, while the lawful king of Sweden is wandering in exile and begging through Europe. I asked him how he reconciled these things with the high principles which he was ordered to proclaim about the rights of Spain to her Spanish Americas? He had nothing to answer. I have sent *him* a memorandum too, in which my part of the dialogue is inserted. I think that I shall teach the Holy Alliance not to try the trick of these simultaneous sermons again." George Canning and his Times, p. 430.

In a subsequent letter, of April 8, 1825, to Lord Granville, Mr. Canning says: "I explained to Esterhazy, as you may do to Metternich, that I made it a point to record the memoranda just as I received them back from the respective parties. Count Lieven sent me a long addition which I added (translating it only in order to incorporate it with mine). Maltzahn sent me an entire substitution, and I substituted it for mine. Esterhazy sent me a partial correction, and I let it stand as he sent it. As for the communication of these memoranda, they are to be communicated nowhere, without encountering a previous communication on the part of the allied Courts. It is quite a mistake, or rather confusion, to talk of this mode of rectification as a breach of confidence. Information may be given without offence, and to repeat it without permission is a breach of confidence. But a scolding is not a confidence, and if the party giving it thinks himself en-

titled to publish the fact of its having been given, surely the party receiving it makes but just reprisals when he tells the world exactly to what it amounted. This does not suit Metternich's system, and why? Because simultaneous scolding is a part of the assumed jurisdiction of the Holy Alliance. But it is surely a very innocent revenge to repeat exactly what has been said, and to show them how little we mind it; better so than scold again." Metternich was then in Paris. Ib. p. 431.

The Colombian Minister was received by the King, November 21, 1825, which was the first formal recognition by England of a Spanish American State. Ib. p. 447. A treaty of amity, commerce, and navigation with Colombia, had been signed at Bogota, April 18, 1825, and one with the United Provinces of the Rio de la Plata, at Buenos Ayres, February 2, 1825. Annual Register, 1825, pp. 80, 84.] — *L.*

Note [134, page 404.

[During Mr. Gallatin's mission at London, in 1827, an incident occurred involving a question of diplomatic privileges which led to an exposition of the British views on the rights of embassy. His coachman was arrested in his stable on a charge of assault by a warrant from a magistrate. The subject having been informally brought to the notice of the Foreign Office, a communication was addressed to the Secretary of the American Legation by the Under-Secretary of State, Mr. Backhouse, May 18, 1827, in which he informed Mr. Lawrence of the result of a reference made by order of Lord Dudley, to the law-officers of the Crown. In it, it is said that "the statute of the 7th Anne, chap. 16, has been considered, in all but the penal parts of it, nothing more than a declaration of the law of nations; and it is held that neither that law, nor any construction that can properly be put upon the statute extends to protect the mere servants of ambassadors from arrest upon criminal charges, although the ambassador himself, and probably those who may be named in his mission are, by the best opinions, though not by the uniform practice of this country, exempt from every sort of prosecution, criminal and civil. His lordship will take care that the magistrates are apprised, through the proper channel, of the disapprobation of His Majesty's government of the mode in which the warrant was executed in the present instance, and are further informed of the expectation of His Majesty's government that, whenever the servant of a foreign minister is charged with a misdemeanor, the magistrate shall take proper measures for apprising the minister either by personal communication with him, or through the Foreign Office, of the fact of a warrant being issued, before any attempt is made to execute it, in order that the minister's convenience may be consulted as to the time and manner in which such warrant shall be put in execution."

An official character was given to the preceding communication by a note from Earl Dudley, Secretary of State for Foreign Affairs, June 2, 1827, in which he says, that it is only necessary for him to "confirm the statement contained in the private note of Mr. Backhouse referred to by Mr. Gallatin, as to the law and practice of this country upon the questions of privilege arising out of the arrest of Mr. Gallatin's coachman, and to supply an omission in that statement, with respect to the question of the supposed inviolability of the premises occupied by a foreign minister. He is not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the laws of nations."

He adds that courtesy requires that their houses should not be entered without permission being first solicited, in cases where no urgent necessity presses for the immediate caption of an offender. MS.] — *L.*

Note [145, page 437.

The proposition in reference to consular pupils, was renewed by Mr. Secretary Seward, in the following communication to the President, under date of December 24, 1862, and by him transmitted to Congress: —

"By the act of Congress of August 18, 1856, which was carefully framed, deliberately considered, and unanimously passed, the President was authorized to appoint a class of officers called consular pupils. The motives which led to this authorization probably were, in part, a consciousness that as consuls were forbidden to employ clerks at the public expense, and as these were absolutely indispensable at some of the principal ports, if one or more pupils were attached to the consulate they could, while learning the general duties of the consular service, perform those of clerks, and thereby relieve the consuls in a degree from the charge of clerk-hire, which, when taken from the compensation of those officers, leaves the latter quite inadequate for an economical support of themselves and their families in expensive foreign capitals.

"Another motive which it is believed influenced Congress in sanctioning the appointment of consular pupils was the necessity for interpreters at many of the consulates, especially in China, Japan, and the Turkish dominions. This necessity had previously led to the employment of persons in that capacity owing no allegiance to the United States, and for whose character, antecedents, and qualifications there could be no sufficient guarantee. If, however, consular pupils were appointed having a natural aptitude for foreign languages, the country might, in a short time, expect to be served by its own citizens as qualified interpreters.

"It is not to be doubted also that the public would be benefited, if from among the consular pupils who might distinguish themselves by their in-

telligence, industry, and general good character, the President should have the opportunity to appoint consuls.

"The sudden repeal by the appropriation act, approved February 7, 1857, of the section of the act of Congress referred to, authorizing the appointment of consular pupils, was consequently regretted by the executive government for the time being, and subsequent experience has proved it to have been so improvident a measure that the expediency of asking Congress again to confer the authority for the appointment of such officers has since repeatedly been brought to its notice, and is now submitted to your consideration also.

"In reviewing the subject, that enlightened body will, it is hoped, bear in mind that the United States is at least the second commercial power on the globe; that their rivals have long since carefully devised and adopted the system now recommended, with, it is believed, the sole view of imparting to their consulates superior efficiency, and thereby securing to the subjects of their respective countries corresponding advantages in trade.

"No one could be more reluctant than the undersigned to countenance any measure the effect of which would be materially or unnecessarily to increase the public burdens at this juncture. The consular system, however, is now in a great measure self-supporting, and if consular pupils were allowed, being, as it is believed they are, indispensable for the success and efficiency of the public service, the additional charge which the allowance would occasion would, it is expected, bear no proportion to the advantage, both immediate and remote, which would result from the measure." 37th Cong. 3d Sess. Senate Ex. Doc. No. 14.] — *L.*

Note [146, page 434.

[An early case of the exercise of this power occurred in the withdrawal of his exequatur from the vice-consul of France for the States of New Hampshire, Massachusetts, and Rhode Island. The proclamation of the President of October 10, 1793, declared this to be done because the consul had, "under color of his offices, committed sundry encroachments and infractions on the law of the land, and particularly for having caused a vessel to be rescued with an armed force out of the custody of an officer of justice who had arrested the same by process from his court." Annual Register, 1793, p. 212. Another case is cited in Appendix No. 3 of this work. It is that of the revocation, in 1795, of the exequatur of the British Vice-Consul at Newport, Rhode Island, in consequence of his connection with the attempted seizure in American waters of the French Minister, M. Fauchet.] — *L.*

Note [167, page 501.

[The following is the dispatch, taken from the "Moniteur," of the French Minister of Foreign Affairs, addressed to the Ambassadors of France at London and St. Petersburg, dated Paris, Oct. 30, 1862:—

"Europe watches with painful interest the struggle which has been raging more than a year upon the American continent. These hostilities have provoked sacrifices. Efforts, certainly, of a nature to inspire the highest idea of perseverance and energy of the two populations. But this spectacle, which does so much honor to their courage, is only given at the price of numberless calamities and a prodigious effusion of blood. To these results of a civil war which from the first assumed vast proportions, there is still to be added apprehensions of a servile war, which would be the culminating point, and many irreparable disasters would ensue.

"As you are aware, when the conflict commenced we held it our duty to preserve the strictest neutrality, and, in concert with the other maritime powers, have frequently acknowledged to the Washington Cabinet that our sentiments had undergone no change.

"But the benevolent character of that neutrality, instead of imposing on the powers an attitude which might resemble indifference, ought rather to make them of service to the two parties, by helping them out of a position which seems to have no issue.

"From the commencement of the war an armed force was set on foot by the belligerents, which, since then, has almost constantly been kept up. After so much bloodshed they are now in that respect nearly in the same position. Nothing authorizes the presumption that more decisive military operations will shortly occur. According to the last news received in Europe, the two armies were in a condition that would not allow either party to hope for any decided advantage to turn the balance and accelerate the conclusion of peace.

"All the circumstances taken together point to the opportunity of an armistice, to which, moreover, under the present circumstances, no strategetical objections can be made. The favorable dispositions towards peace, which are beginning to manifest themselves in the North as well as in the South, might on the other hand rescind any steps that might be made to recommend a truce.

"The Emperor has therefore thought that the occasion has presented itself of offering to the belligerents the support and good offices of the maritime powers, and His Majesty has charged me to make the proposition to France and Russia that the three Cabinets exert their influence at Washington, as well as with the Confederates, to obtain an armistice.

"We should not, in fact, believe ourselves called upon to decide, but to proffer the solution of the difficulties which have heretofore opposed reconciliation between the belligerent parties. Would not, moreover, an agree-

ment between the three Courts respond sufficiently to their institutions? Would it not give to this step the character of evident impartiality? Acting in concert, they would combine the conditions best suited to inspire confidence in the government of the Emperor by the constant tradition of the French policy towards the United States, in that of England by community, and in that of Russia by the marks of friendship she has never ceased to show to the Washington Cabinet.

"Should the event not justify the hope of the three powers, and should the ardor of the struggle overrule the wisdom of their counsels, this attempt would be the no less honorable for them. They would have fulfilled a duty of humanity, more especially indicated in a war in which excited passions render all direct attempts at negotiation more difficult.

"It is the mission which international law assigns to neutrals, at the same time that it prescribes to them strict impartiality; and they could never make a nobler use of their influence than by endeavoring to put an end to a struggle which causes so much suffering, and compromises such great interests throughout the whole world.

"Finally, even without immediate results, these overtures would not be entirely useless, for they might contribute to encourage public opinion so as to hasten the moment when peace might become possible.

"I request you, Sir, in the name of His Majesty, to submit these considerations to Lord Russell, begging him to state the views of his government."

The following dispatch was addressed by Earl Russell to Lord Cowley, Her Majesty's Ambassador at Paris: — "Foreign Office, November 18. — The Count de Flahault came to the Foreign Office by appointment on Monday, the 13th instant, and read to me a dispatch from M. Drouyn de l'Huys relating to the civil war in North America.

"In this dispatch the Minister of Foreign Affairs states that Europe has followed with painful interest the struggle which has now been going on for more than a year on the American continent. He does justice to the energy and perseverance of both sides, but he observes that these proofs of their courage have been given at the expense of innumerable calamities and immense bloodshed. To these accompaniments of civil conflict is to be added the apprehension of a servile war, which would be the climax of so many misfortunes. Not only America, but Europe has suffered in one of the principal branches of her industry, and her artisans have been subjected to the most cruel trials. France and the maritime powers have, during the struggle, maintained the strictest neutrality. But the sentiments by which they are animated, far from imposing on them anything like indifference, seem, on the contrary, to require that they should assist the two belligerent parties in an endeavor to escape from the position which appears to have no issue. The forces of the two sides have heretofore fought with balanced success, and the latest acts do not show any prospects of a speedy termination of the war."

[Earl Russell proceeds to recapitulate the remaining points of the French dispatch, and replies to them as follows:] —

"The proposal of the Emperor of the French has attracted the serious attention of Her Majesty's government. Her Majesty is desirous of acting in concurrence with France upon the great questions now agitating the world, and upon none more than upon the contingencies connected with the great struggle now going on in North America.

"Neither Her Majesty, the Queen, nor the British nation will ever forget the noble and patriotic manner in which the Emperor of the French vindicated the law of nations, and asserted the cause of peace in the instance of the seizure of the Confederate Commissioners on board The Trent.

"Her Majesty's government recognize with pleasure, in the design of arresting the progress of war by friendly measures, the benevolent and humane intentions of the Emperor. They are also of the opinion that if the steps proposed were to be taken, the concurrence of Russia would be extremely desirable.

"Her Majesty's government, however, has not been informed, up to the present time, that the Russian government have agreed to coöperate with England and France on this occasion, although that government may support the endeavors of England and France to attain the end proposed.

"But is the end proposed attainable at the present moment by the course suggested by the government of France? Such is the question which has been anxiously and carefully examined by Her Majesty's government.

"After weighing all the information which has been received from America, Her Majesty's government are led to the conclusion that there is no ground at the present moment to hope for peace.

"Her Majesty's government think therefore that it would be better to watch carefully the progress of opinion in America, and if, as there appears reason to hope, it may be found to have undergone, or may undergo hereafter any change, the three Courts might then avail themselves of such change to offer their friendly counsel with a greater prospect than now exists of its being accepted by the two contending powers.

"Her Majesty's government will communicate to that of France any intelligence whatever received from Washington or Richmond."

The following dispatch from Prince Gortchakoff to the Russian Chargé d'Affaires at Paris conveys the answer of the Russian government to the French proposal of mediation in America:

"I herewith enclose you a copy of a dispatch from M. Drouyn de l'Huys, which the Duke of Montebello has been charged to communicate to us.

"It concerns the affairs of North America, and its object is to invite us

to an *entente* with France and England, to take advantage of the actual lassitude of the parties to propose, in common, a suspension of hostilities.

"In reply to this overture, I reminded the French Ambassador of the solicitude which our august master has never ceased to feel for the American conflict from its very onset, a solicitude caused by the amicable relations existing between the two countries, and of which the Imperial Cabinet has given public proofs. I have assured him that nothing could better respond to our wishes than to see the termination approach of a struggle which we deplore, and that to this effect our Minister at Washington has instructions to seize every favorable opportunity to recommend moderation and conciliation, so as to appease conflicting passions, and lead to a wise settlement of the interests at stake. I admitted that such councils would certainly have greater weight if presented simultaneously and in the same friendly manner by the great powers who take an interest in the issue of this conflict.

"But I added that, in our opinion, what ought specially to be avoided, was the appearance of any pressure whatsoever of a nature to wound public opinion in the United States, and to excite susceptibilities very easily aroused at the bare idea of foreign intervention. Now, according to the information we have hitherto received, we are inclined to believe that a combined step between France, England, and Russia, no matter how conciliatory and cautiously done, if it was taken with an official and collective character, would run the risk of causing precisely the very opposite of the object of pacification, which is the aim of the wishes of the three Courts.

"We have, therefore, drawn the conclusion that if the French government should persist in deeming a formal and collective step opportune, and that if the English Cabinet shares that opinion, it would be impossible for us, at the distance we are at, to anticipate the manner in which such a measure would be received. But if, in that case, our Minister should not participate officially, his moral support is not the less acquired beforehand to any attempt at conciliation. By giving it to his colleagues of France and of England under the friendly form (*forme officieuse*), which he might deem best suited to avoid the appearance of pressure, M. de Stoeckl will only be continuing the position and language which, by order of our august master, he has never ceased to observe since the commencement of the American quarrel.

"It is in this sense that I invite you to explain yourself to the French Minister of Foreign Affairs, in reply to the communication he has made to us."

At the opening of the Legislative Chambers, on 12th of January, 1863, the Emperor said: "The condition of France would be flourishing if the American war had not dried up one of the most fruitful sources of our industry. A public grant will be asked for cotton operatives. I have

attempted to send beyond the Atlantic advices inspired by sincere sympathy, but the great maritime powers not thinking it advisable as yet to act in concert with me, I am obliged to postpone to a more suitable opportunity the offer of a mediation, the object of which was to stop the effusion of blood and prevent the exhaustion of Americans, whose future cannot be looked upon with indifference." From the annual *exposé* of Foreign Affairs, (*livre jaune,*) laid before the Corps Législatif, 1863, it will be seen that the despatches respecting the late attempted mediation were of the most amicable character; and they show that the celebrated proposition of M. Drouyn de l'Huys was read by that minister to Mr. Dayton, before sending it to London and St. Petersburg. All similar intentions are declared to be now abandoned, although the Emperor holds himself always ready, either singly or coöperatively, to labor for the restoration of peace in America.

M. Mercier writes, 10th November, 1862: "The recent elections must be considered as an incontestable proof of a great change of opinion as regards the war. The question really put at them was, whether the war was to be prosecuted *à outrance,* with the integrity of the country as the exclusive end in view, to be attained even by servile insurrection, complete devastation of the South and ruin of the public liberties; or whether it was to be restrained within legal and constitutional limits, even at the risk of failing in completely attaining its object. The movement of public opinion which has just manifested itself is altogether opposed to the policy of a war *à outrance.*" And thereupon the French Minister expresses his opinion that the moment is propitious for the Emperor to attempt some step for the reëstablishment of peace; and this especially before another spring campaign is begun, and the cultivation of cotton abandoned in such a manner as to "render it impossible that it should ever be again resumed." Public Journals.] — *L.*

Note [169, page 511, line 16.

[Of the same nature, with the embargo of 1807, was the one which was imposed originally by a resolution of March 26, 1794, on all ships and vessels in the ports of the United States, bound to any foreign port, for thirty days, which by the further resolution of April 18, 1794, was continued to the 25th of May. Statutes at Large, vol. i. pp. 400, 401. By the act of June 4, 1794, ch. 41, the President was authorized whenever, in his opinion, the public safety might so require, to lay an embargo on all ships and vessels in the ports of the United States. This act was limited to fifteen days after the commencement of the next session of Congress. Ib. p. 372.] — *L.*

Note [170, page 514.

[It is doubted in the last edition of "Kent's Commentaries," that was published during the Author's life, as to the validity of the powers claimed by the President in his official letter of March 31, 1847, to the Secretary of the Navy. He exercised, as being charged by the Constitution with the prosecution of the war, the right of levying military contributions upon the enemy for the purposes of the war, and of opening the Mexican ports to neutral trade, the whole execution of these commercial regulations being placed under the control of the military and naval forces. "These fiscal and commercial regulations would," it is said, "seem to press strongly upon the constitutional powers of Congress to raise and support armies, to lay and collect taxes, duties and imposts, and to regulate commerce with foreign nations, and to declare war, and make rules for the government and regulation of the land and naval forces, and concerning captures on land and water, and to define offences against the law of nations. Though the Constitution vests the executive power in the President, and declares him Commander-in-Chief of the Army and Navy of the United States, these powers must necessarily be subordinate to the legislative power in Congress. It would appear to me to be the policy or true construction of this simple and general grant of power to the President, not to suffer it to interfere with those specific powers of Congress, which are more safely deposited in the legislative department, and that the powers thus assumed by the President do not belong to him but to Congress." Kent's Commentaries, vol. i. p. 292, note *b*.] — *L*.

Note [170, page 522.

[The arrests made in the loyal States, in consequence of the attempted suspension of the writ of habeas corpus, having been pronounced illegal, by the Judges both of the Federal and State judiciaries, whenever the cases were presented to them, the following notice was issued from the War Department, November 22, 1862: —

"Ordered, 1st. That all persons in military custody, who have been arrested for discouraging volunteer enlistments, opposing the draft, or otherwise giving aid and comfort to the enemy in the States where the draft has been made, or the quota of volunteers and militia has been furnished, shall be discharged from further military restraint.

"2d. That persons, who by authority of the military commander or Governor in any rebel State have been arrested and sent from such State for disloyalty or hostility to the government of the United States, and are now in military custody, may also be discharged upon giving their parole to do no act of hostility against the government of the United States, nor render aid to its enemies; but such persons shall remain sub-

ject to military surveillance, and liable to arrest on breach of their parole, and if any such persons shall prefer to leave the loyal States on condition of their not returning again during the war, or until special leave for that purpose be obtained from the President, then such persons shall at his option be released and depart from the United States, or be conveyed beyond the military lines of the United States forces.

"This order shall not operate to discharge any person who has been in arms against the government, or by force and arms has resisted or attempted to resist the draft, nor relieve any person from liability and trial and punishment by the civil tribunals or by court-martials, or by military commissions, who may be amenable to such tribunals for offences committed." Public Journals.] — *L.*

Note [172, page 530.

[The 26th article of the treaty of 1794 which provided, in case of rupture, that the merchants and others of each of the two nations, residing in the dominions of the other, shall have the privilege of remaining and continuing their trade, was not one of the permanent articles, but was limited to twelve years from the exchange of the ratifications.] — *L.*

Note [189, page 604.

[The President in his message at the opening of the session of 1862–3, only makes the following references to the emancipation measures adopted on his sole authority. He informs Congress, that, on the 22d day of September, a proclamation was issued by him, a copy of which is subjoined, and in connection with his proposition for the compensated emancipation of slaves, he states: "Nor will the war, nor proceedings under the proclamation of September 22, 1862, be stayed because of the recommendation of this plan."

On the 1st of January, 1863, the President issued a further proclamation. After reciting the proclamation of September, it thus proceeds: —

"Now, therefore, I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States, in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord, one thousand eight hundred and sixty-three, and in accordance with my purpose so to do, publicly proclaimed for the full period of one hundred days from the day of the first above-mentioned order, designate, as the States and parts of States wherein the people thereof respectively are this day in rebellion against the United States, the following, to wit: Arkansas, Texas, Louisiana — except the

parishes of St. Bernard, Placquemines, Jefferson, St. John, St. Charles, St. James, Ascension, Assumption, Terre Bonne, Lafourche, St. Mary, St. Martin, and Orleans, including the city of New Orleans; Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia — except the forty-eight counties designated as West Virginia, and also the counties of Berkley, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Portsmouth, and which excepted parts are, for the present, left precisely as if this proclamation were not issued.

"And, by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States and parts of States are and henceforth shall be free, — and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

"And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence, and I recommend to them that in all cases, when allowed, they labor faithfully for reasonable wages.

"And I further declare and make known that such persons of suitable condition will be received into the armed service of the United States, to garrison forts, positions and other places, and to man vessels of all sorts in said service.

"And upon this, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind and the gracious favor of Almighty God."

The retaliatory measures, to which the carrying of this proclamation into effect may lead, are thus stated in the following extract from the Message of the President to the Congress of the Confederate States, of January 12, 1862: —

"So far as regards the action of this government on such criminals as may attempt its execution, I confine myself to informing you that I shall — unless in your wisdom you deem some other course more expedient — deliver to the several State authorities all commissioned officers of the United States that may hereafter be captured by our forces in any of the States embraced in the proclamation, that they may be dealt with in accordance with the laws of those States providing for the punishment of criminals engaged in exciting servile insurrection. The enlisted soldiers I shall continue to treat as unwilling instruments in the commission of these crimes, and shall direct their discharge and return to their homes on the proper and usual parole."

In furtherance of the policy of President Lincoln's proclamation, an act has passed (February, 1863,) the House of Representatives, by which the

President is authorized to enroll, arm, equip, and receive into the land and naval service of the United States, such a number of volunteers, of African descent, as he may deem equal to suppress the present rebellion, for such term of service as he may prescribe, not exceeding five years; the said volunteers to be organized according to the regulations of the branch of the service into which they may be enlisted, to be officered by white or black persons, appointed and commissioned by the President, and to be governed by the rules and articles of war, and such other rules and regulations as may be prescribed by the President. But, nothing in the act, or in the rules or articles of war, shall be so construed as to authorize or permit any officer of African descent to be appointed to rank, or exercise military or naval authority over white officers, soldiers, or men in the military or naval service of the United States. It also provided that slaves of loyal citizens in the States, exempt by the President's proclamation, shall not be received into the armed service of the United States; nor shall recruiting offices be opened in any of those States without the previous consent of the Governor. Public Journals.] — *L.*

Note [189, page 611.

[A report was made to the old Congress, by Mr. Jay, as Secretary for Foreign Affairs, February 28, 1786, in reference to the violation or non-fulfilment by Great Britain of the treaty of 1783. Among the matters specially enumerated is the carrying off of negroes. While he fails to contend for including in the terms of the treaty such as were in the course of the war captured and disposed of as booty, — acts which Mr. J. Q. Adams regarded as contrary to the usages of war among civilized nations, — he insists on the validity of our claim, not only as to such negroes as remained with and belonged to American inhabitants within the British lines, but also as to those *who, confiding in proclamations and promises of freedom and protection, fled from their masters without, and were received and protected within, the British camps and lines.* The latter, he thinks, are clearly comprehended in the article, because they remained as much as ever the property of their masters. "They could not," he said, "by merely flying or eloping, extinguish the right or title of their masters, nor was that title destroyed by their coming into the enemy's possession, for they were *received*, not *taken* by the enemy; they were *received* not as *slaves*, but as *friends and freemen;* by no act, therefore, either of their own or of their friends, was the right of their masters taken away; so that being the property of American inhabitants, it was an infraction of the seventh article of the treaty to carry them away." This view of the rights of the American slave-owners is entitled to the more weight from the disposition manifested in the course of the report to justify

the conduct of the English, on the score of humanity. Mr. Jay, who was the earliest advocate of African emancipation, does not, however, propose that these benevolent sentiments should be indulged in by the British government at the expense of the property of American citizens, but, he concludes, that "Great Britain ought to stand excused for having carried away these slaves, provided she pays the full value of them, and on this he thinks the United States may with great propriety and justice insist. Indeed, there is an intimation in one of Mr. Adams's letters that the British Minister did not object to it." Secret Journals of Congress, Foreign Affairs, vol. iv. p. 276.

In going on the extraordinary mission which resulted in the treaty of 1794, great deference was had to the fact that the negotiator was, also, one of the commissioners who concluded the treaty of 1783, and that, as Secretary of Foreign Affairs and as the Chief Justice of the United States, he had formed and expressed opinions on all the questions in controversy. Compensation for the negroes carried off was one of the points in issue, and, in instructing Mr. Jay, the Secretary of State deemed it sufficient to express a wish that he would "support the doctrines of government with arguments proper for the occasion, and *with that attention to your* (*his*) *former public opinions, which self-respect* will justify, without relaxing the pretensions which have hitherto been maintained." It would seem, however, that the arguments of Lord Grenville had a greater influence with him than those which his successors had with Mr. J. Q. Adams or with the Emperor of Russia. When the reply of Mr. Randolph, denying the force of Lord Grenville's reasoning, and instructing him to insist on compensation, was received, Mr. Jay had already abandoned claims, which, as Secretary for Foreign Affairs, he had deemed so clear. American State Papers, vol. i. pp. 485–6. Trescot's American Diplomatic History, p. 109. This will explain the silence of the treaty.] — *L.*

Note [189, page 612.

[In the answer of the Emperor to the address of the Senate, on his return from Russia, December 1812, the very wise policy of not embittering the quarrel with Alexander was visibly manifested. "The war which I carry on," said Napoleon, "is a political war. I have undertaken it without animosity, and I would have wished to spare to Russia the evils which she has brought on herself. I could have armed against her a part of her population by proclaiming the liberty of the serfs. A great number of villages asked it of me, but I refused to avail myself of a measure, which would have devoted to death thousands of families." Thiers, Histoire du Consulat et de l'Empire, tom. xv. p. 168.] — *L.*

Note [189, page 613.

[Nor are the views expressed in the note at variance with those understood to have been entertained at no very remote period by the present government of the United States. In a confidential instruction of the 17th of February, 1862, to Mr. Adams, Mr. Seward asks: "Does France or does Great Britain want to see a social revolution here, with all its horrors, like the slave revolution in San Domingo? Are those powers sure that the country or the world is ripe for such a revolution, so that it must certainly be successful? What if, inaugurating such a revolution, slavery, protesting against its ferocity and inhumanity, should prove the victor?" Again he says, March 10, 1862: "If the government of the United States should precipitately decree the immediate abolition of slavery, it would reinvigorate the declining insurrection in every part of the South." Papers Relating to Foreign Affairs, 1862, pp. 38, 45.] — *L.*

Note [189, page 615.

[The project of colonization of the negroes does not appear to have received much encouragement from the countries to which it was proposed that the emigrants should be sent. Communications were addressed, Sept. 30, 1862, to London, Paris, the Hague, and Copenhagen, with drafts of conventions to provide for the emigration of the free negroes to the colonial possession of those powers. Mr. Adams informs Mr. Seward, October 30, 1862, that Lord Russell was not disposed to negotiate on the subject. "I gathered," said the American Minister, "from what he said, that the whole matter had been under consideration with the Ministers for some time back, and that the Duke of Newcastle had had much correspondence with the authorities in the West India colonies about it. The conclusion had been that on the whole it might be the means of entangling them in some way or other with the difficulties in the United States by possible reclamations of fugitives or in some other way, or danger which they were most desirous to avoid. Hence they could not be inclined to enter upon negotiations, and least of all to adopt the form of a convention." No direct response is published from any of the other European powers named, though it was understood that both Denmark and the Netherlands were disposed to receive African emigrants into their colonies. Mr. Yrisarri, the Minister of Guatemala and San Salvador, August 26, 1862, protested against the proposed colonization of the blacks in Central America; and on the 9th of September, he enclosed to the Secretary of State a dispatch from the Minister of Foreign Affairs of San Salvador, and in which transcribing the official note to the same effect from the Minister of Foreign Relations of Nicaragua, he is ordered to take suitable steps towards averting from Central America the evils which are apprehended there from such a colonization.

On the 19th of September a protest against such colonization was entered by Mr. Molina, who represented Costa Rica, Nicaragua, and Honduras. Papers relating to Foreign Affairs 1862, pp. 202, 227, 881–910. Costa Rica has passed a law, one section of which provides that the colonization of the African or Chinese races is prohibited, and, in the event of its being deemed necessary, the introduction into the country of individuals pertaining to these races may be limited or entirely stopped. The President says, in his annual message, that Liberia and Hayti are the only countries to which colonists of African descent from here could go with certainty of being received and adopted as citizens. President's Message, 1862] — *L.*

Note [192, page 643.

[Mr. Seward instructed Mr. Adams, July 12, 1862: "This transaction will furnish you with a suitable occasion for informing Lord Russell that since The Oreto and other gunboats are being received by the insurgents from Europe, to renew demonstrations on our national commerce, Congress is about to authorize the issue of letters of marque and reprisal, and that if we find it necessary to suppress that piracy, we shall bring privateers into service for that purpose, and, of course, for that purpose only." Papers relating to Foreign Affairs, 1862, p. 135.] — *L.*

Note [196, page 659.

[In the case of a vessel captured by a Confederate privateer, carried into Charleston, South Carolina, and there condemned, by a tribunal acting under the assumed authority of the Southern Confederacy, and sold under its decree, and subsequently registered at Liverpool, as a British vessel and in the name of a British subject as sole owner, it was held that no proceedings of any such prize court can have any validity in a court of the United States, and that a sale under them would convey no title to the purchaser, nor confer upon him any right to give a title to others. At the same time salvage was allowed under the act of 1800, as in the case of a merchant vessel taken by a public enemy and recaptured by a public armed ship of the United States. It is said "the language of this statute is perhaps in strictness applicable only to captures in an international war. But the analogy is so close that I think it most proper to adopt the rule therein prescribed in the present case." Law Reporter, December 18, 1862, p. 92. The Lilla, Judge Sprague's Opinion.] — *L.*

Note [199, page 667.

[In consequence of what occurred in the case of The Emily St. Pierre, a copy of Mr. Pickering's letter was subsequently (July 7, 1862,) furnished by Mr. Adams to Lord Russell, who communicated, in return, Lord Gran-

ville's instructions of October 21, 1799, to Mr. Liston, that "in case the vessel mentioned in them should be brought into any port of the United States, to make a formal demand that she be immediately delivered up to him, together with the deserters and seamen, who rescued her out of the possession of the prize-master, in order that they may be sent to Jamaica, or some other possession of His Majesty's colonies, to be there dealt with agreeably to the law of nations." Papers relating to Foreign Affairs, 1862, p. 148.

In the case of The Emily St. Pierre, Earl Russell wrote to Mr. Adams, May 7, 1862: "I have consulted the law officers of the Crown on this matter, and in conformity with their opinions I have now the honor to state to you that Her Majesty's government are unable to comply with your request for the restitution of The Emily St. Pierre, inasmuch as they have no jurisdiction or legal power whatever to take or to acquire possession of her, or to interfere with her owners in relation to their property in her. Acts of forcible resistance to 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 the 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 such vessel, for such recapture is not an offence against the municipal laws of the country." Parliamentary Papers, North America, No. 11, p. 5.

In the case of an American vessel, in 1809, in the High Court of Appeals, it was held that the master or crew of a neutral vessel captured are not bound to assist in carrying a vessel into port for adjudication. They owe no service to the captors, and are still to be considered answerable to the owners for their conduct. It is the duty as well as the interest of the captors to make the capture sure; if they neglect it from any anxiety to make other captures, or thinking the force already furnished sufficient, it is exclusively at their own peril. In this case, the captain performs a duty he conceives he owes to the owners. He will not act against their interest, nor will he attempt to prosecute their interest by any violence on his part or that of his crew; neither he nor they are bound to make resistance. The captors, therefore, are left to pursue their separate interests; they are unable to navigate the vessel and the captain resumes his command. In this case, the vessel was again captured by another privateer and carried into Malta, where the claim of the neutral owners was rejected and the ship condemned as having been rescued from the original captors. The sentence was reversed on appeal and the vessel restored to the neutra

owners, each party paying his own costs. Acton's Reports, vol. i. p. 34, The Pennsylvania.]—*L.*

Note [200, page 669.

[In the case of Mason *v.* The Ship Blaireau, Chief Justice Marshall said: "A preliminary question has been made by the counsel for the plaintiffs which ought not to be disregarded. As the parties interested, except the owners of the cargo of the firm, are not Americans, a doubt has been suggested, respecting the jurisdiction of the court, and upon a reference to authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea, that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than upon any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it." Cranch's Reports, vol. ii. p. 240.] — *L.*

Note [201, page 670.

[It is the duty of the captors to proceed to the adjudication of the property before the lawful court; and if they omit or unreasonably delay thus to proceed, any person claiming an interest in the captured property may obtain a monition against them, citing them to proceed to adjudication; which if they do not do or show cause why the property should be condemned, it will be restored to the claimants proving an interest therein. And this process is often resorted to where the property is lost or destroyed, through the fault or negligence of the captors, in order to obtain a compensation in damages for the unjust seizure and detention. Wheaton on Captures, p. 280.] — *L.*

Note [215, page 715.

[On occasion of the capture of a British vessel, as was alleged in British waters, on the ground of her having contraband on board, Mr. Stuart, Chargé d'Affaires, having complained to the Secretary of State, Mr. Seward, under date of August 8, 1862, addressed a note to the Secretary of the Navy, in which it is said: "It is the duty of the naval officers to be vigilant in searching and seizing vessels, of whatever nation, which are carrying contraband of war to the insurgents of the United States; but it is equally important that the provisions of the maritime law, in all cases, be observed and respected. Without waiting to inquire into the correctness of the representations of Admiral Milne, thus brought to my notice, and with a view to prevent collisions between the armed vessels of the United States and Great Britain, I am directed by the President to ask you to give the following instructions, explicitly, to the naval officers of the United States, namely:

"First. That under no circumstances will they seize any foreign vessel within waters of a friendly nation.

"Secondly. That in no case are they authorized to chase and fire at a foreign vessel without showing their colors, and giving her the customary preliminary notice of a desire to speak and visit her.

"Thirdly. That when the visit is made, the vessel is not then to be seized without a search, carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war to the insurgents and to their ports, or otherwise violating the blockade; and that if it shall appear that she is actually bound and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, then she cannot be lawfully seized.

"And, finally, that official seals or locks or fastenings of foreign authorities are in no case nor under any pretext to be broken, or parcels covered by them read by any naval authorities of the United States; but all bags or other things carrying such parcels and duly sealed or fastened by foreign authorities will be, in the discretion of the United States officer to whom they may come, delivered to the consul, commanding naval officer, or legation of the foreign government, to be opened upon the understanding that whatever is contraband or important as evidence concerning the character of a captured vessel will be remitted to the prize court or to the Secretary of State at Washington, or such sealed bags or parcels may be at once forwarded to this Department, to the end that the proper authorities of the foreign government may receive the same without delay.

"The President desires especially that naval officers may be informed that the fact that a suspected vessel has been indicated to them as cruising in any limits which have been prescribed to them by the Navy Department does not in any way authorize them to depart from the practice of the rules of visitation, search, and capture prescribed by the law of nations.

"Instructions similar to this will be given to the district attorneys of the United States."

As to the particular vessel in question, Mr. Seward wrote, August 13, 1862, to Mr. Stuart: "I have the honor to state that as the prize appears to have been taken into Key West, where proceedings against her have been set on foot in the Court of the United States, for the southern district of Florida, it is not to be doubted that justice will be done in the case according to public law. If, however, I should be mistaken in this, and the claimants, upon appeal to the Supreme Court of the United States, to which they will have a right, shall fail to obtain redress, this government will make that reparation which the circumstances may seem to call for." Cong. Doc. 37th Cong. 3d Sess. Senate Ex. Doc. No. 27, pp. 6, 22.] — *L.*

Note [221, page 735.

[On the 1st of December, the following official notice was received by the Liverpool Chamber of Commerce from the Under Secretary of State, in answer to a communication in relation to British cargoes, destroyed

by The Alabama: "Earl Russell desires me to state to you, that British property on board a vessel belonging to one of the belligerents must be subject to all the risks and contingencies of war, so far as the capture of the vessel is concerned. The owners of any British property, not being contraband of war, on board a Federal vessel captured and destroyed by a Confederate vessel of war, may claim in a Confederate prize court compensation for destruction of such property." Public Journals.] — *L.*

Note [227, page 745.

[The secret history of the origin of the "armed neutrality" is given in the Memoirs of Count de Göertz, (Mémoire ou précis historique sur la neutralité armée), a full analysis of which will be found in Flassan, Diplomatie Française, tom. vi. p. 260. A knowledge of the facts is well calculated to destroy any pretension founded on it, of superior political sagacity, on the part of the Czarina. It seems that it was the accidental result of rivalry between Count Panin and Prince Potemkin, who had been in more than one sense candidates for her favor. Panin, who was Minister of Foreign Affairs, but without whose intervention, a strict alliance with England had been proposed to the Empress direct, by Lord Malmesbury, through the aid of Potemkin, skilfully availed himself of an incident on which his adversaries had relied for their success — the indignation of Catherine at the violation of her neutral rights in the capture in the Mediterranean, by the Spaniards, then at war with England, of two Russian merchantmen laden with corn. Potemkin suggested that, instead of the offence being an exceptional case, it proceeded from a false system of public law against which it was now the time to protest. He, therefore, persuaded her to publish a declaration to all the belligerents that such a violation of neutral rights would not be tolerated, and to call upon all the northern and neutral powers to make common cause in defence of the just principles of maritime law. He satisfied her that this was not only conformable to the desire of the English Ambassador, but that it placed her at the head of a great league for a high and worthy purpose. So convinced was she that she was doing what was acceptable to England, that though it was decided that the communications should be kept secret, till they had reached their destination, she could not refrain from intimating to the British Minister her views of their purport, and he hastened to transmit them to his Court. "Great, then, was the surprise and indignation of the British Cabinet when they received from Russia a formal declaration of maritime law contradicting the whole practice of the English government, and striking at the foundation of the system which England had always haughtily maintained, and could at this very juncture, least of all, afford to dispense with. Russia demanded that free ships should make free goods; that even the coasting trade of belligerents should be opened to neutrals; that contraband

should be limited, and blockades stringent. The Northern powers eagerly combined with Russia to form a league in defence of this system, and the belligerents, whom Lord Malmesbury hoped to discomfort, seized their advantage. Spain made restitution, and in recognizing the justice of the new code, pleaded the arbitrary conduct of England as her excuse for having violated it; while France approved the magnanimous wisdom of the Empress, and readily consented to what, by the ordinances of 1778, she had already enacted in principle, as the law of her own marine." Trescot, Diplomacy of the Revolution, p. 75. "England was the only maritime power which did not in some form sanction the principles of the armed neutrality. On one point the declaration was silent. While announcing that free ships made free goods, it neither adopted nor rejected the rule that enemy ships made enemy goods." Martens, Précis, &c. § 325, note by Vergé.] — *L.*

Note [228, page 779.

[The American Minister at Vienna, Mr. J. Glancy Jones, transmitting, July 20, 1861, the report of the Austrian Minister's remarks in the "Reichsrath," as given in the notes, added: "In an interview with Count Rechberg, a day or two ago, he expressed to me a hope that the answer might be deemed satisfactory to my government, as it was his wish to make it so. He repeated his strong desire to see the integrity of the Union preserved in America, and said Austria was anxious to cultivate the most friendly relations with us, and would be the last to aid or abet any movement looking to the disruption of our confederacy, or weakening its power." President's Message, &c., 1861–2, p. 189. A proposition, in conformity with Count Rechberg's remarks, was communicated by the Austrian Minister at Washington to Mr. Seward, who, under date of August 22, 1861, after stating the three last articles of the Paris declaration, adds, that he "has great pleasure in assuring Mr. Hülsemann that his government does adopt and that it will apply the principles thus recited and set forth." He qualifies the general adhesion by saying, "Of course the principles referred to are understood by the United States, as not compromising their right *to close any of their own ports*, for the purpose of suppressing the existing insurrection in certain of the States, either directly or in the more lenient and equitable form of blockade, which has already for some time been established."]—*L.*

Note [232, page 817.

[A discussion has recently taken place between the Chargé d'Affaires of Mexico to Washington and the Secretary of State, in which the former claims to have applied to shipments for the French army in Mexico, the principles which, he says, have been maintained by Mr. Seward in the correspondence with the British government, with regard to the Southern insur-

gents. Mr. Romero, in a note of November 22, 1862, complains that "the chief of the French expedition which is invading Mexico, has sent emissaries to New Orleans and New York to purchase mules and wagons for transporting the cannon, war materials, and provisions to the interior of Mexico." In a subsequent note (December 20, 1862,) he refers to the subsisting treaty between the two countries, which enumerates among articles of contraband, "horses with their furniture, or any other materials manufactured, prepared, and formed expressly to make war by sea or land." Mr. Seward writes him, in reply, November 24, 1862, "that the matter had been submitted to the consideration of the Secretary of the Treasury, a copy of whose reply, he says, I herewith enclose, together with the extracts from the authorities in the case; and from which it appears that no intervention with the mission of the French officers is contemplated by the Treasury Department, to whom the subject more immediately appertains. This decision appears to be in conformity with precedents and with the rules of international law governing the case." Mr. Romero attempts to make a distinction between contraband articles shipped, as merchandise, by individuals on private speculation, to be sold to belligerents, and the shipments made on behalf of a belligerent government itself. He also complained, in his note of December 10, 1862, that Mexico was prohibited from exporting arms from the United States, while articles equally contraband of war were exported for the French government. Mr. Seward answered, December 15, 1862: "Mr. Romero builds his argument upon the fact that clearances of arms said to be designed for the use of the Mexican government were denied in its war with France, while clearances of wagons designed for the use of the French government in the same war, are allowed. Mr. Romero is respectfully informed that the prohibition of the shipment of arms, in the case referred to, was a general prohibition, including all other nations as well as Mexico, on the ground of the military necessities of the United States, which, while engaged in suppressing a formidable insurrection, cannot consent that firearms of any kind should be sent out of the country as merchandise. For these reasons: first, because the government may need all such for the army; and secondly, that they might fall into the hands of the insurgents, — neither the French, who are at war with Mexico, nor any other nation which is at peace with the United States, no matter what its condition or situation, could now be allowed to export arms of any sort from this country. Mr. Romero implies, probably with truth, that wagons are as necessary and will be as useful to the French as firearms to the Mexicans; but wagons are allowed to be shipped, not on the ground that France wants them as a belligerent, but on the ground that the military situation of the United States does not demand an inhibition." In answer to Mr. Romero's attempt to assimilate his complaints to those of the United States against Great Britain, Mr. Seward says, January 7, 1863: "The undersigned is unable to perceive the bearing of Mr. Ro-

mero's allusions to the correspondence which occurred between this government and that of Great Britain, in which complaints have been made by the United States that Great Britain wrongfully and injuriously recognized as a public belligerent an insurrectionary faction which has arisen in this country; has proclaimed neutrality between that faction and this government; and has suffered armed naval expeditions to be fitted out in British ports to depredate on the commerce of the United States, in violation of, as was believed, the Queen's proclamation and the municipal laws of the United Kingdom." Cong. Doc. 37th Cong. 3d Sess. Senate Ex. Doc. No. 24.] — *L.*

Appendix, No. 1, page 916.

[The Parliament of Sardinia was a school for Italian statesmen. There were more elements of homogeneousness in Italy than was, in general, supposed. The great families had estates and titles in more than in one State, and in many cases they possessed them in several distinct sovereignties. After the revolution of 1848–9, the prominent men from the different parts of the peninsula, who had been compromised by the events of that period, made Turin their residence. Many of them were members of the Chambers, and at no time was the Ministry without a representative of that class. Keeping up their connections with the countries of their origin, they were enabled to give an efficient direction to public opinion. The affiliation of the masses going back almost to the territorial delimitations, after the treaties of Vienna, was complete. Failing, on previous occasions, in attempts either at radical democracy or at a revival of the municipal sovereignties of the Middle Ages, every idea was turned to political independence under a government powerful enough to maintain its position among foreign States.] — *L.*

[Events are passing so rapidly that, since our Addenda to Note [167 was printed, we have been put in possession of a despatch of M. Drouyn de l'Huys, of January 9, 1863, to M. Mercier, a copy of which was left with Mr. Seward. The French Minister of Foreign Affairs, after referring to former attempts to shorten hostilities in America, says: "We flatter ourselves, besides, that, in proffering to place ourselves at the disposal of the belligerent parties to facilitate negotiations between them, the basis of which we abstain from prejudging, we have manifested to the United States all the consideration to which it is entitled now, perhaps, still more than ever, after such new proof of moral force and energy. We are none the less ready in the wishes which we form in favor of peace, to take into account all the susceptibilities of national feeling, and we do not at all question the right of the Federal government to decline the coöperative concourse of the great maritime powers of Europe. But this coöperation is not the only means which offers itself to the Cabinet of Washington to

hasten the close of the war; and if it believes it ought to repel any foreign intervention, could it not honorably accept the idea of direct or even informal conferences (*pourparlers*,) with the authority which may represent the States of the South? Negotiations about peace are not always the consequence of a suspension of warfare. To recall only one memorable instance drawn from the history of the United States. The negotiations which consecrated their independence were commenced long before hostilities had ceased in the New World, and the armistice was not established until the act of the 30th of Nov., 1782, which, under the name of provisional articles, embraced in advance the principal clauses of the definitive treaty of 1783."

The Secretary of State, in answering, February 6, through Mr. Dayton, the proposition of M. Drouyn de l'Huys, thus concludes: "It is true, indeed, that peace must come some time, and that conferences must attend, if they are not allowed to precede, the pacification. There is, however, a better form for such conferences than the one which M. Drouyn de l'Huys suggests. The latter would be palpably in derogation of the Constitution of the United States, and would carry no weight because destitute of the sanction necessary to bind either the loyal or disloyal portion of the people. On the other hand, the Congress of the United States furnishes a constitutional forum for debates between the alienated parties. Senators and Representatives from the loyal people are there already empowered to confer, and seats are also vacant inviting the Senators and Representatives of the discontented party, who may be constitutionally sent there from the States involved in the insurrection. Moreover, the conferences which can be held in Congress have this great advantage over any that could be organized on the plan of M. Drouyn de l'Huys, viz.: That Congress, if it thought it wise, could call a national convention to adopt its recommendations and give them all the solemnity and binding force of organic law. Such conferences between the alienated parties may be said to have already begun. Maryland, Virginia, Kentucky, Tennessee, and Missouri, States which are claimed by the insurgents, are already represented in Congress, and are submitting with perfect freedom and in a proper spirit to their advice upon the course best calculated to bring about in the shortest time a firm, lasting, and honorable peace. Representatives have been sent from Louisiana, and others are understood to be coming from Arkansas. There is a preponderating argument in favor of the Congressional form of conference over that which is suggested by M. Drouyn de l'Huys, viz.: That while accession to the latter would bring the government into concurrence with the insurgents in disregarding and setting aside an important part of the Constitution of the United States, and so would be of pernicious example — the Congressional conference, on the contrary, preserves and gives new strength to that sacred instrument which must continue through future ages the sheet anchor of the republic."] — *L.*

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SUPPLEMENT,

May, 1863,

TO THE NEW EDITION OF

Wheaton's Elements of International Law,

INCLUDING

ALL THE RECENT DECISIONS IN THE PRIZE COURTS

OF THE

UNITED STATES OF AMERICA,

SETTLING BY AUTHORITY THE CHARACTER OF THE HOSTILITIES IN WHICH THEY ARE INVOLVED AND THEIR LEGAL CONSEQUENCES.

LONDON:
SAMPSON LOW, SON, & CO.,
ENGLISH, AMERICAN, AND COLONIAL BOOKSELLERS,
47, LUDGATE HILL.

1863.

SUPPLEMENT.

SEVERAL acts essentially affecting matters noticed, either in the Author's text or in the Editor's annotations, were passed at the Session of the Congress of the United States which terminated on the 4th of March, last. The decisions in the Prize Cases in the Supreme Court, at their late term, are of paramount importance, as they settle authoritatively the character of the hostilities in which we are involved, and the legal consequences to be deduced from them. The new laws, as well as the opinions of the Judges in the cases in question, are here inserted. The occasion is also availed of to add some diplomatic papers that have appeared since the completion of the book. The references are to the notes and pages of the "Elements."

W. B. L.

OCHRE POINT, April, 1863.

Note [30, page 75.

[Since the "Elements" passed through the press, events have occurred, in connection with attempts at a new insurrection in Poland, presenting points of great interest in international law. How far the stipulations of the treaty of Vienna, to which the other powers of Europe were parties, and which had years ago been set at naught by Russia, (see Part I., ch. 2, § 19, p. 74,) gave them any special claims to intervention in the affairs of Poland, became anew a subject for diplomatic discussion; while a convention, understood to have been entered into between Russia and Prussia, was deemed, at least by France, to be such an interposition of the latter in behalf of the former, in her contest with her revolted subjects, as to be a matter of international concern.

Despatches relating to Poland were laid before the French Senate March 15, 1863. Among them is one from M. Drouyn de Lhuys, dated

March 26, 1855, addressed to M. Walewski, Ambassador in London. It calls to mind that, in 1831, the Emperor Nicholas released himself from the obligations towards Europe imposed on him by the treaties of 1815 with regard to Poland. The great powers fully understood the danger which might arise by the aggrandizement of Russia, and the advantages to be derived from returning to the treaties prohibiting Russia to possess the kingdom of Poland otherwise than as a distinct State. The despatch then continues: — The time appears to have arrived for reminding Russia of the obligations she has contracted towards Europe with reference to Poland. Count Walewski is requested to ascertain the opinion of Lord Clarendon on the subject.

A despatch, addressed by M. Walewski to M. Persigny, October 15, 1855, states that Lord Clarendon entertained similar views upon the expediency of taking advantage of passing events to bring about, as far as possible, some change in favor of Poland. His lordship, however, did not think it necessary to impose such an arrangement as an absolute condition for the reëstablishment of peace with Russia.

A despatch from M. Drouyn de Lhuys to M. de Talleyrand, dated February 17, 1863, regrets that Prussia has departed from her neutrality, and it enumerates as inconveniences likely to result from that resolution, that the Polish question has thereby acquired European importance; that the idea of unity between the different populations of the ancient kingdom of Poland has been revived; that a really national insurrection has been brought about; that the Prussian government has by this means cast itself into serious embarrassments; and that it has created a political situation already a cause of grave uneasiness, and likely to prove the source of future complications for the Cabinet.

Another despatch is from M. Drouyn de Lhuys to the Duc de Montebello, dated February 18, 1863. This document states that the Polish question possesses, above any other, the privilege of exciting in France the sympathy of all classes. He says that the representatives of the European powers, assembled at the Congress of Vienna, were actuated by the same sentiments when, seeking to repair the misfortunes of Poland, which was one of the principal objects of their solicitude, they placed at the head of the general act, destined to serve as the basis of the new political system of Europe, the stipulations which connected Poland with that system. He recapitulates a conversation with the Baron de Budberg, from whom, he says, he had not concealed that, even "despite of us, events may grow more and more embarrassing, and the pressure of public opinion become greater as the gravity of the circumstances increases." He comments upon the hopes aroused upon the accession of the Emperor Alexander to the throne, and considers that, if they should not be realized, Russia would create embarrassment for herself, and place France in a disagree-

able position. He concludes by requesting the Duc de Montebello to lay the question in this shape before Prince Gortchakoff.

In a despatch from the Minister of Foreign Affairs, of the 19th of February, 1863, to the Duke de Gramont, it is said: "The Cabinet of Vienna has calculated the dispositions which it was necessary for it to assume in conformity with the real obligations of its situation in the presence of the movements which have been produced in the Polish provinces of Russia. This agitation could not fail to attract the attention of the populations of Gallicia, and even to awaken their sympathies; but these sentiments have not provoked any act of opposition against the government of the country, nor excited any fear of manifestations tending to the disquiet of Austria.

"The interest of the Cabinet of Vienna was, that the insurrection should essentially maintain the local character which it had taken from the beginning and preserves to the present time. In adopting the measures which it deemed conformable to its international duties, it had to avoid further agitating the sentiments of the Gallicians, and creating the idea that the governments were identified in their policy, which would probably have had no other effect than to render general the movement of the populations. The Court of Austria has thus protected herself against the fault into which, it appears to me, that the Cabinet of Berlin has fallen, in signing the Convention of St. Petersburg. She cannot have occasion to regret this reserve, for, in the midst of conjunctures so grave and so delicate, the advantage is evidently for the power which preserves the liberty of judging and deciding for itself.

"It is notorious that, in the difficult phases which the Polish question has assumed during the last century, the attitude of the Cabinet of Vienna has not been identical with that of Russia and Prussia. This difference has not escaped the Polish populations, and has not been without influence in their dispositions towards Austria."

The following is the despatch from M. Drouyn de Lhuys to Baron de Gros at London, under date of February 21, 1863:—

"The despatch which I had the honor to write to you (No. 21) made you acquainted with the observations which the Convention concluded between Prussia and Russia suggested to the government of the Emperor. The disturbances excited by the recruiting in Poland, outside the usual conditions, naturally attracted our attention. The lamentable incidents of the resistance of the people to a measure of home administration could not, however, yet be looked upon by us except in the point of view of humanity. But the arrangement signed at St. Petersburg has unexpectedly given to this crisis a political character upon which the Cabinets have an undoubted right to express an opinion.

"I have pointed out to Baron de Talleyrand the order of ideas he has to follow with the Berlin Cabinet. On the other hand, the lively expres-

sion of public feeling manifested in England, the former declarations of the government of Her Britannic Majesty, and the principles of its policy, authorize me to believe that Sir A. Buchanan's instructions perfectly coincide with those of the Minister of the Emperor. But I put the question to myself, whether the oral expression of our views is in keeping with the gravity of the act which we have to consider, and whether it would not be advisable to give to the manifestation of our opinion a more permanent and a more determined form. Could we not, for example, combine the terms of an identical communication, to be delivered simultaneously to the Berlin Cabinet, and then brought to the cognizance of the St. Petersburg Cabinet?

"It also appears to me, that a step of this nature would obtain the adhesion of the Austrian government. The London Cabinet is as well informed as we are of the attitude of Austria. It is aware that Austria has followed a line of conduct different from that of Prussia. There is reason to believe that the Vienna Cabinet takes the same view that we do of a convention, the very news of which at once increased the agitation in Poland, and the enforcement of which would increase it still more. Under all circumstances, it would be in its interest to decline all connection with it by joining our views. It would thereby give a satisfaction to public opinion, which would powerfully contribute to the maintenance of tranquillity in Gallicia.

"If, as I hope, Lord Russell should approve this idea, all that remains to be done would be, to come to an understanding upon the tenor of the communication to be sent to Berlin. To give you some idea of our views how it might be couched, I herewith enclose you a copy of the draught of a note, in which, however, we are willing to admit all reasonable alterations. I request you to read this despatch to Lord Russell. Tell him I am writing in similar language to Vienna, and you will oblige me by letting me know as soon as possible the intentions of the government of Her Britannic Majesty.

"DRAUGHT OF NOTE.

"The undersigned, ambassador of His Majesty the Emperor of the French, has received the order to enter into frank explanations with the government of His Majesty the King of Prussia relative to the arrangement concluded between the Cabinets of Berlin and of St. Petersburg on the occasion of the disturbances which have arisen in the kingdom of Poland, and, with this object in view, he has been charged to address the following communication to M. de Bismark-Schœnhausen:—

"The measures adopted by the Russian government to carry out the recruiting in Poland having led to a resistance which has given rise to conflicts on various points; the Court of France has watched these events

with a sad interest. It was the more desirable that no incident should add to those troubles, as the country was already suffering under various elements of excitement and disorder. It was important to avoid every manifestation of a nature to excite the popular mind in the other Polish provinces, and to change the character, hitherto purely local, of the insurrection.

"The government of His Majesty the Emperor of the French has therefore learned, not without anxiety, that the Cabinet of Berlin has signed a convention with that of St. Petersburg, by which the Court of Prussia consents to allow Russian troops to enter its territory in pursuit of armed bands seeking a refuge there, and engages to drive back on to Russian territory, until a sufficient national force presents itself, the insurgents in presence of the Prussian troops.

"In fact, the struggle, as yet confined to the kingdom of Poland, may thus, at any given moment, spread to the Polish provinces of Prussia thrown open to Russian troops, and Prussia may, on her part, find herself compelled to take part in the military operations in course of execution on the other side of her frontier.

"Such an agreement (*un semblable accord*) would not only tend to increase the sphere of hostilities, but would create a new situation, and transform an incident in the affairs of Poland into a European question.

"The Imperial government by no means wishes to deny that the Court of Prussia, from causes of neighborhood (*en raison du voisinage*), has not international duties to fulfil under existing circumstances. It would not have had any right to be astonished at measures of precaution taken to prevent a violation of the common frontier and to prevent contraband of war. But a coöperation, even limited, not justified moreover by any symptoms in the Polish provinces of the Prussian monarchy, exceeds the rights of the Berlin Cabinet as laid down by the law of nations; it appears to emanate from a preconceived idea of a political identity (*solidarité*) not established by European treaties, in settling the fate of Poland, and which might be detrimental to the general interests.

"Thus, public opinion has been aroused, and the anxiety to which it has given rise cannot have escaped the observation of the government of His Majesty the King of Prussia.

"The government of His Majesty the Emperor considers, on its part, that it is its duty to itself as well as to Europe to point out to the Court of Berlin the anxiety caused by the arrangements which it has concluded with the Cabinet of St. Petersburg, and it flatters itself that these observations, inspired by the sincere desire of obviating any misunderstanding, will be received in the same friendly spirit which dictated them."

The following is a circular despatch to the French diplomatic agents

abroad, from the Minister of Foreign Affairs, dated Paris, March 1, 1863:—

"When the present troubles broke out in Poland, they had merely the character of an act of resistance to a measure of internal administration adopted under abnormal conditions. The uneasy state in which the country had long been, no doubt augmented the gravity of the crisis. It was nevertheless, purely local before the signature of the Convention between Prussia and Russia. But when it became the object of an international act, the question changed its nature, and the Cabinets were called upon to appreciate these arrangements. We were speedily made aware of the views of the British Cabinet by the speeches of the Queen's Ministers in Parliament, and a communication from the Court of Austria, regarding her attitude in Galicia, led us to think that the sentiments of that power were not widely different from our own.

"It appeared to us, however, that an understanding was desirable before taking any official step in regard to the Prussian government. We were persuaded that observations which the three Cabinets might agree in thinking it legitimate and useful to make separately at Berlin, would be more legitimate and more useful still if made simultaneously in similar terms; that an opinion presented in that form would be of more authority; and that, moreover, the very necessity of giving a common expression to the ideas of the three parties would be a guarantee for moderation and impartiality. The government of Her Britannic Majesty has not adhered to the step which we were disposed to take. Austria, on her part, while adopting our view, has not thought herself justified in officially blaming a Convention with which she had from the first declined solidarity. In this state of things the government of the Emperor has no means to pursue further a proposition, which supposed an agreement. However, we have reasons to hope that the effect produced by the signing of the Convention of St. Petersburg will not be entirely lost, and that the two contracting Courts will duly appreciate the unanimity of the observations which these arrangements have occasioned.

"For our part, we shall continue to follow these events with the degree of interest which they are calculated to inspire. Our duties in this respect concur with those of the other great powers placed in the same position as ourselves. The efforts which we have made to subordinate any proceedings of the Cabinets to previous concert testifies, moreover, to the sentiments which we feel in an affair which involves, on our part, neither private policy nor isolated action." Le Nord, Mars 17, 1863.

The view taken by Great Britain of the Polish question, may be inferred from the note of Earl Russell, of the 5th of March, 1863, addressed to the powers that signed the treaty of Vienna. It differs from the French in referring to the proclamation of the Emperor Alexander, which formed

no part of the final act, instead of invoking the treaties. The following are the demands proposed to be made of Russia: 1st. An immediate amnesty in favor of the Polish insurgents. 2d. The realization of the promises made by the Emperor Alexander to the Poles in his celebrated proclamation of November, 1815. 3d. The immediate convocation of the Polish Diet. Le Nord, 24 Mars, 1863.] —*L.*

Note [55, page 164.

[An Act to facilitate the taking of depositions within the United States, to be used in the courts of other countries, approved March 3, 1863, ch. 95, provides: —

SECT. 1. That the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained to be used in such suit. If a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending, on producing the same before the district judge of any district where said witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. Such summons shall specify the time and place at which such witness is required to attend, which place shall be within one hundred miles of the place where said witness resides or shall be served with said summons.

SECT. 2. That if any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with this act, or if, upon his appearance, he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offence on the trial of a suit in the district court of the United States.

SECT. 3. That every witness who shall appear and testify, in manner aforesaid, shall be allowed and shall receive from the party, at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States.

SECT. 4. That whenever any commission or letters rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, shall have been executed by the court or the commissioner to whom the same shall have been directed, the same shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where said letters or com-

mission shall have been executed, who, on receiving the same, shall indorse thereon a certificate, stating the time and place when and where the same was received; and that the said deposition is in the same condition as when he received the same; and he shall thereupon transmit the said letters or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official despatches are transmitted to the government. And the testimony of witnesses so, as aforesaid, taken and returned, shall be read as evidence on the trial of the suit in which the same shall have been taken, without objection as to the method of returning the same. Statutes at Large, 1862–3, p. 769.] — *L.*

Note [114, page 365.

[In the treaty of May 13, 1858, between the United States and Bolivia, it is said: "In accordance with fixed principles of international law, Bolivia regards the rivers Amazon and La Plata, with their tributaries, as highways or channels opened by nature for the commerce of all nations." Treaties of the United States, 1862–3, p. 305.] — *L.*

Note [115, pages 373, 1003.

[An act to prevent correspondence with rebels, passed February 25, 1863, ch. 60, makes it a high misdemeanor, punishable by a fine not exceeding $10,000, and by imprisonment not less than six months nor exceeding five years, for any person being a resident of the United States or being a citizen thereof, and residing in any foreign country without the permission or authority of the government of the United States, and with the intent to defeat the measures of the said government or to weaken in any way their efficacy, to hold or commence, directly or indirectly, any correspondence or intercourse, written or verbal, with the present pretended rebel government, or with any officer or agent thereof, or with any other individual acting or sympathizing therewith." Statutes at Large, 1862–3, p. 696.] — *L.*

Note [126, pages 390, 391. Appendix No. 1, page 903.

[In the note of Mr. Seward to Mr. Stuart, referred to in the article on naturalization, (p. 903,) it is said, "that none but citizens are liable to militia duty in this country, and that this Department has never regarded an alien, who may have merely declared his intention to become a citizen, as entitled to a passport; and, consequently, has always withheld from persons of that character any such certificate of citizenship."

The act known as the Conscription Act, approved March 3, 1863, ch. 75, provides: "That all able-bodied male citizens of the United States, and *persons of foreign birth who shall have declared on oath their intention to*

become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose." Statutes at Large, 1862–3, p. 731.

And by another act of the same date, ch. 79, § 23, it is declared that so much of the act of 1856, (Editor's note [126, p. 390,) as prohibits the granting of passports to any other than citizens of the United States, is repealed, "so far as that prohibition may embrace any class of persons liable to military duty by the laws of the United States." Ib. p. 754.

A notice from the State Department of the United States, under date of the 13th of March, 1863, states that the giving of a "military service bond," and the approval indorsed thereon of the United States Marshal of the District, is now an indispensable condition to the issuing of passports to any persons between the ages of eighteen and forty-five, subject to military duty. It is also understood that since the accession of the present Secretary of State to office, March 1861, passports, as to citizens, have been granted to persons of color.] — *L.*

Note [167, pages 501, 1009, 1017.

[The subject of French mediation, in the pending civil war in the United States, would not be complete without the insertion of the following document: —

Mr. Sumner, from the Committee on Foreign Relations, to whom was referred the "Message of the President of the United States, communicating, in answer to a resolution of the Senate, correspondence on the subject of mediation, arbitration, or other measures looking to the termination of the present rebellion," reported to the Senate, February 28, 1863, the following concurrent resolutions, which received the assent of both houses, March 3, 1863.

"*Whereas* it appears from the diplomatic correspondence submitted to Congress that a proposition, friendly in form, looking to pacification through foreign mediation, has been made to the United States by the Emperor of the French and promptly declined by the President; *and whereas* the idea of mediation or intervention in some shape may be regarded by foreign governments as practicable, and such governments, through this misunderstanding, may be led to proceedings tending to embarrass the friendly relations which now exist between them and the United States; *and whereas*, in order to remove for the future all chance of misunderstanding on this subject, and to secure for the United States the full enjoyment of that freedom from foreign interference which is one of the highest rights of independent States, it seems fit that Congress should declare its convictions thereon: *Therefore* —

"*Resolved*, (the House of Representatives concurring,) That while in times past the United States have sought and accepted the friendly mediation or arbitration of foreign powers for the pacific adjustment of *international* questions, where the United States were the party of the one part and some other sovereign power the party of the other part; and while they are not disposed to misconstrue the natural and humane desire of foreign powers to aid in arresting *domestic* troubles, which, widening in their influence, have afflicted other countries, especially in view of the circumstance, deeply regretted by the American people, that the blow aimed by the rebellion at the national life has fallen heavily upon the laboring population of Europe: yet, notwithstanding these things, Congress cannot hesitate to regard every proposition of foreign interference in the present contest as so far unreasonable and inadmissable that its only explanation will be found in a misunderstanding of the true state of the question, and of the real character of the war in which the Republic is engaged.

"*Resolved*, That the United States are now grappling with an unprovoked and wicked rebellion, which is seeking the destruction of the Republic that it may build a new power, whose corner-stone, according to the confession of its chiefs, shall be Slavery; that for the suppression of this rebellion, and thus to save the Republic and to prevent the establishment of such a power, the national government is now employing armies and fleets, in full faith, that through these efforts all the purposes of conspirators and rebels will be crushed; that while engaged in this struggle, on which so much depends, any proposition from a foreign power, whatever form it may take, having for its object the arrest of these efforts, is, just in proportion to its influence, an encouragement to the rebellion, and to its declared pretensions, and, on this account, is calculated to prolong and embitter the conflict, to cause increased expenditure of blood and treasure, and to postpone the much desired day of peace; that, with these convictions, and not doubting that every such proposition, although made with good intent, is injurious to the National interests, Congress will be obliged to look upon any further attempt in the same direction as an unfriendly act which it earnestly deprecates, to the end that nothing may occur abroad to strengthen the rebellion or to weaken those relations of good will with foreign powers which the United States are happy to cultivate.

"*Resolved*, That the rebellion, from its beginning, and far back even in the conspiracy which preceded its outbreak, was encouraged by the hope of support from foreign powers; that its chiefs frequently boasted that the people of Europe were so far dependent upon regular supplies of the great Southern staple that, sooner or later, their governments would be constrained to take side with the rebellion in some effective form, even to the extent of forcible intervention, if the milder form did not prevail; that

the rebellion is now sustained by this hope, which every proposition of foreign interference quickens anew, and that, without this life-giving support, it must soon yield to the just and paternal authority of the National government; that, considering these things, which are aggravated by the motive of the resistance thus encouraged, the United States regret that foreign powers have not frankly told the chiefs of the rebellion that the work in which they are engaged is hateful, and that a new government, such as they seek to found, with Slavery as its acknowledged corner-stone, and with no other declared object of separate existence, is so far shocking to civilization and the moral sense of mankind that it must not expect welcome or recognition in the Commonwealth of Nations.

"*Resolved*, That the United States, confident in the justice of their cause, which is the cause, also, of good government and of Human Rights everywhere among men; anxious for the speedy restoration of Peace, which shall secure tranquillity at home and remove all occasion of complaint abroad; and awaiting with well-assured trust the final suppression of the rebellion, through which all these things, rescued from present danger, will be secured forever, and the Republic, one and indivisible, triumphant over its enemies, will continue to stand an example to mankind, *hereby announce*, as their unalterable purpose, that the war will be vigorously prosecuted, according to the humane principles of Christian States, until the rebellion shall be overcome; and they reverently invoke upon their cause the blessings of Almighty God.

"*Resolved*, That the President be requested to transmit a copy of these resolutions, through the Secretary of State, to the Ministers of the United States in foreign countries, that the declaration and protest herein set forth may be communicated by them to the governments to which they are accredited." Congressional Documents, 37th Cong. 3d Sess. Mis. Doc. No. 38.

The following note from Lord Russell to Mr. Mason, Commissioner from the Confederate States, dated July 24, 1862, will explain the motives of Great Britain for abstaining, on her own part, from any proffer of mediation to the American belligerents, as well as for declining to unite with France in such a measure: —

"I have the honor to acknowledge the receipt of your letter of the 17th instant, respecting the intention expressed by Her Majesty's government to refrain from any present offer of mediation between the contending parties in North America, and I have to state to you, in reply, that in the opinion of Her Majesty's government, any proposal to the United States to recognize the Southern Confederacy would irritate the United States, and any proposal to the Confederate States to return to the Union would irritate the Confederates.

"This was the meaning of my declarations in Parliament upon the subject." Parliamentary Papers.] — *L.*

Note [170, page 514; note [173, page 535; note [175, page 555; note [241, page 848.

[The same view, as in the charge of Judge Nelson, with a like reference to the insurrections in Scotland, was taken in the Pennsylvania Circuit, by Judge Cadwallader, with the concurrence of Judge Grier, in the case of a person accused of being concerned in the attack on Fort Pulaski. "This doctrine," it was said, "continues whenever and so long as the duty of allegiance to an existing government remains unimpaired."

In that case the peculiar difficulties growing out of the conflicting claims of Federal and State allegiance are also noticed. "When," it is said, "this fort was captured, the accused, in the language of the Supreme Court, owed 'allegiance to two sovereigns,' the United States and the State of Georgia. See 14 How. 20. The duty of allegiance to the United States was coextensive with the constitutional jurisdiction of their government, and was, to this extent, independent of, and paramount to, any duty of allegiance to the State. 6 Wheaton, 381, and 21 Howard, 517. His duty of allegiance to the United States continued to be thus paramount, so long at least, as their government was able to maintain its place through its own courts in Georgia, and thus extend there to the citizen that protection which affords him security in his allegiance, and is the foundation of his duty of allegiance. The revolutionary secession of the state, though threatened, had not then been consummated. This party's duty of allegiance to the United States, therefore, could not then be affected by any conflicting enforced allegiance to the State. He could not then, as a citizen of Georgia, pretend to be a public enemy of the United States in any sense of the word 'enemy,' which distinguishes its legal meaning from that of traitor. Future cases," the Judge adds, "may perhaps require the definition of more precise distinctions and possible differences under this head." Law Reporter, June, 1861, p. 98. United States *v.* Greiner.

The above case occurred before a territorial civil war could have been deemed to exist by the exercise of belligerent powers by the President or by the legislation of Congress.

The actual *status* of the people of the seceded States in reference to the United States, as well as the question, whether the President's proclamations of April, 1861, calling out the militia to suppress insurrection, and instituting blockades of the insurgent ports, created a state of war, independently of the action of Congress in July following, came before the Supreme Court of the United States, at the December Term, 1862, in appeals from several decrees in prize cases, among which were those (The Hiawatha and Amy Warwick) from New York and Massachusetts, referred to in our notes.

As preliminary to the decisions, in the particular cases, the following propositions are understood to have received the assent of a majority of the Judges:—

"Neutrals have a right to challenge the existence of a blockade *de facto* and also the authority of the party instituting it. They have a right to enter the ports of a friendly nation for the purposes of commerce, but are bound to recognize the right of a belligerent engaged in actual war, to use this mode of coercion for subduing the enemy.

"To legitimate the capture of a neutral vessel or property on the high seas, a *war* must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the belligerents to use this mode of coercion against a port, city, or territory in possession of the other.

"War is that state in which a nation prosecutes its right by force; and it is not necessary that both parties should be acknowledged as independent nations or sovereign states, nor that war should be solemnly declared.

"As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in domestic history which the courts are bound to notice and know.

"Where the sovereign of a neutral State has acknowledged the existence of a war by his proclamation of neutrality, a citizen of that State is estopped from denying the existence of the war, and the belligerent right of blockade."

March 9th, 1863. — The opinion of the Court as pronounced by GRIER, Justice, was as follows: —

"There are certain propositions of law which must necessarily affect the ultimate decision of these cases and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each. They are, —

"1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States?

"2d. Was the property of persons domiciled or residing within those States, a proper subject of capture on the sea as '*enemies' property?*'

"I. Neutrals have a right to challenge the existence of a blockade, *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

"That a blockade *de facto* actually existed and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases. That the President, as the executive chief of the government and commander-in-chief of the army and navy, was the proper person to make such notification, has not been, and cannot be disputed.

"The right of prize and capture has its origin in the *jus belli*, and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel, or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory in possession of the other.

"Let us inquire whether, at the time this blockade was instituted, a state of *war* existed which would justify a resort to these means of subduing the hostile force.

"War has been well defined to be '*that state in which a nation prosecutes its right by force.*' The parties belligerent in a public war are independent nations. But it is not necessary to constitute 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.

"Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupies and holds in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

"The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"'A civil war,' says Vattel, 'breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms. This being the case, it is very evident that the common laws of war — those maxims of humanity, moderation, and honor — ought to be observed by both parties in every civil war.

Should the sovereign conceive that he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation.'

"As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history, which the Court is bound to notice and to know.

"The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.' By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war, either against a foreign nation or a domestic State. By the acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia, and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State, or of the United States.

"If a war be made by invasion of a foreign nation, the President is not only authorized, but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less *a war*, although the declaration of it be '*unilateral*.' Lord Stowell (1 Dodson, 247,) observes: 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge, to be accepted or refused at pleasure by the other.'

"The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress, of 13th of May, 1846, which recognized 'a state of war *as existing by the act of the Republic of Mexico*.' This act provided not only for the future prosecution of the war, but vindicated and ratified the act of the President in accepting the challenge without a previous formal declaration of war by Congress.

"This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless

sprung forth suddenly from the parent brain a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

"It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted Province or State be acknowledged, in order to constitute it a party belligerent in a war, according to the law of nations. Foreign nations acknowledge it as war by declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of The Santissima Trinidad, 7 Wheaton, 337, this Court says: 'The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war.' See also 3 Binn. 252.

"As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, 'recognizing hostilities as existing between the government of the United States of America and *certain States* styling themselves the Confederate States of America.' This was immediately followed by similar declarations, or silent acquiescence by other nations.

"After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government and paralyze its powers by subtle definitions and ingenious sophisms.

"The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: —

"'That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors;* and a war levied on the government by traitors, in order to dismember and destroy it, is not *a war*, because it is an 'insurrection.'

"Whether the President, in fulfilling his duties as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance,

and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances, peculiar to the case. The correspondence of Lord Lyons with the Secretary of State, admits the fact and concludes the question.

"If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861, which was wholly employed in passing laws to enable the government to prosecute the war with vigor and efficiency. And, finally, in 1861, we find Congress '*ex majore cautela*,' passing an act approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., 'as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States.'

"Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well-known principle of law, '*Omnis ratihabitio, retrotrahitur et mandato equiparatur*,' this ratification has operated to perfectly cure the defect.

"In the case of Brown *v.* United States, 8 Cranch, 131, 132, 133, Mr. Justice Story treats of this subject, and cites numerous authorities, to which we may refer, to prove this position, and concludes, 'I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did? I would ask if the sovereign may not ratify his proceedings; and then, by a retroactive operation, give validity to them?'

"Although Mr. Justice Story dissented from the majority of the Court, on the whole case, the doctrine stated by him on this point is correct, and fully substantiated by authority.

"The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

"On this first question, therefore, we are of opinion that the President had a right *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

"II. We come now to the consideration of the second question. What is included in the term '*enemies' property?*'

"Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as 'enemies' property,' whether the owner be in arms against the government or not?

"The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war.

"Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

"The appellants contend that the term '*enemies*' is properly applicable to those only who are subjects or citizens of a foreign state at war with our own. They quote from the pages of the Common Law, which say, That persons who wage war against the king may be of two kinds: subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies.'

"They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party, and its 'de facto government,' to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance: they have, therefore, a correlative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made *war* against the government by treasonably resisting its laws.

"They contend also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law; that confiscation of their property can be effected only under municipal law; that by the law of the land such confiscation cannot take place without the conviction of the owner of some offence; and finally, that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national government; consequently, the Constitution and laws of the United States are still operative over persons in all the States for punishment as well as protection.

"This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations.

"It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of

belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field, or by the executioner, his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is '*unconstitutional*.' Now it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights. See 4 Cranch, 272. Treating the other party as a belligerent, and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity.

"We have shown that a civil war, such as that now waged between the Northern and Southern States, is properly conducted, according to the humane regulations of public law, as regards capture on the ocean.

"Under the very peculiar Constitution of this government, although the citizens owe supreme allegiance to the Federal government, they owe also a qualified allegiance to the State in which they are domiciled; their persons and property are subject to its laws.

"Hence, in organizing this rebellion, they have *acted as States* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal government. Several of these States have combined to form a new Confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary, marked by lines of bayonets, and which can be crossed only by force. South of this line is enemy's territory, because it is claimed and held in possession by an organized, hostile, and belligerent power.

"All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

"But in defining the meaning of the term 'enemies' property,' we will be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.' It is a technical phrase peculiar to Prize Courts, and depends upon principles of public as distinguished from the common law.

"Whether property be liable to capture as 'enemies' property,' does not

in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. 8 Cranch, 384. 'The owner *pro hac vice* is an enemy.' 3 Wash. C. C. R. 183.

"The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within its territory. See Upton, ch. 3d, et cas. cit."

The Court then proceeded to notice the facts peculiar to the several cases submitted for their consideration. The Amy Warwick was captured on the high seas. All the claimants were residents of Richmond, Virginia. Editor's note [173, p. 536. The only question was as to its being enemy's property. At the time of the capture the Confederate States were waging actual war against the United States. Only two facts, the Court said, are necessary for condemnation: 1st. The domicile of the owner in hostile territory; 2d. The capture of the property on the high seas by the belligerent against whom it might have been used.

The Hiawatha was the case referred to (Editor's note [238, p. 843,) as having been condemned, notwithstanding the note of the Secretary of State, authorizing it, for leaving a blockaded port with a cargo *laden after notification* of the blockade. The Court, after recognizing the rule of law laid down by Judge Betts, says: "We are not satisfied that the British Minister erred in the construction that a license was given to *all vessels* to depart with their cargoes within fifteen days after the blockade." It was decided, however, under the facts, which will be found stated by Judge Nelson, that the actual departure was not till after the expiration of the fifteen days. It was also held in that case that an indorsement on the register was not necessary, notwithstanding the terms of the President's Proclamation, where there was actual knowledge, and that this is implied as to all vessels in the blockaded ports.

The opinion of Justice Grier was concurred in by Justices Wayne, Swayne, Miller, and Davis.

From this decision the Chief Justice (Taney), Catron, Nelson, and Clifford, dissented. Claimants of schooners Brilliant, Crenshaw, bark Hiawatha, brig Amy Warwick *v.* United States.

The following is the dissenting opinion of Mr. Justice NELSON, in the case of The Hiawatha, in which the other dissenting judges concurred: —

"The property in this case, vessel and cargo, was seized by a government vessel on the 20th of May, 1861, in Hampton Roads, for an alleged violation of the blockade of the ports of the State of Virginia. The Hiawatha was a British vessel, and the cargo belonged to British subjects. The vessel had entered the James River before the blockade, on her way to

City Point, upwards of one hundred miles from the mouth, where she took in her cargo. She finished loading on the 15th of May, but was delayed from departing on her outward voyage till the 17th for want of a tug to tow her down the river. She arrived at Hampton Roads on the 20th, where, the blockade in the meantime having been established, she was met by one of the ships, and the boarding officer indorsed on her register, 'ordered not to enter any port in Virginia, or south of it.' This occurred some three miles above the place where the flag-ship was stationed, and the boarding officer directed the master to heave his ship to when he came abreast of the flag-ship, which was done, when he was taken in charge as prize. On the 30th of April, Flag-officer Pendergrast, U. S. ship Cumberland, off Fortress Monroe, in Hampton Roads, gave the following notice: 'All vessels passing the Capes of Virginia, coming from a distance and ignorant of the Proclamation, (the Proclamation of the President of the 27th of April, that a blockade would be established,) will be warned off; and those passing Fortress Monroe will be required to anchor under the guns of the fort and subject themselves to an examination.' The Hiawatha, while engaged in putting on board her cargo at City Point, became the subject of correspondence between the British Minister and Secretary of State, under date of the 8th and 9th of May, which drew from the Secretary of the Navy a letter of the 9th, in which, after referring to the above notice of Flag-officer Pendergrast, and stating that it had been sent to the Baltimore and Norfolk papers, and by one or more published, advised the Minister that fifteen days had been fixed as a limit for neutrals to leave the ports after an actual blockade had commenced, with or without cargo. The inquiry of the British Minister had referred not only to the time that a vessel would be allowed to depart, but whether it might be laden within the time. This vessel, according to the advice of the Secretary, would be entitled to the whole of the 15th of May to leave City Point, her port of lading. As we have seen, her cargo was on board within the time, but the vessel was delayed in her departure for want of a tug to tow her down the river.

"We think it very clear, upon all the evidence, that there was no intention on the part of the master to break the blockade; that the seizure, under the circumstances, was not warranted; and, upon the merits, that the ship and cargo should have been restored.

"Another ground of objection to this seizure is, that the vessel was entitled to a warning, indorsed on her papers by an officer of the blockading force, according to the terms of the Proclamation of the President; and that she was not liable to capture except for the second attempt to leave the port.

"The Proclamation, after certain recitals, not material to this branch of the case, provides as follows: The President has 'deemed it advisable to

set on foot a blockade of the ports within the States aforesaid, (the States referred to in the recitals,) in pursuance of the laws of the United States, and of the law of nations, in such case made and provided.' . . . 'If, therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave, either of said ports, she will be duly warned by the commander of one of the blockading vessels, who will indorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her cargo, as prize, as may be deemed advisable.' The Proclamation of the President of the 27th April extended that of the 19th to the States of Virginia and North Carolina. It will be observed, that this warning applies to vessels attempting to enter or leave the port, and is, therefore, applicable to The Hiawatha. We must confess that we have not heard any satisfactory answer to the objection founded upon the terms of this Proclamation. It has been said, that the Proclamation, among other grounds, as stated on its face, is founded on the 'law of nations,' and hence draws after it the law of blockade as founded on that code, and that a warning is dispensed with in all cases where the vessel is chargeable with previous notice or knowledge that the port is blockaded. But the obvious answer to the suggestion is, that there is no necessary connection between the authority upon which the Proclamation is issued and the terms prescribed as the condition of its penalties or enforcement; and, besides, if founded upon the law of nations, surely it was competent for the President to mitigate the rigors of that code, and apply to neutrals the more lenient and friendly principles of international law. We do not doubt, but that considerations of this character influenced the President in prescribing these favorable terms in respect to neutrals; for, in his Message, a few months later, to Congress, (4th July,) he observes, 'a Proclamation was issued for closing the ports of the insurrectionary districts' (not by blockade, but) 'by proceedings *in the nature of a blockade.*'

"This view of the Proclamation seems to have been entertained by the Secretary of the Navy, under whose orders it was carried into execution. In his report to the President, (4th July,) he observes, after referring to the necessity of interdicting commerce at those ports where the government were not permitted to collect the revenue, that, 'in the performance of this domestic municipal duty, the property and interests of foreigners became, to some extent, involved in our home-questions; and with a view of extending to them every comity that circumstances would justify, the rules of blockade were adopted, and, as far as practicable, made applicable to the cases that occurred under this embargo or non-intercourse of the insurgent States. The commanders (he observes) were directed to permit the vessels of foreigners to depart within fifteen days, as in case of actual effective

blockade, and their vessels were not to be seized unless they attempted, after having been once warned off, to enter an interdicted port in disregard of such warning.'

"The question is not a new one in this court. The British government had notified the United States of the blockade of certain ports in the West Indies, but 'not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and, then, not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them.' A question arose upon this blockade in Maryland Ins. Co. *v.* Woods, (6 Cranch, 29).

"Chief Justice Marshall, in delivering the opinion of the Court, observed: 'The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force, a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade until she should be warned off.'

"We are of opinion, therefore, that, according to the very terms of the Proclamation, neutral ships were entitled to a warning by one of the blockading squadron, and could be lawfully seized only in the second attempt to enter or leave the port. It is remarkable, also, that both the President and Secretary, in referring to the blockade, treat the measure, not as a blockade under the law of nations, but as a restraint upon commerce at the interdicted ports under the municipal laws of government.

"Another objection taken to the seizure of this vessel and cargo is, that there was no existing war between the United States in insurrection, within the meaning of the law of nations, which drew after it the consequences of a public or civil war. A contest, by force, between two independent sovereign States is called a public war; and, when duly commenced by proclamation, or otherwise, it entitles both of the belligerent parties to all the rights of war against each other, and as respects neutral nations. Chancellor Kent observes: 'Though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things.' . . .

'Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them.' He further observes: 'As war cannot lawfully be commenced on the part of the United States without an act of Congress, such act is, of course, a formal notice to all the world, and equivalent to the most solemn declaration.'

"The legal consequences resulting from a state of war between two countries, at this day, are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries immediately become the enemies of the other, — all intercourse, commercial or otherwise, between them, unlawful, — all contracts existing at the commencement of the war suspended, and all made during its existence utterly void, — the insurance of enemies' property, the drawing of bills of exchange or purchase in the enemies' country, the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved; and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries, on land or sea, are subject to capture and confiscation by the adverse party, as enemies' property, with certain qualifications as it respects property on land, (8 Cranch, 110, Brown *v.* The United States); all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prize, as defined by the law of nations, comes into full and complete operation, resulting from maritime captures *jure belli*. War also affects a change in the mutual relations of all States or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral.

"This great and pervading change in the condition of a country, and in the relations of all her citizens and subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war; and hence the same code which has attached to the existence of a war all these disturbing consequences, has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State. This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country. By our Constitution this power is lodged in Congress. Congress shall have power 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' We have thus far been considering the status of the citizens or subjects of a country at the breaking out of a public war when recognized or declared by a competent power. In the case of a rebellion or resistance by a portion of the people of a country against the established

government, there is no doubt, if, in its progress and enlargement, the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties, as in the case of a public war.' Mr. Wheaton observes, speaking of civil war, 'But the general usage of nations regards such a war as entitling all the contending parties to all the rights of war as against each other, and even as respects neutral nations.'

"It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow the government at the time this vessel was seized, and if she be guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the government. No power short of this can change the legal status of the government, or the relation of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war. The war-power under the Constitution must be exercised before this changed condition of the government and people and of neutral third parties can be admitted. There is no difference, in this respect, between a civil or a public war.

"We have been more particular upon this branch of the case than would seem to be required, not on account of any doubt or difficulties attending the subject, in view of the approved works upon the law of nations, or from the adjudication of the courts, but because some confusion existed in the argument as to the definition of a war that drew after it all the rights of prize of war. Indeed, a great portion of the argument proceeded upon the ground that these rights could be called into operation — enemies' property captured, blockades set on foot, and all the rights of war enforced in prize courts, by a species of war unknown to the law of nations and to the Constitution of the United States. An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district of country in a state of rebellion — the conflicts on land and on sea — the taking of towns and capture of fleets, — in fine, the magnitude and dimensions of the resistance against the government constituted war, with all the belligerent rights belonging to civil war. With a view to enforce this idea, we had, during the argument, an imposing historical detail of the several measures adopted by the Confederate States to enable them to resist the authority of the general government, and of many bold and daring acts of resistance and conflicts. It was said that war was to be ascertained by looking at the armies and

navies, or public force, of the contending parties, and the battles lost and won; that, in the language of one of the learned counsel, 'whenever the situation of opposing hostilities has assumed the proportions and pursued the methods of war, then peace is driven out, the ordinary authority and administration of law are suspended, and war, in fact and by necessity, is the *status* of the nation until peace is restored and the laws resumed their dominion.' Now, in one sense, no doubt, this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is, what constitutes war in a legal sense, in the sense of the law of nations and of the Constitution of the United States. For it must be a war in this sense to attach to it all the consequences that belongs to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the general government, the inquiry should be into the law of nations and into the municipal fundamental laws of the government. For we find there, that, to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State, and which sovereign power, by our Constitution, is lodged in the Congress of the United States. Civil war, therefore, under our system of government, can exist only by an act of Congress, which requires the assent of two of the great departments of the government — the executive and legislative.

"We have thus far been speaking of the war-power under the Constitution of the United States, and as known and recognized by the law of nations. But we are asked, what would become of the peace and integrity of the Union in case of an insurrection at home or invasion from abroad, if this power could not be exercised by the President in the recess of Congress, and until that body could be assembled? The framers of the Constitution fully comprehended this question, and provided for the contingency. Indeed, it would have been surprising if they had not, as a rebellion had occurred in the State of Massachusetts while the convention was in session, and which had become so general that it was quelled only by calling upon the military power of the State. The Constitution declares that Congress shall have power 'to provide for calling for the militia to execute the laws of the Union, suppress insurrections, and repel invasions.' Another clause is, 'that the President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States'; and again, 'He shall take care that the laws shall be faithfully executed.' Congress passed laws on this subject in 1792 and 1795. 1 United States Laws, pp. 264, 424.

"The last act provided that, whenever the United States shall be invaded

or be in imminent danger of invasion from a foreign nation, it shall be lawful for the President to call forth such number of the militia most convenient to the place of danger; and in case of insurrection in any State against the government thereof, it shall be lawful for the President, on the application of the legislature of such State, if in session, or, if not, of the Executive of the State, to call forth such number of militia of any other State or States as he may judge sufficient to suppress such insurrection. The second section provides that, when the laws of the United States shall be opposed, or the executions obstructed in any State by combinations too powerful to be suppressed by the course of judicial proceedings, it shall be lawful for the President to call forth the militia of such State, or of any other State or States, as may be necessary to suppress such combinations; and by the act of March 3, 1807, (2 United States Laws, 443,) it is provided that, in case of insurrection or obstruction of the laws, either in the United States or of any State or Territory, where it is lawful for the President to call forth the militia for the purpose of suppressing such insurrection, and causing the laws to be executed, it shall be lawful to employ for the same purpose such part of the land and naval forces of the United States as shall be judged necessary.

"It will be seen, therefore, that ample provision has been made under the Constitution and laws against any sudden and unexpected disturbance of the public peace from insurrection at home or invasion from abroad. The whole military and naval power of the country is put under the control of the President to meet the emergency. He may call out a force proportionate to its necessities, — one regiment or fifty, one ship-of-war or any number, at his discretion. If, like the insurrection in the State of Pennsylvania, in 1793, the disturbance is confined to a small district of country, a few regiments of the militia may be sufficient to suppress it. If at the dimensions of the present, when it first broke out, a much larger force would be required. But whatever its numbers, whether great or small, that may be required, ample provision is here made; and whether great or small, the nature of the power is the same. It is the exercise of a power under the municipal laws of the country, and not under the law of nations; and, as we see, the power furnishes the most ample means of repelling attacks from abroad or suppressing disturbances at home, until the assembling of the Congress, who can, if it be deemed necessary, bring into operation the war-power, and thus change the nature and character of the contest. Then, instead of the contest being carried on under the municipal law of 1795, it would be under the law of nations, and the acts of Congress as war-measures, with all the rights of war.

"It has been argued that the authority conferred on the President by the act of 1795 invests him with the war-power. But the obvious answer is, that it proceeds from a different clause in the Constitution, and given for

different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity of the country in a time of peace, by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there be any force in this argument, then we are in a state of war, with all the rights of war and all the penal consequences attending it, every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. If so, what number will constitute war, and what number will not? It has also been argued that this power of the President, from necessity, should be construed as vesting him with the war power, or the republic might greatly suffer, or be in danger from, the attacks of the hostile party, before the assembling of Congress. But we have seen that the whole military and naval force are in his hands under the municipal laws of the country. He can meet the adversary upon land and water with all the forces of the government.

"The truth is, this idea for the existence of any necessity for clothing the President with the war-power, under the act of 1795, is simply a monstrous exaggeration; for, besides having the command of the whole of the army and navy, Congress can be assembled within any thirty days, if the safety of the country requires that the war-power shall be brought into operation. The acts of 1795 and 1807 did not, and could not, under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or *inter-gentes*, as we have seen, converts every citizen of the hostile State into a public enemy, and treats him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the executive. Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished, in his person or property, unless he has committed some offence against a law of Congress passed before the act was committed, which made it a crime and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

"In the breaking out of a rebellion against the established government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the government against those in rebellion, and at the same time by extending encouragement and support to the loyal people, with a view to their coöperation in putting

down the insurgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion, in the reign of James the Second, and in the rebellions of 1715 and 1745 by the Pretender and his son, and also in the beginning of the rebellion of the thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority of the government. This was the character of the war of our Revolution till the passage of the act of the Parliament of Great Britain of the 16th of George the Third, 1776. By that act, all trade and commerce with the thirteen Colonies were interdicted, and all ships and cargo belonging to the inhabitants subjected to forfeiture as if the same were the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations. Down to this period, the war was personal against the rebels, and encouragement and support constantly extended to the loyal subjects who adhered to their allegiance; and although the power to make war existed exclusively in the King, and of course this personal war carried on under his authority, and a partial exercise of the war-power, no captures of the ships or cargo of the rebels as enemies' property on the sea, or confiscation in prize courts as rights of war, took place, until after the passage of the act of Parliament. Until the passage of the act, the American subjects were not regarded as enemies in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That act provided for the capture and confiscation of their property, as if the same were the property 'of open enemies.' For the first time the distinction was obliterated.

"So the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their coöperation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war, which would draw after it all the rights of a belligerent; but in the case of the President no such power existed; the war, therefore, from necessity, was a personal war, until Congress assembled and acted upon this state of things. Down to this period, the only enemy recognized by the government was the person engaged in the rebellion; all others were peaceful citizens, entitled to all the privileges of citizens under the Constitution. Certainly it cannot rightfully be said that the President has the power to convert a loyal citizen into a belligerent enemy, or confiscate his property as enemy's property. Congress assembled on the call for an extra session the fourth

July, 1861; and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize; and also to direct the capture of any ship or vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are declared by the Proclamation to be in a state of insurrection, found at sea or in any port of the rest of the United States. (Act of Congress, 13th July, 1861, §§ 5, 6.) The fourth section also authorized the President to close any port in a collection district obstructed so that the revenue could not be collected, and provided for the capture and condemnation of any vessel attempting to enter.

"The President's Proclamation was issued on the 16th August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida.

"This act of Congress, we think, recognized a state of civil war between the government and the Confederate States, and made it territorial.

"The act of 1861 resembles in its leading features the act of Parliament of 1776, which converted the rebellion of our Colonies into a civil territorial war.

"Government, in recognizing or declaring the existence of a civil war between itself and a portion of the people in insurrection, usually modifies its effects with a view as far as practicable to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the government arising from the magnitude of the resistance that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence; hence the modification in the act of Parliament declaring the territorial war. It is found in the 44th section, which for the encouragement of well affected persons, and to afford speedy protection to those desirous of returning to their allegiance, provided for declaring such inhabitants of any colony, county, town, port, or place, at peace with His Majesty, and after such notice by proclamation there should be no further captures. This act of 13th July provides that the President may, in his discretion, permit commercial intercourse with any such part of a State or section, the inhabitants of which are declared to be in a state of insurrection, (§ 5,) obviously intending to favor loyal citizens and encourage others to return to their loyalty. And the 8th section provides that the Secretary of the Treasury may mitigate or remit the forfeitures incurred under the act. The act of 31st July is also one of a kindred character. That appropriates two million of dollars to be expended under the authority of the President in supplying and delivering arms and munitions of war to loyal citizens residing in any of the States of which the inhabitants are in rebellion, or in which it may be

threatened. We agree, therefore, that the act of 13th July, 1861, recognized a state of civil war between the government and the people of the States described in that Proclamation.

"The cases of The United States *v.* Palmer, 3 Wheat. 610, The Divina Pastora, 4 ib. 52, and that class of cases to be found in the reports, are referred to as furnishing authority for the exercise of the war-power claimed for the President in the present case. These cases hold that when the government of the United States recognizes a state of civil war to exist between a foreign nation and her colonies, but remaining itself neutral, the Courts are bound to consider as lawful all those acts which the new government may direct against the enemy; and we admit the President, who conducts the foreign relations of the government, may fitly recognize, or refuse to do so, the existence of civil war in the foreign nation under the circumstances stated.

"But this is a very different question from the one before us, which is, whether the President can recognize or declare a civil war, under the Constitution, with all its belligerent rights, between his own government and a portion of its citizens in a state of insurrection. That power, as we have seen, belongs to Congress. We agree when such a war is recognized or declared to exist by the war-making power, but not otherwise, it is the duty of the Courts to follow the decision of the political power of the government. The case of Luther *v.* Borden et. al. (7 How. 45), arose out of the attempt of an assumed new government in the State to overthrow the old and established government of Rhode Island by arms. The legislature of the old government had established martial law, and the Chief Justice, in delivering the opinion of the Court observed, among other things, that 'if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force, and the declaration of martial law, we see no ground upon which this Court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and overcome the unlawful opposition.' But it is only necessary to say, that the term 'war' must necessarily have been used here by the Chief Justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the Federal Constitution to declare war.

"Congress, on the 6th August, 1862, passed an act confirming all acts, proclamations, and orders of the President, after the 4th March, 1861, respecting the army and navy, and legalizing them, as far as was competent for that body; and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an *ex post facto* civil war with all the rights of capture and confiscation, *jure belli*, from the date referred to. An *ex post facto* law is defined, when, after an

action, indifferent in itself or lawful, is committed, the legislature then, for the first time, declares it to have been a crime and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words, trade and commerce authorized at the time by acts of Congress and treaties, may, by *ex post facto* legislation, be changed into illicit trade and commerce with all their penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of war, which is well known, is referred to as an authority. But there the ships were seized by the war power, the orders of the government, the seizure being a partial exercise of that power, and which was soon after exercised in full. The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence's 2d edition of Wheaton's Elements of International Law, pt. 4, ch. 1, sec. 4, and notes. But, admitting its full weight, it affords no authority in the present case. Here the capture was without any constitutional authority, and void; and, in principle, no subsequent ratification could make it valid.

"Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this government and the States in insurrection till recognized by the act of Congress, 13th July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo in this case, and in all the cases before us in which the capture occurred before the 13th July, 1861, for breach of blockade, or as enemy's property, are illegal and void, and that the decree of condemnation should be reversed and the vessels and cargo restored." Peter Miller et al., claimants of the bark Hiawatha, appellants, *v.* United States.

From the above opinions it will appear that the Court was unanimous in considering a civil war, with all the consequences to the residents of the seceded States of a public territorial war, to have existed, since the act of July 13, 1861, and still to exist. The minority of the judges dated its commencement at that time, as they deemed an act of Congress to be, under the Constitution, essential to create a state of war, and that till the legislature acted in the case, the hostile proceedings against the government

were to be regarded as an insurrection, for which the guilty parties were alone to be held personally responsible. The majority, on the other hand, maintained that civil war was a material fact of which the Court was bound to take notice; and the case of the war of Mexico against the United States was cited to show that war may exist without an act of Congress; that the proclamations of blockade, in April, 1861, were a recognition of a state of war by the President, and that foreign nations were moreover estopped by their proclamations of neutrality from denying its existence, with all its consequences to neutrals.

The result of the decision of the Court was to legitimate all captures, after the breaking out of hostilities, as well those made before as after the 13th of July, 1861, of property taken at sea belonging to the residents of the seceded States without regard to their individual loyalty, and also, by validating the blockade from its commencement as a belligerent act, to condemn all neutral property seized for its violation. From the principle established by the Supreme Court it would also seem to follow not only, as was intimated in the appropriate place, (Note [73, p. 253,) that the exercise by the Federal government of belligerent rights, was a waiver or renunciation of all claim to proceed against the Confederate privateersmen as pirates, which is no longer a practical question, but that, contrary to a decision in the District of Masssachusetts, Addenda, p. 1020, the title of a neutral purchaser of a vessel condemned in an Admiralty Court of the Confederate States is to be deemed valid.

We have elsewhere shown (Note [241, p. 849,) that the proposition that belligerent rights may be superadded to those of sovereignty, and for which Rose *v.* Himely is usually referred to, was not passed on in that case, and that it is in no wise sanctioned by any expression in the opinion of Chief Justice Marshall. Moreover, the condition of St. Domingo was not one of civil war, but of a colony in insurrection, to which belligerent rights had not been conceded either by France or by the United States. On the other hand, all institutional writers concur in considering sovereign municipal rights suspended in a civil war, such as the existing hostilities with the States assuming to form the Southern Confederation have been judicially determined to be. According, indeed, to obsolete precedents, now universally repudiated by the civilized world, in the event of the entire unconditional subjection of the secessionists, the extreme rights of the Federal government to punish the leaders as for rebellion might revert; but private individuals have ever in modern times been deemed exempt from penalties for acquiescing in a government *de facto.* Note [171, pp. 523, 525. According to our author, the last example in Europe of the confiscation and partition of the lands of the conquered among the conquerors was that made by William of Normandy. See Part IV. ch. 2, § 5, p. 597.]—*L.*

Note [170, pages 518, 1014.

[The following act of March 3, 1863, ch. 81, which gives legislative sanction to a suspension of the ordinary security of individual rights, even in States where the courts have ever been open for the administration of justice, is so intimately connected with preceding discussions, and is so necessary to a comparison between the consequences of the *état de siège* by the sovereign or legislative authorities of continental Europe and the suspension in the United States of the writ of *habeas corpus*, that it is deemed expedient to insert its principal provisions entire. It provides, —

SECT. 1. That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus in any case throughout the United States, or any part thereof.* And whenever and wherever the said privilege shall be suspended as aforesaid, no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of *habeas corpus* shall be suspended by the judge or court having issued the said writ so long as said suspension by the President shall remain in force and said rebellion continue.

SECT. 2. That the Secretary of State and the Secretary of War be, and they are hereby directed, as soon as may be practicable, to furnish to the judges of the circuit and district courts of the United States and of the District of Columbia a list of the names of all persons, citizens of States in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President of the United States or either of said Secretaries, in any fort, arsenal, or other place, as State or political prisoners, or otherwise than as prisoners of war; the said list to contain the names of all those who reside in the respective jurisdictions of said judges, or who may be deemed by the said Secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions, and also the date of each arrest; the Secretary of State to furnish a list of such persons as are imprisoned by the order or authority of the President, acting through the State Department and the Secretary of War, a list of such as are imprisoned by the order or authority of the President, acting through the Department of War. And in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment or present-

ment, or other proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged; and every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's order; and in case he shall delay or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than five hundred dollars and imprisonment in the common jail for a period not less than six months, in the discretion of the Court. *Provided, however*, That no person shall be discharged by virtue of the provisions of this act, until after he or she shall have taken an oath of allegiance to the government of the United States, and to support the Constitution thereof; and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof. *And provided also*, That the judge or court before whom such person may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behavior towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with, according to law, as the circumstances may require. And it shall be the duty of the district attorney of the United States to attend such examination before the judge.

SECT. 3. That in case any of such prisoners shall be under indictment or presentment for any offence against the laws of the United States, and by existing laws bail or a recognizance may be taken for the appearance for trial of such person, it shall be the duty of said judge at once to discharge such person upon bail or recognizance for trial as aforesaid. And in case the said Secretaries of State and War shall for any reason refuse or omit to furnish the said list of persons held as prisoners as aforesaid at the time of the passage of this act within twenty days thereafter, and of such persons as hereafter may be arrested within twenty days from the time of the arrest, any citizen may, after a grand jury shall have terminated its session without finding an indictment or presentment, as provided in the second section of this act, by a petition alleging the facts aforesaid touching any of the persons so as aforesaid imprisoned, supported by the oath of such petitioner or any other credible person, obtain and be entitled to have the said judge's order to discharge such prisoner on the same terms and conditions prescribed in the second section of this act: *Provided, however*, That the said judge shall be satisfied such allegations are true.

SECT. 4. That any order of the President, or under his authority made

at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue.

SECT. 5. Provides for the removal to the United States courts, as well by appeal after final judgment, as on the defendant's entering his appearance in the State court, and without regard to the citizenship of the parties, of any suit or prosecution, civil or criminal, which has been or shall be commenced in any State court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from, or exercised by, or under the President of the United States, or any act of Congress.

SECT. 6. Provides that any suit or prosecution described in this act, in which final judgment may be rendered in the circuit court, may be carried by writ of error to the supreme court, whatever may be the amount of said judgment.

By the 7th section, no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed or act may have been omitted to be done: *Provided*, That in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of this act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this act. Statutes at Large, 1862-3, p. 758.

The preceding bill, as it originally passed the House of Representatives, was the subject of a protest signed by thirty-seven members, but which was not allowed to be inserted in the Journal. Among the objections assigned were that "it purports to confirm and make valid by act of Congress arrests and imprisonments which were not only not warranted by the Constitution of the United States, but were in palpable violation of its express prohibitions," and that "it purports to authorize the President during this rebellion, at any time, as to any person, and everywhere throughout the limits of the United States, to suspend the privilege of the writ of *habeas corpus*, whereas by the Constitution the power to suspend the priv-

ilege of that writ is confided to the discretion of Congress alone, and is limited to the places threatened by the dangers of invasion or insurrection." Congressional Globe, 1862–3, p. 165.] — *L.*

Note [186, page 595.

[It would seem that by the existing legislation, as well of the so-called Confederate States as of the United States, all distinctions between militia and regular troops are abolished. Not only are all citizens of the United States, between the ages competent for the performance of military duty, including persons of foreign birth, who have declared their intention to become such, declared to constitute the "national forces," but they are deemed, in the event of not complying with the requisitions of a draft, by reporting in person, furnishing a substitute, or paying the required sum therefor, deserters, to be tried by a court-martial. And it is made the duty of the Provost-Marshals, to be appointed for each Congressional District, under the direction of the Provost-Marshal-General, whose office shall be at the seat of government, forming a separate bureau of the War Department, to arrest all deserters, whether regulars, volunteers, militiamen, or *persons called into the service*, under this or any other act of Congress, wherever they may be found, and to send them to the nearest military commander or military post. Statutes at Large, p. 731. Act of March 3, 1863, ch. 75. It had been previously enacted in the Confederate States, on the recommendation of the President, that all persons rightfully subject to military duty, should be held to be in the military service of those States. Moore's Rebellion Record, vol. iv. p. 443.] — *L.*

Note [189, page 599.

[The act of June 7, 1862, was amended in some of its details by the act of February 6, 1863, ch. 21. Statutes at Large, 1862–3, p. 640.] — *L.*

Note [189, pages 604, 1015.

[The following is the British view of the emancipation policy of President Lincoln, as contained in a note of January 17, 1863, from Earl Russell to Lord Lyons: —

"The Proclamation of the President of the United States, enclosed in your Lordship's despatch of the 2d instant, appears to be of a very strange nature.

"It professes to emancipate all slaves in places where the United States authorities cannot exercise any jurisdiction nor make emancipation a reality; but it does not decree emancipation of slaves in any States, or parts of States, occupied by Federal troops, and subject to United States jurisdiction, and where, therefore, emancipation, if decreed, might have been carried into effect.

"It would seem to follow that in the border States, and also in New Orleans, a slave-owner may recover his fugitive slave by the ordinary process of law, but that in the ten States in which the proclamation decrees emancipation, a fugitive slave arrested by legal warrant may resist, and his resistance, if successful, is to be upheld and aided by the United States authorities and the United States armed forces.

"The proclamation, therefore, makes slavery at once legal and illegal, and makes slaves either punishable for running away from their masters, or entitled to be supported and encouraged in so doing, according to the locality of the plantation to which they belong, and the loyalty of the State in which they may happen to be.

"There seems to be no declaration of a principle adverse to slavery in this proclamation. It is a measure of war, and a measure of war of a very questionable kind.

"As President Lincoln has twice appealed to the judgment of mankind in his proclamation, I venture to say I do not think it can or ought to satisfy the friends of abolition, who look for total and impartial freedom for the slave, and not for vengeance on the slave-owner." Parliamentary Papers.

No appropriation has been made by Congress in furtherance of the joint resolution of April 10, 1862, (p. 599,) or of the President's Proclamation of September 22, 1862, (p. 603,) for compensated emancipation in the non-seceding States.] — *L.*

Note [189, page 617.

[The note of August 2, 1862, from Lord Russell to the Confederate Commissioner, Mr. Mason, though properly referable to the subject of recognition, is inserted under the above head as being intimately connected with Lord Russell's answer of July 28, 1862, to Mr. Seward's note of the 28th of May, of the same year.

"I have had the honor to receive your letters of the 24th of July and 1st instant, in which you repeat the considerations which, in the opinion of the government of the so-called Confederate States, entitled that government to be recognized of right as a separate and independent power, and to be received as an equal in the great family of nations.

"In again urging these views, you represent, as before, that the withdrawal of certain of the Confederates from the Union of the States of North America is not to be considered as a revolution, in the ordinary acceptation of that term, far less an act of insurrection or rebellion, but as the termination of a confederacy which had, during a long course of years, violated the terms of the Federal compact.

"I beg leave to say, in the outset, that upon this question of a right of withdrawal, as upon that of the previous conduct of the United States, Her

Majesty's government have never presumed to form a judgment. The interpretation of the Constitution of the United States, and the character of the proceedings of the President and Congress of the United States under that Constitution, must be determined, in the opinion of Her Majesty's government, by the States and people in North America who inherited and have till recently upheld that Constitution. Her Majesty's government decline altogether the responsibility of assuming to be judges in such a controversy.

"You state that the Confederacy has a population of twelve millions; that it has proved itself capable, for eighteen months, of successful defence against every attempt to subdue or destroy it; that in the judgment of the intelligence of all Europe the separation is final, and that, under no possible circumstances, can the late Federal Union be restored.

"On the other hand, the Secretary of State of the United States has affirmed, in an official despatch, that a large portion of the once disaffected population has been restored to the Union, and now evinces its loyalty and firm adherence to the government; that the white population now in insurrection is under five millions, and that the Southern Confederacy owes its main strength to hope of assistance from Europe.

"In the face of the fluctuating events of the war; the alternations of victory and defeat; the capture of New Orleans; the advance of the Federals to Corinth, to Memphis, and the banks of the Mississippi as far as Vicksburg, contrasted, on the other hand, with the failure of the attack on Charleston, and the retreat from before Richmond, — placed, too, between allegations so contradictory on the part of the contending powers, — Her Majesty's government are still determined to wait.

"In order to be entitled to a place among the independent nations of the earth, a State ought to have not only strength and resources for a time, but afford promise of stability and permanence. Should the Confederate States of America win that place among nations, it might be right for other nations justly to acknowledge an independence achieved by victory and maintained by a successful resistance to all attempts to overthrow it. That time, however, has not, in the judgment of Her Majesty's government, yet arrived. Her Majesty's government, therefore, can only hope that a peaceful termination of the present bloody and destructive contest may not be distant."

The recognition of the Confederate States was resisted by Lord Russell, in the House of Lords, on the 25th of March, 1863, on the ground that the Confederate States had not attained that condition which had, in the case of the South American Republics, been declared by Mr. Canning, Sir James Mackintosh, and Lord Lansdowne, a prerequisite to their acknowledgment by foreign powers. We have already given the views of the two former, (see pp. 978, 48, *supra*).

"In the first place, the Marquis of Lansdowne stated it was necessary that a country which required to be recognized should have established its independence. In the next place, that it should be able to maintain that independence for the future; and lastly, that it should be able to carry on with all foreign nations those relations of peace and amity which form the general international law of the world." Parliamentary Debates.] — *L.*

Note [190, page 625.

[The following instructions from the commander-in-chief of the United States armies, (General Halleck,) who is also the author of a treatise on "International Law," under date of March 5, 1863, to the commanding officer in Tennessee, indicates the policy pursued in regard to the inhabitants of the territory of the Confederate States, occupied by the Federal forces.

"The suggestion of General Reynolds and General Thomas, in regard to the more rigid treatment of all disloyal persons within the lines of your army, are approved. No additional instructions from these headquarters are deemed necessary. You have already been urged to procure your subsistence, forage, and means of transportation, so far as is possible, in the country occupied. This you had the right to do without any instructions. As the commanding general in the field, you have the power to enforce all the laws and usages of war, however rigid and severe these may be, unless there be some act of Congress, regulation, order, or instruction forbidding or restricting such enforcement. As the general rule, you must be the judge where it is best to rigidly apply these laws, and where a more lenient course is of greater advantage to our cause. Distinctions, however, should always be made in regard to the character of the people in the district of country which is militarily occupied or passed over. The people of the country in which you are likely to operate may be divided into three classes:

"First. The truly loyal, who neither aid nor assist the rebels except under compulsion, but who favor or assist the Union forces. Where it can possibly be avoided, this class of persons should not be subjected to military requisitions, but should receive the protection of our arms. It may, however, sometimes be necessary to take their property, either for our own use or to prevent its falling into the hands of the enemy. They will be paid, at the time, the value of such property, or, if that be impracticable, they will hereafter be fully indemnified. Receipts should be given for all property so taken without being paid for.

"Second. Those who take no active part in the war, but belong to the class known in military law as non-combatants. In a civil war like that now waged, this class is supposed to sympathize with the rebellion rather than with the government. There can be no such thing as neutrality in

a rebellion. This term is applicable only to foreign powers. Such persons, so long as they commit no hostile act, and confine themselves to their private avocations, are not to be molested by military forces; nor is their property to be seized, except as a military necessity. They are, however, subject to forced loans and military requisitions, and their houses to be let for soldiers' quarters, and to appropriation for other temporary military uses. Subject to these impositions the non-combatant inhabitants of a district of country militarily occupied by one of the belligerents are entitled to the military protection of the occupying forces; but while entitled to such protection they incur very serious obligations — obligations differing in some degree from those of civil allegiance, but equally binding. For example, those who rise in arms against the occupying army, or against the authority established by the same, are rebels or military traitors, and incur the penalty of death. They are not entitled to be considered as prisoners of war when captured; their property is subject to military seizure and military confiscation. Military treason of this kind is broadly distinguished from the treason defined in the constitutional and statutory laws and made punishable by the civil courts. Military treason is a military offence, punishable by the common laws of war. Again, persons belonging to such occupied territory and within the military lines of the occupying forces, can give no information to the enemy of the occupying force without proper authority. To do so, the party not only forfeits all claim to protection, but subjects himself, or herself, to be punished either as a spy or a military traitor, according to the character of the particular offence. Our treatment of such offences and such offenders has hitherto been altogether too lenient. A more strict enforcement of the laws of war in this respect is recommended. Such offenders should be made to understand the penalties they incur; and to know that those penalties will be rigidly enforced.

"Third. Those who are openly and avowedly hostile to the occupying army, but who do not bear arms against such forces. In other words, while claiming to be non-combatants they repudiate the obligations tacitly or impliedly incurred by the other inhabitants of the occupied territory. Such persons not only incur all the obligations imposed upon other non-combatant inhabitants of the same territory, and are liable to the same punishments for offences committed, but they may be treated as prisoners of war, and be subjected to the rigors of confinement or expulsion, as non-combatant enemies. I am of opinion that such persons should not, as a general rule, be permitted to go at large within our lines. To force those capable of bearing arms to go within the lines of the enemy adds to his effective force. To place them in confinement will require guards for their safe-keeping, and this necessarily diminishes our effective forces in the field. You must determine in each particular case which course will be

most advantageous. We have suffered very severely from this class, and it is time that the laws of war should be more rigorously enforced against them. A broad line of distinction must be drawn between the friends and enemies, between the loyal and disloyal.

"The foregoing remarks have reference only to military statutes and to military offences, under the laws of war. They are not applicable to civil offences under the Constitution and general laws of the land. The laws and usages of civilized war must be your guide in the treatment of all classes of persons of the country in which your army may operate, or which it may occupy, and you will be permitted to decide for yourself where it is best to act with rigor, and where best to be more lenient. You will not be trammelled with minute instructions."] — *L.*

Note [192, pages 643, 1020.

[An Act concerning letters of marque, prizes, and prize goods, passed on the same day (March 3, 1863, ch. 58,) with the acts before noticed, provided, that in all domestic and foreign wars the President of the United States is authorized to issue to private armed vessels of the United States commissions or letters of marque and general reprisal in such form as he shall think proper, and under the seal of the United States, and make all needful rules and regulations for the government and conduct thereof, and for the adjudication and disposal of the prizes and salvages made by such vessels: *Provided*, That the authority conferred by this act shall cease and terminate at the end of three years from the passage of this act. Statutes at Large, 1862–3, p. 758.

This bill was earnestly opposed by Mr. Sumner, chairman of the Committee of Foreign Affairs of the Senate, as a measure in case of foreign hostilities, as well as with reference to the existing rebellion. He proposed as a substitute, that the Secretary of the Navy be authorized to hire any vessels needed for the national service, and, if he sees fit, to put them in charge of officers commissioned by the United States, and to give them in every respect the character of national ships.

"If Senators desire," he said, "a militia of the seas, here it is; a sea militia, precisely like the land militia, mustered into the service of the United States, under the command of the United States, and receiving rations and pay from the United States, instead of sea-rovers not mustered into the national service, not under national command, and not receiving rations or pay from the nation; but cruising each for himself according to his own will, without direction, without concert, simply according to the wild temptation of booty. Such a system on land would be rejected at once. Nobody would call it a militia. Do not sanction it now on the ocean; or if you are disposed to sanction it, do not call it a militia of the seas."

As to its application in reference to the Confederate States, he said:

"While I see no probable good from the launching of privateers upon the ocean to cruise against a commerce which does not exist, and to be paid by a booty which cannot be found, I see certain evils which I am anxious to avoid for the sake of my country, especially at this moment. I think that I cannot be mistaken in this anxiety.

"It is well known, that according to ancient usage and the law of nations, every privateer is entitled to belligerent rights, one of which is that most difficult, delicate, and dangerous right, the much-disputed right of search. There is no right of war with regard to which nations are more sensitive, and no nation has been more sensitive than our own, while none has suffered more from its exercise. By virtue of this right, every licensed sea-rover will be entitled to stop and overhaul on the ocean all merchant vessels, under whatever flag. If he cannot capture, he can at least annoy. If he cannot make prize, he can at least make trouble, and leave behind a sting. I know not what course the great neutral powers may adopt; nor do I see how they can undertake to set aside this ancient right, even if they smart under its exercise. But when I consider that these powers have already by solemn convention — I refer of course to the Congress of Paris in 1856 — renounced the whole system of privateers among themselves, I confess my fears that they will not witness with perfect calmness the annoyance to which their commerce will be exposed. And now, sir, mark my prediction. Every exercise upon neutral commerce of this terrible right of search by a privateer will be the fruitful occasion of misunderstanding, bickering, and controversy at a moment when, if I could have my way, there should be nothing to interfere with that accord, harmony, and sympathy, which are due from civilized States to our Republic in its great battle with barbarism. Even if we are not encouraged to expect these things from Europe, I hope that nothing will be done by us that will put impediments in their way. Justly sensitive with regard to our own rights, let us respect the sensibility of others.

"It is not enough to say that we have an unquestioned right to issue letters of marque. Rights, when exercised out of season or imprudently, may be changed into wrongs. It was a maxim of ancient jurisprudence, *Sic utere tuo, ut alienum non lædas;* and I think that this maxim, at least in its spirit, is applicable to the present occasion. Our right may be clear, but if its exercise would injure or annoy others, especially without corresponding advantage to ourselves, we shall do well if we forbear to exercise it." Congressional Globe, 1862–3, pp. 1021, 1022.

As it is only against supposed infractions of belligerent rights by neutrals, carrying contraband and violating blockades, that privateers could have in the present war any scope for action, it may be well to notice that even Hautefeuille, who pronounces the privateer clause, in the declaration of Paris, "a grave fault, a misfortune for all navigating peoples, except the

English," contends for confining privateers exclusively to operations against the enemy. He says, "If it is difficult and, above all, dangerous to abolish privateering as a direct means of war against the enemy, that is to say, inasmuch as it is conformable to the primitive laws of war, would it not be possible to take from privateers the attributes contrary to those laws, which the belligerent sovereigns have given them, and which alone render them dangerous for the happiness of the world — the permission to disturb (*inquiéter*) neutrals?" Droits des nations neutres, tom. i. p. 181.

In the treaty of the United States with Bolivia, concluded 13th May, 1858, but the ratifications of which were only exchanged November 9, 1862, there is an express stipulation that the article, according refuge or asylum in the rivers and ports of the dominions of one of the contracting parties to the citizens of the other, "shall apply to privateers or private vessels of war as well as public, until the two high contracting parties may relinquish the right of that mode of warfare, in consideration of the general relinquishment of the right of capture of private property upon the high seas." Treaties of the United States, 1862–3, p. 297.] — *L.*

Note [209, page 691.

[A proclamation was issued July 1, 1862, in accordance with the act of June 7, 1862, (p. 599,) declaring what States and parts of States were then in insurrection and rebellion, so that the act of August 6, 1861, could not be peaceably executed therein; and "that the taxes legally chargeable upon real estate, under that act, lying within those States and parts of States, together with a penalty of fifty per centum of said taxes, shall be a lien upon the tracts and lots till paid." Statutes at Large, 1861–2, p. iv.

By the act of March 3, 1863, ch. 120, all property coming into any of the United States not declared in insurrection by the Proclamation of July 1, 1862, from within any of the States declared in insurrection, through or by any other person than an agent duly appointed under the provisions of this act, or under a lawful clearance by the proper officer of the Treasury Department, shall be confiscated to the use of the government of the United States. The act is not to apply to any lawful maritime prize by the naval power of the United States. Statutes at Large, 1862–3, p. 820.

The Proclamation of August 16, 1861, (Editor's note [175, p. 555,) had contained an exception, not only in favor of the inhabitants of that part of Virginia lying west of the Alleghany Mountains, but of such other parts of that State and of the other States declared to be in a state of insurrection, as might maintain a loyal adhesion to the Union and the Constitution, or might, from time to time, be occupied and controlled by forces of the United States, engaged in the dispersion of the insurgents.

By the Proclamation of 30th March, 1863, the exceptions are limited to the forty-eight counties of Virginia, designated as Western Virginia, and the ports of New Orleans, Key West, Port Royal, and Beaufort in North Carolina; and it declares that the inhabitants of the enumerated States, with the above exceptions, are in a state of insurrection, and that all commercial intercourse, not licensed and conducted according to the act of 13th July, 1861, between the said States and the inhabitants thereof, and the citizens of other States and other parts of the United States, is unlawful, and will remain unlawful, until such insurrection shall cease or have been suppressed, and notice thereof given by proclamation.] — *L.*

Note [221, page 735, 1023; note [232, page 813.

[Lord Russell, in a note of January 24, 1863, to Mr. Adams, asks: "Do you mean that Her Majesty's government in sustaining a penal statute or carrying into effect the provisions of a penal statute were to hurry at once to a decision, and to seize a ship building and fitting out at Liverpool without being satisfied by evidence that the provisions of the enlistment act had been violated in the case of such vessel? The opinion of the law officers, until the receipt of which Her Majesty's government could not act, was delivered at the Foreign-Office on the 29th of July; but in the morning of that day The Alabama, under pretext of a pleasure excursion, escaped from Liverpool."

In the same note he remarks: "Both parties in the civil war have to the extent of their wants and means induced British subjects to violate the Queen's proclamation of the 13th of May, 1861, which forbids her subjects from affording supplies to either party. It is no doubt true that a neutral may furnish, as a matter of trade, supplies of arms and warlike stores impartially to both belligerents in a war, and it was not on the ground that such acts were at variance with the law of nations that the remark was made in a former note. But the Queen having issued a proclamation forbidding her subjects to afford such supplies to either party in the civil war, Her Majesty's government are entitled to complain of both parties for having induced Her Majesty's subjects to violate that proclamation, and their complaint applies most to the government of the United States, because it is by that government that by far the greatest amount of such supplies have been ordered and procured."

Complaints are also made of attempts of the United States to enlist British subjects in their belligerent service in defiance of the laws of their country and of the Queen's proclamation. Parliamentary Papers.] — *L.*

Note [235, page 833, line 3 of note.

[The following is the reply of Earl Russell, under the date of February 10, 1863, to a note addressed to him, January, 1863, by the Confederate Commissioner, Mr. Mason: —

"I have, in the first place, to assure you that Her Majesty's government would much regret if you should feel that any want of respect was intended by the circumstance of a mere acknowledgment of your letter (of the 7th of July last) having hitherto been addressed to you. With regard to the question contained in it, I have to say that Her Majesty's government see no reason to qualify the language employed in my despatch to Lord Lyons of the 15th of February last. It appears to Her Majesty's government to be sufficiently clear that the declaration of Paris could not be intended to mean that a port must be so blockaded as really to prevent access in all winds, and independently of whether the communication which might be carried on in a dark night, or by means of small low steamers or coasting craft creeping along the shore; in short, that it was necessary that communication with a port under blockade should be utterly and absolutely impossible under any circumstances.

"In further illustration of this remark, I may say there is no doubt that a blockade would be in legal existence although a sudden storm or change of wind occasionally blew off the squadron. This is a change to which, in the nature of things, every blockade is liable. Such an accident does not suspend, much less break, a blockade. Whereas, on the contrary, the driving off a blockading force by a superior force does break a blockade, which must be renewed *de novo*, in the usual form, to be binding upon neutrals.

"The declaration of Paris was, in truth, directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as the occasional appearance of a man-of-war in the offing, or the like.

"The adequacy of the force to maintain the blockade must, indeed, always, to a certain extent, be one of fact and evidence; but it does not appear that in any of the numerous cases brought before the prize courts in America the inadequacy of the force has been urged by those who would have been most interested in urging it against the legality of the seizure.

"The interpretation, therefore, placed by Her Majesty's government on the declaration of Paris, was that a blockade, in order to be respected by neutrals, must be practically effective. At the time I wrote my despatch to Lord Lyons, Her Majesty's government were of opinion that the blockade of the southern ports could not be otherwise than so regarded; and certainly the manner in which it has since been enforced gives to neutral governments no excuse for asserting that the blockade has not been efficiently maintained.

"It is proper to add, that the same view of the meaning and effect of the article of the declaration of Paris on the subject of blockades, which is above explained, was taken by the representative of the United States at

the Court of St. James's (Mr. Dallas), during the communications which passed between the two governments some years before the present war with a view to the accession of the United States to that declaration."

To a further note of Mr. Mason's protesting, in behalf of his government, against the interpretation given by Great Britain to the declaration of Paris, Earl Russell answers, February 27, 1863: "I have already, in my previous letters, fully explained to you the views of Her Majesty's government on this matter, and I have nothing further to add in reply to your last letter, except to observe that I have not intended to state that any number of vessels of a certain build or tonnage might be left at liberty freely to enter a blockaded port without vitiating the blockade; but the occasional escape of small vessels on dark nights, or under particular circumstances, from the vigilance of a competent blockading fleet, did not evince that laxity in the belligerent which enured, according to international law, to the raising of a blockade." Parliamentary Papers, 1863.] — *L.*

Appendix, No. 4, p. 968.

[By the seventh section of an act to regulate proceedings in prize causes, approved March 3, 1863, ch. 86, it is provided that appeals from the district courts of the United States in such causes shall be directly to the supreme court. Statutes at Large, 1862–3, p. 760.] — *L.*

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