

ELEMENTS OF  
INTERNATIONAL  
LAW AND  
LAWS OF WAR



Halleck

ELEMENTS  
OF  
INTERNATIONAL LAW  
AND  
LAWS OF WAR.

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PREPARED FOR THE USE OF COLLEGES AND PRIVATE STUDENTS.

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## PREFACE.

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THIS abridgment has been prepared at the suggestion of a number of professors and instructors in our colleges and higher institutions of learning. The experience of our officers, both volunteers and regulars, in the great civil war which has just terminated, has proved that this subject has been too much neglected, not only in our colleges, but also in our two great national schools—the Military and Naval Academies. An attempt is here made to supply a suitable text-book for such instruction.

The plan of the larger work has been closely followed, the chapters are the same, and only a few of the paragraphs have been changed. Therefore, the instructor or student who may desire to further investigate any particular question, has only to turn to the corresponding chapter and paragraph of the larger edition, and to refer to the authorities there quoted. It should be remembered that these authorities are not quoted in support of the author's opinions, but are often in conflict both with those opinions and with each other.

In order to diminish the size and reduce the price of this abridgment as much as possible, the author has omitted most of the discussions in regard to the principles adopted, and also many of the historical illustrations, leaving these to be supplied from the larger work, according to the judgment of the teacher, and the opportunity of the student.

H. W. H.

SAN FRANCISCO, CAL., *May*, 1866.



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# INTERNATIONAL LAW

AND

## LAW S O F W A R .

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### CHAPTER I.

#### HISTORICAL SKETCH.

§ 1. Division of the subject. In the following sketch of the history of international law, we shall divide the subject into periods of unequal length, but usually marked by some important event, and having reference rather to the progress of the law than the history of nations. This plan seems preferable to that adopted by Hallam, of dividing it arbitrarily into periods of half a century each. We shall therefore consider the condition of international jurisprudence: 1st, Among the ancients; 2d. From the beginning of the Christian era to the fall of the Roman Empire; 3d. From the fall of the Roman Empire to the beginning of the reformation; 4th. From the beginning of the reformation to the peace of Westphalia; 5th. From the peace of Westphalia to the peace of Utrecht; 6th. From the peace of Utrecht to the close of the seven years war; 7th. From the close of the seven years war to the beginning of the French Revolution; 8th. From the beginning of the French Revolution to the congresses of Paris and Vienna in 1814 and 1815; 9th. From the congress of Vienna to the treaty of Wash-

ington in 1842; 10th. From the treaty of Washington to the end of the civil war in the United States in 1865.

FIRST PERIOD—INTERNATIONAL LAW AMONG THE ANCIENTS.

§ 2. International law among the Jews. The history of the Jews, as derived from the Old Testament and the writings of Josephus, furnishes much information relating to the rules by which the ancient Hebrews regulated their intercourse with other nations in peace and war. Grotius, and other writers on international jurisprudence, have illustrated their own views of public law by numerous examples taken from the history of this singular people, and Selden's *International Law of the Jews* is a work of great erudition. He very justly distinguishes between the usages and practices which were susceptible of general application, and those limited rules of conduct which constitute the *jus gentium* of the Roman lawyers. As might be expected from an isolated and religious people, most of the laws regulating their international intercourse in peace and war were of the latter character. Nevertheless the history of the ancient Jews is well worthy of careful study in its connection with this branch of public law; but it must be remembered there is much in the Jewish dispensation, although of divine revelation, which has exclusive reference to them as a peculiar people, with a special mission to perform, and therefore not of general application.

§ 3. Among the ancient Greeks and Romans. Nearly all our knowledge of international law among ancient states is derived from their intercourse with the Jews, and with the Greeks and Romans, more particularly with the latter. Although no professed treatise on international jurisprudence has been left us by any classical writer, nevertheless much information respecting this branch of public law among the Greeks and Romans has been elicited from their civil laws and military ordinances, and from the history of their numerous wars,—information calculated to throw much light upon the rules by which, at different

periods, they regulated their intercourse with other nations. Most of these rules were exclusively founded on religion.

§ 4. The *Jus Gentium* of the Romans. What was called the law of nations (*jus gentium*) by the Romans, was not any positive system of jurisprudence established by the consent of all, or even the greater part, of the nations of the world, and applicable alike to themselves and others; it was simply a civil law of their own, made for the purpose of regulating their own conduct toward others in the hostile intercourse of war. It was, therefore, contracted in its nature, and somewhat illiberal in the character of its provisions.

SECOND PERIOD—FROM THE CHRISTIAN ERA TO THE FALL  
OF THE ROMAN EMPIRE.

§ 5. Introduction of Christianity. The doctrines of the Christian religion, and the universality of their application, were well calculated to give a milder character and a greater extension to the principles of international law, than they had received either under the Jewish dispensation, or the defective and multifarious system of the Greek and Roman mythology. But its progress was comparatively slow, and the bitter persecutions suffered by the early Christians naturally engendered a spirit of retaliation. Moreover, it must be continually borne in mind, while tracing the history of international relations during the reigns of Constantine and the succeeding Christian emperors, that the contests which they carried on with barbarous states were not of a character to develop the refinements of a *commercium belli*, or even to cause the observance of the acknowledged usages of war, or the previously established practices of international intercourse in peace.

§ 6. Effects of the Fall of the Roman Empire. It is not within the object of this chapter to investigate or describe the causes which finally overthrew the mighty fabric which valor and policy had founded on the seven hills of Rome, nor to

trace the history of those barbarous nations of the north, who, by their martial energy, and irresistible numbers and force, imposed their yoke upon the ancient possessors of that vast empire, and permanently settled themselves in its fairest provinces. The decline of taste and knowledge for several preceding ages, and the general corruption of political partizans and office-holders, had prepared the way for this revolution, and the establishment of the barbarian nations on the ruins of the Roman Empire in the west was accompanied, or immediately followed, by an almost universal loss of that learning which had been accumulated in the Greek and Latin languages. What of classical learning is still preserved to us are the mere fragments of those magnificent intellectual temples which industrious antiquaries have dug up from the vast ruins of ancient greatness. These fragments, however, are sufficient to show the grandeur of the original structure, and the beauty of its architecture; and the value of what remains only increases our regret for what is irrecoverably lost.

THIRD PERIOD—FROM THE FALL OF THE ROMAN EMPIRE  
TO THE BEGINNING OF THE REFORMATION.

§ 7. International Law during the dark ages. After the fall of the Roman Empire many cities still preserved their municipal constitutions, and the *jus gentium*, in connection with the *jus civile*, into which many of its principles had become incorporated, continued to be practiced, to a limited extent, both in Italy and the Provinces. Some have attempted to trace its influence upon the institutions and history of the different European nations, even through the darkest ages of human learning; it must, however, be admitted that this influence was not very marked in any case, and was by no means general.

§ 8. Its origin in Modern Europe. The origin of the law of nations, in modern Europe, has been traced to two principal sources—the canon law, and the Roman civil law. It was

founded, says Wheaton, 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 a 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 code, or as subsidiary to the local legislation of each country."

§ 9. Effects of Papal Supremacy. On the formation and consolidation of the Christian government in modern times, by Charlemagne, the human mind began to recover from its torpor, and art, science, and learning, sprang up out of the ruins of the ancient world. The church had constituted a kind of bridge, spanning the chaotic gulf which separated declining antiquity from modern civilization. The effects which this change produced upon international relations, and public law in general, may be traced in the lives of such rulers as Charlemagne, the pious King Alfred, King Stephen of Hungary, Rodolph of Hapsburg, and St. Louis of France.

#### FOURTH PERIOD—FROM THE BEGINNING OF THE REFORMATION TO THE PEACE OF WESTPHALIA.

§ 10. Effects of the Reformation. The reformation began to produce its effects upon the minds of men some time prior to the advent of Luther. Its effects were by no means confined to articles of religious faith. A greater theological liberty was its immediate object, but this was intimately allied with political freedom; and these two necessarily caused a great change in the law of nations. The different states of Europe were ranged under different standards, and each party was united by a kind

of *common cause*. Moreover, the separate members of each of the contending masses were bound together by principle or interest, rather than by any recognized paramount authority, for even the catholic states soon ceased to render full obedience to the papal supremacy in matters purely temporal. This necessarily led to the independence of sovereign states, the true basis of international jurisprudence. The impulse which had been given to this subject by the canon law was gradually dying away, and the infant science was likely to be smothered and lost by papal dictation and tyranny, when the more liberal notions engendered by the reformation rescued it from destruction, and placed it upon a more sure and firm foundation. Its progress was thenceforth both certain and rapid.

§ 11. Other causes of its advancement. Mr. Ward in his "Enquiry into the foundation and history of the law of nations in Europe, from the time of the Greeks and Romans to the age of Grotius," has pointed out and discussed the influence of Christianity, and of the ecclesiastical establishments, in laying the foundation and developing the principles of this branch of jurisprudence. He has also called attention to the obstacles placed in the way of its progress by religious intolerance, and the absurd and dangerous pretensions of the Popes to decide and determine, not only international disputes, but all questions relating to temporal matters connected with the government of independent states, and the effect of the reformation in establishing more liberal principles. Nor has he failed to notice the influence of the Roman law, of the feudal system, of chivalry, of treaties and conventions, and last, though not least, of those twin giants of modern civilization—commerce and trade—and the maritime and commercial laws resulting from the increased intercourse between the people of different cities and countries.

§ 12. The Rhodian Laws, etc. The Rhodians were probably among the first to adopt a regular system of laws and regulations relating to maritime trade. This collection of maritime usages is known by the names of *Rhodian Laws*, and *Maritime*

*Law of the Rhodians.* The collection known as the *Rooles or Jugemens d'Oléron*, was prepared under the direction of Queen Eleanor, and named from her favorite island of Oléron. Next we have the *Leges Wisbuenses*, the *Lois de Westcapelle*, the *Coutumes de Amsterdam*, etc., relating to maritime laws and usages in northern Europe.

§ 13. The *Consolato del Mare*, etc. The *Consolato del Mare* is one of the most curious and venerable monuments of early maritime jurisprudence. The first edition which can now be traced was published at Barcelona in 1494; but some refer it to a much earlier date, and suppose it to contain the maritime usages of the Greek emperors, and of the states and cities bordering on the Mediterranean and other waters. The date of the first publication of the *Guidon de la Mer* is not known, but it was commented on in *Les Us et Coutumes de la Mer*, published in 1647. From the *Ordonnance de la Marine* of Louis XIV., published in 1681, we date the modern system of maritime and commercial law.

§ 14. Writers prior to Grotius. The most noted writers, prior to Grotius, on matters connected with international law, were Machiavelli, Victoria, Soto, Suarez, Ayala, Bolaños, Bodinus, Gentilis, Peckius, Straccha and Sauterna.

§ 15. Writings of Grotius. Hugo Grotius is justly regarded as the founder of this branch of jurisprudence. He was born in Holland in 1583, and died in 1645. His great work, *de Jure Belli ac Pacis*, was published at Paris in 1625. Grotius wrote during the "thirty years war,"—that fierce struggle for religious liberty which was terminated a short time after his death by the peace of Westphalia, based on the principles which he had so ably and earnestly advocated.

#### FIFTH PERIOD—FROM THE PEACE OF WESTPHALIA TO THAT OF UTRECHT, 1648–1713.

§ 16. Political Events of this period. Although the peace of Westphalia terminated that memorable struggle in Germany

against the preponderance of the house of Austria, war continued to rage in other parts of Europe until the treaty of Utrecht in 1713.

§ 17. Questions agitated. Of the questions particularly discussed during this period we may mention those relating to the independence of states, the liberty of the seas, the rights of conquest and pre-emption, the theory of maritime prize, the law of sieges and blockades, the belligerent right of visitation and search, and the treatment due to prisoners of war. In many of these subjects a considerable advance was made from the restricted rules of the *jus gentium* of the Romans, and even from the more liberal principles established by Grotius; but in others, the progress of this branch of jurisprudence scarcely kept pace with the increasing civilization of nations.

§ 18. Writers following Grotius. The principal writers on international law, immediately following Grotius, were Selden, Hobbes, Puffendorf, Spinoza, Zouch, Loccenius, Molloy, Jenkins, Cumberland, Wicquefort, Rachel, Leibnitz, Stypmanus, Kuricke and Roccus.

SIXTH PERIOD—FROM THE PEACE OF UTRECHT TO THE END  
OF THE SEVEN YEARS WAR, 1713–1763.

§ 19. Political Events of the period. The peace of Utrecht was followed by the maritime war between England and Spain; by the war of the Austrian succession; and lastly by the “seven years war,” which served to develop the military resources of Prussia, and to display the brilliant genius of Frederick the Great.

§ 20. Questions agitated. During this period arose the celebrated question of the Silesian loan, which led to important discussions. Great Britain attempted to establish the doctrine denominated the “Rule of 1756.” Many questions also gave rise to discussion in regard to the rights and privileges of public ministers, and the rules of diplomatic etiquette.

§ 21. Writings of publicists. This period was prolific in

writers on questions of international law, among the most distinguished of which we may mention the names of Bynkershoek, Wolfius, Vattel, Montesquieu, Heineccius, Barbeyrac, Mably, Emerigon, Valin, Burlamaqui, Pothier, Casaregis, Real, Ruthenforth, Tindall, Hubner, Abreu and Dumont.

SEVENTH PERIOD—FROM THE SEVEN YEARS WAR TO THE FRENCH REVOLUTION, 1763–1789.

§ 22. Political Events. This period is marked by the partition of Poland, the war of Bavarian succession, the mediation of France between Joseph II. and the United Provinces, the triple alliance between Great Britain, Prussia and Holland in 1788, and the American Revolution which secured the independence of the United States and led to the wars of the French Revolution.

§ 23. Questions agitated. The more important questions of international law agitated during this period were those connected with the independence of states, the right of intervention and mediation, and the right of revolution. Among those relating to maritime jurisprudence, we may mention the rule of *free ships, free goods*, which was recognized and attempted to be established by the French ordinance of 1778; the rights of neutral commerce, as declared by the armed neutrality of 1780; and the abolition of privateering, as agreed upon by Prussia and the United States in the treaty negotiated by Franklin in 1785.

§ 24. Writings of publicists. The most distinguished writers of this period on international law, were the two Mosers, Lampredi, Galiani, G. F. Martens, Mirabeau, and Bentham. Among those of less note we may mention Neyron, Gunther, Van Romer, Wench, and Schmass.

EIGHTH PERIOD—FROM THE BEGINNING OF THE FRENCH REVOLUTION TO THE CONGRESS OF VIENNA, 1789–1815.

§ 25. Political Events. The conflict of opinions and interests growing out of the events of the French revolution engendered

a war which soon involved nearly all the states of Europe and America. The whole period is marked by encroachments on the true principles of international law, and a total disregard of the rights of sovereign and independent states.

§ 26. Questions agitated. Among the questions more particularly discussed during this period, we may mention the right of armed intervention, the laws of war in regard to military occupation and conquest, to sieges and blockades, to prize and booty, and to the treatment and exchange of prisoners of war. The law of contraband, the rights of colonial and neutral trade, and the rights of visit, search, impressment, and pre-emption, were also matters of warm dispute between the great maritime powers.

§ 27. Writings of publicists. Although this was eminently a period of action rather than of calm discussion and investigation, it produced several able text-writers on international law, among which we may mention Azuni, Martens, Kant, Koch, Savigny, Ward, Mackintosh, Dou, Flassan, Rayneval, Jouffroy, Jacobson, Merlin, and Marin.

§ 28. Judicial Decisions. Much importance was attached during this period to the opinions and decisions of judicial tribunals on questions of international law, many of which were characterized by profound learning and great legal ability. In maritime law none have been more distinguished for learning, sagacity, and comprehensive views than Sir William Scott, afterward Lord Stowell. The opinions of this great jurist must, however, be consulted with due caution, on account of his leaning toward British precedents and British pretensions.

NINTH PERIOD—FROM THE CONGRESS OF VIENNA TO THE  
TREATY OF WASHINGTON, 1815–1842.

§ 29. Political Events. Europe, exhausted by the great wars of the French revolution and empire, which were terminated in 1815, enjoyed a long period of general peace. The local revolu-

tions in Greece, France, Belgium, Poland, etc., and the war of 1829, between Russia and the Porte, were too limited in extent, and too temporary in their character, to disturb the general tranquility. In America the Spanish and Portuguese provinces, during this period, threw off the colonial yoke and assumed the position and rank of sovereign and independent states. The treaty of Ghent, in 1814, between the United States and Great Britain, had left unsettled many of the causes of the war of 1812, which were again likely to involve the two countries in serious difficulties, but most of these points of dispute were happily settled by the treaty of Washington in 1842, and a general peace prevailed throughout the civilized world.

§ 30. Questions agitated. During this period many of the questions of international law which had arisen in the previous wars were elaborately discussed. The attention of publicists was also directed to new ones, or, at least, old questions presented under new circumstances. Among these we may mention the rights and duties of neutrality; the right of revolution and intervention; the right of visitation and search in time of peace; of exclusive territorial jurisdiction; and the free navigation of great rivers, as the Rhine, the St. Lawrence, etc.

§ 31. Writings of publicists. Among the more distinguished publicists of this period we may mention the names of Kamptz, Kluber, Hegel, Wheaton, Kent, Story, Manning, Lieber, Bello, Pfeiffer, C. De Martens, Garden, Pardessus, Boulay-Paty, Hauterive, De Cussy, De Felice, Schoel, etc.

#### TENTH PERIOD—FROM THE TREATY OF WASHINGTON TO THE END OF THE AMERICAN REBELLION, 1842–1865.

§ 32. Political Events. During this period we have, in Europe, the revolution in France and the restoration of the Bonapartes; abortive revolutions in Germany, Poland, Hungary, and elsewhere; the Crimean war, and the war in Italy; and lastly, the Schleswig-Holstein German war. In America

we have the war between the United States and Mexico, and the resulting *filibuster expeditions*, with civil wars in Mexico and the Central and South American Republics; and lastly, the great rebellion in the United States, and the invasion of Mexico by the French.

§ 33. Questions agitated. This period has probably given rise to more important questions of international law than any one which preceded it. Among these we may mention the rights of intervention; of military occupation and conquest; of annexation and secession; of visit, search and blockade, and of neutral trade; and, in fine, innumerable points in regard to international, political, and personal rights and duties growing out of rebellion and civil war.

§ 34. Writings of publicists. This period has been prolific in works on international law and its kindred subjects. Among the more distinguished authors we will mention Wheaton, Duer, Story, Reddie, Wildman, Westlake, Phillimore, Twiss, Lieber, Woolsey, Hautefeuille, Ortolan, Fœlix, Massé, Pouget, Pistoye and Duverdy, Heffter, Pando, Riquelme, etc.

§ 35. Judicial Decisions. Some of the numerous and important questions of international law which have been agitated within the last twenty-five years have been most elaborately discussed in the decisions and opinions of eminent judges. None of these have shown greater ability than the late Chief Justice Marshall, and Justice Story, of the United States Supreme Court. The decisions of these two eminent judges on questions of international law, and more particularly of maritime capture, rank, at least, next to Sir Wm. Scott, and, on some points, they are now regarded as the better authority.

§ 36. Diplomatic Papers, etc. More full and complete discussions may be found in the diplomatic correspondence, parliamentary debates and periodical literature. Many of the state papers of Webster, Marcy and Seward, on these subjects, are admirable, and some of the debates of Lyndhurst, Palmerston, Russell,

Bright, and Cobden, throw much light on the legal questions discussed. Many valuable articles on international subjects may be found in the periodical literature of the day, and questions arising under the laws of war have sometimes been discussed with marked ability in the correspondence of military officers.

## CHAPTER II.

### NATURE AND SOURCES OF INTERNATIONAL LAW.

§ 1. **Definition of International Law.** International law, or The law of nations, may be defined to be, *The rules of conduct regulating the intercourse of states.*

Most writers have endeavored to frame their definition so as to embrace the sources of this law, rather than to describe the nature and character of the law itself. Thus, Grotius considers the law of nations as a positive institution, deriving its authority from the positive consent of all, or the greater part of civilized nations, united in a social compact for this purpose. While Rutherford denies the existence of any such social union among nations, and concludes that what is called the law of nations, when applied to states, is nothing more than what is called natural law when applied to individuals as parts of these collective bodies. Hobbes and Puffendorf also consider the general principles of natural law, and the law of nations, as one and the same thing, and the distinction between them as merely verbal, while others define this law to consist only of the usages, customs and conventions adopted and observed among nations. The definition here given avoids any reference to those questions which have been so much discussed by publicists, and upon which there is very little prospect of a general agreement.

§ 2. **General Divisions.** The difference in the nature and origin of the rules which ought to regulate the conduct of nations in their mutual intercourse, has led text-writers to divide international law into different branches. The most common of these general divisions is, into the natural law of nations, and

the positive law of nations. The first of these branches has been sub-divided into the divine law, and the application of the law of God to states. The second branch has also been sub-divided into the conventional law of nations and the customary law of nations. These divisions are somewhat arbitrary, and we shall follow them only so far as may be necessary or convenient in pointing out the sources of international jurisprudence, and in discussing the nature and character of the rules which constitute that code.

§ 3. Divine or Natural Law. Ethical writers hold that there is a dictate of right reason or law of conscience, enjoining some actions and prohibiting others, according to their moral obligation or moral deformity. And it is further said that the revealed will of God points out and enforces these principles.

§ 4. Its application to States. Some contend that international law is simply the law of nature applied to states, while others contend that the divine laws, both natural and revealed, apply only to individuals, and that they must be modified in their application to the conduct of independent nations. It is therefore claimed that international law is a science distinct from natural law.

§ 5. The Positive Law of Nations. It is certainly true that states are capable of contracting obligations toward others, either by their general acquiescence in certain positive rules for the regulation of their mutual intercourse, by that tacit-convention implied from usage and practice, or by direct and positive compact or agreement. These, where not contrary to the law of nature, are binding rules of conduct, and must be inquired into before we can determine what is the rule to be observed by such states in any particular case. Hence arises that important branch called the *positive law of nations*, which has been sub-divided into the *conventional* law of nations and the *customary* laws of nations.

§ 6. Relations between the Natural and Positive Law. It is said that the rights and duties of states which require an international law for their regulation and enforcement, result from the law of

nature, or the will of God, and that the rules of this law, whether resulting from compact, custom or usage, are the mere outward expressions of the consent of nations to things which are naturally, that is, by the law of God, binding upon them.

§ 7. *Conventional Law.* *The Conventional Law of Nations* results from the stipulations of treaties, and consists of the rules of conduct agreed upon by the contracting parties. As such agreement binds only the contracting parties, it is evident that the conventional law of nations is not an universal, but a particular law. Nevertheless, as these agreements are not always limited to the intercourse of the contracting parties with each other, but extend to their intercourse with other nations, and are, moreover, frequently intended to express opinions or to establish rules of action, with respect to particular points or questions in the law of nations, they belong to history, and have an important influence in regulating the general intercourse of states, and in modifying and determining the principles of international law. Hence the stipulations of treaties between highly civilized nations form an important branch of the general law of nations.

§ 8. *Customary Law.* *The Customary Law of Nations* embodies, says Mr. Justice Story, "those usages which the continued habit of nations has sanctioned for their mutual interest and convenience." As this law is founded on the tacit or implied consent of nations as deduced from their intercourse with each other, in order to determine whether any particular act is sanctioned or forbidden by this law, we must inquire whether it has been approved or disapproved by civilized nations generally, or at least by the particular nations which are affected in any way by the act.

§ 9. *Customs how far binding.* Customs which are lawful and innocent are binding upon the states which have adopted them; but those which are unjust and illegal, and in violation of natural and divine law, have no binding force.

§ 10. *Division by Vattel.* Wolfius, and his abridger, Vattel,

distinguish between particular and general usages, and confine the term *customary* to the former, and introduce a third division of the positive law of nations, which they call *the voluntary law of nations* to designate that universal voluntary law of usage, or of custom, which has been established and sanctioned by the frequency of its recognition and the numbers who have approved it. From this sub-division they would exclude all usages which are confined to particular periods or to particular nations and countries.

§ 11. Objections to this. This division of the positive law of nations, by Vattel, into voluntary, conventional, and customary laws, has been objected to by some as improper, and calculated to confuse rather than to elucidate the subject. It was adopted by Wheaton in the first edition of his *Elements of International Law*, but afterward rejected by him on the ground that the term “voluntary law of nations,” more properly designated the *genus*, including all the rules introduced by positive consent, for the regulation of international conduct, and should be divided into two *species*,—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. Notwithstanding this objection, we think the divisions of Vattel not entirely without foundation, and, at least, as worthy of consideration. His terms, however, are not well chosen.

§ 12. Other Divisions. Other publicists have made still further and different divisions and sub-divisions of this branch of international jurisprudence. Of these we shall mention but one, which not only seems to be well founded, but to point out distinctions which it is important to observe. The custom and usage of nations have established certain rights which are called *absolute*, or rights *stricti juris*, while at the same time, increasing civilization has in other respects, mitigated the severity of these rights by the *usage of comity*,—*comitas gentium*, by which is understood, the rule of convenience, as distinguished from

abstract right. Again, with regard to the intercourse of *individual* members of different states, this comity has produced what is termed *international law private*—*jus gentium privatum*,—as distinguished from *international law public*; that is to say, rules having reference, not to the relations of states among themselves, but the relations of individuals of one state to the laws and institutions of other states.

§ 13. Law not universal or immutable. It is admitted by all, that there is no universal or immutable law of nations, binding upon the whole human race, which all mankind in all ages and countries have recognized and obeyed. Nevertheless, there are certain principles of action, a certain distinction between right and wrong, between justice and injustice,—a certain divine or natural law,—or rule of right reason, which, in the words of Cicero, “is congenial to the feelings of nature, diffused among all men, uniform, eternal, commanding us to our duty, and prohibiting every violation of it,—one eternal and immortal law, which can neither be repealed nor derogated from, addressing itself to all nations and all ages, deriving its authority from the common sovereign of the universe, seeking no other law-giver and interpreter, carrying home its sanctions to every breast, by the inevitable punishment he inflicts on its transgressors.”

§ 14. Its rules obligatory. It must not be inferred, that because there is no immutable law of nations absolutely binding upon all mankind, that the rules of national intercourse established by general consent and sanctioned by reason, are not obligatory upon states and may be violated with impunity. These rules cannot, perhaps, with strict propriety be called *laws*, in the sense of commands proceeding from an authority competent in all cases to enforce obedience or punish violations. But, like the *laws of honor*, they are rules of conduct imposed by public opinion, and are enforced by appropriate sanctions. They are, therefore, by their analogy to positive commands, properly termed *laws*; and they are enforced, not only by moral sanctions, but by the fear of provoking general hostility, and incur-

ring its evils, in case of violating maxims which are generally received and respected among nations.

§ 15. Violations how punished. Moreover, the law of nations provides, in a measure, for the enforcement of its rules, and the punishment of a violation of its maxims. Certain offenses against this law, as piracy for example, wheresoever and by whomsoever committed, are within the cognizance of the judicial power of every state; for, being regarded as the common enemies of all mankind, any one may lawfully capture pirates upon the high seas, and the tribunal of any state, within whose territorial jurisdiction they may be brought, can try and punish them for their crimes. Again, international law determines the mode, means and extent of the punishment which one state may impose upon the offending individuals of another state, in order to repair the wrongs it has suffered.

§ 16. Can a sovereign state be punished? Some publicists have argued that, as all sovereign states are considered equal in international law, and as they can never be subjects of *criminal law*, they cannot be *punished* for offenses committed. This is probably true in the strict technical sense of the term *punish*. Nevertheless, as the injured state may, in order to obtain indemnity for the past and security for the future, destroy the property of the offending state, and kill its citizens, it does, to all intents and purposes, inflict *punishment*.

§ 17. General sources of International Law. In the present imperfect state of international law, which recognizes the obligatory force of no written code, and acknowledges no permanent judicial expositor of its principles, we must necessarily resort to the precedents collected from history, the opinions of jurisconsults, and the decisions of tribunals, in order to ascertain what these principles are, and to determine what are the proper rules for their application. Some of these principles and rules have been settled for ages, and have the force of positive laws which no one will now venture to dispute or call in question; while others are admitted only by particular states, and

cannot be regarded as binding upon any one which has not adopted them. The sources of international law are therefore as various as the subjects to which its rules are applied; and, in deducing these rules, we should distinguish between those which are applicable only to particular states, and those which are obligatory upon all.

§ 18. *The Divine Law.* The first source from which are deduced the rules of conduct which ought to be observed between nations, is the *divine law*, or principle of justice, which has been defined "a constant and perpetual disposition to render every man his due." The peculiar nature of the society existing among independent states, renders it more difficult to apply this principle to them than to individual members of the same state; and there is, therefore, less uniformity of opinion with respect to the rules of international law properly deducible from it, than with respect to the rules of moral law governing the intercourse of individual men.

§ 19. *Rather a test.* Grotius lays down the broad principle that the positive law of nations may *add to*, but cannot *subtract from* the law of nature. Others say that human laws are only declaratory, but have no power over the substance of *original justice*. In this view, the divine law, or principle of justice, would be regarded as the test rather than the source of the rules of positive international law.

§ 20. *History as a Source.* The *history* of transactions relating to the intercourse of states, both in peace and war, is one of the most fruitful sources of international law. What is called the voluntary, or positive law of nations, is mainly derived from usage and custom, and to determine these we must have recourse to the history of what has passed from time to time among the several nations of the world; not that history will afford us the record of any constant and uninterrupted practice, but because we shall there find what has been generally approved and what has been generally condemned in the variable and contradictory practice of nations; "for," in the words of Grotius, "such a

universal approbation must arise from some universal principle, and this universal principle can be nothing else but the common sense or reason of mankind.”

§ 21. *The Roman Civil Law.* It will generally be found that the deficiencies of precedent, usage, and express international authority, may be supplied from the rich treasury of the *Roman Civil Law*. Indeed, the greater number of controversies between states would find a just solution in this comprehensive system of practical equity, which furnishes principles of universal jurisprudence, applicable alike to individuals and to states.

§ 22. *Decisions of Prize Courts.* According to the present law and practice of nations, the seat of judicial authority of *prize courts* is located in the belligerent country, and they are dependent, in a measure, upon the laws and institutions of the particular states by which they are established. In this respect they are *ex parte* tribunals. But the subjects of their adjudication, are, without distinction, matters relating to the citizens and property of their own states, of neutrals, and of the belligerent country; and the law itself, by which their decisions should be governed, has no locality, and it is the duty of such a court to determine questions which come before it exactly as it would determine them by sitting in the neutral or belligerent country, the rights of whose citizens are to be adjudicated upon. In theory, therefore, such courts are regarded as international tribunals.

§ 23. *Judgments of mixed Tribunals.* Greater weight is justly attributable to the judgments of *mixed tribunals*, appointed by the joint consent of the several states between which they are to decide, than to those of admiralty courts established by, and dependent, in some measure, on the instructions of a single state; provided that the judges and umpires of these mixed tribunals possess the same character, ability, and learning, as the judges of admiralty. But, unfortunately, this has not generally been the case; and the decisions of these boards of arbitration have too often been mere compromises of differences,

rather than the elucidation of principles of international law, founded upon the true basis of international justice and supported by right reason. Nevertheless, these adjudications furnish a fruitful source of international law, and may always be consulted with profit and instruction.

§ 24. Ordinances and Commercial Laws. *The ordinances and commercial laws* of particular states, and the rules prescribed for the conduct of their commissioned cruisers and prize tribunals, may also be referred to for illustrations of the voluntary law of nations, as understood and practiced by such states. They, however, should be investigated with caution, and are received only as particular admissions of general principles. Nevertheless, some of the most important modifications and improvements in the modern law of nations have thus originated in the ordinances and commercial regulations, the proclamations and manifestoes of particular states.

§ 25. Decisions of Local Courts. The same remarks are applicable to the *decisions of local courts*. The adjudications of questions arising from international relations by such tribunals, are not obligatory upon other states, except so far as they conform to general principles and established usages; but as many questions can be decided only in this way, we may derive from this source many rules relative to the positive or practical law of nations.

§ 26. Text-writers. Another source, and perhaps the most fruitful of all, is formed of *the works of text-writers* of approved authority, showing the usage of nations, or the general opinions respecting their mutual conduct, with the definitions and modifications introduced by general consent. As a general rule, authors of text-books and treatises on international law, have risen above the local interests and prejudices which too often influence the writings of diplomatists, and even the decisions of courts, and have treated the subject in a philosophical spirit worthy of all commendation, and which causes their opinions to be referred to as authority on all disputed questions. Of course

we cannot expect to find a complete uniformity of opinions in these writers, but there is a very general concurrence of views on all the great and leading principles which they have discussed. "In cases where the principal jurists agree," says Kent, "the presumption will be very great in favor of the validity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers of international law."

§ 27. Reason of their authority. But it is not entirely upon their unanimity of opinion on great principles that the authority of text-writers has so great weight in the settlement of controversies between states. As a general rule, reference is made to those who wrote before the cause of the controversy arose, and who are therefore impartial. Moreover, it may be that the text-writers belonging to the very country which is urging a demand, have, in advance, pronounced against it. "If the authority of Zouch," says Phillimore, "of Lee, of Mansfield, and, above all, of Stowell, be against the demand of England; if Valin, Domat, Pothier, and Vattel be opposed to the pretensions of France; if Grotius and Bynkershoek confute the claim of Holland; Puffendorf that of Sweden; if Heineccius, Leibnitz and Wolff array themselves against Germany; if Story, Wheaton, and Kent condemn the act of America, it cannot be supposed (except, indeed, in the particular epoch of a revolution, when all regard to law is trampled under foot,) that the *argumentum ad patriam* would not prevail; at all events, it cannot be doubted that it *ought* to prevail, and should the country relying upon such authority be compelled to resort to arms, that the guilt of the war would rest upon the antagonist refusing to be bound by it."

§ 28. Treaties and compacts. Express *compacts* between states, and *treaties* of peace, alliance and commerce, declaring, modifying, or defining the rules which regulate their mutual intercourse, furnish another fruitful source of international law.

Such treaties and conventions are of binding force only upon the contracting parties, and they cannot modify the original and pre-existing law of nations to the disadvantage of those states which are not direct parties to these compacts; but where they relax the rigor of the primitive law in favor of others, or furnish a more definite rule of practice in matters which have given rise to conflicting pretensions, the conventional laws thus introduced are not only obligatory upon the contracting parties, but constitute a rule to be observed by them toward the rest of the world. And although one or two treaties, varying from the general usage and custom of nations, cannot alter the pre-existing international law, yet an almost perpetual succession of treaties, establishing a perpetual rule, will go very far toward proving what that law is upon a disputed point.

§ 29. Their effect on meaning of terms. Thus the consent of several nations, evidenced by treaties, to adopt a particular interpretation of a particular term, is, in the absence of other testimony, strong evidence that such is the true international meaning belonging to it. It is true that no treaty between two or more states can affect the general principles of international law, or directly prejudice the interests of others, though it may do so indirectly by positively declaring the interpretation to be given to a doubtful term, and thus laying down a principle binding, on them at least, in their intercourse with the rest of the world. This doctrine is laid down with great precision by Lord Grenville in his speech in the house of peers, on the convention of Russia in 1801.

§ 30. Diplomatic papers. State papers, and *diplomatic correspondence* between statesmen distinguished for their character and learning, frequently contain much valuable information respecting the particular points and questions of international law which are discussed by them. And perhaps these discussions exhibit the views and opinions of particular states more correctly than the compacts or treaties which may result from them, as such conventions are always more or less the result of

compromise or temporary necessity. Moreover, these documents sometimes contain important admissions of what is, or ought to be, the law on points not immediately involved in the conflicting pretensions which have given rise to such discussions.

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## CHAPTER III.

### SOVEREIGNTY OF STATES.

§ 1. A Sovereign State Defined. *A state* is a body politic, or society of men united together for mutual advantage and safety. Such a society has affairs and interests peculiar to itself, and is capable of deliberation and resolution; it is therefore regarded as a kind of moral person, possessing a will and an understanding, and susceptible of rights and obligations. From the nature and design of such a society, it is necessary that there should be established in it a *public authority*, to order and direct what is to be done by each individual in relation to the end and object of the association. This political authority, whether vested in a single individual or in a number of individuals, is properly the *sovereignty* of the state. This term, however, in international law, is usually employed to express the external rather than the internal character of a nation, with respect to its ability or capacity to govern itself, independently of foreign powers. *A sovereign state* may, therefore, be defined to be *any nation or people organized into a body politic and exercising the rights of self-government.*

§ 2. Distinguished from a nation or people. *A state* is distinguishable from a *nation* or a *people*, since the former may be composed of different races of men, all subject to the same supreme authority. Thus, the Austrian, Russian, British and Ottoman empires, are composed of a variety of nations and people. So, also, the same nation or people may be subject to, or compose, several distinct and separate states. Thus the Poles are subject to the dominion of Austria, Prussia, and Russia, respectively;

and the Italians constitute several distinct and independent sovereignties. The terms nation and people, however, are frequently used by writers on international law as synonymous with the term states.

§ 3. A colony is a part of a state. The sovereignty of a state has reference to its political character, rather than to the nature of its territorial possessions. The territory of some states is in one compact body, like Prussia, Bavaria, and Belgium, in Europe, Mexico, and the United States, in America, while the territory of other states, like that of Great Britain, consists of detached parts situate in every quarter of the habitable globe. Under the general appellation of *state* are included all the possessions of a nation, wheresoever situated, so that a *colony*, however distant, is, in the eye of international law, as much a part of the state which establishes it as is a city or province belonging to its most ancient territory.

§ 4. Not itself a state. As a colony, a possession, or a dependency, constitutes only a part of the state, it cannot in itself be regarded, in international law, as a distinct political organization. Hence, any public or private corporation, created by, and deriving its authority from a state, cannot of itself constitute a separate and independent sovereignty. Thus, the East India Company, although exercising the sovereign powers of peace and war, with respect to the native princes and people, acted in subordination to the supreme power of the British empire, and was represented by the British government in all its relations with foreign sovereigns and states.

§ 5. Sovereignty and dependence. The mere fact of dependence, however, does not prevent a state from being regarded in international law as a separate and distinct sovereignty, capable of enjoying the rights and incurring the obligations incident to that condition. Much more importance is attached to the nature and character of its connection with other states, and the degree and extent of its dependence.

§ 6. Occasional obedience. Nor is the sovereignty of a

particular state necessarily destroyed by its mere nominal obedience to the commands of others, nor even by an habitual influence exercised by others over its councils. Thus, the city of Cracow, in Poland, with its territory, was declared by the congress of Vienna, in 1815, to be a perpetually free, independent, and neutral state, under the protection of Russia, Austria and Prussia. Although its councils were habitually influenced by these great powers, it was nevertheless regarded in international law as a sovereign state; and when, by the convention of 1846, it was annexed to the empire of Austria, the governments of Great Britain, France and Sweden, protested against the proceeding as a violation of the act of 1815, by which it was recognized as an independent state.

§ 7. Feudal Vassalage. So, also, tributary states, and those subject to a kind of feudal dependence or vassalage, are still considered as sovereign, unless their sovereignty is destroyed by their relation to other states. Tribute, like that paid by the European maritime powers to the Barbary States, does not necessarily affect the sovereignty of the tributary; nor does the acknowledgment of a nominal vassalage or feudal dependence, like that of Naples to the Papal See, prior to 1818, necessarily impair the sovereignty of the vassal state.

§ 8. These may affect sovereignty. But the character of a state *may* be legally affected by its connection with others, and its sovereignty will be considered as impaired or entirely destroyed, according to the nature of the compact, the extent of the influence exercised by the superior, and the obedience acknowledged or rendered by the inferior; no matter whether such condition results from political organization or from treaties of unequal alliance and protection. If a state, in either of these modes, parts with its rights of negotiation and treaty, and loses its essential attributes of independence, it can no longer be regarded as a sovereign state, or as a member of the great family of nations. Its legal *status* is not changed by a loss of relative power, but by a loss of the essential attributes of inde-

pendence and sovereignty—the right to exercise its volition, and the capacity to contract obligations.

§ 9. Effect of a protectorate. The effect of a *protectorate* upon the sovereignty of a state must depend entirely upon the character and conditions of the protection afforded. No doubt, one state may place itself under the protection of another without losing its international existence as a sovereign state, if it retains its capacity to treat, to contract alliances, to make peace and war, and to exercise the essential rights of sovereignty. But these rights must be retained *de facto*, as well as *de jure*, for although a state may retain the forms of independence, if it be practically and notoriously governed by officers appointed by another state, and incapable of exercising its own volition, it will be regarded as a mere dependence of the governing power.

§ 10. Effect of a union of states. Two or more sovereign states may be united together under a common ruler, or by a federal compact; and it will depend upon the nature of this union or confederation, whether such states retain their separate sovereignty, notwithstanding this connection with others. If each separate state retains the essential qualities of independence,—the right of will and judgment, and the full capacity to contract obligations,—it will still be regarded as a distinct society or body politic, possessing the rights of sovereignty, and subject to its duties; but if it has lost these qualities by such union with others, either by becoming subject to their will, or by creating a new national power, of which it is only a component part, it can no longer be regarded, in the eye of international law, as a sovereign state, although it may retain many of its sovereign rights with respect to its confederates.

§ 11. A personal union. A union of two or more states under a common sovereign is called a *personal union*, if there is no incorporation, and if the component parts are united with a perfect equality of rights. Thus, Hanover, and the United Kingdom of Great Britain and Ireland, were at one time subject to

the same prince, but there was no dependence on each other and both retained their respective national rights of sovereignty.

§ 12. A real union. A *real union* of different states, under a common sovereign, is where the several component parts are not only united under the same sceptre, but the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign powers, although still retaining respectively their distinct fundamental laws and other political institutions. Thus the Austrian monarchy, prior to 1849, was a *real union*, composed of the hereditary dominions, the kingdoms of Hungary, Bohemia, and other states, each of which retained a separate sovereignty with respect to its coördinate states, but were component parts of the empire, with respect to their international relations with other powers.

§ 13. An incorporate union. An *incorporate union* is where several states are united under a common sovereign, and a common government and legislature, although each may have its distinct laws and a separate but subordinate administration. Thus the three kingdoms of England, Scotland, and Ireland are incorporated into an empire, the sovereignty of each original kingdom being completely merged by their successive unions in the United Kingdom, which, in international relations, is regarded as a single state.

§ 14. A Federal Union. Sovereign states are sometimes firmly united together by a federal compact, without acknowledging any common sovereign. This kind of union is perhaps less frequent among monarchies than among states which have a republican form of government. From the extremely complicated nature of these leagues or federal compacts, it is sometimes very difficult to determine how far the sovereignty of each nation is affected or impaired by the conditions or regulations of such union. These compacts are divided by publicists into two general classes, *confederated states and composite states*.

§ 15. Confederated States. By a *confederation*, or *system of*

*confederated states*, we understand that kind of union, or compact, which does not essentially differ from an ordinary treaty of equal alliance. The resolutions of the federal body are enforced not as laws directly binding upon the individual subjects of each state, but upon each separate government which adopts them, and gives them the force of law within its own jurisdiction; thus leaving to each state the exercise of its own will and responsibility in its general intercourse with foreign powers.

The confederation of 1778, between the United States of North America, was nothing more than a *system of confederated states*. The difficulty of enforcing the laws and regulating foreign affairs of the government led to the adoption of a constitutional Union.

§ 16. A Composite State. A *composite state*, or *supreme federal government*, results from a grant of supreme federal powers to the government of the union, with the consequent limitations imposed upon the separate governments of the several compact states. Each separate state may retain its own legislature, and its distinct laws and administration, and its separate sovereignty may still subsist internally in respect to its coördinate states, and, in respect to the supreme federal government, in questions of power not expressly granted to it; but in all external relations its sovereignty is completely merged and destroyed.

§ 17. Semi-Sovereign States. *Semi-sovereign states* are those which do not possess all the essential rights of sovereignty, and which, therefore, can be regarded as subjects of international law only indirectly, or at least in a subordinate degree. Such states must generally, in war, share the fortunes of their protector, and in peace, must have his consent to the engagements they may desire to form with others. But as they are, for certain purposes, and under certain limitations, to be dealt with independently of such protectors, it is necessary to regard them as distinct organizations. Such states are usually independent in their action, on mere questions of comity, such as the rights

of strangers in their own territory, and of their own subjects in foreign countries.

§ 18. *How Sovereignty is acquired.* The sovereignty of a state is acquired either at the origin of the civil society of which it consists, or when it separates itself from the community of which it formed a part, and assumes the rights and obligations of a distinct and independent political organization. All questions with respect to the origin of states, belonging to the province of political philosophy, rather than to that of international law.

§ 19. *Identity not affected by internal changes.* A state, as to the individual members of which it is composed, is a fluctuating body, being kept up by a constant succession of new members; so, also, its form of government and municipal constitution may be subjected to frequent alterations and changes; but these fluctuations and changes in the constituent parts of the body politic, and in their relations to each other, do not affect the character of the body itself, in its external relations to other communities,—that is, in international law. The state itself remains the same political body, until its identity is destroyed by interruption in its existence as a separate and distinct society; and it neither loses any of its rights nor is discharged from any of its obligations, by any mere municipal change or internal revolution.

§ 20. *Effect of civil war.* Neither a civil war, nor the revolt of a province or a colony, affect the sovereignty of the original state; and although a foreign state may, without violating any rule of international law, assist another state in suppressing a rebellion, it cannot assist rebels against an established government duly reorganized, without committing an act of hostility against that government. Whilst the civil war continues, or while a revolted colony or province is shaking off the bonds of a former government, the safer rule is for foreign states to remain mere passive spectators, conceding only such belligerent rights to the contestants as the particular circumstances of the case may justify or require.

§ 21. When a new state may be recognized. But when the contest is virtually determined, and the revolted province or colony has virtually established its independence, and organized its separate government, foreign powers may, without any just offense to the metropolitan government, recognize that independence and enter into full diplomatic and commercial relations with the new state as a separate and distinct sovereignty.

§ 22. Recognition by whom made. As the time and circumstances of such recognition of the independence and sovereignty of a revolted province, or of its claim to international belligerent rights during the war, might necessarily affect the relations of the recognizing power and the metropolitan government, such recognition must be made by the sovereign power of the state, and not by any subordinate authority, or by the private judgment of individual subjects.

§ 23. State sovereignty, how lost. The sovereignty of a state may be lost in various ways. It may be vanquished by a foreign power and become incorporated into the conquering state as a province, or as one of its component parts; or it may voluntarily unite itself with another in such a way that its independent existence as a state will entirely cease. Again, two sovereign states may become incorporated into one, so as to form a new sovereign state in place of the other two whose independent existence, as states, is entirely destroyed by such incorporation.

§ 24. Changes in the government of a state. Questions of great importance sometimes arise with respect to the international effects produced by internal changes in the form of government, and by a change in the sovereignty of a state, with respect to its duties and obligations toward others. These questions relate to treaties, public debts, the public domain, private rights of property, and to responsibility for wrongs done to the governments or subjects of other states.

§ 25. Changes by internal revolution. As a general rule, a mere change in the form of government, or in the person of the

ruler, does not affect the duties and obligations of a state toward foreign nations. All treaties of amity, commerce, and *real* alliance, remain in force precisely as if no intervening change had taken place, except in cases where the compact relates to the form of government itself, or to the person of the ruler in the nature of a guaranty. Public debts, whether due to or from the revolutionized state, are neither canceled nor affected by any change in the constitution or internal government of a state. So, also, of its public domain and right of property. If a revolution be successful, and a new constitution be established, the public domain and public property pass to the new government. The state, on the other hand, remains responsible for the wrongs done to the government or subjects of another state, notwithstanding any intermediate change in the form of its government or in the persons of its rulers. These results flow necessarily from the principle that the identity of a state is preserved, notwithstanding the accidental changes in its internal constitution.

§ 26. By dismemberment of a part. The dismemberment of a state, by the loss of a portion of its subjects and territory, does not affect its identity, whether such loss be caused by foreign conquest, or by the revolt and separation of a province. Such a change no more affects its rights and duties, than a change in its internal organization, or in the person of its rulers. This doctrine applies to debts due to, as well as from, the state, and to its rights of property and its treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.

§ 27. By division. The case is slightly different where one state is divided into two or more distinct and independent sovereignties. In that case, the obligations which had accrued to the whole, before the division, are, (unless they have been the subject of a special agreement,) rateably binding upon the different parts. This principle is established by the concurrent opinions of text-writers, the decisions of courts, and the practice

of nations. It was incorporated into the treaty by which the modern kingdom of Belgium was established.

§ 28. By incorporation. The converse of this rule is also generally true; that is, where several separate states are incorporated into a new sovereignty, the rights and obligations which had accrued to each one separately, before the incorporation, belong to, and are binding upon the new state which is created by such incorporation. But the rule must be varied or modified to suit the nature of the union formed, and the character of the act itself of incorporation in each particular case. Thus, a distinction must be made between the mere union, or confederation of states, and the creation of a new sovereignty, or composite state. In the one case, the obligations would remain with the states originally separate, while in the other case, they would, as a general rule, be transferred from the constituent parts to the new body politic. But if, by the act of incorporation, and by the constitution of the composite state, the rights and obligations of the component parts were to remain with the states originally separate, it could hardly be contended that the new sovereignty had either acquired the one or incurred the other. What might be claimed or incurred, under a general rule of presumptive law, could hardly be enforced against written instruments which provide especially against such claims or obligations.

## CHAPTER IV.

### RIGHTS OF INDEPENDENCE AND SELF-PRESERVATION.

§ 1. Independence of a Sovereign state. Every sovereign state may, from the very nature of its organization, freely exercise its sovereign rights in any manner not inconsistent with the equal rights of other states. The very fact of its sovereignty implies its independence of the control of any other state. It may therefore exercise all rights and contract all obligations incident to its sovereignty, as a separate, distinct, and independent society, or political organization. These rights and obligations are limited only by the law of nature and the existence of similar rights in others.

§ 2. May establish its own Government. The right of every sovereign state to establish, alter, or abolish its own municipal constitution and form of government, would seem to follow, as a necessary conclusion, from these premises. And from the same course of reasoning, it will be inferred, that no foreign state can interfere with the exercise of this right, no matter what political or civil institutions such sovereign state may see fit to adopt for the government of its own subjects and citizens. It may freely change from a monarchy to a republic, from a republic to a limited monarchy, or to a despotism, or to a government of any imaginable shape, so long as such change is not of a character to immediately, or of necessity, affect the independence, freedom and security of others.

§ 3. Choice of its own rulers. The right of a sovereign state to the choice of its own rulers rests upon the same foundation as its right to determine the form of its own internal constitu-

tion; and the interference of a foreign state in the one case cannot be justified except under the same circumstances and upon the same grounds as in the other, viz., *the immediate and pressing danger to its own independence and security.*

§ 4. Grounds of pacific Interference. The principal grounds upon which such interference has been justified are: first, self-defense; second, the obligations of treaty stipulations; third, humanity; and fourth, the invitation of the contending parties in a civil war. We will here examine each of these grounds, with respect to pacific interference, reserving for another place a discussion of how far they will justify a resort to force or a war of intervention.

§ 5. For self-security. Foreign interference in the *internal* affairs of a state, has sometimes been defended on the ground of a necessity on the part of the interfering states, involving their own particular security. That a right of pacific interference, and even of armed intervention, may sometimes grow out of such threatened danger to a particular state, cannot be doubted. So, also, there may be an impending danger, affecting the general security of nations, which may justify an interference on their part, for the security of their own independence and the preservation of peace. But such danger must be threatening and immediate, and not a mere remote contingency; and even then the interference must be limited to the removal of the danger itself; beyond that it would be unlawful.

§ 6. This usually a mere excuse. But this impending or contingent danger to the general peace of nations, or to the independence of particular states, is more frequently appealed to as an *excuse*, than as a *justifiable reason*, for foreign interference in the internal affairs of others. And instead of preserving peace, such unlawful interference has frequently been the cause of wars the most cruel and bloody that have ever stained the annals of history. We scarcely need refer to the wars which resulted from foreign interference in the internal affairs of France in the revolution of 1789, in proof of our assertion.

§ 7. Chateaubriand's views. M. de Chateaubriand in a most able discussion in the French Chamber, on the Spanish war of 1823, announced the modern rule of international law on this subject to be, "That no government has a right to interfere in the affairs of another government, *except in case where the security and immediate interests of the first government are compromised.*"

§ 8. Under treaty stipulations. Another ground of foreign interference in the internal affairs of a sovereign state advocated by some text-writers, is the obligation of treaty stipulations. But if the interference is in itself unlawful, no previously existing stipulations can make it lawful; for the reason that a contract against public morals has no binding force, and there is more merit in its breach than in its fulfillment.

§ 9. On the plea of humanity. Another ground of foreign interference, in the internal affairs of a sovereign state, is that of *humanity*, it being done for the alleged purpose of stopping the effusion of blood caused by a protracted and desolating civil war in the bosom of the state so interfered with. If such interference be in the nature of a pacific mediation, one state merely proposing its good offices for the settlement of the intestine dissensions of another state, there can be no doubt of its lawfulness.

§ 10. By invitation of contending factions. Again, suppose such interference in the internal affairs of another state be made on the invitation of the contending parties in the civil war? If the invitation be from only one of the contestants, it can, by itself, confer no rights whatever as against the other party. But if both parties unite in the invitation, it will afford just grounds for the pacific interference of the mediating power. How far such invitations will justify an armed intervention between the contending parties, will be discussed in another chapter. It is sufficient to remark in this place, that the opinion or decision of a mediating power, whether the mediation be

proffered or invited, is of the nature of advice, or rather of a proposition for an amicable adjustment of existing differences; which proposition may be rejected by one or both of the parties, without just offense to the mediator.

§ 11. *Arbitration between parties in a civil war.* But if such proffered or invited mediation is of the nature of an arbitration, in which the question of difference is submitted to the decision of the mediating power as an *arbitrator*, with an agreement to abide by such decision, neither party can properly refuse to abide by the result of the reference, unless it be shown that the award has been made in collusion with one of the parties, or that it exceeds the terms of the submission. The general rules governing such arbitrations, are the same as those governing arbitrations between sovereign and independent states, which will be discussed in another chapter.

§ 12. *Right of arbitrator to enforce his decision.* But suppose the award has been made without collusion, and has been confined to the terms of the submission, and that one of the parties should refuse to abide by the decision, although both agreed to do so, will such refusal justify the mediating power in employing force to compel obedience to its decision? To decide this question, it will be necessary to inquire into the particular circumstance of each case. The arbitrator's right to use force, in order to carry his decision into effect, if it exist at all, must be deduced from the terms of the agreement entered into by the contracting parties to the submission. It does not result, as a necessary consequence of his undertaking the office of arbitrator.

§ 13. *Independence in legislation and courts.* Another incident to the sovereignty of a state is its independence of every other in the exercise of its legislative and judicial power, so far as such exercise does not conflict with the sovereign rights of other states, or violate the stipulations of treaties. But this subject will be more particularly discussed in another chapter.

§ 14. In rewards and punishments. Every sovereign state being independent of all others in the exercise of its legislative and judicial powers, it follows, as a necessary consequence, that it is also independent of all others in the rewards and punishments of its own subjects. It may make its own laws defining offenses, organize its own tribunals for trying them, and for awarding punishments to its own subjects, and it may inflict its punishments upon its own subjects found in its own vessels upon the high seas, or within its own territorial jurisdiction. Moreover, its laws and penalties follow its citizens into all places and all countries.

§ 15. Only within its own territory. But while the laws of a state follow its own citizens into other countries, it can neither arrest nor punish them within the territorial jurisdiction of a foreign state except where such a right is conceded by treaty stipulations. The case of Martin Koszta, in 1853, and the discussions resulting from his seizure and forcible release in the port of Smyrna, have given to this rule of international law a prominent position in the public mind.

§ 16. Interference in cases of dependent states. There are certain cases where the very character of the constitution or government of one state may authorize the interference of another in the choice of its rulers. Such cases, however, are mainly confined to semi-sovereign, or dependent states. But the states of the church have usually been regarded, in the international law of Europe, as sovereign and independent. Nevertheless, Austria, France, and Spain, as catholic countries, have a voice in the election of the Pope, who is the temporal sovereign of the Roman states, as well as the supreme Pontiff of the Roman Catholic Church. But if these spiritual and temporal offices should be separated, the right of foreign states to interfere in the choice of the person to fill the office of civil ruler, might well be questioned.

§ 17. In case of confederated states. In the case of a composite state, or a confederation of several states, the right of one

state to interfere in the affairs of another, or of the supreme government to interfere with that of one of its constituents, will depend upon the constitution or plan of confederation; it does not result from any general right in sovereign states, as recognized by international law.

§ 18. Right of self-preservation. The right of self-preservation is regarded as one of the most essential and important rights incident to state sovereignty, and lies at the foundation of all the rest. It is not only a *right* with respect to other states, but a *duty* with respect to its own members, and one of the most solemn and important duties which it owes to them. "The right of self-preservation," says Phillimore, "is the first law of nations, as it is of individuals. A society which is not in a condition to repel aggression from without, is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution."

§ 19. Means incident to this right. This right of self-preservation necessarily involves all other incidental rights which are essential as means to give effect to the principal end. And other nations have no right to prescribe what these means shall be, or to require any account or explanation of the conduct of a sovereign state in this respect, except so far as their own peace or safety may be affected or threatened. The means usually resorted to for this purpose are the construction of fortifications, the organization of military and naval forces, and the contraction of alliances with other states. "The full liberty of a nation in this respect," says Phillimore, "cannot, as a general principle of international law, be too boldly announced or too firmly maintained."

§ 20. May be limited by treaty. But the exercise of these incidental rights may be modified or controlled by special compacts freely entered into with other states. Thus, by the treaties of 1748, and 1763, France engaged to demolish the fortifications of Dunkirk, and this stipulation, so humiliating to the French nation, was not effaced till the treaty of 1783. Again,

by the treaty of 1815, France engaged to demolish the fortifications of Huningen, and never to renew them nor to replace them by other fortifications within three leagues of the city of Bâsle. By the treaty of 1856, between Russia, Turkey, and the allies, the former stipulated to relinquish her right to construct military-marine arsenals, to maintain a naval force in the Black Sea. All such compacts, when freely entered into, are binding, notwithstanding that they limit the natural rights of independent states.

§ 21. By the rights of others. These incidental rights may also be modified or limited, by the equal and corresponding rights of other states. If, under the plea of self-defense, a nation makes extraordinary warlike preparations, inconsistent with pretended pacific intentions, and threatening to the peace and independence of others, such threatened states may very properly demand an explanation, and, if none of a satisfactory character is given, to require a discontinuance of such hostile demonstrations. Such hostile preparations, if not satisfactorily explained, may become a matter of serious complaint, but seldom, if ever, in themselves alone a just cause of war.

§ 22. Increase of army and navy. A distinction, however, must be made between those means and preparations for self-defense, which are exclusively *defensive*, and those which, from their nature, may also be regarded as offensive. Thus an extraordinary increase of the military and naval forces of a state, may be calculated to alarm other nations whose peace and security they may appear to menace. It is, therefore, usual under such circumstances, to require and to receive amicable explanations of such warlike preparations. And if asked for in a proper tone and spirit, the explanation cannot be properly refused, without giving offense, or, at least, well-founded cause for suspicion.

§ 23. Of fortifications and military schools. Not so, however, with respect to the erection and arming of fortifications, which

are essentially means of defense and self-preservation. That such works are of immense assistance in carrying on military and naval operations against others, cannot be doubted, but they cannot of themselves be injurious or dangerous to foreign powers. They, therefore, are not just causes of complaint by others. The same may be said of military schools, and a general diffusion of military education and military science among the subjects of a state. They are legitimate and proper means of self-preservation, which every sovereign state has a perfect right to use, and others have no right to require an account of its conduct in this respect.

§ 24. *Extra-territorial defense.* The means of self-preservation which we have hitherto considered as the right of a sovereign state to resort to, are such as are made *within* its own dominions, or on the high seas. It has been contended by some that, for the same reasons, a state may extend its precautionary measures *without* its own territorial limits and within the borders of a neighboring state. Mr. Phillimore describes a hypothetical case which would come under this pretended rule of international jurisprudence. "A rebellion, or a civil commotion, it may happen, agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the conterminous state, and from thence, with restored strength and fresh appliances, renew their invasions upon the state from which they have escaped. The invaded state remonstrates. The remonstrance, whether from favor to the rebels, or feebleness of the executive, is unheeded, or, at least, the evil complained of remains unredressed. In this state of things, the invaded state is warranted by international law, in crossing the frontier, and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their stronghold, as the exigencies of the case may fairly require."

§ 25. *Violation of territorial rights.* But such measures are obviously violations of territorial rights, and, even where neces-

sary, are acts of *hostility*, and the exercise of *belligerent rights* and not the *peaceful right* of self-defense. The case to which Mr. Phillimore has reference, is that of the destruction of the steamer "Caroline," in which his own government apologized for its violation of our territorial jurisdiction.

## CHAPTER V.

### RIGHTS OF EQUALITY.

§ 1. Natural equality of states. "Nations," says Vattel, "composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." In other words, all sovereign states, without respect to their relative power, are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations.

§ 2. Consequence in regard to rights. A necessary consequence of this equality of sovereign states is the general rule of public law, that, "whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other."

§ 3. In regard to titles. Another necessary consequence of this equality is the rule that all sovereign princes and states may assume whatever titles of dignity they think fit, and may exact from their own subjects the corresponding 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.

§ 4. Effect of custom and treaties. Where, however, we wish to promote a friendly intercourse with another nation, or to have another state recognize the titles we have conferred on our public

officers, we cannot very well refuse to acknowledge those which it has given to its rulers; so, also, with respect to honors and distinctions claimed as due to such rulers, policy, friendship and fear have not unfrequently induced certain states to yield the precedence to others. This has caused the establishment in Europe, at different periods, of different regulations with respect to foreign ceremonial. This ceremonial is founded, in part, upon custom, and, in part, upon the stipulations of conventions and treaties. There can be no doubt that the natural equality of sovereign states may be modified by the consent which is implied from constant usage, or by positive compacts voluntarily entered into, so as to entitle one state to a superiority over another, in respect to external matters, such as rank, titles, and other ceremonial distinctions.

§ 5. The Pope and Emperor of Germany. Thus the catholic powers concede the precedence to the Pope, as the visible head of the church; but Russia, and the protestant states of Europe, consider him only as a sovereign prince in Italy, and as such, entitled to royal honors, but not to any precedence from his rank as sovereign pontiff. 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, but the claim is considered to have been lost by the dissolution of the Germanic Constitution, and the new organization of the Austrian Empire.

§ 6. Dignity of a state represented by its ruler. The sovereign, or ruler of a state, is considered, in international law, as representing, in his person, its sovereign dignity. It matters not whether he is a monarch or a president, whether he is the *de facto* or the *de jure* head of a nation, (if he has been duly recognized as such,) custom has invested his person with certain international rights, as the representative of his state. He is therefore entitled to the precedence and honor due to the nation of which he is the ruler. But as sovereigns and rulers seldom meet in council, questions of this kind do not often arise between them

individually. There, however, were no less than five such congresses between 1814 and 1821, viz: the congress of Vienna, 1815; of Aix-la-Chapelle, 1818; of Troppau, 1820; of Verona, 1820; and of Laybach, 1821. As all matters of etiquette and precedence in such congresses are usually arranged before the meeting of the sovereigns, questions of precedence are not likely to arise in the congress itself.

§ 7. *Difficulties between ministers.* In former times, when public ministers claimed to represent, in their own persons, the dignity and right of precedence of their respective states, numerous disputes and difficulties occurred, some of a serious character, and others exceedingly ludicrous. Thus, at the public entry of the Swedish ambassador into London, a contest for precedence took place between the French and Spanish ambassadors, which was attended with loss of life on both sides, and probably would have led to war, if the king of Spain, who was interested in maintaining peace with France, had not made such concessions as to satisfy the pride of Louis XIV. Again, the ambassadors of two Italian princes met on the bridge at Prague, and as neither would give way, they stood for the greater part of the day, face to face, exposed to the jeers of the crowd collected by the strangeness of the spectacle.

§ 8. *Royal honors.* The customary law of European nations has attributed to certain states what are called *royal honors*, which entitle the states, by whom they are possessed, to precedence over all others who do not enjoy the same rank, with the exclusive privilege of sending to other states public ministers of the first rank, together with other distinctive titles and ceremonies.

§ 9. *Emperors and kings.* The title of emperor, from the historical associations connected with it, was formerly considered as the most eminent and honorable among all sovereign titles; but it is not now regarded by other crowned heads as conferring any prerogative or precedence over monarchical sovereigns of another name, ruling states of equal rank and dignity. The

title of king is now considered as equal in every respect to that of emperor. In fine, the influence and importance of the sovereign, result rather from the rank and importance of the state, than from the name and nature of the title conferred upon its ruler.

§ 10. Monarchical sovereigns. Among monarchical sovereigns, those who enjoy royal honors, but are not crowned heads, concede the preference, on all occasions, to emperors and kings; and the princes who do not enjoy royal honors, yield the precedence to those who are entitled to them. This rule is based on the consent of the parties themselves, and does not extend to their intercourse with other states.

§ 11. Semi-sovereign and dependent states. In all matters of ceremony and etiquette, the representatives of semi-sovereign or dependent monarchical states rank below the representatives of sovereign and independent monarchical states, and, of course, and as a matter of necessity, below those of the state on which they are dependent, or whose protection or *suzeraineté* they claim or acknowledge.

§ 12. Republics. It will be observed that these regulations for determining the relative ranks of states, or of their representatives, established in part by usage and custom, and in part by the Congress of Vienna in 1815, relate exclusively to monarchical sovereigns. An abortive attempt was made at the same congress, to classify the different states of Europe, with a view to determine their relative rank. A committee was appointed for this purpose in December, 1814; their report was discussed in February, 1815, and its adoption indefinitely postponed, doubts having arisen with respect to the proposed classification, and especially as to the rank assigned to republics. It therefore appears that republics have no definitive rank assigned to them by the rules of ceremonial etiquette in Europe, in the intercourse of their representatives with those of monarchical sovereigns.

§ 13. General rule of equality and precedence. It may be

stated, as a general rule resulting from the natural equality of states as members of an universal community, and subject alike to the same general code of international jurisprudence, that all sovereign states, no matter what may be their form of government, are equal before the law, and no one can claim any superiority or precedence over another. Republics, therefore, are entitled to the same rank as monarchies, unless they themselves have yielded their natural right of equality and conceded the precedence to others. Formerly, the Roman Republic considered all kings as very far beneath it; but when the monarchs of Europe found none but feeble republics to oppose, they disdained to admit them to an equality. Nevertheless, the powerful Republics of Venice and of the United Provinces assumed the honors of crowned heads. Cromwell would not allow the slightest mark of honor which had been paid to the representatives of the monarchy to be omitted toward those of the Republic of England. In the treaties between the French Republic and the other European Powers, it was expressly stipulated that the same ceremonials, as to rank and etiquette, which had been observed before the revolution of 1789, should be continued between them. The states of Europe observed the same rule toward the recent Republic of France. The United States of North America, the Germanic Confederation, and Switzerland (collectively, not in its individual cantons,) have been considered as entitled to the same rank as the monarchical states of Europe.

§ 14. Usage of the *Alternat*. Where the rank of different states is equal or undetermined, resort has sometimes been had to the usage of the *alternat*, as it is called, by which the rank and places of different powers is 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. Another expedient, some-

times resorted to in order to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing, in the alphabetical order of the names of the respective states which are parties to these acts, the French alphabet being adopted for that purpose. Thus, at the congress of Vienna, in 1815, the plenipotentiaries signed in the following order: Austria, Denmark, Espagne (Spain,) France, Great Britain, Prussia, Russia, Sweden; but it was distinctly understood, at the time, that this practice was not to be taken as derogating from the ancient usage of the *alternat*.

§ 15. *Diplomatic language.* At one time the Latin language was used as a matter of general convenience in the diplomatic intercourse between the different nations of Europe. Toward the end of the fifteenth century, the preponderance of Spain contributed to the general diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, in the age of Louis XIV., was superseded by the French language, which became the almost universal diplomatic idiom of the civilized world. The primitive equality of states authorized each nation to make use of its own language in treating with others, and this right is still preserved in the practice of many states; each carrying on its diplomatic correspondence in its own language, and treaties between them being written in their respective languages in parallel columns. Where the states which enter into negotiation or treaty have a common language, they generally make use of it in their transactions with each other.

§ 16. *Military and maritime ceremonial.* The usage of nations has established certain military and maritime ceremonials to be observed, either on the ocean between ships, or in ports between ships, and between ships and forts, or on land between armies, forts, military and naval officers, and in the military honors to be paid to high civil officers. Among these is the salute by striking the flag, or the sails, or by firing a certain number of guns, &c. These are matters of, perhaps, trivial importance in

themselves, but their due observance facilitates the amicable intercourse of nations, and their neglect frequently leads to international differences, dissensions and enmities, which have sometimes terminated in long and bloody wars.

§ 17. *How regulated.* Every sovereign state has the exclusive right, in virtue of its independence and equality, to regulate the ceremonies to be observed within its own territorial jurisdiction. This extends to the ceremonials between its own ships on the high seas, and to the honors to be rendered by them to foreign ships on the high seas, and to ships and to fortresses in foreign ports. Regulations for determining these ceremonies, and the reciprocal honors to be rendered by one nation to another, are established by municipal ordinances, by usage, and by the stipulations of treaties.

§ 18. *In the narrow seas.* Questions of territorial jurisdiction, or dominion over the narrow seas, have not unfrequently given rise to contentions with respect to the maritime honors to be rendered to the flag of the state claiming such dominion, by the vessels of others who denied its pretensions to such supremacy. This kind of supremacy was claimed by Great Britain over the narrow seas, and by Denmark over the sound and Belts at the entrance of the Baltic Sea, and serious international difficulties resulted in former times with respect to the formalities and maritime honors required by these states, and the neglect or refusal of others to observe or render them. But these peculiar formalities, formerly required by particular places where their dominion was disputed, are now, either entirely suppressed, or modified and regulated by treaty stipulations.

§ 19. *In foreign ports and on the high seas.* Not only in the narrow seas, but also upon the ocean, when the ships of different nations happened to meet, serious questions sometimes arose with respect to the time and character of reciprocal salutes. Ortolan has given us numerous instances of these difficulties and disputes, which not unfrequently terminated in actual war.

As the lowering of the flag was considered an act of humiliation the custom was entirely dispensed with about the middle of the eighteenth century, and salutes were confined to the firing of cannon. Nevertheless, the vessels of the great powers for a long time refused to salute those of the smaller states, and those of crowned-heads, on entering ports and harbors of republics, required the forts of the latter, (contrary to ordinary rule,) to salute first.

§ 20. *Treaty regulations.* Since the beginning of the eighteenth century there have been a number of treaties regulating matters of ceremonial between the contracting parties. But as these regulations varied in the different treaties, publicists have discussed the character and object of these usages, and sought to deduce from reason certain general principles which should form the basis of all internal regulations, and, by thus establishing a uniform system, remove all cause of difficulty or dispute.

§ 21. *General rules of text-writers.* The following general rules are collected from the best authorities on international jurisprudence :

As already stated, the method of saluting by striking or furling the flag, is now entirely abandoned between ships of war, although merchant vessels, as a mark of deference, sometimes salute in this way the men-of-war of their own state. But Ortolan considers even this as an objectionable practice, because the national flag should be considered as a sacred emblem, and should never be lowered voluntarily, not even through deference and as a matter of politeness. A salute by lowering the sails is more suitable and much less objectionable; it is sometimes used by merchant vessels. Merchant vessels of different nations, meeting on the high seas, or in port, do not, as a general rule, salute each other; sometimes, however, they exchange compliments by lowering their national flags. This, for the reason given above, is by some regarded as an objectionable practice. Such salutations should be confined to private signals, or to the sails.

All sovereign states are, with respect to salutes, to be regarded as equal; and any inequality of salutes, in respect to time, place, form, or number of guns, is to be regarded as resulting from general agreement, or of individual rank of the parties saluting, and not as conveying any idea of domination or supremacy. Salutes are never, in the absence of treaty stipulations, to be regarded as obligatory, but as a matter of courtesy and etiquette. To refuse an exchange of salutes is therefore regarded as evidence of a want of friendship and good will, which justifies the other party in asking explanations; but it cannot in itself be considered an offense or an insult, sufficient to justify hostilities.

Where two ships of war meet upon the high seas, courtesy requires that the commanding officer lowest in rank shall salute first, and that the salute be returned, gun for gun. The same rule holds with respect to the flag-ships of squadrons; but a single ship, no matter what its rank, meeting a squadron, salutes first. Vessels carrying sovereigns, members of royal families, rulers of states, and ambassadors, are to be saluted first. As before remarked, only personal salutes can be returned by a less number of guns.

§ 22. Salutes between ships and forts. Vessels of war, in entering or leaving foreign ports, or in passing foreign forts, batteries, or garrisons, salute first, without reference to the relative rank of the officers of the ships and forts. Such salutes are always to be returned gun for gun. As messages are to be exchanged between the parties, with respect to the number of guns to be given and returned, such salutes are usually fired after the vessel comes to anchor, and before leaving her anchorage on her departure. This salute is a compliment to the flag, and, consequently, is considered international rather than personal. The same rule holds with respect to the interchange of compliments and visits with the authorities on shore; the compliment or visit being first made from the vessel, without regard to relative rank, even if it were possible to fix any relative rank for officers so different in their nature and character. The rule, making

such compliments international, avoids any necessity of attempting such assimilation.

An apparent exception is made to this rule, in the case of vessels carrying persons of sovereign rank, members of the royal family, or ambassadors representing sovereigns or sovereign states. In such cases, the forts, batteries and garrisons, always salute first. But such salutes are intended expressly for the persons carried, and not for the vessel carrying them, and, consequently, the vessel does not return the salute. It is customary, however, for such vessel, if foreign, to afterward salute the fort or garrison in the usual manner, which salute is, of course, to be returned gun for gun. Ambassadors visiting foreign ports, not the capital or seat of the court of a sovereign or a sovereign state, first receive the visits and compliments of the local authorities. This rule of courtesy results from their supposed representative character. The rules of etiquette to be observed with respect to ambassadors at foreign courts, are discussed in another chapter. Where vessels of war, in foreign ports, land or receive on board their own sovereigns, or officers of their own government, the salutes to be given and ceremonies to be observed, are to be determined by their own laws and regulations. The same remark applies to the compliments to be paid on such occasions by other ships in port, and by the military establishments on shore, each being governed by their own laws and regulations. Every country determines for itself the salutes to be paid to its own authorities, and it will hardly be expected that any higher compliment will be paid to those of other countries, of the same rank. All such matters, however, should be regulated by previous arrangement, and in case of differences which cannot be accommodated, the party dissenting will take no part in the ceremonies.

§ 23. *Ships in foreign ports.* Ships of war of different countries, meeting in port, exchange salutes, gun for gun, the officer of the lowest rank always saluting first, except in the case where a single ship meets a squadron or fleet, in which

event, the flag ship is first saluted without regard to the relative rank of the officers. In all other cases, where the officers are of equal grade, the last arrival salutes first. Salutes are not to be exchanged where the regulations of the place do not permit them. With respect to the ceremony of visit, courtesy requires that the commander of the vessel in port, shall first send a message of compliment and inquiry to the commander of a vessel coming into port, and such message of compliment is to be immediately returned by the new comer; after which the visits of ceremony are to be exchanged, the lowest in rank visiting first. The number of guns to be fired in a salute is usually determined by the laws and regulations governing the party which salutes first, but before making the salute, it is proper to ascertain whether it will be returned gun for gun.

Vessels of war in foreign ports celebrate their own fêtes according to the regulation of their own government. Courtesy also requires them to take part in the national fêtes of the place, by joining in the public demonstrations of joy or grief. The same mark of respect is shown to vessels of a third power which celebrate fêtes in foreign ports. But if such celebrations are of a character to offend or wound the feelings of their own countrymen, or the nation in whose waters they are anchored,—as public rejoicings for a victory gained,—ships of war will remain as silent spectators, or leave the ports, according to the circumstances of the case. In public ceremonies upon land, the commandants of vessels or fleets usually land with the officers of their staff, and receive a place of honor according to the hierarchy of rank, precedence being determined by grade, and, if equal, by date of arrival. In case of disputes as to rank, it is proper for the contestants to withdraw and become mere spectators of the ceremonies.

§ 24. Regulations of U. S. Army and Navy. The military regulations for the government of the army of the United States, determine with great minuteness the salutes and military honors to be paid by troops and forts to our civil, military, and

naval officers, according to the rank of each. Thus, a national salute is determined by the number of states composing the Union, at the rate of one gun for each state. The President of the United States alone, is to receive a salute of twenty-one guns; the Vice President, seventeen guns; the heads of the executive departments of the federal Government, the commanding general of the army, and the governors of states and territories, within their respective jurisdictions, fifteen guns; major-generals, and ministers to foreign states, thirteen guns; brigadier-generals, eleven guns; and officers of the navy, according to their relative rank with officers of the army. The President and Vice President of the United States, are to be received by troops with standards and colors dropping, officers saluting, drums beating, and trumpets sounding. The compliments of other officers of government are varied according to the rank of each. Foreign officers, whether civil, military, or naval, when invited to visit a military post or national vessel, are to be saluted according to their rank, and to receive the same honors as officers of the United States of the rank which corresponds. Thus, a foreign sovereign prince receives the same honors as the President of the United States; foreign ambassadors and ministers, the same as American envoys of corresponding rank to foreign courts, etc. Foreign ships of war, entering American ports, are saluted from fortifications in return for a similar compliment, gun for gun, on notice being officially received of such intended salute. It is usual to agree beforehand what number of guns are to be fired, and it is directed that in no case shall the compliment exceed the national salute. Similar rules are established for the navy of the United states, with respect to salutes to be given to our own and foreign officers. American ships of war, on visiting foreign ports, salute fortifications on receiving notice that the compliment will be returned, gun for gun. Our ships salute each other and foreign ships, according to the rank of their respective commanders.

## CHAPTER VI.

### RIGHTS OF PROPERTY AND OF DOMAIN.

§ 1. Sovereignty of a state. The sovereignty of a state is the collection of the wills and powers of all the individual members of which the state is composed; or, in other words, it is the public power and authority of the state; and the *sovereign* is the person, or body of persons, who are invested with that power or authority.

§ 2. Prerogative. The term *prerogative* is frequently used to express the uncontrolled will of the sovereign power in the state. It is applied not only to the king, but also to the legislative and judicial branches of a government, as the “royal prerogatives,” the “prerogatives of parliament,” the “prerogatives of the court,” etc. Rutherford says, prerogative simply means a power or will which is discretionary, and above and uncontrolled by any other will, and, that if this power be limited in any respect, so far the prerogative is at an end.

§ 3. *Jura majestatis* and *regalia*. The word *majestas* was used by the Romans to express the supreme dignity of the commonwealth, and hence *majestas*, as employed by the civilians, is a legal term signifying *the sovereign dignity of the state*; and the different powers of the state, or parts of sovereign power, are called by them *jura majestatis*. They very properly distinguish between things, and rights to things, the former being called *corpora*, and the latter *jura*. The term *regalia*, differs from sovereignty, or *jura majestatis*, as being applicable both to things and to rights to things,—*corpora* and *jura*,—and, also, as not being inherent to or inseparable from the sovereign power,

for *regalia* may be alienated, either with or without the consent of parliament. It may be applied to the rights and prerogatives, not only of the king, but also of the church, the treasury, the courts, and parliament, and also to property of the state, of the church, etc. And when applied to property, it may include both that which necessarily appertains to the crown, and that which is alienable, or which may be passed to individual subjects.

§ 4. Property and domain. By the term *property*, we understand the ownership of a thing, or the exclusive right of possessing, enjoying and disposing of it. Things owned by individuals, or corporate bodies, are termed *private property*, and those owned by the state are called *public property*, or the property of the state. The property of a state is therefore very different from its sovereignty, or the prerogatives of its ruler. In speaking of real property, whether of individuals or of states, the term *domain* is frequently used.

§ 5. Right of eminent domain. Eminent domain is a term applied to one of the *jura majestatis*; it is that highest right over property which is in the government, and is never granted to the individual, and, therefore, is essentially different from what is ordinarily understood by the word property. The term *eminent domain*, properly speaking, is not applicable to the property of the state, but only to the property of individuals, for the right of the state to dispose of its property results from its right of ownership, and not from the right of eminent domain, which latter right remains in the state after it has transferred the ownership of its property. It is a right which, from its very nature, is inseparable from the sovereignty, and is necessarily transferred with the sovereignty.

§ 6. Right of a state to own property. A state is regarded in public law as capable of the same rights, duties and obligations, with respect to other states, as individuals with respect to other individuals. Among the most important of these natural rights is that of acquiring, possessing and enjoying property. The

property of a state, of whatsoever description, is marked by the same characteristics relatively to other states, as the property of individuals: that is to say, "it is exclusive of foreign interference, and susceptible of free disposition."

§ 7. Modes of acquisition. A state may acquire property or domain in various ways; its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of time; or by discovery and lawful possession; or by conquest, confirmed by treaty or tacit consent; or by grant, cession, purchase, or exchange; in fine, by any of the recognized modes by which private property is acquired by individuals.

§ 8. Right of disposition of territory. A sovereign state has the same absolute right to dispose of its territorial or other public property, as it has to acquire such property, but it depends upon its own municipal constitution and laws, how, and by what department of its government, the disposition shall be made. This is sometimes a question of peculiar interest to foreign states, who may acquire such property by purchase, exchange, cession, conquest, and treaties of confirmation, and especially where such acquisitions are made from a state continually subject to revolutions and fluctuations in the character of its government and in the powers of its rulers. The act of a government *de facto*, a government which is submitted to by the great body of the people, and recognized by other states, is binding as the act of the state; and it is not necessary for others to examine into the origin, nature and limits of that authority. If it is an authority *de facto*, and *sufficient* for the purpose, others will not inquire how that authority was obtained.

§ 9. Authority to make a valid transfer. Nevertheless, in order to make such transfer valid, the authority, whether *de facto* or *de jure*, must be competent to bind the state. Hence the necessity of examining into and ascertaining the powers of the rulers, as the municipal constitutions of different states throw many difficulties in the way of alienations of their public property, and particularly of their territory. In some this au-

thority is conferred upon the executive branch of the government, while in others the concurrence of the legislative branch is requisite to make valid the transfer of public property.

§ 10. *Patrimonial kingdoms.* Formerly what Grotius calls *patrimonial kingdoms* were considered in the light of absolute property of particular families, who transferred them to others at their will, sometimes by way of mortgage, and sometimes by deeds of gift and by bequests. The transfer of Schleswig-Holstein to Denmark is a modern instance of this kind of sale.

§ 11. *Inhabitants of such kingdoms.* As the inhabitants of such kingdoms had by their blind submission to their rulers become mere adjuncts of the soil, the transfer of the sovereignty was considered to include, not only the right of eminent domain, and the absolute property of the sovereign or state, but all private lands, and the property and services of the subjects, who were transferred with the soil, in the same manner as a slaveholder may transfer his slaves and all they possess, together with the title to his plantation.

§ 12. *Modern transfers.* But in modern times sales and transfers of national territory to another power can only be made by treaty or some solemn act of the sovereign authority of the state. And such transfers of territory do not include the allegiance of its inhabitants without their consent, express or implied, and a change of sovereignty does not involve any change in the ownership of private property. The new sovereignty, however, acquires the same *right of eminent domain* as that held by the former.

§ 13. *Extent of maritime territory.* National territory consists of water as well as land. The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other state. The general usage of nations superadds to this extent of maritime territory an exclusive territorial jurisdiction

over the sea for the distance of one marine league, or the range of a cannon-shot, along all the shores or coasts of the state. The maxim of law on this subject, is, *terræ dominium finitur ubi finitur armorum vis*, which is usually recognized to be about three miles from the shore. And, even beyond this limit, states may exercise a qualified jurisdiction for fiscal and defensive purposes, that is, for the execution of their revenue laws, and to prevent "hovering on their coasts." It is necessary to distinguish between *maritime territory* and *territorial jurisdiction*, which latter will be discussed in another chapter.

§ 14. Coasts and shores. The term "coasts" does not properly comprehend all the *shoals* which form sunken continuations of the land perpetually covered with water, but it includes all the natural appendages of the territory which rise out of the water, although they may not be of sufficient firmness for habitation or use. No matter whether such appendages are composed of mud or of solid rock, they are considered as a part of the territory of the main land, the right of dominion not depending upon the texture of the soil.

§ 15. Islands. Another case, involving the international right of domain and property, is that of islands in the sea, which do not derive their elements, on the principle of alluvium and increment, immediately from the main shore, but are separated from it by deep channels of a greater or less width. Such islands, if in the vicinity of the main land, are regarded as its dependencies, unless some one else has acquired title to them by virtue of discovery, colonization, purchase, conquest, or some other recognized mode of territorial acquisition. The ownership and occupation of the main land includes the adjacent islands, even though no positive acts of ownership may have been exercised over them. In such a case, the attempt of another power, without title, to colonize them, would be a just cause of complaint, and, if persisted in, of war. But if such islands be in the sea, distant from the main land, their owner-

ship follows the general rule of discovery, occupancy, colonization, purchase, and conquest.

§ 16. Principle of the king's chambers. The exclusive right of domain, and territorial jurisdiction, of the British crown, have immemorially extended to the bays or portions of the sea cut off by lines drawn from one promontory to another, along the coasts of the island of Great Britain. They are commonly called the *king's chambers*. A similar jurisdiction, or right of domain, is also asserted by the United States over the Delaware Bay, and other bays and estuaries, as forming portions of their territory. Other nations have claimed a right of territory over bays, gulfs, straits, mouths of rivers, and estuaries which are enclosed by capes and headlands along their respective coasts, and the principle would seem to be pretty well established as a rule of international law.

§ 17. Difficulties in its application. The principle of this rule is not now contested, but differences have arisen with respect to its limitation, and its application to particular cases, or, in other words, as to what constitutes a bay or estuary, or mouth of a river, and what must be regarded as a portion of the open sea, which is the property or territory of no one, but is common to all nations. By the treaty of 1818, between the United States and Great Britain, the former "renounced forever any liberty heretofore enjoyed, or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three miles of any of the coasts, bays, creeks, or harbors of his Britannic Majesty's dominions in America," etc. From 1849 to 1852, serious difficulties occurred between the inhabitants of the two countries with respect to the construction of this treaty; the one contending that the *three miles* were to be measured from a line uniting the extreme headlands of the coasts of Nova Scotia, while the other party objected to this, on the ground that the line so drawn cut off large portions of the open sea, or broad estuaries, which were the common property of all; and that such line must be drawn from one headland to the next adjacent, so as not to include

these broad bays, or slight indentations, which were properly portions of the open sea. Serious collisions were at one time apprehended between the men-of-war sent by the two governments to protect their respective fisheries.

§ 18. Claims to portions of the sea. But, besides this claim of maritime territory over the mouths of rivers, bays and estuaries along the coast, different nations have at different times asserted a right of property to certain narrow seas and straits adjacent to their shores, and outside of any lines joining one cape or promontory with another. Such, for example, as the sovereignty formerly claimed by the Republic of Venice over the Adriatic; the supremacy claimed by England over the narrow seas; and 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. Such claims have generally been placed on the ground of immemorial use, or prescription. The honors and duties demanded by the state asserting such maritime supremacy, have been paid or refused by other nations, according to circumstances, but the claim itself has never been sanctioned by general acquiescence.

§ 19. Danish sound dues. The claim of Denmark, to impose what are called *sound dues*, was rested by the Danish publicists and diplomatists, not only upon immemorial prescription, sanctioned by a long succession of treaties with other powers, but upon a kind of vested right, originating in remote antiquity, recognized by the system of public law subsequently subsisting, and ratified by the acquiescence of all maritime nations from time immemorial; and they said the claim was originally founded in equity, and still has equitable considerations in its favor, in virtue of the expenses incurred by Denmark in improving the navigation of the sound for the general benefit of commerce. They admitted "that the general principles of the law of nations would now hardly seem to sanction the imposition of tolls similar to the sound dues, where none before had existed." The United States denied the *right* of Denmark to

collect such dues. The dispute was amicably arranged by the convention of February 12th, 1858, the sound and belts being made entirely free to American vessels and their cargoes, the United States paying a fixed sum *en bloc* for light-houses, buoys, etc.

§ 20. *Mare-clausum* and *mare-librum*. No one would now think of reviving the controversy which once occupied the pens of the ablest European jurists, with respect to the right of any one state to appropriate to its own use, and to the exclusion of others, any part of open sea or main ocean, beyond the immediate vicinity of its own coast; but it has sometimes been attempted to extend the principle of *mare-clausum* to inland seas, not entirely enclosed within the territorial limits of a single state. It is now a settled principle of international law that no number of nations, bordering upon the sea can combine together to close it against the commerce of the rest of the world.

§ 21. *The Black Sea*. It is generally admitted that the territory of a state includes the seas, lakes and rivers entirely enclosed within its limits. Thus, so long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might, with propriety, be considered as *mare-clausum*; and there seemed 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 also portions of the Turkish territory. But when Turkey lost a part of her possessions bordering upon this sea, and Russia had formed her commercial establishments on the shores of the Euxine, both that empire and other maritime powers became 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 treaty of Adrianople in 1829. But the right of free navigation of the Black Sea, and the consequent right of passage through the Dardanelles and the Bosphorus, was not construed to interfere

with the right of *territorial jurisdiction* which the Ottoman Porte exercises over these straits.

§ 22. **The great lakes and their outlets.** The great inland lakes, and their navigable outlets, are considered as subject to the same rule as inland seas: where enclosed within the limits of a single state they are regarded as belonging to the territory of that state, but if different nations occupy their borders, the rule of *mare-clausum* cannot be applied to the navigation and use of their waters. No distinction is made between salt water lakes, or inland seas, and fresh water lakes.

§ 23. **Navigable rivers as boundaries.** A river which flows, for its entire length, through the territory of a state, is regarded as forming a part of its dominion, including the bays and estuaries formed by its junction with the sea. Where the entire upper portion of a navigable river is included within a single state, the part so enclosed is undoubtedly the property of such state. Where a navigable river forms the boundary of coterminous states, the middle of the channel,—the *filum aquæ*,—or *thalweg*, is generally taken at the line of their separation, the presumption of law being, that the right of navigation is common to them both. But this presumption may be rebutted or destroyed by actual proof of the exclusive title of one of the riparian proprietors to the entire river. Such title may have been acquired by prior occupancy, purchase, cession, treaty, or any one of the modes by which other public territory may be acquired. But where the river not only separates the coterminous states, but also their territorial jurisdictions, the *thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit, for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object.

The division of the islands in the river and its bays, would follow the same rule.

§ 24. Changes in dividing rivers and lakes. Where the dividing line of two states is water, as a river or lake, which is subject to changes, important questions may arise respecting the rights of property. Thus, where, by a gradual and insensible movement, the water advances on one side and recedes on the other, or by detrition on one side and deposit on the other, a portion of the soil is gradually transferred, there is evidently a loss to one state and an increase to the other. So also, where islands are washed away on one side of the channel, and new ones formed on the other, there is a corresponding change of territory. Again, suppose that the river or lake which constitutes the boundary, has suddenly changed its bed, will this change produce a corresponding increase or diminution of territory to the adjacent proprietors? The Roman law determined with great care the effects of changes in the distribution of waters upon the ownership of private lands; and the influence of this law is manifest in the rules adopted by publicists with respect to international property.

§ 25. Effects on boundaries. Where the moving of the dividing water is so gradual as to be almost insensible, the changes produced are not considered as acquisitions and losses of property, but the natural consequences of property already existing; because, the thing owned is naturally susceptible of this physical increase or decrease. In such a case, whether the dividing water belongs entirely to one state, or the boundary is the middle or *thalweg*, each party gains or loses accordingly as the increase or decrease is upon its side. The same rule applies to the gradual removal or formation of islands in a river or lake which divides states, or in the sea, within the territorial limits or *ligne de respect* of a state bordering upon the ocean. Moreover, a state has a certain right of preëmption to islands formed adjacent to its coast, even outside of this line of respect. But the case is very different where the river abandons its ancient bed

and forms a new channel, or where a lake leaves its former banks and forms a new lake, or a series of new lakes; the boundaries of the states remain in the abandoned bed of the river, or in the position formerly occupied by the lake.

§ 26. Rivers passing through several states. Where a navigable river, during a part of its course, flows through the territory or forms the boundary of one state, but passes through a third state before it enters the sea, questions of some difficulty have arisen with respect to its dominion and use. It is, however, now generally conceded that the right of navigation, for commercial purposes, 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 which is affected by it, and can only be effectually secured by mutual conventions, regulating the mode of its exercise. The Roman law declared navigable rivers to be so far public property, that a free passage over them was open to everybody, but distinguished between rivers and the sea, the former being classed among *res publicæ*, and the latter among *res communes*.

§ 27. Use of their banks. The Roman law also declares the right to use the shores to be an incident to that of the water, and the right to navigate a river carries with it the right to moor vessels to its banks, to lade and unlade cargoes, etc. Publicists have applied this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for the purposes, as means necessary to the attainment of the end, for which the free navigation of the water is permitted. The principal right would seem to draw after it the incidental right of using all the means which are necessary to secure its proper enjoyment. But this 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.

§ 28. Right of innocent passage. Such right of innocent

passage, though an *imperfect* right, and requiring mutual conventions regulating the mode of its exercise, is, nevertheless, a real, subsisting right, founded upon the law of nature, and recognized by the most approved writers on public law. It may also be added, that it has been recognized by the general consent of nations, and must now be regarded as an established principle of international law.

§ 29. *Modified by compact.* But those interested in the enjoyment of this principal right, and its incidents, may renounce them entirely, or consent to modify them in such a manner as mutual convenience and policy may dictate. Thus, by the treaty of Westphalia, the navigation of the River Scheldt was closed to the Belgic provinces, in favor of the Dutch; and by the treaties of Vienna, and subsequent conventions, the riparian powers, on the banks of the great rivers of Europe, agreed to certain detailed regulations respecting their navigation through the territory of the states in which such rivers debouched into the ocean. But this agreement of the riparian states to regulations of police and fixed toll duties on vessels and merchandise passing through the territory of another state, to and from the sea, or even an entire surrender or renouncement of the right, cannot be adduced as an argument against the existence of the right itself. On the contrary, if no such right existed, there would be no necessity for its regulation, and its renouncement would be an act of supererogation.

§ 30. *The Rhine and other great rivers.* The navigation of the Rhine and other large rivers in Europe, and of the Mississippi and the St. Lawrence in North America, have been the subject of extended discussions and numerous treaties, to which those who wish to pursue the examination of this subject are referred for further information.

## CHAPTER VII.

### RIGHTS OF LEGISLATION AND JURISDICTION.

§ 1. Exclusive power of legislation. We have already remarked, that the exclusive power of civil and criminal legislation, is one of the essential rights of every independent and sovereign state. An infringement upon this right is a limitation of the natural sovereignty of the state, and if extended to a general denial of this power, it is justly considered as depriving the state of one of its most essential attributes, and as reducing it to the position of dependence upon the will of another.

§ 2. Law of real property. This sovereign right of legislation extends, (with the exceptions hereafter to be mentioned,) to the regulation of real or moveable property within the territorial limits of the state, no matter by what title such property may be held, or whether it belongs to aliens or to citizens of the state. The law of the place, where real or immovable property is situate, or the *lex loci rei sitæ*, governs in everything relating to the tenure, title, and transfer of such property. Hence it is, that the descent, devise, or conveyance of real property, in a foreign country, must be governed by, and executed according to, the local laws of the state where such property is situate.

§ 3. Law of personal property. With respect to personal or movable property, the same rule generally prevails, except that the law of the place where the person to whom it belonged was domiciled at the time of his disease, governs the succession, *ab intestato*, to his personal effects. So, also, the law of the place where any instrument relating to personal property is executed,

by a person domiciled in that place, governs, as to the form, execution and interpretation of the instrument. Thus, the validity, effect and interpretation of a testament of personal property, must be determined by the law of the place where it is made, and where the party making it is domiciled. *Lex loci domicilii regit actum.* The rule is applicable to every transfer, alienation, or disposition made by the owner, whether it be *inter vivos*, or *causa mortis*, and is founded on the maxim that personal property has no locality, but adheres to the person of its owner. *Mobilia sequuntur personam.* There are exceptions to this rule; *first*, in cases where the local or customary law of the place gives to the particular property a necessarily implied locality; and *second*, in special cases provided for by local statutes.

§ 4. Law of contracts. The general law of contracts is, that the validity of every contract is to be decided by the law of the place where it is made, or, in legal phraseology, the *lex loci contractus* is to govern in everything respecting the form, interpretation, obligation, and effect of the contract. "The rule," says Story, "is founded, not merely in the convenience, but in the necessities of nations; for, otherwise, it would be impracticable for them to carry on an extensive intercourse with each other."

§ 5. Exceptions to the rule of comity. From this rule are excepted all contracts deemed repugnant to the fundamental laws of the state in which the contracts are to be executed. But as comity as applied to the law of contracts is the general rule, these exceptions are to be limited so as not to affect the established principle.

§ 6. Rule of judicial proceedings. But while the law of the place where the contract is made must determine the obligation of the contract, the law of the place where the suit is pending must regulate the remedy, or manner of proceeding, to enforce the obligation. Thus, if a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another, everything relating to the forms of proceeding, and the rules of evidence, to limitation or pre-

scription, and to the execution of judgments, is to be determined solely and exclusively by the law of the state where the proceeding is pending.

§ 7. Law of personal capacity and duty. The right of municipal legislation of a sovereign state extends to everything affecting the state and capacity of its own subjects, with respect to their personal rights within its own territory, and also, with certain exceptions, to the regulation of the conduct of all persons within its jurisdiction, whether subjects or foreigners. Moreover, these municipal laws, in some cases, operate beyond its territorial jurisdiction, with respect to the condition and personal capacity of its citizens, when resident in a foreign country; such as the qualities of citizenship, legitimacy and illegitimacy, minority and majority, idiocy, lunacy, marriage and divorce. The laws of a state, with respect to these qualities or capacities of its subjects, travel with them wherever they go, and attach to them in whatever country they are resident. But it must be observed that the municipal laws of one state cannot interfere with any rights its subjects may acquire, or privileges they may enjoy, under the laws of another state, while they are resident in such foreign state, and without the jurisdiction of their own country. The same rule applies to personal duties and obligations.

§ 8. *Droit d'aubaine* and *droit de retraction*. In the darkness of the middle ages, the rule called *jus albinatus*, or *droit d'aubaine*, was established, by which all the property of a deceased foreigner, whether movable or 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 deceased. But the progress of civilization has almost entirely abolished this barbarous and inhospitable usage. Judge Story expresses a doubt if it is now recognized by any of the civilized nations of the earth. The analogous usage of the *jus detractus* or *droit de retraction*, by which a tax was levied upon the removal from one state to another of property acquired by succession or

device, has also been reciprocally abolished in most civilized countries.

§ 9. Law of escheat. The rules of international and municipal law, with respect to foreigners holding real estate, are less liberal and just than with respect to their personal property. It seems to be the universal rule of civilized society, that when the owner of property dies intestate and leaves no heirs, it should vest in the public, and be at the disposal of the government. Where, therefore, the deceased leaves no heirs capable of succeeding to his estate, it vests in the state. According to the English law, *escheat* denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee. But where there are no feudal tenures, and no private person to succeed to the inheritance by escheat, the state steps in; in the place of the feudal lord, by virtue of its sovereignty, as the presumed original proprietor of all the lands within its jurisdiction. The principle is certainly a just one, that, if the ownership of property becomes vacant, the right should subside into the whole community, in whom it was supposed to be originally vested, when society first assumed the elements of order and subordination. But the rules of English law, with respect to the rights of alien heirs to inherit property, are so unjust and illiberal in their nature and effects, that they have been modified and limited in most of the states of the American Union, by decisions of courts and statutory dispositions.

§ 10. Foreign marriages. By the laws of some countries, marriage is considered in no other light than as a civil contract, while in others, it becomes a religious as well as a natural or civil contract; "for it is a great mistake," says Story, "to suppose that because it is the one, therefore it may not likewise be the other. Marriage is a personal consensual contract, but is a contract *sui generis*, and differs from other contracts in this, that the rights and obligations, or duties arising from it, are not left

entirely to be regulated by the agreement of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will; and, unlike other contracts, it cannot, in general, be dissolved by mutual consent. It is, therefore, evident that the rules of law applicable to other contracts, cannot always be resorted to in expounding and enforcing the marriage contract. It may, however, be laid down as a general principle, that so far as marriage is a consensual personal contract, its validity must be determined according to the *lex loci*; if valid in the place where it is celebrated, it is valid everywhere, and if invalid there, it is equally invalid everywhere. But there are certain exceptions to this rule, the most prominent of which are, those of polygamy and incest, (which are prohibited by the laws of every civilized country,) and to these some writers add those marriages made by a fraudulent evasion of the laws of the state to which the parties belong.

§ 11. Foreign divorces. “There can be no doubt,” says Story, “that a divorce regularly obtained, according to the jurisprudence of the country where the marriage was celebrated and where the parties are domiciled, will be held a complete dissolution of the matrimonial contract in every country.” But where the marriage was celebrated in one place, and the parties are domiciled in another, and the laws of the two places in regard to the dissolution differ, there is a conflict of opinions and authorities.

§ 12. Laws of trade and navigation. As a general rule, the laws of trade and navigation of a state are binding upon its citizens wherever they may be, but they cannot affect foreigners beyond its territorial limits. Thus, offenses against the laws of a state, regulating or prohibiting any particular trade, if committed by foreigners within the territorial jurisdiction of another state, are not punishable by the tribunals of the state whose laws they have violated; but if committed by its citizens, they are so punishable, no matter where committed, whether within

its own limits, on the high seas, or in a foreign country. A distinction, however, must be made between mere commercial regulations permitting or prohibiting a certain trade, and statutes creating a criminal offense, with personal penalties expressly applicable to all the citizens of the state.

§ 13. Laws of bankruptcy. It is laid down, as a general principle of international jurisprudence, that a discharge of a contract by the law of the place where it is made, is a discharge everywhere, no matter whether made between a citizen and a foreigner, or between foreigners. But in the application of this rule, it is necessary to distinguish between cases where, by the *lex loci*, there is a virtual or direct extinguishment of the debt itself, and where there is only a partial extinguishment of the remedy. As some bankrupt and insolvent laws absolutely discharge from all rights and remedies, while in others neither are entirely extinguished, there necessarily result various refinements and distinctions in the international law of bankruptcy.

§ 14. Law of treason and other crimes. Criminal laws may be applied to foreigners, and all persons resident within the territory, for all such persons owe a temporary allegiance to the state where they reside. But although a state takes no cognizance of offenses committed beyond its limits, and against the laws of another country, it nevertheless can punish the crimes of its own citizens, under its own laws, if within their reach, no matter where the crime may have been committed. Thus, the laws of treason are binding upon the subjects of a state, no matter where the treasonable act is done, for their allegiance, until changed, is considered as traveling with them, wherever they may go.

§ 15. Judicial power of a state. It may be stated, in general terms, that the judicial power of a state is coëxtensive with its legislative power, and is independent of every other state. This general position, however, must be qualified by the exceptions to its application arising out of express compacts with others, by which it may part with certain portions of its sovereign

rights or modify the exercise of its powers as a sovereign and independent state. It must be noticed also that its judicial power does not embrace those cases in which the municipal claims of another nation operate within its territory, such as the cases of foreign ministers, or of a fleet, or army coming within its territorial limits, by its permission, either express or implied.

§ 16. Jurisdiction with respect to actions. Continental jurists generally agree that, properly speaking, there are three places of jurisdiction; first, the *forum domicilii*, or place of domicile of the party defendant; second, the *forum rei sitæ*, or the place where the thing in controversy is situate; and third, the *forum contractus*, or *forum rei gestæ*, or the place where the contract is made, or the act is done. These distinctions in jurisdiction result from the distinctions of the Roman civil law which have been introduced into the jurisprudence of most of the continental nations of Europe. In the corresponding distribution of actions by the English common law into personal, real, and mixed actions, the former are generally capable of being brought wherever the party can be found, while the jurisdiction of the latter are confined to the place *rei sitæ*; in other words, personal actions are *transitory*, while real and mixed actions are *local*. Considered in an international point of view, either the thing or the person made the subject of the jurisdiction, must be within the territory, for no sovereignty can extend its process beyond its own territorial limits so as to subject either persons or property to its judicial decisions; and every exertion of authority of this sort, beyond its limits, is a mere nullity, and incapable of binding such persons or property in any other tribunals.

§ 17. Of a state over its own citizens. In regard to the citizens (native or naturalized) of a state, while within its territory, the jurisdiction of the sovereignty over them is complete and irresistible. It cannot be controlled, and ought everywhere to be respected. In regard to citizens domiciled abroad, nations

generally assert a claim to regulate the rights, duties, acts, and obligations of their own citizens, wherever they may be domiciled. This claim is sometimes admitted by foreign nations as a matter of comity; but it may be denied whenever it is deemed injurious to their own interest, or subversive of their policy or institutions.

§ 18. **Over alien residents.** All persons found within the limits of a government, (unless specially excepted by the law of nations,) whether their residence is permanent or temporary, are subject to its jurisdiction; but it may or may not, as it chooses, exercise it in cases of dispute between foreigners. "Thus, in France, with few exceptions, the tribunals do not entertain jurisdiction of controversies between foreigners, respecting personal rights and interests. But this is a matter of mere municipal policy and convenience, and does not result from any principles of international law. In England and America, on the other hand, suits are maintainable, and are constantly maintained, between foreigners, where either of them is within the territory of the state where the suit is brought."

§ 19. **Over real property.** As everything relating to the tenure, title, transfer, descent, and testamentary disposition of real property, is regulated by the local law, so, also, all proceedings in courts of justice relating to that species of property, such as the rules of evidence, the forms of action and pleadings, and rules of decision, must necessarily be governed by the same law. This jurisdiction is exclusive. "In respect to immovable property," says Story, "every attempt of a foreign tribunal to found a jurisdiction over it, must, from the very nature of the case, be utterly nugatory, and its decree must be forever incapable of execution *in rem*."

§ 20. **Over personal property.** The state, in whose territory personal property is actually situate, has an entire dominion, sovereignty and jurisdiction over it, while there, as it has over real property, and it may, to the same extent, regulate its transfer, subject it to process and execution, and control its uses and disposition. Hence it is, that whenever personal property

is taken by arrest, attachment, or execution, within a state, the title so acquired under the laws of the state, is held valid in every other state; and the same rule is applied to debts due non-residents, which are subjected to the like process under the local laws of the state.

§ 21. Qualification of the rule. Mr. Wheaton considers the rule, with respect to the jurisdiction of a state over personal property or movables within its territorial limits, to be the same as over immovables or real property, with this qualification, that foreign laws may furnish the rule of decision in cases where they apply, whilst the forms of process, rules of evidence and prescription, are governed by the *lex fori*. "Thus the *lex domicilii* forms the law in respect to a testament of personal property, or succession *ab intestato*, if the will is made, or the party on whom the succession devolves resides, in a foreign country; whilst, at the same time, the *lex fori* of the state, in whose tribunals the suit is pending, determines the forms of process and prescription.

§ 22. Origin of the difference. "The difference," says Pothier, "which the law establishes between acts *inter vivos* and acts *causa mortis*, in permitting foreigners to do the former, and prohibiting them from doing the latter, is founded on the very nature of these acts. Acts *inter vivos* are founded on the *droit des gens*, (*jus gentium*—or law of nature.) Foreigners enjoy every right which arises from the *jus gentium*. They may, therefore, perform all sorts of acts *inter vivos*. The right to make a testament, active or passive, is, on the contrary, derived from the civil law—*testamenti factio est juris civilis*—foreigners not enjoying what is of civil law, have not this faculty or right."

§ 23. Voluntary assignments and assignments in bankruptcy. From the same principle results the distinction which is generally made by the courts of the United States between a foreign voluntary assignment for the benefit of creditors, and a foreign assignment in bankruptcy. The *jus disponendi* applies to the

former, whereas an assignment under the bankrupt law, is a proceeding *in invitum*; the one is a universal natural right applicable everywhere, while the other is a forcible disposition, having its origin in local law, and confined to the jurisdictional limits of the maker of the law.

§ 24. **Public and private vessels on the high seas.** Public and private vessels, 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. The ocean is common to all mankind, and may be successively used by all as they have occasion. But this jurisdiction is exclusive, only so far as respects offenses against its own municipal laws, and not as respects offenses against the law of nations, which 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.

§ 25. **Public vessels and prizes in foreign ports.** Where there are no express prohibitions, the ports of one state are considered as open to the public armed and commissioned vessels of every other nation with whom it is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under an express permission, stipulated by treaty, or a permission implied from the absence of prohibition. This exemption extends not only to the belligerent ships of war, privateers, and the prizes of either, who seek a temporary refuge in neutral waters, from the casualties of the sea and war, but also to prisoners of war, on board any prize or public vessel of her captor. Such vessels, in the command of a public officer, possess, in the ports of a neutral, the rights of ex-territoriality, and are not subject to the local jurisdiction.

§ 26. **Private vessels in foreign ports.** Private vessels of one state entering the ports of another, are not, in general, exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact. But there are certain exceptions to this rule, which result from the right of asylum,

based on the laws of humanity. A vessel driven by stress of weather, or carried by unlawful force into a prohibited port, or into an open port with prohibited articles on board, incurs no penalty or forfeiture, in either case. The cases of blockade and carrying contraband, are familiar examples of the principle. But the rule of law, and the comity and practice of nations, go much further than these cases of necessity, and allow a merchant vessel of one state, coming into an open port of another, voluntarily, for the purposes of lawful trade, to bring with her, and keep over her, to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding, to this extent, by consequence, the jurisdiction of the local law.

§ 27. Summary of the judicial powers of a state. It may be stated, in general terms, that the judicial power of every sovereign state extends: 1st. To all civil proceedings, *in rem*, relating to immovable or real property within its territory; 2d. To all civil proceedings *in rem*, relating to movable or personal property within its territory; 3d. To all mixed actions, relating to real and personal property within its territory; 4th. To all its public and private vessels on the high seas, to its public vessels and their prizes in foreign ports, and, in certain cases, to its private vessels in foreign ports; 5th. To all controversies respecting personal rights and contracts, or injuries to the person or property, when the person resides within the territory, wherever the cause of action may have originated. In this class of controversies, the judicial power may or may not be exercised, according as is provided by municipal law. This general principle is entirely independent of the rule of the decision which is to govern the tribunal.

With respect to criminal matters, the judicial power of the state extends, with certain qualifications: 1st. To the punishment of all offenses against its municipal laws, by whomsoever committed, within its territory; 2d. To the punishment of all such offenses, by whomsoever committed, on board its public or private vessels on the high seas, and on board its public vessels,

and, in some cases, on board its merchant vessels in foreign ports; 3d. To the punishment of all such offenses by its own subjects, wheresoever committed; 4th. To the punishment of piracy, and other offenses against the law of nations, by whomsoever and wheresoever committed.

§ 28. *Extradition of criminals.* There has been much discussion in regard to the duty of a foreign state to deliver up the persons charged with or convicted of high crimes, on the demand of another in which the crime has been committed. The weight of authority is in favor of regarding this question as a matter of comity and not of strict right. Extradition is, therefore, usually regarded as a matter of treaty stipulation, the mode and means of executing which must depend upon the constitutional and municipal laws of each state. It seems to be settled in Great Britain and the United States that a treaty alone is not sufficient; there must also be a legislative act for its execution.

§ 29. *Criminal sentences.* A criminal sentence, pronounced under the municipal law of one state, can have no legal effect in another. If it be a conviction, it cannot be executed without the limits of the state in which it is pronounced; and if such conviction be attended with civil disqualifications in the country where pronounced, these disqualifications do not follow the offender into another independent state.

§ 30. *Foreign judgments.* The conclusiveness of foreign sentences and judgments, where they are drawn in question in the tribunals of another state, will depend upon the nature of the action, and the usage of the different nations, and the special compacts between them. . In personal actions, *res adjudicata*, in one country, can have, *per se*, no effect in another. The effect attached to a foreign judgment is different in different countries. In English and American courts, a foreign judgment is *prima facie* evidence where the party claiming the benefit of it applies to have it enforced, 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; but if it

appears, from the record of the proceedings upon which the original judgment was founded, that it was unjustly or fraudulently obtained, or resulted from false premises, or a palpable mistake of the law applicable to the case, it will not be enforced. In France, the operation of a foreign judgment is restrained within still narrower limits.

§ 31. Judgments of prize courts, etc., in rem. Foreign judgments, or sentences of a court of competent jurisdiction, proceeding *in rem*, such as the sentences of prize courts, courts of admiralty, and revenue courts, are conclusive as to the proprietary interest in, or title to, the thing in question, wherever the same comes incidentally in controversy in the tribunals of another state.

§ 32. Courts, how far judges of their own jurisdiction. If a foreign court exercises a jurisdiction which, according to the law of nations, its sovereign could not confer upon it, its sentence or judgment is not available in the courts of any other state, and the courts in which such judgment is brought in controversy will determine the question of jurisdiction for themselves; but so far as its jurisdiction depends upon municipal law, or its proceedings are governed by municipal rules, it is the exclusive judge of its own jurisdiction and of the regularity of its own proceedings, and its decision on these points binds the world.

§ 33. Proof of foreign laws. As a general rule, courts do not take judicial notice of the laws of a foreign country, but they must be proved, not as facts to the jury, but as facts to the court. The court, therefore, decides what is the proper evidence of such laws, and of their applicability to the case in hand. The manner of proof must vary, according to circumstances. The general principle is, that the best proof shall be required which the nature of the case admits of. But to require such proof of the laws of a foreign state as its institutions and usages do not admit of, would be unjust and unreasonable. "But foreign laws, customs, and usages," says Story, "may be proved,

and indeed must ordinarily be proved, by parol evidence. The usual course is, to make such proof by the testimony of competent witnesses, instructed in the law, under oath. Sometimes, however, certificates of persons in high authority have been allowed as evidence."

§ 34. *Of contracts and instruments.* The same may be said of the proof of contracts, instruments, and other acts made or done in one country, and offered in evidence in another. In some cases, it is sufficient to prove them in the manner and by the solemnities and proofs which are deemed sufficient by the law of the place where they are executed; and, in others, they are required to be proved according to the law of the place where the action or other judicial proceeding is instituted. On this subject, the law and practice of different states differ, as also the opinions of publicists.

§ 35. *Of foreign judgments, etc.* Foreign judgments are, as a general rule, to be authenticated in the same manner as other instruments and documents executed in another country. The most usual mode of proof is by an exemplification under the great seal, but this is by no means the only one. The public seal of a foreign sovereign or state, affixed to a judgment, is generally the highest and most convenient evidence of its authority.

## CHAPTER VIII.

### RIGHTS OF LEGATION AND TREATY.

§ 1. Right of legation essential to sovereignty. Another essential attribute of sovereignty is *the right of legation and treaty*. Legation consists in sending diplomatic agents to other states, and in receiving such as are sent by them. This right of an independent sovereign state to send and receive diplomatic agents, is regarded, in international law, as a *perfect* one; but the obligation to do so is deemed *imperfect*, for, strictly speaking, no state can be compelled either to send or to receive such agents. Nevertheless, usage and comity have established a sort of reciprocal duty in this respect.

§ 2. Of semi-sovereign states, etc. How far the rights of legation belong to a semi-sovereign or dependent state, must depend upon its relations to the superior with which it is connected or under whose protection it is placed. Its sovereignty not being complete, it may, or may not be, entitled to a right incident to sovereignty, according to the nature and circumstance of the case. Thus, by the constitution of the United States of America, every state is expressly forbidden from entering, without the consent of congress, into any agreement or compact with another state, or with a foreign power.

§ 3. How affected by civil war. Strictly speaking, every state has the exclusive right to determine in whom its sovereign authority is vested. Nevertheless, in case of a revolution or civil war, foreign states must, of necessity, judge for themselves whether they will continue their accustomed diplomatic relations with the former government, or commence them with the revo-

lutionary party. This is sometimes a question of great delicacy, and in order to avoid any positive decision of it, diplomatic intercourse is either entirely suspended until the final termination of the contest, or is partially kept up by means of diplomatic agents, of special and limited authority, who are not vested with full ministerial powers, nor entitled to diplomatic honors.

§ 4. Refusal to receive a particular person. As a state is not under a perfect obligation to receive diplomatic agents from another, it may refuse to receive any particular individual, either on the ground of personal character, or of the authority conferred upon him. Thus, in France, where the legates or nuncios of the Pope were the bearers of powers which were deemed incompatible with the constitution and laws of the state, it was deemed proper to refuse such agents until their powers were reduced to reasonable limits. Again, the reception of a foreign diplomatic agent has sometimes been refused on the ground of personal character, or known hostility to the sovereign, or the state to which he is sent.

§ 5. Conditional reception. Where the reception is refused, it is proper that the motives or grounds of the refusal be alleged; and where conditions are annexed, they must be *expressed* before or at the time of the reception, for, otherwise, the agent is entitled to claim the full rights and honors annexed to the office which he fills. There are no tacit or implied conditions in such receptions which can modify or limit the public character in which he is received, and with which he was accredited by the sovereign state which sent him.

§ 6. What department may send and receive. The question with respect to what department of the government belongs the right of sending and receiving diplomatic agents, depends upon the municipal constitution of the state. In monarchical governments, this prerogative usually resides in the sovereign; in republics, it is generally vested in the chief executive, or in the President and his counsel, or the senate, conjointly. In the

United States of America, the President alone receives a foreign minister, and the appointment of a minister to a foreign court is made by the President, with the advice and consent of the senate.

§ 7. Art of diplomacy. In the diplomacy of the middle ages, it was proclaimed, as a maxim of the art, that "dissimulation must be met by dissimulation, and falsehood by falsehood," and, at even later periods, and in the most refined courts of Europe, bribery, gallantry, and intrigue were regarded as the most effective arguments in the discussion of diplomatic questions. But such disreputable means of negotiation are now seldom resorted to, and the most able diplomatists of the present age are men as much distinguished for their exalted personal character and unimpeachable integrity, as for their talents and learning. While a knowledge of the rules of diplomacy, and of the laws regulating the international rights and duties of states, are absolutely indispensable in a public minister, it may be remarked, that good manners and good temper seem peculiarly necessary in an officer so intimately connected with the etiquette of polite society and ceremonies of courts.

§ 8. Exercise of the right may be restricted by treaty. The right of a state to negotiate and contract public treaties with other nations is, like the right of legation, a necessary incident to its sovereignty. This power exists in full vigor in every state which has not parted with this portion of its natural sovereignty, or has not agreed to modify its exercise by some compact with other states. Sovereign and independent states are sometimes restricted in their power to make new treaties by the conditions of alliances already formed with others. Such limitation affects the *exercise* of the power of negotiating treaties, but is not regarded as a modification of the *power* itself.

§ 9. By influence of powerful neighbors. It is admitted that many of the smaller states of Europe, *nominally* sovereign and independent, have been forced to accede to treaties to which they were opposed, and have been deterred from forming those

they desired, through the influence of their powerful neighbors ; but such states were not *really* independent, and their cases do not affect the general rule of international law.

§ 10. *Treaties with dependent states.* The right of semi-sovereign and dependent states to contract, by treaty, is, like their right of legation, to be determined by the nature of their connection with, or dependence on others. We have already shown that a colony, or ordinary dependency, is a part of a state, but cannot itself be regarded as a distinct political organization, possessing the essential attributes of a state ; that the mere fact of dependence, or of feudal vassalage and the payment of tribute, or of occasional obedience, or of habitual influence, does not destroy, although it may greatly impair, the sovereignty of the states so situated. We have also shown the effects of a protectorate, of a confederation, and of a union, upon the sovereignty of the protected, confederated, and united states. The powers of such states to contract, by treaty, will necessarily depend upon the character of the relations thus formed with others. A foreign power, treating with a semi-sovereign, dependent or confederated state, is bound to know how far such state is capable of contracting obligations by treaty. If it contract with a state incapable of entering into such engagements, the treaty is necessarily invalid.

§ 11. *Treaty-making power.* The treaty-making power of a state is determined by its own constitution, or fundamental law. In monarchical governments it is usually vested in the reigning sovereign, sometimes, however, subject to restrictions. In republics it is usually vested in the chief executive, either alone or conjointly with a council or senate. By the Constitution of the United States of America, the President has power, by and with the advice and consent of the senate, to make treaties, provided that two-thirds of the senators present concur.

§ 12. *Treaties must, in general, be ratified.* The question, how far, under the positive law of nations, ratification by the state in whose name the treaty is made, by its duly authorized

minister or diplomatic agent, furnished with full power, is essential to the validity of the treaty, was at one time the subject of much doubt and discussion. But it is now the settled usage to require such ratification, even where this prerequisite is not reserved by the express terms of the treaty itself. The municipal constitution of the state determines in whom the power of ratification resides. By the constitution of the United States of America, treaties are negotiated and concluded under the authority of the President, but the advice and consent of the senate is essential to enable him to pledge the national faith, by making a treaty the supreme law of the land.

§ 13. *Exception in cases of truces, etc.* Such acts as truces, capitulations, cartels, ransoms, etc., if within the implied powers of the military officers making them, do not, in general, require the ratification of the supreme power of the state, unless such ratification be expressly reserved in the act itself, or required by local law.

§ 14. *Sponsions.* In case of sponsions, where agreements are made without authority, or in excess of authority, an express or tacit ratification is necessary to make them binding. The former is given in positive terms and with the usual forms; the latter is implied, from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient.

§ 15. *Legislation to give effect to treaties.* Sometimes the constitution of a state prohibits the making of engagements of a certain character without the joint action of the legislative department of the government. This limitation, where not expressed in the fundamental laws of the state, is sometimes necessarily implied in the distribution of powers to its constitutional authorities. Commercial treaties, for example, which have the effect to change 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. In such cases it is usual to stipulate in the treaty, that it shall not be binding till the proper laws are passed for carrying it into effect.

§ 16. Under the Constitution of the United States. By the constitution of the United States, 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," and it seems to be understood that congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry their stipulations into effect. It is true that their execution is dependent upon such auxiliary legislation, but it is, nevertheless, the duty of every department of government to assist in performing all the obligations properly incurred by the whole state.

§ 17. Case of France in 1831. In regard to the non-fulfillment of the convention of 1831, with France, which was duly ratified, but the chambers refused to vote the monies required, 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 fulfill 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."

§ 18. Case of Great Britain in 1824. The senate of the United States, in ratifying the convention of 1824, with Great Britain, introduced an amendment; whereupon Mr. Canning refused to accept it, on the ground that the senate could exercise no such power. It will be admitted by all, at the present time, that Mr. Canning was in error, as the power of ratification includes the authority to amend a treaty.

§ 19. How far a treaty operates *propria vigore*. How far auxiliary legislation may be necessary to carry into effect the stipulations of treaties, must depend, in a measure, upon the particular constitution of each state. The doctrine of the British constitution, as stated by Blackstone, is, that "whatever con-

tracts the king engages in, no other power in the kingdom can legally delay, resist, or annul." Nevertheless, the treaty binds nobody till its provisions are enacted by law, and a treaty cannot be pleaded in the courts against an act of parliament. In the United States, the constitution declares a treaty to be "the supreme law of the land." It is, therefore, regarded by the courts as equivalent to an act of congress, wherever it operates *propria vigore*, without the necessity of legislative provisions; and, as such, all concerned are bound to obey it, and, within their competence, to execute it. Any law conflicting with a treaty would be declared by our courts as unconstitutional. But when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, rather than the judicial department of the government, and the legislature must execute the contract, before it can become a rule for the court.

§ 20. Real and personal treaties. General compacts between nations have been variously divided by text-writers. One of the most important of these divisions is into *personal* and *real* treaties; the first including only treaties of mere personal alliance, such as are expressly made with a view to the person of the reigning sovereign or his family, and the latter relating only to the things of which they treat, without any dependence on the person of the contracting parties. The first bind the state during the existence of the persons referred to, or their public connection with the state, but expire with the natural life or public authority of those who contract them, while the latter bind the contracting parties independently of any change in the constitution or rulers of the state.

§ 21. Other divisions. There are numerous other divisions of treaties which have been made with respect to their object or general character, as *equal* and *unequal* treaties; treaties of *guarantee* and *surety*; treaties of *confederation* and *association*; treaties of *alliance* and of *succor* and *subsidy*; treaties of *cession*, of *boundaries*, of *friendship*, of *commerce*, etc.

§ 22. Equal and unequal treaties. Treaties are sometimes divided by publicists into *equal* and *unequal*. *Equal* treaties are where the contracting parties promise the same or equivalent things; and *unequal* treaties, are where the things promised are neither the same nor equably proportioned. These different classes of engagements are sometimes spoken of as *bilateral* and *unilateral*. The latter, however, are more properly applied to treaties where promises are made by only one party, without any corresponding engagements, either equal or unequal, by the other.

§ 23. Of guarantee and surety. Treaties of *guarantee* and of *surety*, are engagements by which a state promises to aid another against any interruption of certain specified rights, such as boundaries, territory, constitution or form of government, etc. A distinction is made between guarantee and surety; where the matter relates to things to be done by the party for whom the obligation is contracted, the surety is bound to make good the promise in default of the principal, while the guarantee is only obliged to use his best endeavors to obtain its performance from the principal himself.

§ 24. Of confederation and association. Treaties of *confederation*, and treaties of *association*, not only differ from treaties of general alliance, but are to be distinguished from each other. Treaties of confederation are usually made for the purpose of forming a union, more or less close, in reference to certain specified objects with respect to internal or external matters; as, for instance, the German custom-house confederation, and the American colonial confederation. Treaties of association are usually made for the purpose of war, two or more states associating themselves together for the purpose of carrying on joint operations against a common enemy.

§ 25. Treaties of alliance. Treaties of alliance have been subdivided into different classes, such as treaties of *real* and *personal* alliance; of *equal* and *unequal* alliance; of *general* and *special* alliance; of *defensive* and *offensive* alliance, etc.

§ 26. Of amity or friendship. Among the ancient nations treaties were sometimes entered into, by which the parties simply stipulated to remain *friends*, and to observe towards each other those pacific relations which international law now impose upon all, without the formality of formal engagements, such as the obligations to render justice, to accord satisfaction for injuries, etc. These were called *treaties of amity or friendship*. But, in modern times, this term is usually applied to *treaties of recognition*, which have for their object the admission of a new body politic into the family of nations, or the recognition of a new title assumed by a state, or its ruler, already recognized as sovereign and independent.

§ 27. Of commerce, boundaries, etc. Treaties of *commerce* are those which regulate the conditions of reciprocal trade, and define and secure the imperfect rights and duties of commercial intercourse. It will be shown hereafter that such treaties usually terminate with a declaration of war between the contracting parties. Treaties of *boundary* and of *cession* are usually of a more permanent character.

## CHAPTER IX.

### RIGHTS AND DUTIES OF PUBLIC MINISTERS.

§ 1. *Permanent legations.* The establishment of permanent legations is generally dated from the peace of Westphalia, in 1648. "There is no circumstance," says Wheaton, "which marks more distinctly the progress of modern civilization, than the institution of permanent diplomatic missions between different states."

§ 2. *No distinction in ancient times.* The primitive law of nations made no distinction between the different classes of public ministers; but the increase in their number and duties in modern times, has led to numerous distinctions in the name and rank of the different public agents, as well as in the rights which pertain to their respective offices.

§ 3. *Modern classification.* Diplomatic officers and their trains in a foreign country are now arranged in the following order: first, ambassadors; second, envoys and ministers plenipotentiary; third, ministers resident; fourth, *chargés d'affaires*; fifth, secretaries of legation; sixth, *attachés* and the families of ministers; seventh, messengers, couriers, domestics, servants, etc.

§ 4. *Ambassadors, etc.* Every public minister, in some measure, represents the state or sovereign by whom he is sent, as an agent represents his constituent; but an *ambassador* is considered as peculiarly representing the honor and dignity of his principal, and, if the representative of a monarchical government, he has been regarded as entitled to the dignity and exact ceremonial of one representing the person of his sovereign. The terms *ordinary* and *extraordinary* are applied to designate

the time of their intended residence and employment, whether for an indeterminate period, or only for a particular and extraordinary occasion. Papal legates, or nuncios, at catholic courts, are usually ranked as ambassadors.

§ 5. *Envoys, etc.* Envoys, and other public ministers not invested with the peculiar character which is supposed to be derived from representing generally the dignity of the state or the person of the sovereign, come next in rank to ambassadors. They represent their principal only in respect to the particular business committed to their charge at the court to which they are accredited. They are variously named, as envoys, envoys extraordinary, and ministers plenipotentiary, and internuncios of the pope.

§ 6. *Ministers, etc.* In the third class are included ministers, ministers resident, residents, and special ministers charged with a particular business, and accredited to sovereigns. Vattel thus distinguishes between a minister resident, and one called simply minister, and gives us the origin of the name: "The word *resident* formerly only related to the continuance of the minister's stay, and it is frequent in history for ambassadors in ordinary to be styled only residents. But since the establishment of different orders of ministers, the name of resident has been limited to ministers of a third order, to the character of which general practice has annexed a lesser degree of regard. The resident does not represent the prince's person in his dignity, but only his affairs." \* \* "Lastly, a custom still more modern has erected a new kind of ministers, without any particular determination of character. These are called simply *ministers*, to indicate that they are invested with the general quality of a sovereign's mandatories, without any particular assignment of rank and character."

§ 7. *Chargés d'affaires.* *Chargés d'affaires*, near the courts of the monarchical governments of Europe, are not accredited to the sovereigns, but to the ministers of foreign affairs. They are divided into two classes, according to the nature and object of

their appointments, viz., *chargés d'affaires ad hoc*, who are originally sent and accredited by their governments in that capacity, and *chargés d'affaires par interim*, who are substituted in the place of the minister of their respective nations during his absence, or when the office of minister is vacant.

§ 8. Secretaries. 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 local jurisdiction. "The ambassador's secretary," says Vattel, "is one of his domestics; but the secretary of the embassy has his commission from the sovereign himself, which makes him a kind of public minister, and he, in himself, is protected by the law of nations, and enjoys immunities independent of the ambassador, to whose orders he is indeed but imperfectly subjected, sometimes not at all, and always according to the determination of their common master."

§ 9. Attachés and minister's family. The attachés, and the wife and family of a minister, participate in the inviolability attached to his public character. "The persons in an ambassador's retinue," says Vattel, "partake of his inviolability; his independency extends to all his household; these persons are so connected with him, that they follow his fate. They depend immediately on him only, and are exempt from the jurisdiction of the country, into which they would not have come, but with this reserve.

§ 10. Messengers and couriers. "The practice of nations," says Wheaton, "has also extended the inviolability of public ministers to the messengers and couriers sent with dispatches 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 case of dispatches sent by sea, the vessel, or *aviso*, must also be pro-

vided with a commission or pass. In time of war, a special agreement, by means of a cartel or flag of truce, with passports, not only from their own government, but from its enemy, is necessary for the purpose of securing these dispatch vessels from interruption, as between the belligerent powers.

§ 11. *Domestics and servants.* The domestics and servants of a minister also participate in the inviolability attached to his public character. “Did not the domestics,” says Vattel, “and the household of a foreign minister solely depend on him, it is known how very easily he might be molested and disturbed in the exercise of his functions.” But as this exemption of persons of this class sometimes leads to difficulties with the local police, the municipal laws of some states, and the usage of most nations, now require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to any of the privileges or exemptions pertaining to them by virtue of their being dependents of a foreign embassy or legation.

§ 12. *Inviolability of ministers.* The act of sending a minister by the one, and of receiving him by the other, amounts to a tacit compact between the two states, that he shall be subject only to the authority of his own government. The inviolability of the minister is founded upon mutual utility, growing out of the necessity that such officers and agents should be entirely independent of the local authority, in order to properly fulfill the duties of their mission. Hence, the fiction of *ex-territoriality* has been invented, by which the minister, though actually in a foreign country, is considered still to remain within the territory of his own state. He continues subject to the laws of his own country, both with respect to his personal *status*, and his rights of property; and his children, though born in a foreign country, are considered as natives.

§ 13. *Exemption from all local jurisdiction.* As a consequence of the sacredness and inviolability of the person of a public minister, he is entitled to an entire exemption from the local

jurisdiction, both civil and criminal. This exemption commences the moment he enters the territory of the state to which he is sent, and continues, not only during the whole time of his residence, but until he leaves the country, or at least till he loses his official character, and the protection due to his office. The state to which he is accredited may at any time require him to leave, either before or after his recall by his own government. Sometimes the period within which he must leave is designated in his letter of dismissal; and, at the termination of that period, the protection due to his office necessarily ceases.

§ 14. If he plot against the government. There are several apparent exceptions to this rule of exemption. The first is, where he is found guilty of plotting against the government to which he is accredited. But this is not a real exception, for the minister can be neither tried nor punished. He may be dismissed, or *forcibly resisted*, or if necessary, *forcibly ejected* from the country.

§ 15. If he renounce his right of exemption. In the second case, that is, where the minister owes allegiance to the country where he resides, and has been received on condition of renouncing any claim to be exempt from the local jurisdiction, a question may arise as to whether such minister is to be considered as really the representative of the country by which he is accredited. And if he is to be regarded as such representative, can the renouncement of his privilege of exemption from local jurisdiction extend to the *inviolability* of his person and office? In other words, must not such renouncement, however general in its terms, be limited to his right of *ex-territoriality*, and with respect to civil jurisdiction only? The better opinion is that he cannot renounce his inviolability, nor his right of *ex-territoriality* in regard to criminal jurisdiction.

§ 16. If he voluntarily submit to local jurisdiction. The third apparent exception is where the minister voluntarily submits to the local jurisdiction, by renouncing his right of *ex-territoriality*.

Some have thought that such renouncement may be general, but the better opinion is that there must be a special submission in the particular case, either directly made or necessarily implied by the act of bringing suit as plaintiff, or consenting to appear as defendant in a civil action; or, appearing as prosecutor, or submitting himself to be judged, in a criminal action.

§ 17. *Extent of civil jurisdiction.* In regard to civil jurisdiction, the following rules must be observed: 1st, If a minister renounces his privilege of exemption, and submits to local jurisdiction by appearing in a civil action, either as plaintiff or defendant, and judgment be rendered against him, he is bound to pay it; 2d, If the judgment be in his favor, and the other party appeal to a higher tribunal, he must submit to the jurisdiction of appeal; 3d, A final judgment against a minister, can only be satisfied out of property which he possesses separate and distinct from his diplomatic character, and no proceedings can be taken against his person, or against property privileged by the law of nations.

§ 18. *Of criminal jurisdiction.* In regard to criminal jurisdiction, the minister appears either charged with crime himself, or charging another with crime. In both cases he might, according to the laws of some countries, be sentenced to fine and imprisonment. But this sentence could not be executed without affecting the *inviolability* of his person. Before this can be done, he must renounce his official character and cease to be a public minister.

§ 19. *Public ministers, how punished.* But if a minister is exempt from local jurisdiction so long as he continues in office, how is he to be punished for offenses, and how are his creditors to obtain justice? The answer is obvious. For his offenses he may be dismissed and sent out of the country. A demand may be made upon the government which sent him that he be punished, or that he be made to do justice to those whom he has wronged.

§ 20. *Dependents, how punished.* In former times, ministers

claimed and sometimes exercised the right to try and punish their dependents. But it is now admitted that no foreign power can set up a tribunal for the trial and punishment of persons within another state. For offenses which his dependents may commit against the laws of his own country, the minister should order them home, and for those against the country in which he resides, he should dismiss them so as to make them amenable to the local tribunals. Should he refuse or neglect to do this, he himself may be dismissed and sent out of the country.

§ 21. *Testimony of ministers, etc.* Ministers and their dependents cannot be compelled to appear in court to give their testimony; and it sometimes happens that they are the only or most important witnesses. The government may, in such cases, request their attendance, and if they refuse, may ask their recall or dismiss them. In 1856, the government of the United States of America requested the recall of the minister of the Netherlands, for having refused to appear before the court, in the city of Washington, to give his testimony in a criminal cause which was then pending, and in which this minister was a most important witness.

§ 22. *Exemption of minister's house, etc.* The independence of a public minister would be very imperfect, if the house in which he lived, and his personal effects or movables, were not entirely exempt from the local jurisdiction. Otherwise, he might be disturbed under a thousand pretenses, his papers searched, his secrets discovered, and his person exposed to insults. Hence, his house is inviolable, and cannot be entered without his permission, by police, custom-house, or excise officers, nor can troops be quartered in it. For the same reasons, his coaches and carriages are usually exempt from all local jurisdiction and examination. But the abuse of this privilege, on the part of ministers, by making their houses an asylum for fugitives from justice, and their carriages a means of effecting the escape of guilty persons, may justify their dismissal or forcible ejection from the country.

§ 23. His other real estate, etc. But the real property of a minister, other than his dwelling situate within the territory of the government to which he is accredited, and the personal property of which he may be possessed, as a merchant, or private person, carrying on trade or other business, or in a fiduciary character as an executor, etc., are not exempt from the operation of the local laws and local jurisdiction. The reason of this is, that the minister does not hold such lands and goods by virtue of his office; they are not annexed to his person so as, like himself, to be reputed out of the territory. Every dispute or suit respecting them, must be carried on in the tribunals of the country, and they are subject to the ordinary process and proceedings of the courts, even of attachment and seizure. But in all such proceedings the minister is to be summoned and proceeded against as an absent person, he being reputed as out of the country; no process can be served on him personally.

§ 24. Of taxes and duties. The minister's person, and personal effects, are not liable to assessment and taxation. But his real property, and his movables, (not connected with his mission or embassy) are all subject to taxation, according to the municipal laws of the country. By the usage of most nations, 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 sometimes limited to a fixed sum per annum, or during the continuance of the mission. So, while the ambassador is exempt from the capitation tax, and every personal imposition relating to the character or quality of a subject of the state, he is expected to pay tolls, postage, etc., and the ordinary duties imposed on the goods and provisions he may use.

§ 25. Freedom of religious worship. A minister, resident in a foreign country, is entitled to the privilege of religious worship according to the peculiar forms of his own faith, although it may not be generally tolerated by the laws of the state to which he is accredited. But this right is, in strictness, confined

to his own residence; he can do what he pleases within his own walls, and nobody has a right to object or interfere. "But if the sovereign of the country where he resides, has good reasons for not permitting him to exercise his religion in a manner any way public, this sovereign is not to be blamed, much less accused of offending against the law of nations."

§ 26. *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*. Such letter usually states the general object of the mission or appointment, the official character of the agent, and requests that full faith and credit may be given to his acts and deeds, as such agent of his government. The execution of this letter depends upon the municipal laws of the state issuing it, and upon the official rank of the agent. In the case of ministers of the first three classes, the letter is usually signed by the sovereign or chief magistrate of the state which sends them, and is addressed to the sovereign or chief magistrate of the state to which they are delegated. In the case of subordinate agents, it is usually addressed by the minister or secretary of foreign affairs, to the department of foreign affairs of the other government.

§ 27. *Full power.* The *full power* authorizing the minister to negotiate is sometimes 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 or convention of nations, are not furnished with a letter of credence, but with letters patent, or a full power, of which they reciprocally exchange copies with each other on the assembling of the congress. But a *full power* to negotiate does not necessarily bind the states to the treaty which may be signed by the minister under such power. It not unfrequently happens that the power of ratifying or rejecting a treaty is vested in other authorities than that which conferred the power to negotiate. Thus, in the United States, the power to negotiate is conferred by the Presi-

dent, but no treaty is binding till confirmed by two-thirds of the senate.

§ 28. *Instructions.* The instructions of a minister, from his own government, are for his own direction only, and are not to be communicated to the government or congress to which he is delegated. He cannot be compelled to show them. He, however, may be directed by his own government to communicate them either partially or *in extenso*, or it may be left to his own discretion to communicate them or not, as he may deem expedient.

§ 29. *Notification of appointments.* It is the duty of every diplomatic agent, on his arrival at his destined post, to notify the government to which he is accredited. In case of a minister of one of the higher classes, he is furnished with a duly authenticated copy of his letter of credence, which is delivered to the minister of foreign affairs, requesting an audience of the sovereign or chief magistrate of the state, for the purpose of delivering the original letter of credence. *Chargés d'affaires*, and other subordinate agents, notify their arrival to the minister of foreign affairs by letter, at the same time requesting an audience of the minister for the purpose of delivering their letters to him.

§ 30. *Presentation and reception.* The ceremony of *solemn entry*, which was formerly practiced with respect to ambassadors and other ministers of the first class, is now usually dispensed with, and they are received in a *private* audience in the same manner as other ministers. On their presentation, by the minister of foreign affairs, they usually deliver their original letter of credence, (which is returned to them,) and pronounce a short complimentary discourse, which is replied to by the sovereign, or chief of the state, to whom they are presented. Such presentation and reception is a sufficient acknowledgement of their official character to enable them to enter on their functions. Each court has its particular ceremonial for the presentation and reception of foreign ministers, which such ministers conform to as a matter of etiquette.

§ 31. *Passports and safe-conduct.* Although the minister's character is not declared in its whole extent, so as to secure to him the enjoyment of all his rights, till he has had his audience and been acknowledged and admitted by the chief authority of the state to which he is accredited, he is, nevertheless, under the protection of the law of nations from the date of receiving his letter of credence, or official document of appointment. In passing through the country to which he is sent, in order to reach his destined post, he only requires, in time of peace, a passport from his own government, certifying to his official character. But 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. A refusal to give such safe conduct is a virtual refusal to receive or admit such ministers.

§ 32. *Passage through other states.* In passing through the territory of a friendly state, other than that of the government to which he is accredited, a public minister, or other diplomatic agent, is entitled to the respect and protection due to his official character, though not invested with all the privileges and immunities which he enjoys in the country to whose government he is sent. He has a right of innocent passage through the dominions of all states friendly to his own country, and to the honors and protection which nations reciprocally owe to each other's diplomatic agents, according to the dignity of their rank and official character. If the state through which he purposes to pass has just reason to suspect his object to be unfriendly, or to apprehend that he will abuse this right by inciting its people to insurrection, furnishing intelligence to its enemies, or plotting against the safety of the government, it may very properly, and without just offense, refuse such innocent passage.

§ 33. *Termination of public missions.* The public mission of a minister may be terminated in various ways, as, for example, by his death, by the expiration of the period of his appoint-

ment, by the termination of the special negotiation or object of the mission, by his recall, by the death of his sovereign, or a radical change in the sovereignty or government of his state, by a change in his diplomatic rank, by his own withdrawal, and termination of his mission, or by his dismissal by the government to which he is accredited. Custom has established particular forms of proceedings applicable to each case, which forms are followed as a matter of etiquette, rather than of strict right or obligation.

§ 34. **By death of the minister.** Where the mission is terminated by the death of the minister, the secretary of legation, or, if there be no secretary, the minister of some allied or friendly power, places seals upon his effects, takes charge of his body, and makes the arrangements for its interment, or for sending it home. The local authorities do not interfere, unless in case of necessity. All the honors and respect due to the minister while living, are usually paid to his remains; and although, in strictness, the personal privileges of his dependents expire with the termination of his mission by death, the usage of nations extends to the widow, family, and domestics of a deceased minister, for a limited period, the same immunities which they enjoyed during his lifetime. The validity of his testament, and disposition of his movable property, *ab intestato*, must be determined by the laws of his own country, on the principle of the ex-territoriality of his residence.

§ 35. **By his recall.** Where the mission is terminated by an ordinary formal letter of recall, nearly the same formalities are observed as on the arrival of the minister at the court to which he is accredited. He delivers a copy of his letter of recall to the minister or secretary of foreign affairs, and asks an audience of the sovereign or chief executive, for the purpose of taking leave. At this audience he delivers, or exhibits the original of his recall, and takes his leave with a complimentary address suited to the occasion, and to which a complimentary reply is usually made. But if he is recalled at the request of the

government to which he is accredited, for misconduct or other objections, he would neither ask nor receive an audience of leave.

§ 36. By expiration of term, etc. Where the mission is terminated by the expiration of the minister's appointment, as in the case of embassies of mere ceremony, or of special negotiations which have been accomplished or have failed, a formal letter of recall is not usually sent to the minister by his own government. But the formalities of taking leave are nearly the same as in case of an ordinary recall by letter. 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.

§ 37. By change of government. Where the mission terminates by the decease or abdication of the minister's own sovereign, or the sovereign to whom he is accredited, it is usual for him to await a renewal of his letters of credence. In the former case, a mere notification of the continuance of his appointment is sent by the successor of the deceased or deposed sovereign, and in the latter, new letters of credence are sent to the minister to be presented to the new ruler. If a radical change should take place in the character or organization of his own government, it would be the duty of the minister to await new letters of credence, or a ratification of his appointment by the new government. The government, to which he is accredited, would be justified in declining any new negotiations with him without such ratification, or new appointment, or, at least, without some evidence of a renewal or continuance of his powers.

§ 38. By his dismissal. When, on account of the measures of his government, the court at which he resides thinks fit to discontinue all diplomatic intercourse with a minister, this is usually done by a diplomatic note informing him of the fact, and offering him his passport. But when the court, at which

he resides, thinks fit to send him away on account of his own misconduct, it is usual to notify his government that he is no longer an acceptable representative, and to request his recall. If the offence be of an aggravated character, he may be dismissed without waiting for a recall by his own government. The government asking such recall, may, or may not, at its own option, state the reasons for the request; they cannot be required. It is sufficient that he is no longer acceptable. In such a case, international courtesy would require his immediate recall. If, however, the request should not be complied with, his dismissal would follow as a matter of course.

§ 39. *Respect due to local authorities.* All ministers and diplomatic agents, of whatever description, are bound to respect the government and authorities of the country where they reside. Any disrespect, on the part of such officers or agents, are good and sufficient causes for asking their recall; or, in aggravated cases, for dismissing them and sending them out of the country.

## CHAPTER X.

### OF CONSULS AND COMMERCIAL AGENTS.

§ 1. **Origin of the institution of consuls.** The institution of a foreign consulate originated in the earlier part of the middle ages, in sending officers or persons from one country or city to the sea-ports and towns of foreign states, for the purpose of protecting the national commerce, especially in matters of shipwreck, and of adjusting disputes between sailors and merchants of their own country. In the absence of regular ambassadors, or other public ministers, these commercial agents sometimes acted in the capacity of representatives and diplomatic agents of their respective states, and not unfrequently assumed and exercised jurisdiction and authority over the merchants and citizens of their own countries in foreign ports and cities.

§ 2. **General powers in modern times.** But since the establishment of permanent diplomatic delegations the powers of consuls, in Christian countries, are usually limited to a general vigilance over the interests of shipping and navigation of their nation at a particular locality.

§ 3. **Consular organization.** The consular organization is usually divided into consuls-general, consuls, vice-consuls, and consular or commercial agents. Some states have only the single office of consuls. Consuls-general exercise their functions over several places, and sometimes over a whole country, giving orders and directions to all consuls, vice-consuls, and commercial agents of their government within the same state. English vice-consuls are usually appointed by the consul, subject to the approbation of the foreign secretary of state. Other countries

have adopted a different system of appointment. This depends entirely upon the institutions of the particular state, and is not governed by any rule of international jurisprudence.

§ 4. *Commission and exequatur.* A consul receives a commission from the proper authority of his own government, a duplicate, or properly authenticated copy, being forwarded to the ambassador or minister of the same state, at the court of the country in which the consul is to officiate, in order that he may apply for the usual *exequatur*, to enable him to enter officially upon his consular duties. This is usually issued under the great seal of state, and made public for the information of all concerned. On arriving at his post, the consul usually furnishes the principal public authority of the place with a copy of his commission, stamped with his consular seal. On receiving his *exequatur*, he becomes entitled to exercise the authority, and enjoy the privileges, immunities, and exemptions due and pertaining to his office.

§ 5. *Consuls have no diplomatic character.* Consuls have neither the representative nor diplomatic character of public ministers. They have no right of ex-territoriality, and therefore cannot claim, either for themselves, their families, houses, or property, the privileges of exemption which, by this fiction of law, are accorded to diplomatic agents who are considered as representing, in a greater or less degree, the sovereignty of the state which appoints them. They, however, are officers of a foreign state, and when recognized as such by the *exequatur* of the state in which they exercise their functions, they are under the special protection of the law of nations. Consuls are sometimes made also *chargés d'affaires*, in which cases they are furnished with credentials, and enjoy diplomatic privileges; but these result only from their character as *chargés*, and not as consuls.

§ 6. *Are subject to local jurisdiction.* Consuls are amenable, generally, to the civil and criminal jurisdiction of the country in which they reside, and their property and effects are subject

to the recourse of execution and process of the local courts. It was at one time contended that they should be exempt from criminal jurisdiction, but the position was neither sustained in practice, nor in the doctrines of text-writers. Consuls are subject to the payment of taxes, and municipal imposts and duties on their property or trade, and to the municipal charges incident to their personal *status*, and from which they are not exempted by the privileges of their office.

§ 7. They have no rank except among themselves. Consuls, says Phillimore, "have no claim to any foreign ceremonial or mark of respect, and no right of precedence, except among themselves, according to the rank of the different states to which they belong." But, as already stated, the present tendency is to consider all sovereign and independent states as equal in rank, with respect to ceremonial and precedence, and consuls of foreign states, of the same rank in the consular hierarchy, should have precedence among themselves, according to the dates of their respective *exequaturs*.

§ 8. Enjoy certain rights and exemptions. Although consuls do not enjoy the rights accorded by the law of nations to public ministers, they are, nevertheless, entitled to certain rights of comity, and to certain privileges of exemption from local and political obligations, which cannot be claimed by private individuals,—rights and privileges which are incident to their office, and which result from their character as the duly appointed and recognized officers of a foreign state. Nor are these exemptions limited to the officers themselves; they extend, in a certain degree, to their houses and to public property in their charge. Thus, they may raise the flag, and place the arms of the country they represent over their gates and doors; and, although their houses are liable to domiciliary visit and search, the papers and archives of their consulate are, in general, exempt from seizure, or detention, and soldiers cannot be quartered in their consular residence.

§ 9. Office distinguished from status of officers. In determining

questions of consular privileges and exemption, we must distinguish between those which belong to the *office* held, and the modifications or exceptions resulting from the personal *status* or occupation of the incumbent.

§ 10. When they are foreigners. There seems to be little or no difficulty in distinguishing between the exemptions of the different classes of foreign consuls who owe no allegiance to the state in which they reside. Those who hold no property, engage in no business, and have no domicile in the country, have the personal exemptions and disabilities of aliens who are mere sojourners. Those who hold real estate, engage in business, and have a fixed residence, are considered as foreigners domiciled in the country, and their consular privileges, or the privileges which pertain to their office, whatever they may be, do not extend to their property or trade so as to change its national character. As neither of these classes owe personal allegiance to the country in which they reside, there can be no conflict between the duties of their allegiance and the duties of their office.

§ 11. When citizens of the country. But where citizens of the country exercise the functions of foreign consuls, there may be such conflict, and it becomes material to ascertain how far the office which they hold exempts them from the performance of the political and municipal duties of citizens. It is evident that they can claim none of the exemptions which the other two classes enjoy in virtue of the personal *status* as aliens; but it is believed that they are entitled to those which pertain to their office, and which are necessary for the due performance of its duties. Some have claimed that such consuls are exempt from no local duty, unless exempted by the local laws of their own state; and that without such statutory exemption, they are liable to do militia duty, jury duty, etc. But the better opinion is that they are not so liable, because the performance of such duties might interfere with the exercise of their consular functions.

§ 12. Jurisdiction over consuls in United States. By the con-

stitution and laws of the United States, the federal courts have exclusive jurisdiction of all suits against consuls and vice-consuls, with certain enumerated exceptions. It has been decided that where a foreign consul is sued jointly with others, his co-defendants are also brought within the jurisdiction of the federal courts.

§ 13. Powers of arbitration. Consuls in Christian states have no civil or criminal jurisdiction over their fellow-countrymen, unless given by treaty ; but, if so authorized by the laws of their own country, they are usually permitted to exercise a kind of quasi-jurisdiction or arbitration in certain matters of trade and commerce. Their awards in such cases may be binding in the tribunals of their own country, although not in those of the places of their residence.

§ 14. Marriages and divorces by consuls. Marriages and divorces by consuls, are not valid in international law, nor as a general rule, even in their own countries, for, as the consul has no ex-territoriality, and is not an officer of the local government, the marriage contract, or its dissolution, is not made by the *lex loci*, either of the country where the parties are, or of that to which they belong. It has, therefore, been held by the Attorney-General of the United States, that an American consul, in a Christian country, has no power to celebrate marriages between either foreigners or Americans. As will be shown hereafter, a different rule applies to consuls in the east.

§ 15. The granting of passports. Consuls are usually allowed to grant passports to subjects of their own country living within the range of their consulates, but not to foreigners. They, however, are usually required to put their *visé* upon the passports of foreigners who embark from the place of their consulate, to go to their (the consuls') country. But this, again, is a matter of local law of their own state. Passports, to be valid, should be given by the proper minister of the country of the person using them, or, at least, by the minister of that country at the court of the state in which they are to be used ; usage has,

nevertheless, extended the same effect to passports issued by consuls, within their consular jurisdiction.

§ 16. *Certificates, etc.* Consuls are frequently required to give certificates relating to matters of fact connected with the commerce of their fellow-countrymen, and of merchant vessels of their own state. Such certificates, under seal, receive full faith and credit in the courts of the country where such fact is collaterally called in question. The laws of most states make it the duty of their consuls to take acknowledgement of deeds for the conveyance of real estate, the depositions of witnesses in civil causes, etc.; but the legal effect to be given to such acts must, in general, be determined by municipal law.

§ 17. *They can afford no refuge from process.* Although within the general duties and rights of consuls to watch over the interests of their own countrymen, it must be remembered that they can afford no protection against due process of the laws of the country where they reside, and any attempt to evade or resist their execution would constitute an offense, for which the offending consul may be dismissed or punished. The only protection he can afford, even to his own countrymen, in such cases, is to see that the laws are properly administered; and if injustice is done to his fellow-countrymen, by depriving them of the ordinary right of trial, or by distinguishing unfavorably between them and citizens of the state where he resides, and to which the tribunals belong, he should make representation to his own government, to whom it belongs to require explanation and satisfaction. He has no diplomatic authority to demand either the one or the other.

§ 18. *Engaging in trade.* Some states permit, and others forbid, their consuls to trade. As already stated, a consul engaged in trade is, in all that concerns that trade, subject to the local laws, and to the local jurisdiction, in the same way as a native merchant. Their consular character gives them no privileges in trade, either in peace or war. "The character of consul," says Lord Stowell, "does not protect that of a merchant, united

in the same person." It is certainly a very objectionable practice to permit consuls to engage in trade, and has so been regarded by the best writers on international law.

§ 19. **Consuls of Christian states in the East.** As already remarked, the powers, privileges and immunities of European and American consuls, in Mohammedan and unchristian dominions, are very different from those of consuls in Christian countries. This has resulted, in part, from their having there retained the general diplomatic character and prerogatives of jurisdiction, which, in earlier times, they possessed everywhere, and, in part, from the stipulation of treaties.

§ 20. **Over their own countrymen.** Such jurisdiction, both civil and criminal, being conceded to the consuls over their countrymen, to the exclusion of the local magistrates and tribunals, it depends upon the laws of their own states how it shall be exercised, and what penalties or punishments may be imposed or inflicted. In civil cases, this jurisdiction is ordinarily subject to an appeal to the superior tribunals of their own country, and in criminal cases, the prisoners are sometimes sent home for trial and punishment, especially if the punishment exceeds the infliction of pecuniary penalties. This, however, depends upon the laws of their own country regulating such proceedings.

§ 21. **Over foreigners.** Usage and treaties also give such consular courts civil jurisdiction of a certain class of cases arising between their own countrymen and other foreign Christians. Thus, an Englishman in China may bring suit against an American before an American consular court, and it is in accordance with the principles of public law that an American may sue an Englishman in an English court, or a Frenchman in a French court established there. For these are cases of voluntary submission on the part of the American to such foreign jurisdiction.

§ 22. **Cannot be compulsory.** But an American cannot be sued in such foreign consular courts in the east, although he may, if in the territories of the respective countries. Thus an Englishman may sue or be sued by an American in the United

States, or an American may sue or be sued by an Englishman in England.

§ 23. Reason of the difference. This difference results from the fact that the local courts of each government in China or the east, are ex-territorial ones, have no territorial jurisdiction, but only a jurisdiction as to persons, namely, their own citizens or subjects. As a matter of comity they permit foreigners to avail themselves of such jurisdiction, but they cannot compel them to do so. Even this act of comity is not a perfect obligation.

B

## CHAPTER XI.

### MUTUAL DUTIES OF STATES.

§ 1. Rights and correlative duties. Every right has its correlative duty. As the international rights of states are divided into *perfect* and *imperfect rights*, so the corresponding international obligations may be also divided into *perfect* and *imperfect duties*. It will be remembered that any right of a sovereign state is none the less a right because it is classed as imperfect in international jurisprudence, or because it cannot be absolutely demanded and enforced under the positive law of nations; so, the corresponding obligation, although imperfect, is, nevertheless, a duty binding upon the conscience of the nation which owes it.

§ 2. Classification of the duties of states. In discussing the mutual duties of states, we will consider: *First*, those *perfect* duties which one state is absolutely bound to perform, and which others have a perfect right to demand, such as the obligations to render justice to others, and to permit to them the enjoyment of the rights of independence, of equality, of property, of legislation and jurisdiction, of legation and treaty, etc.; *second*, those *imperfect* duties which are recognized by international jurisprudence as binding obligations, but which those to whom they are due cannot claim and enforce as absolute rights, such as the ordinary duties of comity, of diplomatic and commercial intercourse, etc.; and *third*, those *imperfect* duties which rest solely upon the law of nature, and are not taken cognizance of by the positive law of nations, such as the offices of humanity, of friendships, of reciprocal kindness, etc.

§ 3. Justice a perfect obligation. The obligation of a state to render justice to all others is a *perfect* obligation, of strictly binding force, at all times and under all circumstances. No state can relieve itself from this obligation, under any pretext whatever. It is an obligation, according to Vattel, “more necessary still between nations than between individuals; because injustice has more terrible consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress.” Moreover, this obligation of the state is equally binding upon all its rulers, officers, and citizens,—in fine, upon each and every individual member which compose the state or body politic.

§ 4. States responsible for acts of their rulers. There can be no doubt that every state is responsible for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the government, so far as the acts are done in their official capacity. States have relations with each other only through their respective governments, and, in international jurisprudence, the government is the state, no matter what may be its form or duration, whether it be a despotism, or a pure republic; whether it be a mere *de facto* government, organized for a temporary purpose, or one deriving its authority from long ages of legitimate descent.

§ 5. Acts of subordinate officers. The question, however, assumes a different aspect when we consider the acts of the subordinate officers of a state. A state is undoubtedly responsible for *all* the acts of its ambassadors and other public ministers furnished with *full power*, and also of all its diplomatic agents, within the limits of their presumed powers and duties, until such acts are expressly disclaimed by the state as being unauthorized. And even then it is bound, in general, to repair the wrong and to punish the offender; for a mere disclaimer is not always satisfactory to the party aggrieved. This rule is particularly applicable to the acts of its military and naval forces. These are regarded as the peculiar guardians of the honor and dignity of

the state as represented by the flag under which they serve; moreover, the rigor of military law and military discipline would, by presumption, give to the act of a military officer a much higher degree of authority and responsibility than the act of a mere civil functionary. The former are under the immediate orders and direction of the head of the state, while the latter, though supposed to be governed by the laws of the state, are not always subject to the immediate direction of its executive government, or amenable to punishment. The act of a military or naval officer, in his official capacity, is, therefore, *prima facie* the act of his government, and is to be so regarded till disavowed by his government.

§ 6. Acts of private citizens. Vattel says, "As it is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model, at his pleasure, all the actions of his subjects, and to confine them, on every occasion, to the most exact obedience, it would be unjust to impute to the nation, or to the sovereign, all the faults of the citizens. We ought not then to say, in general, that we have received an injury from a nation, because we have received it from one of its members." The act of the individual is not necessarily and of consequence the act of the state, nor would it be just, in all cases, to hold a state responsible for the act of each individual member of which it is composed. The responsibility of the state results from its neglect or inability to control the conduct of its subjects, or its neglect and inability to punish the offenses and crimes which they commit.

§ 7. If such acts are ratified or not restrained. But, says the same author, if a nation, or its ruler, approves and ratifies the act committed by a citizen, it makes that act its own; the offense must then be attributed to the nation as the true author of the injury, of which the citizen is, perhaps, only the instrument. So, also, the sovereign who refuses to cause a reparation to be made of the damage done by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself, in some mea-

sure, an accomplice in the injury, and becomes responsible for it. If a nation should refuse or fail to pass the laws necessary to restrain its citizens from aggressions upon other states, or upon their citizens, or if, such laws being enacted, the officers of the state neglect to enforce them, and such aggressions by individuals result therefrom, the state is unquestionably responsible for the injury.

§ 8. Piracy on sea and land. Piracy, being an offense against the law of nations, may be tried and punished anywhere. "Fillibuster expeditions," or illegal and irresponsible military expeditions by land, are equally offenses against international law, and some have considered them equally justiciable at international law anywhere. But be that as it may, a nation which permits and encourages its citizens to engage in such unlawful operations, like the Usbecks and Algerines, become themselves responsible for these acts, and are liable to punishment.

§ 9. Plea of emigration and expatriation. The plea that a state is exempt in such cases from responsibility because such private citizens are *emigrants*, and therefore are virtually *expatriated*, is not admissible, because the right of voluntary expatriation exists only in time of peace, and for peaceful and lawful purposes. Every state has the right, and therefore it is its duty, to prevent the emigration of its citizens for unlawful and criminal purposes either by sea or land.

§ 10. Duties of mutual respect. It is the duty of every state to show all proper respect and honor to other sovereign states, whether the dignity of such states be represented in the person of their sovereign, their flag, their ministers, or their subordinate officers. A want of respect to a subordinate officer, however, is not, by any means, to be necessarily construed into a want of respect for the state to which he belongs, for such officers do not necessarily, nor even by implication, represent the dignity of their state or nation. To be wanting in respect to the representatives and officers of other states is a mark of ill will, and such conduct is equally contrary to sound policy, and to what nations owe to each other.

§ 11. Failure in respect not always an insult. But to fail in matters merely ceremonial, by not rendering the respect and honor which usage and custom have established as properly due to others, is not necessarily an insult to the dignity of a state or of its sovereign. "It is proper," says Vattel, "to distinguish between negligence, or the omission of what ought to be done according to commonly received custom, and positive acts of disrespect and insult. The prince may complain of negligence, and, if it is not repaired, may consider it as a mark of a bad disposition; he has a right to demand, even by force of arms, the reparation of an insult."

§ 12. Duty of trade and commerce. The right of one state to trade with another is an *imperfect* right, which the other state may admit or not, according as it deems such trade beneficial or detrimental. On this subject it must judge for itself; no one can pretend to decide upon, or compel the performance of its duty. The correlative rights and duties of trade are, like those of sending and receiving diplomatic legation, at most *imperfect* obligations.

§ 13. Case of China and Japan. China and Japan for a long time declined all commercial intercourse with other nations, and even now permit only a very restricted trade, in particular articles, and at particular places. The question was at one time discussed, whether these people could not be compelled to open their ports to foreigners, and engage in trade and general intercourse with the rest of the world. But, as a question of international jurisprudence, it scarcely merits consideration. No doubt on this point could arise in the mind of any person except those who contend that the rules of international law, adopted by Christian nations, are wholly inapplicable to the countries of Asia. But this opinion, although at one time supported by writers of unquestionable ability, is now almost universally rejected by publicists.

§ 14. Mutual duties of humanity. Among the mutual duties of states, arising from natural law, and not usually taken cog-

nizance of by the positive law of nations, are the offices of humanity, such as relieving the distresses and wants of others, so far as is reconcilable with our duty toward ourselves. Thus, if a nation is suffering under a famine, all others having a quantity of provisions, are bound to relieve its distress, yet without thereby exposing themselves to want. "But," continues Vattel, "if this nation is able to pay for the provisions thus furnished, it is entirely lawful to sell them at a reasonable rate; for what it can procure is not due to it, and, consequently, there is no obligation of giving for nothing such things as it is able to purchase. Succor, in such a severe extremity, is essentially agreeable to human nature, and a civil nation very seldom is seen to be absolutely wanting in such." Contributions of provisions, by the people of the United States, to the starving population of Ireland and Madeira, are examples of the performance of this natural duty. The same remarks apply to cases of distress resulting from floods, fires, earthquakes, war, etc.

§ 15. Sometimes limited by the duties of neutrality. In time of war the duties of humanity as applied to states are sometimes limited by the duties of neutrality. Thus, a neutral state could not relieve the suffering inhabitants of a place besieged or blockaded, or of a section of country devastated by an invading or operating army. There can be no doubt, however, that when the war is ended, or its operations are removed from the particular place or section of country, foreign nations may extend the offices of humanity to relieve the distresses of a suffering people. Of such a character was the assistance rendered by the people of the United States to the suffering inhabitants of modern Greece, in their struggle against the Turks.

§ 16. Duty of friendship and comity. Nothing tends more to the peace of the world, and the general comity and intercourse of nations, than mutual friendship and kind offices. The cultivation of international good-will and friendship is, therefore, one of the first and highest duties imposed upon every sovereign

state. Rulers, however, are too apt to neglect this duty, and to seek to exalt their own patriotism by depreciating other countries, and inciting in their own people feelings of unkindness and hostility to their neighbors. Such conduct is very reprehensible, and its results are generally dangerous, if not disastrous. For the authorities of one state to abuse and depreciate the government of another, is a sure indication of weakness and want of civilization and refinement. National irritability is mentioned by Dymond as a most prominent cause of war. "It is assumed," he says, "not indeed upon the most rational grounds, that the best way of supporting the dignity, and maintaining the security of a nation, is, when occasions of disagreement arise, to assume a high attitude and a fearless tone. We keep ourselves in a state of irritability, which is continually alive to occasions of offense, and he that is prepared to be offended, readily finds offenses. \* \* \* So well, indeed, is national irritability known to be an efficient cause of war, that they who, from any motive, wish to promote it, endeavor to rouse the temper of a people by stimulating their passions, just as the boys in our streets stimulate two dogs to fight. These persons talk of insults, or the encroachments, or the contempts of the destined enemy, with every artifice of aggravation; they tell us of foreigners who want to trample upon our rights, of rivals who ridicule our power, of foes who will crush, and of tyrants who will enslave us. They pursue their object, certainly, by efficacious means; they desire war, and, therefore, irritate our passions; and when men are angry, they are easily persuaded to fight."

## CHAPTER XII.

### SETTLEMENT OF INTERNATIONAL DISPUTES.

§ 1. Duty of moderation in international disputes. The precepts of morality, as well as the principles of public law, by which human society is governed, render it obligatory upon a state, before resorting to arms, to try every pacific mode of settling its disputes with others, whether such disputes arise from rights denied, or injuries received. This moderation is the more necessary, as it not unfrequently happens that what is at first looked upon as an injury or an insult, is found, upon a more deliberate examination, to be a mistake rather than an act of malice, or one designed to give offense. Moreover, the injury may result from the acts of inferior persons, which may not receive the approbation of their own government. A little moderation and delay, in such cases, may bring to the offended party a just satisfaction; whereas, rash and precipitate measures often lead to the shedding of much innocent blood.

§ 2. Modes of settlement. The different modes of terminating disputes between independent states, short of actual war, are divided into two classes: first *amicable*, or measures taken *viâ amicabile*; and second, *forcible*, or measures taken *viâ facta*. The *amicable* modes or measures have been variously divided by publicists; the division most generally adopted is, into accommodation, compromise, mediation, arbitration, and conference. The *forcible* modes or measures are commonly known as retortion, retaliation, reprisal, seizure, and embargo.

§ 3. Amicable accommodation. *Amicable accommodation* is where each party candidly examines the subject of dispute, with

a sincere desire to preserve peace, by doing full justice to the other. In such cases, all doubtful points of etiquette will be yielded, and all uncertain and imaginary rights will be voluntarily renounced, in order to effect an amicable adjustment of differences. If no compromise of the right in dispute can be effected, the question will be avoided by the substitution of some other arrangement which may be mutually satisfactory.

§ 4. *Compromise.* *Compromise* is where the two parties, without attempting to decide upon the justice of their conflicting pretensions, agree to recede on both sides, and either to divide the thing in dispute, or to indemnify the claimant who surrenders his share to the other. As examples of compromise, we may refer to the negotiations terminating in the treaty of 1842, by which the Maine boundary question was satisfactorily adjusted, and to the negotiations terminating in the treaty of 1846, by which the Oregon difficulty was formally disposed of.

§ 5. *Mediation.* *Mediation* is where a common friend interposes his good offices to bring the contending parties to a mutual understanding. As this friend acts the part of a conciliator, rather than a judge, he may, while favoring the well-founded claims of one party, seek to induce him to relax something of his pretensions, if necessary, in order to secure peace. The mediator is essentially different from the arbitrator, although he frequently assumes the latter office also; he does not decide upon any of the matters in dispute, but merely seeks to reconcile conflicting opinions, and to moderate adverse pretensions.

§ 6. *Arbitration.* *Arbitration* is where the decision of a dispute is left to arbitrators chosen by common agreement. If the contending parties have agreed to abide by the decision of these referees, they are bound to do so, except in cases where the award is obtained by collusion, or is not confined within the limits of the submission. It is usual to specify in agreements to arbitrate, the exact questions which are to be decided by the arbitrators, and if they exceed these precise bounds, and pretend to decide

upon other points than those submitted to them, their decision is in no respects binding.

§ 7. Rejection of offers to arbitrate. Offers to arbitrate are not always accepted, nor is the state declining the proposal bound to give any reasons in justification for rejecting the proposal of the other disputant, or the proffer of a third power to act as arbitrator. "It cannot," says Phillimore, "be laid down as a general and unqualified proposition, that it is the duty of states to adopt this mode of trial. There may, under the circumstances, be no third state willing, or qualified in all respects, for so arduous and invidious a task. Moreover, a state may feel that the contested right is one of vital importance, and one which she is not justified in submitting to the decision of any arbiter or arbiters."

§ 8. Conferences and congresses. *Conferences* and *international congresses* have frequently been resorted to, where differences exist between several states, and they are willing to discuss them in a spirit of conciliation, in order to bring them to an amicable settlement. They are also often resorted to after the termination of a general war, for the purpose of discussing and settling questions growing out of the operations of the war, and not included in the stipulations of the treaty of peace. Other states than those who are parties to the dispute, being interested in the determination of the questions submitted, or at least in the preservation of peace, are most usually invited to take part in these conferences.

§ 9. Retortion. *Retortion*, called by some amicable retaliation, and *retortion de droit*, is where one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances. Thus, if one state should make aggressive laws respecting the property, or trade, or personal rights of the citizens of another state, the latter may retort, by enacting similar laws against the citizens of the former. This kind of retaliation usually follows the

breach of what are called imperfect obligations, and which do not justify a resort to forcible measures.

§ 10. *Retaliation.* *Retaliation*, or, as it is sometimes called, vindictive retaliation, or *retorsio facti*, is where one state seeks to make another, or its citizens, suffer the same amount of evil which the latter has inflicted upon the former. Retaliation should be limited to such punishments as may be requisite for our own safety and the good of society; beyond this it cannot be justified.

§ 11. *Reprisals.* *Reprisals* are resorted to for the redress of injuries inflicted upon the state, in its collective capacity, or upon the rights of individuals to whom it owes protection in return for their allegiance. They consist in the forcible taking of things belonging to the offending state, or of its subjects, and holding them until a satisfactory reparation is made for the alleged injury. If the dispute is afterward arranged, the things thus taken by way of reprisal are restored, or, if confiscated and sold, are paid for with interest and damages; but if war should result, they are condemned and disposed of in the same manner as other captured property, taken as prize of war. As reprisals bring us to the awful confines of actual war, it is proper to inquire what kind of injuries, inflicted upon the state collectively, or upon its individual members, justify a resort to so dangerous a measure of redress. It is only in cases where justice has been *plainly denied*, or *most unreasonably delayed*, that a sovereign state can be justified in authorizing reprisals upon the property of another nation.

§ 12. *General and special reprisals.* Reprisals may be either *general* or *special*. They are *general* where one state awards to its subjects a general permission to seize the goods or persons of the offending nation upon the high seas, or wherever found without the jurisdiction of another state. They are *special* where such permission is limited to particular persons or things, or in time and place.

§ 13. *Positive and negative reprisals.* Another division of re-

prisals, made by writers on public law, is, into *positive* and *negative*, or, as termed by some writers, *active* and *passive*. Reprisals are *negative* when a state refuses to fulfill 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. The same rule applies to both of these classes, that is, neither should be resorted to except where the cause is manifestly just, and after all milder means have proved ineffectual. Negative reprisals, however, are, in general, less likely to produce an immediate rupture than those of a positive character. Nations are more ready to repel force than to employ it.

§ 14. *Seizure*. *Seizure* is a general term applicable to the forcible taking of the persons or property of others, and is applied alike to reprisals and belligerent captures made in war. But, in its more restricted sense, as applied to measures taken *viâ facta*, or forcible means of settling international disputes, the term is limited to taking forcible possession of the thing in dispute, or of the persons by whom the offense is committed. The seizure of the thing in controversy is generally regarded as the preliminary step toward the commencement of a war. It is, nevertheless, neither an actual nor a formal declaration of hostilities, and there is, therefore, still a possibility of a settlement of the dispute, before entering into a state of solemn and public war.

§ 15. *Right to be first proved*. But before taking such forcible possession, it is necessary for us to prove clearly our right to the thing in dispute, and also that we have already tried the milder modes of adjustment, for other people are not obliged to respect that title any further than we show its validity, nor will they justify us in resorting to a measure of so much rigor, and one, too, so likely to produce the most serious consequences to society, until we justify our conduct on the ground of its absolute necessity. The possessor may, therefore, remain in the pos-

session till proof is adduced to convince him that his possession is unjust.

§ 16. Reprisals upon persons. It is a well settled principle of international law, that reprisals, strictly speaking, affect the *persons* as well as the *property* of the subjects of the government against which they are granted; but, in modern times, they have been chiefly confined to *goods*. In executing the right of reprisal upon vessels, the persons of the commanders and crews are necessarily affected, although it is usual to release them immediately on bringing into port the vessel taken by way of reprisal. Nevertheless, the right of reprisal, extends also to all persons of the offending nation.

§ 17. In the punishment of individual offenders. Reprisals in the case of individual offenders is sometimes extended to their seizure for punishment, in the territory of the offended party, upon the high seas, and even within the territory of his own state. As already stated, the latter act is a violation of territorial rights, and, if done with an armed force, is an act of hostility, but not necessarily of war.

§ 18. Where his government assumes his act. It is generally held that where the government assumes the act of the individual, the latter cannot be individually punished, *unless* the act was one which his government had no power to order in the exercise of its pacific or belligerent rights.

§ 19. Case of McLeod. Alexander McLeod in 1841 crossed the Canadian line into our territory, burned the steamer "Caroline," and it was said, killed one Amos Durfee. The British government assumed the responsibility of these acts as done by its authority. Nevertheless, the Supreme Court of the State of New York claimed the right to try and punish McLeod *individually*. The federal authorities of the United States took the ground that, after the avowal of his government, he could not be made liable.

§ 20. Embargoes. *An embargo* is a species of reprisal upon the property of the offending nation, found within the territory

of the injured state, by prohibiting the departure of vessels, or the removal of goods. An embargo may, or may not be, followed by the sequestration of the goods and property detained. If war follows, it is said to have a retroactive effect, and the detained goods are considered as the property of enemies taken in war. But if the difficulty which led to the embargo is amicably arranged, they are released upon the terms which the parties may stipulate in such arrangement. In maritime embargoes, persons as well as goods are usually seized and retained, to be subsequently released, or treated as prisoners of war, according as the embargo results in peace or solemn war. An embargo is more usually resorted to in contemplation of hostilities, than as a mode of settling disputes between states. It is, therefore, classed by Phillimore as a measure of redress, "midway between reprisals and war."

§ 21. Where reprisals, etc., are followed by war. The resort to reprisals, seizures, or embargoes, or forcible means of redress between nations, may assume the character of war, in case they fail to produce the satisfaction demanded of the offending state. Such acts, as already remarked, not being positive acts of war, the effects seized are not usually condemned till the question of peace or war is finally decided. If peace should be continued, they are restored, but if war follows, they are confiscated.

§ 22. Who grants reprisals, etc. The right of granting reprisals, or of authorizing seizures and embargoes, is vested in the sovereign, or supreme power of the state. It being little short of the right to carry on war, it is usually conferred only by the war-making power of the state. This, however, is regulated by municipal law.

§ 23. Not in favor of foreigners. A state may authorize seizures and reprisals in favor of its own citizens, and for the redress of its own grievances, but not in favor of foreigners, or in an affair in which the nation has no concern.

§ 24. May in favor of domiciled aliens. Valin is of opinion that the exception of foreigners does not apply to aliens domiciled

in the country, (*regnicola*), the state being bound to protect them, and to consider an injury done to them as an affront to its own sovereignty. Letters of reprisal may, therefore, issue not only to a subject, by birth or naturalization, but also to a foreigner domiciled in the country. This might be inferred from the rule of international law, which subjects the property of domiciled aliens to all the contingencies of the war, they being considered, in law, as the subjects of the state in which they are domiciled. Being themselves liable to reprisals against the country of their domicile, it would seem just that they be allowed to participate in their benefits.

## CHAPTER XIII.

### JUST CAUSES OF WAR.

§ 1. Wars without just cause. "Whoever," says Vattel, "entertains a true idea of war,—whoever considers its terrible effects, its destructive and unhappy consequences, will readily agree that it should never be undertaken without the most cogent reasons. Humanity revolts against a sovereign who, without necessity, or without very powerful reasons, lavishes the blood of his most faithful subjects, and exposes his people to the calamities of war, when he has it in his power to maintain them in the enjoyment of an honorable and salutary peace."

§ 2. Reasons and motives of war. The reasons which determine a nation to undertake a war, are divided, by publicists, into two distinct classes: those which relate to the *right* to make the war, and those which relate to the *expediency* or propriety of doing so. The former are called the *causes* of war, and the latter the *motives*; these causes may be *justifiable* or *unjustifiable*, and the motives may be *commendable* or *vicious*. The distinction has not always been observed by publicists and historians, and we not unfrequently find reasons alleged as *causes* of a war which were only *motives* or mere *pretexts* for undertaking it.

§ 3. Justifiable causes. The *justifiable causes* of a war are injuries received or threatened. There must be a strong probability that the threat may be attempted to be carried into execution, as mere empty words will seldom justify us in declaring war. It is not necessary that the injury should be material or physical, as a national insult is often as injurious as the robbery of a province. The justifiable objects of a war may, therefore,

be divided into three classes or sub-divisions: 1st, To secure what belongs or is due to us; 2d, To provide for our future safety by obtaining reparation for injuries done to us; and 3d, To protect ourselves and property from a threatened injury. We will consider each of these classes separately.

§ 4. Wars to secure what belongs to us. *First*, of wars undertaken to secure what belongs or is due to us. We have shown, in the preceding chapter, that the party in possession has a right to retain his possession till the other claimant shows a clear and valid title to the thing in dispute; and if, before proving such title, he should attempt to oust the actual possessor by force, the latter may employ force to resist the attack. So, if the latter be removed from his possession by fraud or surprise, or violence, he may employ force to recover it; but if the former shows a clear and valid title to the thing in dispute, and has first resorted to the amicable modes of settling the question upon an equitable footing, and has been refused all reasonable modes of adjustment, he may be justifiable in resorting to force for the recovery of what really and truly belongs to him, and is unjustly withheld by his opponent.

§ 5. To punish an aggression. *Second*, of wars undertaken to provide for our future safety, by obtaining a reparation of injuries done to us. We have stated, in a former chapter, that a sovereign state is not liable to *punishment* in the strict technical sense of that term; but, that where one state is injured or insulted by another, the former may require not only indemnity for the past, but security for the future, by making war upon the aggressor. This is regarded, in ordinary language, as a *punishment* for the offenses committed, and is intended to prevent their recurrence. But, in public law, it is considered in the light of a reparation of injuries received, and as an act of self-defense in providing for future security. A war, undertaken for such a cause, must be limited to the object in view; beyond this, it is unjustifiable.

§ 6. To protect us from threatened danger. *Third*, of wars

undertaken to protect ourselves and property from a threatened injury. Self-defense is not limited to the repelling of unjust violence; if it be seriously threatened, we may resort to such forcible measures as may be necessary to prevent its occurrence. It is not required of a state that it wait till an injury is actually received, and then make war to obtain reparation; it is its duty to provide against the threatened danger, by making war, if need be, upon the threatening party, in order to deprive him of the means of inflicting the injury.

§ 7. Against the aggrandizement of a neighbor. The aggrandizement of a state so as to give it a predominating power over its neighbor, is not in itself a just cause of war. There must be not only a capacity, but an *actual intention* to injure us, and that intention must be made clearly and unmistakably manifest, before we are justified in resorting to war to diminish its power or oppose its increase.

§ 8. The motives of a war. As has already been remarked, it is not sufficient, in the forum of conscience, that we have just grounds for war, or that its objects are justifiable; we must, also, have good and proper *motives* for undertaking it. Thus, we may have received injuries, and suffered aggressions from another nation, which would, in themselves, have constituted good and sufficient reasons for declaring war against it, but, through fear or policy, we have not done so. In the meantime, the state from which we received the injury may have been so humbled or reduced as to be utterly unable, either to repeat the aggression, or to recompense us for the harm it formerly did us. What motive have we now for declaring war against that state? Solely that of *revenge*, which can be considered neither good nor proper. The motives of a war are divided, as already stated, into two classes: 1st, *Commendable*, and 2d, *Vicious*.

§ 9. Commendable motives. *Commendable motives* are derived from the good of the state and the protection of the people. If the motive for the war is to prevent an injury, or to repair one by obtaining a just satisfaction, or to provide for our future

safety by obtaining a reparation for an injury done, or to recover a right of which we have been unjustly deprived, it is both proper and commendable.

§ 10. *Vicious motives.* *Vicious motives* are not derived from the good of the state or the protection of its citizens, but from the suggestions of evil passions. Such are the motives which spring from unbridled and wicked ambition,—the arrogant desire for command, the ostentation of power, the thirst for riches, the avidity of conquest,—from jealousy, hatred and revenge.

§ 11. *Pretexts.* *Pretexts* are the reasons which are alleged in justification of a war, when the real motives are different. Thus, the true cause of the war which Greece undertook against the Persians, was the experience she had had of their weakness, while the pretext, alleged by Philip, and by Alexander after him, was the desire of avenging the injuries which the Greeks had so often suffered, and of providing for their future safety. "Pretexts," says Vattel, "are at least an homage which unjust men pay to justice. He who screens himself with them, shows that he still retains some sense of shame. He does not openly trample on what is most sacred in human society; he tacitly acknowledges that a flagrant injustice merits the indignation of all mankind."

§ 12. *Early Christians opposed to all wars.* While ethical writers of all ages have denounced *unjust* wars as the greatest of crimes, some of the early fathers of the church went so far as to adopt the principle, that war, *in any case*, and *under any circumstances*, is unjustifiable, because contrary to the revealed will of God, and that all Christians were forbidden to bear arms. The consequence was that the Roman soldiers, who became converts to Christianity, deserted their flags in crowds, and some suffered martyrdom rather than continue in the military service. This extreme doctrine afforded the opponents of Christianity good ground for saying that it was destructive of civil government, and that a state composed of true Christians could not subsist. Moreover, it became evident, that if Christians

were not permitted to use arms in self-defense, they must all perish by the incursions and invasion of the barbarians. The question was referred to Saint Augustin, the most learned father in the East. On his opinion, the councils pronounced excommunication against those soldiers who deserted, even in time of peace.

§ 13. Modern writers. Notwithstanding the reasoning and opinion of St. Augustin and other early authorities of the church that Christians may with propriety engage in just wars; some modern authors have strenuously advocated the doctrine, that "all wars are contrary to the revealed will of God," and, therefore, unjustifiable even in self-defense.

§ 14. Dymond and Wayland. The most able and moderate works in which this doctrine is attempted to be sustained are Dymond's *Essays on Morality*, and Wayland's *Elements of Moral Philosophy*. However plausible their arguments may appear at first sight, they need only to be examined to convince us of their weakness, if not absurdity. Wars, with all their attending evils, are frequently in the hands of Providence, the means of disseminating and establishing civilization. Without them bad men might again reduce us to a state of slavery and barbarism. The *Peace or Non-Resistance Doctrine* was quite prevalent in many parts of the United States, prior to the rebellion of the Southern states, but many of its advocates became strong supporters of the war for the preservation of the union.

## CHAPTER XIV.

### DIFFERENT KINDS OF WARS.

§ 1. Definition of war. War has been defined, "A contest between states, or parts of states, carried on by force." This definition is by some considered defective, and as excluding that class of civil wars which are sometimes carried on between families and factions which do not constitute either states or organized parts of states; like the wars of the Guelphs and Ghibellines in Italy, the guerrilla wars in Spain, and the wars of factions in Mexico and South America. But a close examination into the origin and nature of these wars will show that they are, in most cases, waged by organized parts of a state, and have reference to some principle of internal organization or party supremacy.

§ 2. Divisions by military writers. Wars have been divided into different classes, according to the views and professions of those who discuss them. Military writers, generally, consider them in relation to the military operations which are carried on, and, therefore, divide them into *offensive* and *defensive* wars. But these terms are here used in a very different sense from that in which they are usually employed by political and ethical writers; for a war may be essentially defensive in its political and moral character, even where we begin it, if intended to prevent an attack or invasion, which is under preparation.

§ 3. By historians. Historians and publicists have generally divided wars according to their origin, objects, and effects, having reference, also, to the character of the parties which engage in them. Thus, historians have classified these contests, as *wars*

of *intervention*, wars of *insurrection* or of *revolution*, wars of *independence*, wars of *conquest*, wars of *opinion*, *religious wars*, *national wars*, and *civil wars*. They have also classified them according to the general theater of military operations, as land wars, and maritime wars; or, as Asiatic, African, European, and American wars. Again, they are sometimes divided, with respect to periods of time or of history, as ancient and modern wars, or wars of antiquity, of classic history, of the middle ages, and of recent times.

§ 4. By publicists. Publicists, on the other hand, have divided and classified these contests with reference to the affairs of state, the legal *status* of the parties engaged in them, and the international rights and obligations which result from them. Thus, text-writers usually classify them as public or *solemn wars*, *perfect wars*, and *imperfect wars*, *mixed wars*, *the non-solemn kind of wars*, and acts of hostility not followed by actual war, but governed by the laws of war. Such classification is of little importance, except so far as it may be necessary to distinguish between the rules applicable to particular cases.

§ 5. Wars of insurrection and rebellion. An insurrection is the rising of a portion of the people against their government, or against its officers, or against the execution of its laws. The term *rebellion* is applied to an insurrection of large extent or long duration, and is usually a war between the legitimate government of a state, and portions or parts of the same, who seek to overthrow the government, or to dissolve their allegiance to it, and to set up one of their own. The war of the "Great Rebellion" in England, and of the rebellion of the Southern states of the United States, may be referred to as examples under this head.

§ 6. Wars of revolution. Wars of *insurrection*, and of *revolution*, are generally those undertaken to gain, or to regain the liberty or independence of the party or state which undertakes them; as was the case with the Americans in 1776, against England; of the Mexicans, and South American states, against

Spain; of the Greeks, in 1821; and of the Hungarians in 1848, and the Italians in 1860. A war of revolution is generally undertaken for the dismemberment of a state, by the separation of one of its parts, or for the overthrow and radical change of the government; while an insurrectionary war is sometimes waged for a very different purpose.

§ 7. *Wars of independence.* *Wars of independence* are those waged by a state against foreign dictation and control; such as the wars of Poland against Russia, of the Netherlands against Spain, of France against the several coalitions of the allied powers, of the Spanish Peninsula against France, of India against England, of Hungary against Austria, and of Turkey against Russia. The war of 1812, between the United States and England, partook largely of this character, and some judicious historians have denominated it the war of American Independence, as distinguished from the war of the American Revolution, by which the revolted colonies attained the position of a distinct and separate sovereignty.

§ 8. *Wars of opinion.* *Wars of opinion* have been sub-divided into two classes, *political wars* and *religious wars*. As examples of the former, we may mention those which the Vendéans have sustained in support of the Bourbons, and those France sustained against the Allies, as also those of propagandism waged against the smaller European states by the republican hordes of the French revolution. As examples of the latter we may mention the Jewish wars, the wars of Islamism, those of the crusades, and of the reformation. Religious wars are the most cruel and bloody, and are often carried on without any regard to the rules of international law. All wars of opinion are more cruel than those resulting from principle, policy or necessity.

§ 9. *Civil wars.* This term is usually applied to hostile operations carried on between different parties of the same state, as the wars of the Roses, in England, of the League, in France, of the Guelphs and Ghibellines in Italy, and of the factions in Mexico and South America. Wars of insurrection, of rebellion,

and of revolution, come under the general head of civil wars, and are governed by the same rules so far as regards international law and the laws of war.

§ 10. General laws of war apply to civil wars. It may be stated, as a general rule, that *the laws of war*, as understood and defined by the law of nations, govern in the *commercium belli*, or belligerent intercourse of the contending parties in civil wars. Thus, combatants are distinguished from non-combatants; troops regularly organized from guerrilla bands; sieges and blockades are to be conducted according to the rules applicable thereto; prisoners who surrender or are taken in arms, are to be treated as prisoners of war, and may be exchanged or paroled in the usual way; spies may be tried and executed; truces may be made; capitulations entered into, etc.

§ 11. This implies no recognition of their government. But the adoption of rules of regular warfare toward rebels does not imply any recognition of their government, if they have set up one, as an independent power, nor of themselves as legitimate belligerents; nor does it afford any ground whatever to neutrals for acknowledging or treating such rebels or their government as constituting an independent or belligerent power.

§ 12. Rebels nevertheless amenable to civil law. Nor does the adoption of such rules toward rebels imply any engagement with them extending beyond the limits of the rules themselves. Treating them as prisoners of war when captured, and concluding cartels, or other warlike agreements with them, has never prevented the legitimate government from trying and punishing them for high treason, or any other offense against the laws to which they owed obedience, unless they were exempted by special agreement, or included, in a general amnesty, made or ratified by the supreme power of the state. It is usual, however, to apply the extreme penalties of the law to the leaders only.

§ 13. Wars of conquest. *Wars of conquest* are those undertaken for the acquisition of territory and the extension of empire, like those of the Romans in Gaul and Britain, of the English in

India, Africa, and America, of the French in Egypt and Africa, of the Spaniards in America, and of the Russians in Circassia and Turkey. The recent war of the United States against Mexico, partook largely of the character of a war of conquest, at least in its prosecution.

§ 14. *National wars.* *National wars* are those where the great body of the people of a state take up arms and join in the contest, like those of the Swiss against Austria and the Duke of Burgundy, of the Catalans in 1712, of the Dutch against Philip II., of the Americans against England, of the Poles and Circassians against Russia, and of the Hungarians against Austria. A war may be a war of insurrection, or revolution, or independence, and, at the same time, a national war.

§ 15. *Wars of intervention.* *Wars of intervention* are those where one state interferes in favor of a particular state as against others, or in favor of a particular party, sovereign, or family in a state. This intervention is divided into two classes, according as it is made with respect to the *internal* or *external* affairs of a nation. The interference of Russia in the affairs of Poland, of England in the government of India, of Austria and the allied powers in the affairs of France during the revolution, and under the empire, are examples under the first head. The intervention of the Elector Maurice of Saxony against Charles V., of King William against Louis XIV. in 1688, of Russia and France in the seven years war, of Russia again between France and Austria in 1805, and between France and Prussia in 1806, of France, Great Britain, and Sardinia, between Turkey and Russia in 1854, are examples under the second head.

§ 16. *Public wars.* *A public war* is one carried on under the direction, or, at least, with the sanction of the supreme authority of the state. "If it is declared in form," says Wheaton, "or is duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations makes no distinction in this respect, between a just and unjust war. A war in form, or duly commenced, is to

be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties, is equally permitted to the other.”

§ 17. *Private wars.* A *private war* is one carried on by individuals, or united bodies of individuals, without the authority or sanction of the state of which they are subjects. Such contests may take place between individuals of the same state, or of different states. The first are not the objects of international law, but of the local laws and jurisdiction of the particular state. The second, may, or may not, belong to international jurisprudence, according to the circumstances of each particular case. As has already been said, every state is, in general, responsible for the acts of its subjects while within its control and jurisdiction; so, also, is it bound to protect its subjects in all their just rights, and to procure indemnity for any wrongs that may be inflicted on them. But the acts of private individuals, whether citizens or foreigners, are, as a general rule, to be judged of and punished by the tribunals, and according to the laws of the place where they are committed. Grotius has devoted considerable space to prove that some kinds of private war are not repugnant to the law of nature, and therefore may be lawfully waged. But his reasoning is not applicable to the present system of international jurisprudence.

§ 18. *Mixed wars.* A contest by force between different members of the same society or state, has sometimes been called a *mixed war*. Grotius regards such a war as *public* on the side of the established authorities, and *private* on the part of those who resist such authorities. Such a contest, on the part of individuals against the established government, may be a mere insurrection or rebellion, and the acts of such *individual* insurgents, or rebels, in resisting or opposing the authority of the government, may, as already stated, be punished according to municipal law which they have violated; but where the contest assumes the character of a *public war*, as defined and recognized by the law of nations, it is the general usage for other

states to concede to both parties the rights of war, so far as regards the law of blockades, of contraband, etc. It must be remembered, however, that every insurrection or rebellion is by no means a public war, and a state which recognizes it as such, does so under the responsibilities which are imposed by the laws of international comity.

§ 19. *Perfect and imperfect wars.* Hostile collisions of states have sometimes been divided into *perfect* and *imperfect* wars. A *perfect* war is where the whole state is placed in the legal attitude of a belligerent toward another state, so that every member of the one nation is authorized to commit hostilities against every member of the other, in every place, and under every circumstance, permitted by the general laws of war, and subject only to the limitations and exceptions prescribed by such laws. An *imperfect* war is limited, as to places, persons, and things. Such was the character of the hostilities authorized by the United States against France in 1798.

§ 20. *Solemn and non-solemn wars.* Grotius divides public wars into *solemn wars* and *wars non-solemn*. The former includes all those which are waged under the authority of the state, and are duly commenced or declared in form. Both the authority and the formality are requisite to constitute a solemn war. "But a public war, less solemn," says Grotius, "may be without those formalities, (of a solemn war,) and be made against private men, and have for its authority any magistrate. And, indeed, if we consider the thing without respect to the civil law, every magistrate seems to have the power of making war, as in the defense of the people entrusted to him, so, also, to exercise that jurisdiction, if violence be offered. But, since by war the whole city, or state, is endangered, therefore it is provided, by the laws of almost all nations, that war be not made but by the authority of him who has the sovereign power in the state." But if the hostile act of the subordinate officer be approved and ratified by the sovereign power of the state, "this approbation renders the war solemn, by reflecting back,

as it were, an authority upon it, so that it obliges the whole commonwealth.”

§ 21. Lawful and unlawful wars. Vattel divides all hostile collisions between nations, into “two sorts of wars, *lawful and unlawful*.” Unlawful wars are those undertaken “without apparent cause,” and for “havoc and pillage,” and all which do not come under this head are classed as lawful wars. Unlawful wars are such as were waged by the “Grandes compagnies,” which had assembled in France during the wars with the English; armies of banditti which ranged about Europe purely for spoil and plunder. Such were the cruises of the *fillibusters*, without commission, and in time of peace; and such, in general, are the depredations of pirates. To the same class belong almost all the expeditions of the African corsairs, though authorized by a sovereign, they being founded on no apparent just cause, and whose only motive is the avidity of captures. I say these two sorts of war, *lawful and unlawful*, are to be carefully distinguished, their effects, and the rights arising from them, being very different.

## CHAPTER XV.

### DECLARATION OF WAR AND ITS EFFECTS.

§ 1. By whom war is to be declared. The right of making war, as well as the right of authorizing retaliations, reprisals, and other forcible means of settling international disputes, belongs, in every civilized nation, to *the supreme power of the state*, whatever that supreme power may be, or however it may be constituted. As states are known to each other only through their constituted authorities, so all their relations, whether peaceful or hostile, must be settled by their recognized governments. They cannot be legally changed or interfered with by individuals.

§ 2. Ancient modes of declaration. It was customary, in former times, to precede hostilities by a public declaration, communicated to the enemy. This was always done by the ancient Greeks and Romans. The latter first sent the chief of the *feciales*, called the *pater-patratus*, to demand satisfaction of the offending nation; and if, within the space of thirty-three days, no satisfactory answer was returned, the herald called the gods to witness the injustice, and came away, saying that the Romans would consider upon the measures to be adopted. The matter was then referred to the senate, and, when the war was resolved on, the herald was sent back to the frontier to make declaration in due form. Invasions, without such public notice, were looked upon as unlawful, and no nation was regarded as an enemy of the Roman people until war was thus publicly declared against it.

§ 3. Modern practice. But, in modern times, the practice of a

formal declaration to the enemy has fallen into entire disuse, the belligerents limiting themselves to a public declaration within their own territories and to their own people. The latest example of a public declaration to the enemy, was that of France against Spain, at Brussels, in 1735, by heralds at arms, according to the forms observed during the middle ages.

§ 4. Declaration sometimes omitted. Notwithstanding a very general accordance, in modern wars, with the doctrine of unilateral declaration, there are quite a number of instances where wars between the most civilized nations have been commenced and carried on without a formal declaration of any kind. But these instances have generally resulted from peculiar circumstances, which rendered, or seemed to render, a public declaration unnecessary or inconvenient; they are, therefore, exceptions to the general rule established by modern usage.

§ 5. Conditional declaration. Declarations of war may be either *absolute* or *conditional*. Hostilities result at once from the former, and the two nations are regarded as belligerents from the date of the declaration. But the demand of the one power upon the other may be accompanied by a notification that hostilities will be commenced unless satisfaction upon some matter specified be obtained immediately, or within a certain limited time. In this case the war dates from the commencement of hostilities.

§ 6. Offers after declaration. If the enemy, says Vattel, on either declaration offers equitable conditions of peace, the war is to be suspended, for whenever justice is done, all right of employing force is superseded. To these offers, however, are to be added good and sufficient securities, for we are under no obligations to suffer ourselves to be amused by empty proposals. Moreover, we have a right to demand security, not only for the principal objects for which hostilities were declared, but also for the expenses incurred in making preparations for the war.

§ 7. Object of declaration in a defensive war. Although Vattel strenuously insists upon the ancient rule, that the declaration

of war must, in general, be communicated to the state against which it is made, he makes the case of a war strictly defensive an exception. It has already been shown that modern usage does not absolutely require a formal declaration in any case, *ex debito justitiæ inter gentes*, although some public act, recognizing the existence of the war, may be required by public or municipal law, in order to determine the duties and relations of the subjects of the belligerents. Such recognition seems as necessary in a defensive as in an offensive war.

§ 8. *Effect on individuals.* A war duly declared, or officially recognized, is not merely a contest between the governments of the hostile states in their political character or capacity; on the contrary, its first effect is to place every individual of the one state in legal hostility to every individual of which the other is composed, and these individuals retain the legal character of enemies, in whatever country they may be found. In the next place, all the property of the one state, and of each of its citizens, is deemed hostile with respect to the opposing belligerent.

§ 9. *On commerce, etc.* One of the immediate and important consequences of this principle, which has been fully confirmed by the usages of modern warfare, and by the decisions of the judicial tribunals of Europe and the United States, is, that a declaration, or recognition of war, effects an absolute interruption and interdiction of all commercial intercourse and dealings between the subjects of the two countries. The idea, says Kent, that any commercial intercourse, or pacific dealing, can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license, is utterly inconsistent with the duties growing out of a state of war. It is a well settled doctrine, in the English courts, and with the English jurists, that there cannot exist, at the same time, a war of arms and a peace of commerce.

§ 10. *Carrying supplies to a colony, etc.* "This strict rule," says Kent, "has been carried so far in the British admiralty, as to prohibit a remittance of supplies even to a British colony

during its temporary subjection to the enemy, and when the colony was under the necessity of supplies, and was only partially and imperfectly supplied by the enemy. The same interdiction of trade applies to ships of truce, or cartel ships, which are a species of neutral navigation, intended for the recovery of the liberty of prisoners of war."

§ 11. Only exception to a rule of non-intercourse. The only exceptions to this strict and rigorous rule of international jurisprudence, are "contracts of necessity, founded on a state of war, and engendered by its violence." All ransom bills come under this exception, as, also, bills of exchange drawn by a prisoner in the enemy's country for his own subsistence. In the case of a bill of exchange drawn upon England, by a British prisoner in France, for his own subsistence, and endorsed to an alien enemy, the latter was allowed to enforce it on the return of peace.

§ 12. Effect on subjects of an ally. "It is equally illegal," says Kent, "for an ally of one of the belligerents, and who carries on the war conjointly, to have any commerce with the enemy. A single belligerent may grant licenses to trade with the enemy, and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause. The community of interests, and object, and action, creates a mutual duty not to prejudice that joint interest; and it is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally engaged in a trade with a common enemy, and thereby affording him aid and comfort, whilst the other ally was carrying on a severe and vigorous warfare. It would be contrary to the implied contract in every such warlike confederacy, that neither of the belligerents, without the other's consent, shall do anything to defeat the common object."

§ 13. On subjects of an enemy in our territory. One of the immediate consequences of the position in which the citizens

and subjects of belligerent states are placed by the declaration of war, is, that all the subjects of one of the hostile powers, within the territory of the other, are liable to be seized and retained as prisoners of war. But this extreme right, founded on the positive law of nations, has been stripped of much of its rigor in modern warfare, by the milder rules resulting from the usage of nations, the stipulations of treaties, and the municipal laws and ordinances of particular states. These affect, more or less, the exercise of this extreme right of war; but the *right* itself still remains, and may, under certain circumstances, be enforced, at the discretion of the belligerent.

§ 14. *Laws of particular states.* In England it was provided by *magna charta*, that upon the breaking out of war, foreign merchants found in England, and belonging to the country of the enemy, should be attached, "without harm to body or goods," until it be known how English merchants were treated by the enemy. By the statute of 27 Edward III., 17, foreigners were to have convenient warning of forty days, by proclamation, to depart the realm with their goods. The act of congress of July 6th, 1798, authorized the President, in case of war, to direct the conduct to be observed toward subjects of the hostile nation, being aliens and within the United States, and in what case, and upon what security their residence should be permitted; and it declared, in reference to those who were to depart, that they should be allowed such reasonable time as might be consistent with the public safety, and according to the dictates of humanity and national hospitality, "for the recovery, disposal, and removal of their goods and effects, and for their departure."

§ 15. *Enemy's property in territory of belligerents.* What we have said of the detention of the enemy's person, also holds good with respect to the right to seize and confiscate all enemy's property found within our territory at the commencement of hostilities. In former times, this right was exercised with great rigor, but it has now become an established, though not inflex-

ible, rule of international law, that such property is not liable to confiscation as a prize of war. This rule, says chief justice Marshall, "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." Formerly Great Britain treated the goods of enemy's merchants precisely as the goods of English merchants were treated in the enemy's country. But in recent maritime wars, at least prior to the Crimean war, England constantly condemned as droits of admiralty the property of an enemy found in her ports at the breaking out of hostilities, "and this practice," says Wheaton, "does not appear to have been influenced by the corresponding conduct of the enemy in that respect."

§ 16. Conduct of the belligerents in the Crimean war. On the declaration of a war between the Ottoman Porte and Russia, in October, 1853, a notice was issued by the latter government to the effect that, as the Porte had not imposed an embargo on Russian vessels in its ports, etc., the Russian government, on its part, grants liberty to Turkish vessels in its ports to return to their destination till the 10th (22d) of November. After the declaration of hostilities by France and England against Russia, similar declarations were made by these powers. Russia allowed English and French vessels six weeks from the 25th of April, 1854, to take on board their cargoes and sail from Russian ports in the Black Sea, the sea of Azoff, and the Baltic, and six weeks from the opening of navigation, to leave the ports of the White Sea.

§ 17. Debts due an enemy. Debts contracted before the declaration of war, and owing by one belligerent, or its allies, to the enemy, are necessarily merged in the war, and must abide the issue of the contest, or rather the stipulations of the treaty of peace by which it is terminated. Formerly debts contracted in

time of peace, and owing by the belligerent state, or its subjects, to the subjects of the enemy, were also regarded as annulled or confiscated by the declaration of war. This doctrine is fully recognized in the writings of Cicero, Grotius, Puffendorff, Bynkershoek, and others. But, according to Vattel, the rigor of this rule was afterwards relaxed, and the opposite custom grew up in its place, which has now become so general throughout Europe, that the sovereign who should enforce the former rule, would be regarded as violating good faith; for strangers trusted his government or subjects only from the firm persuasion that the modern custom would be observed. Emerigon and Martens advocate the same doctrine. The question is also most ably discussed by Hamilton in the numbers of *Camillus*, published in 1795.

The supreme court of the United States has decided that the right, *stricto jure*, still exists as a settled and undoubted right of war recognized by the law of nations, although it was, at the same time, admitted to be the universal practice at present to forbear to seize and confiscate debts and credits, as also to seize and confiscate enemy's tangible property found in the country at the opening of the war. The court would not confiscate without an act of the legislative power declaring its will that such property should be condemned.

§ 18. Distinction between public and private debts. English writers make a distinction between the debts of the state and those of private citizens to citizens of the enemy, the former not being confiscable even by the most rigid rule, although the latter may, in *stricto jure*. By the treaty of 1794, between the United States and Great Britain, it was stipulated that debts due from individuals of the one nation to individuals of the other, should never, in any event of war or national differences, be sequestrated or confiscated.

§ 19. Distinction made by English text-writers. While the English text-writers and jurists have contended for the right to seize and sequester the property of an alien enemy found in

British territory, at the declaration of a war, as a right conceded by the law of nations, they have almost uniformly denied the right to confiscate debts due to such enemy, on the ground that usage and custom have annulled that right. The distinction thus attempted to be drawn between debts and other property is not well founded in reason or authority, but has resulted, apparently, from policy and interest.

§ 20. Examples of its enforcement. Mr. Wheaton has given several examples of the enforcement of this distinction, in all of which it enured greatly to the advantage of England. The distinction seems to have been made and enforced mainly for her benefit. It is not generally approved by the text-writers of other countries.

§ 21. Commencement of war, how determined. Where there has been no declaration of war, or other public act to fix the time of its commencement, it is sometimes difficult to determine upon individual conduct, or the character of property. Where the government itself has fixed no positive time for the commencement of hostilities, either past or future, and where its intentions are at all doubtful, the conduct of individuals is entitled to a lenient and favorable construction. A court will not, in such cases, condemn property as involved in trade with the enemy, unless fully satisfied, not only that hostilities existed, but that the fact was so public and notorious that the knowledge of its existence was justly to be imputed to the parties by whom the acts of supposed illegality were committed or authorized. It would be plainly unjust to confiscate property, or annul contracts, where reasonable doubts exist, either as to the intentions of the government, or the knowledge of the parties.

§ 22. In regard to neutrals. The same leniency is certainly due to neutrals in such cases. Where there has been no official declaration of war, and no notification by manifesto of its actual existence, the conduct of neutrals is entitled to the most favorable construction, and neutral property cannot be condemned, for violation of neutral duty, without proof that the war *de facto*

was so public and notorious that the neutral could not have been in ignorance of its existence.

§ 23. Effect of declaration of war on treaties. A declaration of war does not *ipso facto* extinguish treaties between the belligerent states. Treaties of friendship and alliance are necessarily annulled by a war between the contracting parties, except such stipulations as are made expressly with a view to a rupture, such as limitations of the general rights of war, etc. So of treaties of commerce and navigation; they are generally either suspended or entirely extinguished by a war between the parties to such treaties. All stipulations, with respect to the conduct of the war, or with respect to the effect of hostilities upon the rights and property of the citizens and subjects of the parties, are not impaired by supervening hostilities, this being the very contingency intended to be provided for, but continue in full force until mutually agreed to be rescinded.

§ 24. On local civil laws. We have thus far mostly confined our remarks to the effects of a declaration of war upon belligerent states and their subjects in their international relations. Its effects upon the relations of the citizens of a belligerent state with their own government belong to constitutional or municipal law, rather than to general public law; nevertheless, as there are certain general principles which govern these relations in all countries and under all governments, it may be proper to allude to them in this place. For example, any place, port, town, fortress, or section of country occupied by the enemy, is, for most purposes, regarded in law as *hostile territory*, so long as such occupation is continued. If the place so occupied were previously neutral, or a part of our own territory, it is no longer regarded as such, for it would be absurd to suppose that persons who are hostile themselves, or who are under a hostile authority, are to exercise the same civil rights as neutrals or citizens in time of peace. The relations of the government to a place or territory so occupied or situated, are of a military character, and consequently are not regulated by the civil laws, which are made

for the condition of peace. This change of relation, or rule of government, does not result from anything in the particular constitution or laws, but from the *fact* of the existence of war and the hostile occupation of the place. The same rule applies to a place, or district of country, which is invaded or besieged by an enemy: the *fact* of the invasion or beleaguering is, in itself, a substitution of military for civil authority; the absence of peace suspends the law of peace, and the presence of war substitutes military rule.

§ 25. Declaration of martial law. What is called a declaration of martial law in one's own country, is the mere announcement of a fact; it does not, and cannot create that fact. The exigencies which, in any particular place, justify the taking of human life without the interposition of the civil tribunals, and without the authority of the civil law, may justify the suspension of the power of such tribunals and the substitution of martial law. The law of war, or at least many of its rules, are merely the results of a paramount necessity. On this point we quote the language of Attorney-General Cushing: "There may undoubtedly be, and have been, emergencies of necessity, capable of themselves to produce and therefore to justify such suspension of all civil law, and involving, for the time, the omnipotence of military power. But such a necessity is not of the range of mere legal questions. 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 been suspended, of itself, by the force of circumstances, and that, by the same force of circumstances, the military has had 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."

§ 26. *Martial and military law distinguished.* *Martial law* has often been confounded with *military law*, but the two are very different. Military law, with us, consists of the "rules and articles of war," and other statutory provisions for the government of military persons, to which may be added the unwritten or common law of the "usage and customs of military service." It exists equally in peace and in war, and is as fixed and definite in its provisions as the admiralty, ecclesiastical, or any other branch of law, and is equally, with them, a part of the general law of the land. But, in the words of Chancellor Kent, "martial law is quite a distinct thing." It exists only in a time of war, and originates in military necessity. It derives no authority from the civil law, (using the term in its more general sense,) nor assistance from the civil tribunals, for it overrules, suspends, and replaces both. It is from its very nature, an arbitrary power, and "extends to all the inhabitants (whether civil or military) of the district where it is in force." It has been used in all countries and by all governments, and it is as necessary to the sovereignty of a state as the power to declare and make war.

§ 27. *Martial law in European countries.* The laws of different countries, with respect to the application and exercise of this power, are very different. In the jurisprudence of France, for example, three conditions of things are carefully defined and provided for: 1st, *The state of peace*, where all persons are governed by the civil or military authority, according to the class to which they belong, and the law applicable to the particular case; 2d, *The state of war*, where the law and authority governing depends upon the particular condition of the place and circumstances of the case, the civil authority sometimes acting in concert with, and sometimes in subordination to the military; and 3d, *The state of siege*, where the civil law is suspended for the time being, or, at least, is made subordinate

to the military, and the place is put under martial law, or under the authority of the military power. This may result from the presence of a foreign enemy, or by reason of a domestic insurrection, and the rule applies to a district of country as well as to a fortress or city. A similar system is adopted in Spain, and in most of the countries of continental Europe. "The state of siege of the continental jurists," says Cushing, "is the proclamation of martial law of England and the United States, only we are without law on the subject, while in other countries it is regulated by known limitations." The English common law authorities, and commentators, generally confound *martial* with *military* law, and, consequently, throw very little light upon the subject considered as a domestic fact, and in parliamentary debates, it has usually been discussed as a *fact*, rather than as forming any part of their system of jurisprudence. Nevertheless, there are numerous instances in which martial law has been declared and enforced in time of rebellion or insurrection, not only in India and British colonial possessions, but also in England and Ireland. It seems that no act of parliament is required to precede such declaration, although it is usually followed by an act of indemnity, when the disturbances which called it forth are at an end, in order to give constitutional existence to the *fact* of martial law.

§ 28. *Martial law in the United States.* Martial law is not mentioned by name in the Constitution of the United States; but that instrument recognizes the law of nations by conferring upon congress the "power to define and punish \* \* \* offenses against the laws of nations." The law of nations, therefore, constitutes a part of the law of the land, both in peace and war, and that branch called *the laws of war*, and of which martial law forms a part, necessarily comes into operation when the jurisdiction of the civil tribunals ceases. The constitution also declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion the public safety may require it." Now, the suspension of the pri-

vilige of the writ of *habeas corpus* is not, in itself, a declaration of martial law; it is simply an incident, although a very important incident to such declaration. In other words, the incident is constitutionally provided for, while the substance, or general principle, is merely recognized, but in no other manner alluded to. Probably the framers of that instrument saw the difficulty of attempting to regulate, by any fixed rules, that which results from paramount necessity alone, and which, from its very nature, is scarcely susceptible of minute regulation. Practically, in England and the United States, the essence of martial law, is the suspension of the privilege of the writ of *habeas corpus*,—that is, the withdrawal of a particular person, or a particular place or district of country from the authority of the civil tribunals. A mere declaration of martial law, no matter how much, “in case of rebellion or invasion, the public necessity may require it,” would be utterly useless unless accompanied by a suspension of the privilege of the writ of *habeas corpus*; for if the local civil authorities were permitted, in such case to enforce this writ, they might, and some probably would, render the military powerless to provide for “the public safety.”

§ 29. Writ of *habeas corpus*. The constitution having provided for the enforcement of martial law by authorizing the suspension of the privilege of the writ of *habeas corpus*, under two coexisting conditions: 1st. That “rebellion or invasion,” exists, and 2d, that “the public safety requires it,” the question arises, who is to decide upon the existence of these facts, and then to declare the suspension? Some of the earlier commentators on the constitution arguing from a supposed analogy between that instrument and the constitution of England, adopted the conclusion that congress, like parliament, had the exclusive right to so judge and declare. But the privilege of the writ of *habeas corpus* in England cannot be suspended without a suspension of a constitutional provision, which is within the powers of parliament but is not within the powers of congress. Nor

with us is the exercise of any such power required, for our constitution forbids the suspension only in time of peace, and provides and authorizes it under the conditions already named. Hence, the better authority is that the power to decide upon the conditions and to make the suspension belongs to the executive department of the government, and that congress can neither enlarge nor abridge the power so conferred.

§ 30. Practice of our government in regard to this writ. And the practice has conformed to this view. During the administration of President Washington, in the Pennsylvania "Whisky Insurrection" of 1794 and 1795, the military authorities engaged in suppressing it disregarded the writs which were issued by the courts for the release of the prisoners who had been captured as insurgents. General Wilkinson, under authority of President Jefferson, during the Burr conspiracy of 1806, suspended the privilege of this writ, as against the superior court of New Orleans. General Jackson assumed the right to refuse obedience to the writ of *habeas corpus*, first in New Orleans, in 1814, as against the authority of Judge Hall, when the British army was approaching that city; and afterward in Florida, as against the authority of Judge Fromentin. The case of General Wilkinson was brought directly to the notice of Congress, but that body refused either to approve or to disapprove his conduct. At the beginning of the rebellion of 1861, President Lincoln claimed the right to suspend this privilege, and continued to exercise it to the close of the war. And the arguments of Mr. Binney in favor of this construction of the constitutional provision, seem to be entirely conclusive.

§ 31. These questions determined by local law. But the questions in regard to who may declare martial law, or who may suspend the privilege of the writ of *habeas corpus*, are simply questions of local law. These powers exist in the state, and are recognized by international law, and, as already stated, foreign nations have no right to question or interfere with the constitutional division and assignment of the sovereign powers of a state.

## CHAPTER XVI.

### MEANS AND INSTRUMENTS FOR CARRYING ON WAR.

§ 1. **Duty to serve and defend the state.** As a general rule, every citizen is bound to serve and defend the state of which he is a member, as far as he is capable. This concurrence, for the common defense and general security, is one of the principal objects of every political association, and without this society could not be maintained. When, therefore, a state has declared war, every citizen is bound to assist in carrying it to a successful conclusion, whatever may be his individual opinion of the necessity or propriety of the resort to arms by his own government.

§ 2. **Certain classes usually exempted.** Although every man, capable of bearing arms, is bound to take them up if required, in the service of the state, this duty is limited and regulated by municipal law. At present most nations maintain regular military and naval forces, which are increased in time of war by volunteers, militia, or new levies. Moreover, the soldiers and sailors required for carrying on military operations are generally enlisted without compulsion, which greatly mitigates the evils of war. Even where levies are made to fill up the ranks of the army, or to supply the navy, the great body of the people are left to pursue their ordinary peaceful avocations.

§ 3. **Levies in mass.** Occasionally, in great invasions and for the defense of particular places, general conscriptions or *levies en masse* are made of all persons capable of bearing arms. All persons so held to military duty are regarded as active belliger-

ents, and if captured by the opposing party are to be treated as prisoners of war.

§ 4. Power to raise troops. As a general rule the power to declare war embraces the power to raise and support armies. This is true with respect to the state in its sovereign capacity, but not with respect to the particular departments into which the government of the state is divided. The constitution must determine to what department these powers shall belong, and whether they shall be combined or separate. In most European countries they both belong to the sovereign, and are regarded as prerogatives of majesty. In England the sovereign declares war, but he cannot compel persons to enlist, nor can he, in fact, keep an army on foot without the concurrence of parliament. In the United States, congress alone can declare war, or authorize the raising of troops.

§ 5. Duty of a state to support its troops. If every citizen, as among the Romans, took his turn in serving in the army, such service would naturally be gratuitous. But where only a portion are called into military service, while the others are left to pursue their ordinary avocations, it is right and proper that those who bear arms should be paid by those who do not, for no individual is bound to do more than his proportion for the service and defense of the State. The duty of the state to support its troops is evident, and its right to levy taxes for this purpose results from its general sovereign power over property within its territory, when necessity or the public good requires.

§ 6. Unpaid troops. If a state neglect to pay and provide for its troops regularly and systematically, they will provide for themselves by pillage, robbery and assassination. The horrible atrocities committed by the unpaid troops of the middle ages, form the most bloody pages in the annals of history. The rules of modern warfare do not permit the use of such troops in the field, although it may be allowable in the defense of a particular place. This is simply a revival of the Roman law which prohibited any man from lifting a weapon or striking a blow,

except in self-defense, against a public enemy, unless he had been enlisted or enrolled as a soldier, had taken the prescribed military oath, and actually served under pay.

§ 7. Use of mercenaries. Foreigners, who voluntarily serve a state for stipulated pay, are called *mercenaries*. The right of citizens of one state to be so employed by another, and of this other to so employ them, has often been discussed by publicists. That any citizen, with the consent of his own state, may serve another, cannot be denied. But, in doing this, he changes his nationality, and must thereafter look for support and protection to the state in whose service he is engaged. The right of a state, to permit its citizens to be employed in the military service of another, is very questionable, but the right of this other to so employ them, (with such permission,) cannot be doubted. The *policy* of doing so, is a very different question. Mercenaries enlist voluntarily, for no state has a right to require such service of undomiciled foreigners. Domiciled foreigners may be required to do duty in the militia, or the civic and national guards, for the preservation of order and the enforcement of the laws, within a reasonable distance of their place of domicile. But such duty is rather of a civil than a military character. It does not include service against a foreign enemy, nor general military service in a civil war.

§ 8. Partizan and guerrilla troops. The term *partizan* is sometimes applied to irregular troops of legitimate organization. We shall here consider only those who are of the same character as *guerrilleros* or *guerrilla bands*, the use of which is prohibited by the modern laws of war. Self-organization and self-control constitute a striking characteristic of such troops; but these are not conclusive, though *prima facie*, proofs against them. Moreover, some of the worst kind of guerrilla bands have been authorized and organized by their own governments, as in Spain, Mexico, and the Rebel States of America. All troops, whether self-controlled or acting under the orders of their government, who are organized, not for legitimate warfare, but for plunder,

robbery, marauding, the destruction of public and private property, or for murder and assassination, or for fighting in disguise, or for committing any other act of perfidy, are not to be regarded as legitimate belligerents, who can plead the laws of war in their justification. Their acts are unlawful; if they take property, it is a *military robbery*, and if they kill, it is a *military murder*.

§ 9. *Guerrilla bands* to be distinguished from *levies en masse*. Some European writers have confounded the rules applicable to guerrilla warfare with those governing *levies en masse* to repel invasions, and the distinction has sometimes been disregarded in European wars. In the invasion of France, in 1814, the allies gave no quarter, and punished with death, armed French peasants, although they had been regularly levied and organized for a legitimate purpose, and by the authority of their government. The proper distinction, however, was made by Wellington in Spain.

§ 10. *Privateering*. A privateer is a private-armed vessel, owned and officered by private persons, but commissioned by the state, or acting under letters of marque. Without such license or commission a private vessel levying war would be treated as a pirate. It has, however, the natural right of self-defense when attacked. The right to use this kind of naval force, as a question of international law, is undisputed.

§ 11. *Its advantages and evils*. The alleged advantages of employing privateers are, that a naval force is thus procured more quickly and cheaper than by the organization of a regular navy; that it gives occupation to vessels and men which are withdrawn from commerce by the war; and that it places a smaller state more nearly on an equality with a larger rival. On the other hand, the evils of privateering are very great. Its motive being plunder, it necessarily has a corrupting influence on those who engage in it, as is shown by the fact that they frequently become pirates. From the want of proper capacity in its officers, and proper discipline in its crews, it often leads to

excesses and cruelties. Again, privateers almost invariably encroach upon the rights of neutrals.

§ 12. Efforts to abolish it. For these and other reasons, the most enlightened statesmen and publicists have advocated the abolition of privateering, as a barbarous practice, entirely inconsistent with the liberal spirit of the age. During the war between the United States and Mexico, no privateers were employed by either party; nor were letters of marque issued by either belligerent in the Crimean or Italian wars. In the treaty of 1785 between the United States and Prussia, negotiated by Dr. Franklin, it was provided that neither of the contracting parties should resort to privateering against the other. Temporary arrangements of the same nature were also made between other powers. And on the 16th of April, 1856, at the conference of Paris, the plenipotentiaries of Great Britain, France, Austria, Russia, Prussia, Sardinia and Turkey adopted the declaration, "*That privateering is and remains abolished.*" This declaration was not to be "binding, except between those powers which have acceded to, or shall accede to it." Nearly all, if not all, of the European and American States promptly signified their accession, except Spain, Mexico and the United States.

§ 13. Attitude of the United States. The United States declined to accede to the proposition, as it stood, but offered to adopt it with the following amendment or additional clause: "*And 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.*" But as this amendment was adopted only by a few, the government of the United States, at the beginning of the War of Rebellion, found itself exposed to this formidable instrument of war, which its political enemies were not slow to use against it, even to the extent of violating their own duties of neutrality.

§ 14. Privateers, by whom commissioned. Letters of marque must proceed from the sovereign power of the state, but it will depend upon its own laws by what department of its govern-

ment they are to be issued. "A vessel," says Phillimore, "which takes a commission from *both belligerents* is guilty of piracy, for one authority conflicts with the other. But a nicer question has arisen with respect to a vessel which sails under two or more commissions granted by *allied powers* against a *common enemy*. The better opinion seems to be, that such practice is irregular and inexpedient, but does not carry with it the substance or name of piracy." Kent does not make this distinction, but states the proposition in general terms, "that a cruiser, furnished with commissions from two different powers, is liable to be treated as a pirate." Hautefeuille says, that if a privateer receives commissions from two sovereigns, she is to be treated as a pirate, "even when the letters of marque *emanate from two princes allied for a common war*."

§ 15. Vessels of neutral states acting as privateers. Another question to be noticed, is, what is the character of a vessel of a *neutral* state, armed as a privateer, with a commission from one of the belligerents? Phillimore says: "That such a vessel is guilty of a gross infraction of international law, that she is not entitled to the liberal treatment of a vanquished enemy, is wholly unquestionable; but it would be difficult to maintain that the character of piracy has been stamped upon such a vessel by the decision of international law." Kent is of opinion that the law of the United States, which declares such an act a high misdemeanor, punishable by fine and imprisonment, to be "in affirmance of the law of nations." Ortolan thinks that such an act is not piracy in international law, but that it ought to be made so. Hautefeuille is of opinion that they are not to be treated as pirates, unless made so by interior laws or treaty stipulations of the neutral state.

§ 16. If declared pirates by treaty or local law. Many states have entered into treaties stipulating that no subject or citizen of the contracting powers shall engage in privateering against the other, under pain of being treated as a pirate. In others it is made piracy by municipal law. It seems, then, whatever

may be thought of the character generally, in international law, of a neutral vessel taking a commission from a belligerent, the other belligerent is justified in treating such vessel as a pirate, when it is so stipulated by treaty with the neutral state, or when the laws of the neutral state declare such acts to be piracy.

§ 17. *Implements of war.* The implements of war, which may be lawfully used against an enemy, are not confined to those which are openly employed to take human life, as swords, lances, fire-arms, and cannon; but also include secret and concealed means of destruction, as pits, mines, etc. So, also, of new inventions and military machinery of various kinds; we are not only justifiable in employing them against the enemy, but also, if possible, of concealing from him their use. The general effect of such inventions and improvements is thus described by a distinguished American statesman: "Every great discovery in the art of war, has a life-saving and peace-promoting influence. The effects of the invention of gun-powder are a familiar proof of this remark, and the same principle applies to the discoveries of modern times. By perfecting ourselves in military science—paradoxical as it may seem—we are therefore assisting in the diffusion of peace, and hastening the approach of that period when 'swords shall be beaten into ploughshares, and spears into pruning-hooks; when nation shall not lift up sword against nation, neither shall they learn war any more.'" The same views are expressed by Ortolan and other recent writers on the laws and usages of war. At one period, however, it was considered contrary to the rules of military honor and etiquette to make use of unusual implements of war. Thus, the French vice-admiral, Marshal Conflans, issued an order of the day, on the 8th of November, 1759, forbidding the use of hollow shot against the enemy, on the ground that they were not generally employed by polite nations, and that the French ought to fight according to the rules of honor. The same view was taken of the use of hot shot, grape, chain-shot, split balls, etc.

§ 18. Use of poisoned weapons. But while the laws of war allow the use of new inventions of arms, or other means of destruction, against the life and property of an enemy, there is a limit to this rule beyond which we cannot go. It is necessity alone that justifies us in making war and in taking human life, and there is no necessity for taking the life of an enemy who is disabled, or for inflicting upon him injuries which in no way contribute to the decision of the contest. Hence, we are forbidden to use poisoned weapons, for these add to the cruelty and calamities of a war, without conducing to its termination. We may wound an enemy in order to disable him, but, when so disabled, we have no right to take his life; we, therefore, cannot introduce poison into the wound so as, subsequently, to cause his death. "It is, therefore, with good reason," says Vattel, "and in conformity with their duty, that civilized nations have classed, among the laws of war, the maxim which prohibits the poisoning of arms."

§ 19. Poisoning wells, food, etc. The practice of poisoning wells, springs, waters, or any kind of food, for the purpose of injuring an enemy, is now also universally condemned. In addition to the reasons given for prohibiting the use of poisoned weapons, there is the additional one, that, by poisoning waters and food, we may destroy innocent persons, and non-combatants. The practice is, therefore, condemned by all civilized nations, and any state or general who should resort to such means, would be regarded as an enemy to the human race, and excluded from civilized society.

§ 20. Assassination, etc. The same may be said of assassination, or treacherously taking the life of an enemy. Not unfrequently the success of a campaign, or even the termination of the war, depends upon the life of the sovereign, or of the commanding general. Hence, in former times, it sometimes happened that a resolute person was induced to steal into the enemy's camp, under the cover of a disguise, and, having penetrated to the general's quarters, to surprise and kill him. Such

an act is now deemed infamous and execrable, both in him who executes, and in him who commands, encourages, or rewards it. The consuls, Caius Fabricius and Quintus Æmilius, rejected, with horror, the proposal of Pyrrhus' physician, to poison his master, and cautioned that prince to be on his guard against the traitor. The proposal of the prince of the Catti, to destroy Arminius, was rejected, although Arminius had treacherously cut off Varus, together with three Roman legions, both the senate and Tiberius deeming it unlawful to poison even a perfidious enemy. It was on the same principle that Alexander formed his judgment of Bessus, who had assassinated Darius. During the middle ages, however, war degenerated into cruelty and barbarism, and poisons and assassinations were frequently resorted to. The assassination of William, Prince of Orange, by the Spaniards, in the war of the Netherlands, is now regarded with universal detestation. But this detestation of the civilized world is not confined to the perpetrators of such acts; those who command, encourage, countenance, or reward them, are equally execrated. And a government, or a general, who should neglect to punish a subject, or a subordinate, for such a crime, would be justly regarded as odious.

§ 21. Surprises. But we must distinguish between a treacherous murder and a surprise, which is always allowable in war. A small force, under cover of the night, may pass the enemy's lines, penetrate to his headquarters, surprise the general, and take him prisoner, or attack and kill him. It was his duty to guard against such attacks, and to prevent a surprise. Such acts are, therefore, not only justifiable, but commendable; it is the disguise and treachery which gives to the deed the character of murder or assassination. The conduct of Leonidas and the Lacedæmonians, who broke into the enemy's camp, and made their way directly to the Persian monarch's tent, was justified by the common rules of war, and did not authorize the king to treat them more rigorously than any other enemies. The act of Mutius Scævola, in entering in disguise, the tent of Por-

senna, with the intention of killing him, was praised by the age in which he lived, but would not be justified by the rules of modern warfare.

§ 22. Allowable deceptions. War makes men public enemies, but it leaves in force all duties which are not *necessarily* suspended by the new position in which men are placed toward each other. Good faith is, therefore, as essential in war as in peace, for without it hostilities could not be terminated with any degree of safety, short of the total destruction of one of the contending parties. This being admitted as a general principle, the question arises, how far we may deceive an enemy, and what stratagems are allowable in war? Whenever we have expressly or tacitly engaged to speak truth to an enemy, it would be perfidy in us to deceive his confidence in our sincerity. But if the occasion imposes upon us no moral obligation to disclose to him the truth, we are perfectly justifiable in leading him into error, either by words or actions. Feints, and deceptions of this kind are always allowable in war. It is the breach of good faith, express or implied, which constitutes the perfidy, and gives to such acts the character of *lies*.

§ 23. Stratagems, what allowed. *Stratagems*, in war, are snares laid for an enemy, or deceptions practiced on him, without perfidy, and consistent with good faith. They are not only allowable, but have often constituted a great share of the glory of the most celebrated commanders. "Since humanity obliges us," says Vattel, "to prefer the gentlest methods in the prosecution of our rights, if, by a stratagem, by a feint devoid of perfidy, we can make ourselves masters of a strong place, surprise the enemy, and overcome him, it is much better, and is really more commendable to succeed in this way than by a bloody siege or the carnage of a battle. Thus, feints and pretended attacks are frequently resorted to, and men or ships are sometimes so disguised as to deceive the enemy as to their real character, and, by this means, enter a place or obtain a position advantageous to their plan of attack or of battle. But the use of

stratagems is limited by the rights of humanity and the established usages of war.

§ 24. What are forbidden. Vattel mentions the case of an English frigate, which, in the war of 1756, is said to have appeared off Calais, and made signals of distress, with a view of decoying out some vessel, and actually seized a boat and some sailors who generously came to her assistance. If the fact be true, that unworthy stratagem deserves a severe punishment. It tends to damp a benevolent charity which should be held sacred in the eyes of mankind, and which is so laudable even between enemies. Moreover, making signals of distress is asking assistance, and, by that very action, promising perfect security to those who give the friendly succor. Therefore the action attributed to that frigate implies an odious perfidy." Ortolan refers to the conduct of an English frigate and two vessels at Barcelona, in 1800, as of the same character as that of the English frigate off Calais, described as above, by Vattel. In that case the English vessel attacked under a false flag, which is forbidden by the laws of war. To sail or chase under false colors is an allowable stratagem, and some say that what is called *the affirming gun*, may be fired under false colors; but any *act* of real hostility must be under the flag of the country to which the vessel belongs. It may be stated in general terms that no stratagem is allowable the object of which is unlawful as a belligerent act, or where the means of its execution are those which a belligerent may not lawfully use.

§ 25. Deceitful intelligence. *Deceitful intelligence* may be divided into two classes; false representations made in order that they may fall into the enemy's hands and deceive him, and the representations of one who feigns to betray his own party, with a view of drawing the enemy into a snare; both are justifiable by the laws of war. Commanders sometimes make false representations of the number and position of their troops, and of their intended military operations, for the purpose of having them fall into the enemy's hands, and of deceiving him; this

is not only allowable, but is regarded as a commendable *ruse de la guerre*.

§ 26. Use of spies. *Spies* are persons who, *in disguise*, or *under false pretenses*, insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then communicate to their employer the information thus obtained. The employment of spies is considered a kind of clandestine practice, a deceit in war, allowable by its rulers. "Spies," says Vattel, "are generally condemned to capital punishment, and not unjustly; there being scarcely any other way of preventing the mischief which they may do. For this reason, a man of honor, who would not expose himself to die by the hand of a common executioner, ever declines serving as a spy. He considers it beneath him, as it seldom can be done without some kind of treachery. The sovereign, therefore, cannot lawfully require such a service of subjects, except, perhaps, in some singular case, and that of the last importance. It remains for him to hold out the temptation of a reward, as an inducement for mercenary souls to engage in the business. If those whom he employs make a voluntary tender of their services, or if they be neither subject to, nor in anywise connected with, the enemy, he may unquestionably take advantage of their exertions, without any violation of justice or honor." No authority can require of a subordinate a treacherous or criminal act in any case, nor can the subordinate be justified in its performance by any orders of his superior. Hence the odium and punishment of the crime must fall upon the spy himself, although it may be doubted whether the employer is entirely free from the moral responsibility of holding out *inducements* to treachery and crime. That a general may profit by the information of a spy, the same as he may accept the offers of a traitor, there can be no question; but to seduce the one to betray his country, or to induce the other, by promises of reward, to commit an act of treachery, is a very different matter. The term *spy* is frequently applied to persons sent to reconnoitre

an enemy's position, his forces, defenses, etc., but not in disguise, or under false pretenses. Such, however, are not *spies* in the sense in which that term is used in military and international law, nor are persons so employed liable to any more rigorous treatment than ordinary prisoners of war. It is the *disguise*, or *false pretense* which constitutes the perfidy, and forms the essential elements of the offense, which, by the laws of war, is punishable with an ignominious death.

§ 27. Military treachery, perfidy, etc. It may be stated, in general terms, that the laws of war forbid the employment of any means, or the performance of any act, which involves *military treachery*, or *perfidy*, or *infamy*, and the individuals guilty of such military offenses are almost always punished with death. Acts which are allowable in themselves, as surprises or stratagems, when performed or attempted by means of *perfidy*, are always subject to the severest punishment.

## CHAPTER XVII.

### THE ENEMY AND HIS ALLIES.

§ 1. Difference between public and private enemies. The Romans had a particular term (*Hostis*,) to denote a public enemy, and to distinguish him from a private enemy, whom they called *Inimicus*. The distinction is a marked one, and should never be lost sight of. Public enemies do not necessarily have any personal hatred; indeed the relation of public belligerents is not inconsistent with the strongest private and personal friendship.

§ 2. Status of legal hostility. The *status* of all the citizens and subjects of the hostile state, is that of legal hostility, and their character of public enemies continues so long as the war lasts, whatever may be their occupation, and in whatever country they may be found. But the treatment which they are entitled to receive at our hands varies according to circumstances.

§ 3. Difference of treatment. Thus an enemy's subject found in our own territory on the declaration of war has certain rights in regard to his person and property, not permitted to him if a resident in his own country. His subjects in neutral territory are legal enemies; but, as belligerents are not permitted to use force against each other within neutral territory, we cannot exercise there the same rights against their persons and property as we might in our own or in enemy's territory, or on the high seas. Moreover, our own subjects, resident or domiciled in the enemy's country, are, in certain matters relating to trade and

the rights of maritime capture, regarded as legal enemies, but not with respect to their personal *status* and personal duties.

§ 4. Allies not necessarily associates in a war. It has already been remarked, that we have the same rights of war against the co-allies or associates of an enemy as against the principal belligerent. It must, however, be observed that general allies are not necessarily associates in a war. The allies of our enemy, therefore, may, or may not, themselves become our enemies, according to the character of the alliance which they have formed with that enemy, the time of making it, and the circumstances under which it was entered into. We must, therefore, distinguish between the general allies of an enemy, and his associates in a war.

§ 5. If an ally of the enemy engage in hostilities. If the ally of an enemy engage in hostilities against us, his subjects and their property are to be treated in the same manner as the principal belligerent. We have no occasion to examine into the character of the alliance, nor is any declaration of war against the ally required.

§ 6. Warlike alliance made during a war. Warlike alliances, made at the commencement of, or during a war, are necessarily binding, for the contracting parties then know the character of the war and the exact nature of the obligations which they have assumed. Alliances, made under such circumstances, are acts of hostility which make the ally an enemy equally with the principal belligerent. It is important, however, to satisfy ourselves as to the character of such alliances, to see whether or not they are really *warlike* compacts which make the contracting parties also parties to the war. The alliance between France and the English revolted colonies in North America, being made during the war of the American revolution, was very properly regarded by Great Britain as tantamount to a declaration of war on the part of France, and as justifying immediate hostilities against this ally of the revolted colonies.

§ 7. Warlike alliance made before a war. In case of alliances,

made before the war, the question is, to determine whether the actual circumstances are such as were contemplated in the engagement,—whether they are such as were expressly specified, or tacitly supposed, in the treaty. This is what the civilians call *casus fœderis*, or the case of the alliance. Whatever has been promised, either expressly or tacitly, in the treaty, is due in the *casus fœderis*. But if not so promised, it is not due. If the war is not such a case as the treaty contemplated, the ally does not become a party to it; for the *casus fœderis* does not take place.

§ 8. An offensive alliance made before a war. The *casus fœderis* of an *offensive* alliance does not necessarily take place as soon as war is declared by the principal. If the case does not come within the conditions of the alliance, or if the war be unjustly declared, his ally is not bound to assist our enemy, and may claim from us the rights of neutrality.

§ 9. A defensive alliance. So, also, in a *defensive* alliance made before the war, the *casus fœderis* does not take place immediately on one of the parties being attacked by an enemy. The other contracting party has the right, as indeed it is his duty, to ascertain if his ally has not given the enemy just cause of war, for no one is bound to undertake the defense of an ally, in order to enable him to insult others, or to refuse them justice. If he is manifestly in the wrong, his co-ally may require him to offer reasonable satisfaction; and if the enemy refuse to accept it, and insists upon a continuance of the war, the co-ally is then bound to assist in his defense. But without such offer of reasonable satisfaction, the war continues to be aggressive in character, and therefore unjust, and the ally may properly refuse to render the promised assistance, for the tacit condition on which such assistance was stipulated to be given, has not been observed, or, in other words, the *casus fœderis* has not taken place.

§ 10. Obligation of an alliance determined by justness of the war. The foregoing rules are based upon the principle, says Vattel, “that there is a tacit clause in every alliance made before

a war, *that the treaty shall not be obligatory except in case of a just war.*" But the presumption is in favor of a confederate, and the case must be one of manifest aggression to justify an ally in refusing to comply with the terms of his engagement.

§ 11. *Treaties of subsidy and succor.* The *casus fœderis* of such treaties depends upon the character of the war, the same as those of an alliance made before the war. Moreover, where their conditions are complied with, the character of the assistance afforded to our enemy may be such that we may not deem it necessary to treat him as an active belligerent, although the *auxiliaries* which are actually furnished would be regarded as enemies.

§ 12. *Capitulations for mercenaries.* There is still less reason for treating as an enemy a state which has furnished *mercenaries* to our enemy under *capitulations*, like those formerly entered into by the Swiss. Nevertheless such an act may become a good cause of war.

§ 13. *Treaty of guarantee.* Treaties of guarantee and surety are to be judged of in the same manner as those of alliance. The party which made the guarantee, may or may not deem itself bound to take part in the particular war, and we should, therefore, not be hasty in treating it as an associate of our enemy.

§ 14. *Warlike associates.* A warlike association is where the alliance or engagement is of such an intimate and perfect character as to form a union of interests; where each of the parties is bound to act with his whole force, and all are alike principals in the war at its commencement or become so during its progress.

§ 15. *No declaration necessary against enemy's associates.* As a general rule, it is not necessary to make a formal declaration of war against the associates of the enemy before treating them as belligerents. The nature of their obligations, or the character of their acts, makes them public enemies, and puts them in the same position toward us as if they were principals in the war.

Our belligerent rights against them commence, in some cases, with the war, and, in others, with their first act of hostility against us.

§ 16. Policy of treating enemy's allies as friends. But, in modern times, there are very few alliances between states which so bind them together as necessarily to make them associates in a war; it is, therefore, in general, a matter of prudence to seek to disarm the enemy's allies by treating them as friends. It is a cheap and honorable means of weakening an opponent's power, and may save the effusion of much innocent blood. The contrary course is not only impolitic on our part, but tends to prolong the war by making it more general, and by involving new elements of discord, and more complicated and conflicting interests.

## CHAPTER XVIII.

### RIGHTS OF WAR AS TO ENEMY'S PERSON.

§ 1. General rights as to enemy's person. It has already been shown that war places all the subjects of one belligerent state in a hostile attitude toward all the subjects of the other belligerent; and although, in order to justify us at the tribunal of conscience, and in the estimation of the world, it is necessary that we should have just cause of war, and justifiable reasons for undertaking it, yet, as the justness or unjustness of a war is usually a matter of controversy between the contending parties, and not always easy to be determined, it has become an established principle of international jurisprudence that a war in form shall, in its legal effects, be considered as just on both sides, and that whatever is permitted to one of the belligerents shall also be permitted to the other. The law of nations makes no distinction, in this respect, between a just and an unjust war, both of the belligerent parties being entitled to all the rights of war as against the other, and with respect to neutrals. Each party may employ force, not only to resist the violence of the other, but also to secure the objects for which the war is undertaken. The first and most important of these rights, which the state of war has conferred upon the belligerents, is that of taking human life.

§ 2. Limitation of right to take life. But this extreme right of war with respect to the enemy's person, has been modified and limited by the usages and practices of modern warfare. Thus, while we may lawfully kill those who are actually in arms and continue to resist, we may not take the lives of those

who are not in arms, or who, being in arms, cease their resistance and surrender themselves into our power. The just ends of the war may be attained by making them our prisoners, or by compelling them to give security for their future conduct. Force and severity can be used only so far as may be necessary to accomplish the object for which the war was declared.

§ 3. *Exemption of non-combatants.* There are certain persons in every state who, as already stated, are exempt from the direct operations of war. Feeble old men, women and children, and sick persons come under the general description of enemies, and we have certain rights over them as members of the community with which we are at war; but, as they are enemies who make no resistance, we have no right to maltreat their persons, or to use any violence toward them, much less to take their lives. This, says Vattel, is so plain a maxim of justice and humanity that every nation, in the least degree civilized, acquiesces in it. And modern practice has applied the same rule to ministers of religion, to men of science and letters, to professional men, artists, merchants, mechanics, agriculturists, laborers—in fine, to all non-combatants, or persons who take no part in the war, and make no resistance to our arms.

§ 4. *Exemption may be forfeited.* But the exemption of the enemy's persons from the extreme rights of war is strictly confined to non-combatants, or such as refrain from all acts of hostility. If the peasantry and common people of a country use force, or commit acts in violation of the milder rules of modern warfare, they subject themselves to the common fate of military men, and sometimes to a still harsher treatment. And if ministers of religion, and females, so far forget their profession and sex as to take up arms, or to incite others to do so, they are no longer exempted from the rights of war, although always within the rules of humanity, honor and chivalry. And even if a portion of the non-combatant inhabitants of a particular place become active participants in hostile operations, the entire community are sometimes subjected to the more rigid rules of war.

§ 5. *Exceptions to rule of exemption.* Moreover, in some cases, even where no opposition is made by the non-combatant inhabitants of a particular place, the exemption properly extends no further than to the sparing of their lives; for, if the commander of the belligerent forces has good reason to mistrust the inhabitants of any place, he has a right to disarm them, and to require security for their good conduct. He may lawfully retain them as prisoners, either with a view to prevent them from taking up arms, or for the purpose of weakening the enemy. Even women and children may be held in confinement, if circumstances render such a measure necessary, in order to secure the just objects of the war. But if the general, without reason, and from mere caprice, refuses women and children their liberty, he will be taxed with harshness and brutality, and will be justly censured for not conforming to a custom established by humanity. When, however, he has good and sufficient reasons for disregarding in this particular, the rules of politeness and suggestions of pity, he may do so without being justly accused of violating the laws of war.

§ 6. *Prisoners entitled to quarter.* As the right to kill an enemy in war, is applicable only to such public enemies as make forcible resistance, this right necessarily ceases so soon as the enemy lays down his arms and surrenders his person. After such surrender, the opposing belligerent has no power over his life, unless new rights are given by some new attempt at resistance. "It was a dreadful error of antiquity," says Vattel, "a most unjust and savage claim, to assume a right of putting a prisoner of war to death, and even by the hand of the executioner." By the present rules of international law, quarter can be refused the enemy only in cases where those asking it have forfeited their lives by some crime against the conqueror, under the laws and usages of war.

§ 7. *Made slaves in ancient times.* According to the laws of war, as practiced by some of the nations of antiquity, and by savage and barbarous nations of the present time, prisoners of

war might be sold to private individuals, or held by their captors as slaves. This right was claimed and exercised as resulting from the right to put them to death, and was deemed a mitigation of the extreme right of war. But when the laws of war prohibited the captor from taking the lives of his prisoners, the right to enslave them also ceased. It is now claimed and exercised only by savages and barbarians.

§ 8. Ransom and exchange. The ancient practice, of putting prisoners of war to death, or selling them into slavery, gradually gave way to that of *ransoming*, which continued through the feudal wars of the middle ages. By a cartel of March 12th, 1780, between France and England, the ransom, in the case of a field-marshal of France, or an English field-marshal, or captain-general, was fixed at sixty pounds sterling. And even as late as the treaty of Amiens, in 1802, between Great Britain and the French and Bavarian Republics, it was deemed necessary to stipulate that the prisoners on both sides should be restored *without ransom*. The present usage of exchanging prisoners without any ransom, was early introduced among the more polished nations, and was pretty firmly established in Europe before the end of the seventeenth century.

§ 9. No positive obligation to exchange. But this usage is not, even now, considered obligatory upon those who do not choose to enter into a cartel for that purpose. "Whoever makes a just war," says Vattel, "has a right, if he thinks proper, to detain his prisoners till the end of the war." \* \* \* "If a nation finds a considerable advantage in leaving its soldiers prisoners with the enemy during the war, rather than exchange them, it may certainly, unless bound by cartel, act as is most agreeable to its interests. This would be the case of a state abounding in men, and at war with a nation more formidable by the courage than the number of its soldiers. It would have been of little advantage to the Czar, Peter the Great, to restore the Swedes, his prisoners, for an equal number of Russians."

§ 19. Moral obligations of the state. But while no state is

obliged, by the positive rules of international law, to enter into a cartel for the exchange of prisoners of war, there is a strong moral duty imposed upon the government of every state to provide for the release of such of its citizens, and allies, as have fallen into the hands of the enemy. They have fallen into this misfortune only by acting in its service, and in the support of its cause. "This," says Vattel, "is a care which the state owes to those who have exposed themselves in her defense."

§ 11. Release on Parole. Sometimes prisoners of war are permitted to resume their liberty, upon the condition or pledge that they will not take up arms against their captors for a limited time, or during the continuance of the war, or until they are duly exchanged. Such pledges are called *military paroles*; and when agreements of this kind are made within the limits of the powers, specified or implied, of the parties making them, they are binding both upon the individuals and upon the state to which they belong. But there are certain limits to the conditions which the captor may impose, and to the stipulations or pledges which the prisoner may enter into. For example: no prisoner can enter into stipulations inconsistent with his duties to his state, or the laws of his government, or the orders of his superiors; he cannot pledge his parole not to bear arms against the same enemy or against any other nation not at the time an ally of his captor; and if his own government has specified other limits to the obligations he may contract, he cannot exceed these limits. Moreover, if his captors are aware of such limitations at the time, the obligations which they impose in excess of his authority to contract, are not binding.

§ 12. United States Regulations in regard to paroles. The United States, in instructions for the government of their armies in the field, (General Orders No. 100 for 1863,) have laid down the general principles relating to military paroles, and prescribed particular rules and limits in giving such paroles. And any obligations entered into in violation of these rules,

unless authorized by a special cartel, duly approved, are held to be null and void.

§ 13. *Duty of a state when it forbids paroling.* Vattel places the duty of a state to provide for the support of its subjects while prisoners of war in the hands of an enemy, upon the same grounds as its duty to provide for their ransom or release by exchange. Indeed, a neglect or refusal to do so, would seem to be even more criminal than a neglect or refusal to provide for their exchange; for the exigencies of the war may make it the temporary policy of the state to decline an exchange, but nothing can excuse it in leaving its soldiers to suffer in an enemy's country, without any fault of their own. It follows, therefore, that although we may properly, under certain circumstances, refuse an exchange, we cannot neglect to make proper arrangements for the support of such prisoners as the enemy is willing to exchange on fair and equitable terms.

§ 14. *General rule for support of prisoners.* As there is usually no great disparity of numbers of prisoners taken by the opposing belligerents in the course of the war, it is the modern practice for each captor to support those who fall into their hands till an exchange can be effected. The burden of their support is thus not unequally distributed between the parties to the war. Sometimes, however, so very large a number is taken by one party as to leave no probability of an immediate exchange. The captor then has no alternative but to support his prisoners himself, or to release them on parole. But if there has been an agreement that each party shall provide for the support of its prisoners in the hands of the other, then the state to which they belong is bound to provide for the case as early as possible. Such matters are usually regulated by general or special cartels, or commissioners, or commissaries, are permitted to reside in respective belligerent countries to provide for the subsistence and care of their prisoners of war. But to make such conventional arrangements is not obligatory, for neither party is bound to receive such commissioners or commissaries of prisoners, and,

in case of rebellion and civil war, they are often, for good reasons, refused.

§ 15. Where exchanges cannot be effected. It not unfrequently happens in war that, although both parties are willing to exchange prisoners, much difficulty and delay occur in agreeing upon the terms of the cartel. And even after these terms have been agreed upon, a delay necessarily occurs in returning the prisoners to their own country, or to the points agreed upon for their delivery. In all such cases, as well as where no exchange or agreement, in regard to their support, has been made, each captor is bound to provide his prisoners with the necessaries of life, such as food, clothing, fuel, etc. He cannot allow them to suffer or starve. Even if his offer to exchange has been refused, he is still bound to treat those who fall into his hands with humanity. Under ordinary circumstances prisoners of war are not required to labor beyond the usual police duty of camp and garrison; but, where their own state refuses, or wilfully neglects, to provide for their support, it is not unreasonable in the captor to require them to pay with their labor for the supplies which he furnishes them. Where one of the belligerents requires such labor from his prisoners of war, the other is always justifiable in doing the same. The modern rules of war do not forbid this; but no degrading, or very onerous labor, should be imposed.

§ 16. Character of support to be given. Where circumstances render it obligatory upon the captor to support the prisoners which he has taken, this support is usually limited to the regular provision ration, and such clothing and fuel as may be absolutely necessary to prevent suffering. Officers, and other persons, who have the means of paying for their support, cannot require any assistance from the captor. But such as have money are certainly entitled to an allowance sufficient for personal comfort; and modern custom, and military usage, require that it should be proportioned to the rank, dignity and character of the prisoner. It, however, can never properly be required

for any considerable length of time, as prisoners of this description are bound to provide for their own support as soon as they can procure the means of doing so. Moneys and valuables found upon the persons, or in the baggage of prisoners when captured, may be, and usually are applied to the support of themselves and their comrades. Watches, and articles of jewelry, of limited value, are most commonly left to their individual owners. But all large sums are legitimate booty, and are appropriated or disposed of according to the laws of the capturing belligerent.

§ 17. *Cases of ill-treatment and starvation.* Although the rules of international law, as well as the obligations of humanity, require the captor to either release his prisoners or to provide for their decent and proper support, there have been recent instances of treatment of such prisoners which would have disgraced the most barbarous ages. The cruelty of the Spaniards to the French prisoners confined at Cabrera, and of the rebel authorities to the United States soldiers confined at Richmond, Andersonville, and other southern prison-pens, furnish some of the darkest pages in modern history, and are disgraceful to the perpetrators.

§ 18. *Where the captor is unable to support his prisoners.* Sometimes a belligerent captures more prisoners than he can properly support for any considerable length of time. In such cases he may parole them so that they may earn their own support in his territory, or may return to their own country, under the usual obligations attached to such paroles. Attempts have sometimes been made to annul such engagements, and to force released prisoners of war to take up arms in the same campaign, a direct violation of their parole. Such an act, on the part of a belligerent government, is utterly futile as a protection to soldiers who may thus violate a parole legally and properly even. We have an example in the war between the United States, and Mexico, which General Scott promptly met by retaliatory measures.

§ 19. May he kill them in certain cases? But suppose a general has taken so large a number of prisoners that he cannot guard and feed them, and cannot safely release them on parole, will the law of self-defense justify him in sacrificing them as Henry V. did after his victory at Agincourt, or as Admiral Anson did with the prisoners taken on an Acapulco galleon?

§ 20. This forbidden by modern law. Vattel seems to think that there may be extreme cases where the captor is justified in destroying his prisoners. Probably this opinion was justified by the practices of the age in which he wrote, and of those which preceded it, but, at the present day, the conduct of any general who should deliberately put to death unresisting prisoners, would be declared infamous, and no possible excuse would remove the stain from his character.

§ 21. Useless defense of a place. It was an ancient maxim of war, that a weak garrison forfeit all claim to mercy on the part of the conqueror, when, with more courage than prudence, they obstinately persevere in defending an ill-fortified place against a large army, and when, refusing to accept of reasonable conditions offered to them, they undertake to arrest the progress of a power which they are unable to resist. Pursuant to this maxim, Cæsar answered the Aduatici that he would spare their town if they surrendered before the battering-ram touched their walls. But, though sometimes practiced in modern warfare, it is generally condemned as contrary to humanity, and inconsistent with the principles which, among civilized and Christian nations, form the basis of the laws of war.

§ 22. Sacking a captured town. We do not, at the present day, often hear, when a town is carried by assault, that the garrison is put to the sword in cold blood, on the plea that they have no right to quarter. Such things are no longer approved or countenanced by civilized nations. But we sometimes hear of a captured town being sacked, and the houses of the inhabitants being plundered on the plea that it was impossible for the general to restrain his soldiery in the confusion and excitement

of storming the place; and, under that softer name of *plunder*, it has sometimes been attempted to veil "all crimes which man, in his worst excesses, can commit; horrors so atrocious that their very atrocity preserves them from our full execration, because it makes it impossible to describe them."

§ 23. *Examples.* Many terrible atrocities of this kind were committed in the war of the Spanish peninsula; and it would be difficult to find, in the history of the most barbarous ages, scenes of drunkenness, lust, rapine, plunder, cruelty, murder and ferocity, equal to those which followed the captures of Ciudad Rodrigo, Badajos, and San Sebastian. These were attempted to be excused on the ground that the soldiers could not be controlled. But this was no valid excuse. An officer is generally responsible for the acts of those under his orders. Unless he can control his soldiers, he is unfit to command them. In the same way, rebel officers were responsible for the murder of our captured negro troops, whether or not by their orders.

§ 24. *Fugitives and deserters.* Fugitives and deserters, says Vattel, found by the victor among his enemies, are guilty of a crime against him, and he has an undoubted right to punish them, and even put them to death. They are not properly considered as military enemies, nor can they claim to be treated as such: they are perfidious citizens, who have committed an offense against the state, and their enlistment with the enemy cannot obliterate that character, nor exempt them from the punishment they have deserved. They are not protected by any compact of war, as a truce, capitulation, cartel, etc., unless specially and particularly mentioned and provided for.

§ 25. *Rule of reciprocity.* In the operations of war, a belligerent not unfrequently adopts the *rule of reciprocity*, both with respect to the person and property of the enemy. There certainly is equity and good sense in the rule of meting out to an enemy the same measure of justice which we receive from him. Thus, if he releases his prisoners of war on *parole*, we do the same; if he forces his prisoners to labor for their support, we

do the same; if he levies heavy contributions, or, exercising the extreme rights of war, seizes or destroys public and private property, we retaliate by measures of the same character.

§ 26. *Limitation of the rule.* But there is a limit to this rule of reciprocity. If our enemy refuses to shape his conduct by the milder usages of war, and adopts the extreme and rigorous principles of former ages, we may do the same; but if he exceed these extreme rights, and become barbarous and cruel in his conduct, we cannot, as a general rule, retort upon his subjects by treating them in like manner. We cannot exceed the limits which humanity has prescribed to the rights of belligerents. Suppose our enemy should use poisoned weapons, or poison the food and water which we use, the rule of reciprocity would not justify us in resorting to the same measures. Should he massacre or starve his prisoners, we cannot follow his example. A savage enemy might kill alike old men, women and children; but would any civilized power resort to similar measures of cruelty and barbarism, under the plea that they were justified by the law of retaliation? And yet a reckless enemy sometimes leaves to his opponent no other means of securing himself against the repetition of barbarous outrages. While, therefore, retaliation cannot be entirely dispensed with in the operations of war, it should be used only as a means of protective retribution, and never as a measure of mere revenge. Inconsiderate and extreme retaliation only removes the belligerents further and further from the rules of regular warfare, and gives play to the passions of a savage nature. Wherever it is possible to punish the parties offending, severe retaliation upon innocent persons should not be resorted to.

§ 27. *Special cases where quarter may be refused.* In the internecine wars of former ages, when the killing of an enemy was regarded as the object of the war, rather than as the means of obtaining peace, it was frequently resolved to give no quarter on either side. This is opposed to modern usage, except as a measure of preventive retaliation. Troops who give no quarter,

are not entitled to receive any. The same rule applies to those who by crimes and cruelties make themselves military outlaws. Enemies who, for the purpose of deceiving in battle, fight in our uniform without any manifest mark of distinction, or under our flag or other emblem, are not entitled to quarter. By such acts of military perfidy, they forfeit all claims to protection under the laws of war, even when taken as prisoners. They may be tried and punished for the particular offense, or be summarily despatched as military outlaws.

§ 28. Disguise and perfidy. Men, or squads of men, who commit hostilities, whether by fighting, or by raids or inroads for the destruction and plunder of public or private property, without commission, pay, or regular organization, who serve in the garb of citizens, or who, at intermitting periods, divest themselves of the character and appearance of soldiers, and, assuming the semblance of peaceful pursuits, return to their homes and avocations—such men, or squads of men, are not public enemies, and, therefore, when captured, are not entitled to the treatment of prisoners of war, but may be treated summarily as highway robbers and pirates. Armed prowlers, by whatever names they may be called, who, disguised in the dress of the country or in the uniform of their enemies, are found within the lines of the army hostile to their own, or within territory in the military occupation of such army, for the purpose of robbing or plunder, or of destroying bridges, canals, roads, telegraph lines, etc., are not entitled to the privileges of prisoners of war, and such acts of perfidy may be punished with death.

§ 29. War-rebels, etc. War-rebels, or war-traitors as they are sometimes called, are persons within an occupied territory who rise in arms against the occupying or conquering power, or who convey information or assistance to the government which has been expelled from such territory. It will be shown in the chapter on military occupation that the inhabitants of territory so occupied owe a temporary or qualified allegiance to the con-

queror and that their allegiance to the former government is suspended during such military occupation. In return for the leniency of the conqueror in not expelling them from the occupied country, they are bound to conform to his authority and to render no aid to his enemy. If they take up arms or conspire against his authority, whether directed to do so or not by the expelled government, their punishment is death. The same penalty attaches if they convey unauthorized information or assistance to the army or authorities of the expelled belligerents; or if they voluntarily serve as guides, or offer to do so, to his raids or forays into the occupied district. No person forced by an enemy to serve as a guide is punishable for having done so; but if he intentionally give false information, he may be put to death for his treachery.

A messenger captured in territory militarily occupied, while carrying written despatches or verbal messages from the expelled belligerent, may or may not be punishable; if armed and in the uniform of his army, he is to be treated by the captor as a prisoner of war; if not in uniform, nor a soldier, and is attempting to steal through the occupied territory to further the interests of the enemy, he will be punished as a spy, or otherwise, according to the circumstances of the case.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from the laws of war, on account of their foreign character. If they communicate with or assist the enemy, they may be expelled from the occupied territory, or suffer such other punishment as the circumstances of the case may require.

§ 30. *Limitation as to time of punishing military offenses.* There is a law of limitation applicable to the punishment of military offenses which resembles in a manner that which applies to crimes at the civil law. The criminality of some military offenses ceases with the completion of the act and the return of the perpetrator to the jurisdiction of the opposing belligerent, while others are punishable at any and all times, at-

least so long as the war continues. To the latter class belong those offenses which are assimilated to capital crimes at the civil law, such as military surrenders and assassinations, poisonings, inhuman treatment of prisoners, acts of military perfidy. For example, the taking of life by guerrilla bands, or other unauthorized belligerents, is a military murder, which is as subversive of civilized society as a murder in time of peace. Hence the crime is considered to adhere to the actor, and the penalty continues to attach to the offense. On the other hand the act of spying is an offense only under the laws and usages of war; it is no crime against society in time of peace. Hence a successful spy, safely returned to his own army, and afterward captured as an enemy, is not subject to punishment for his acts as a spy: he is entitled to be treated as a prisoner of war, but he may be subjected to restraint and held in close custody as a person individually dangerous. On this subject Saalfeld remarks: "The spy himself, except a subject who serves as a spy against his own sovereign, is not guilty of any *crime* in the sense that term is used in the law of nations, and although military usages (*raison de guerre*) universally permit the execution of a spy, nevertheless this procedure is not to be considered as a punishment, but simply as a means of prevention, (or of deterring persons from the commission of the act of spying;) this also serves as a reason why he who has ceased to be a spy cannot be executed. The severe treatment of the spy is permitted by international law only against him *who is caught in the act*; but if the spy has committed, at the same time, a *crime* at international law, he may at any time be punished for this particular crime."

## CHAPTER XIX.

### ENEMY'S PROPERTY ON LAND.

§ 1. General right of capture modified by usage. War gives to one belligerent the right to deprive the other of everything which might add to his strength, and enable him to carry on hostilities. But this general right is subject to numerous modifications and limitations which have been introduced by custom and the positive law of nations. Thus, although, by the extreme right of war, all property of an enemy is deemed hostile and subject to seizure, it by no means follows that all such property is subject to appropriation or condemnation, for the positive law of nations distinguishes not only between the property of the state and that of its individual subjects, but also between that of different classes of subjects, and between different kinds of property of the same subject; and particular rules, derived from usage and the practice of nations, have been established with respect to each.

§ 2. Rules different for different kinds of property. Not only are the rules different in regard to the right of capture of different kinds of property, but also in regard to the kind of title acquired, and to the manner of its acquisition.

§ 3. Distinction between movables and immovables. Some have asserted that the right of a belligerent to the property of an enemy, should be limited to movables, or such things as may be conveyed or carried away. It is argued that war being but a temporary relation of nations, their practices during such a condition of things should be regulated and limited by the temporary character of that relation; that, as real property,

must remain after the termination of the war, and may revert to its former owner by the *jus postliminii*, it can properly never be alienated by the conqueror so long as the war continues. The force of this argument is not readily perceived. The necessity of self-preservation, and the right to punish an enemy, and to deprive him of the means of injuring us, by converting those means to our own use against him, lie at the foundation of the rule, and constitute the right of a belligerent to enemy's property of any kind; and it is difficult to see why this right should be restricted to a particular species of property—to cattle, horses, money, ships, goods—and not include lands or immovables. We think, therefore, that by the just rules of war, the conqueror has the same right to use or alienate the public domain of the conquered or displaced government, as he has to use or alienate its movable property. This principle, we believe to be recognized and sustained by the general law of nations.

§ 4. Title to real property. It must not, however, be inferred that the title which the purchaser acquires to the two species of property is the same. On the contrary, it is essentially different. The purchaser of movable property captured on land, acquires a perfect title as soon as the property is in the firm possession of the captor; and the title to a maritime capture is complete when carried *infra præsidia*, or at least after the sentence of a competent court of prize. But the purchase of any portion of the national domain of a conquered country, takes it at the risk of being evicted by the original sovereign owner, if he should be restored to the possession of his dominions. But if such restoration should not take place, and the title of the conqueror should be confirmed by some one of the modes recognized by international law, the title of the purchaser is then made perfect.

§ 5. Who may purchase. A question here arises as to who may become the purchasers of immovable property alienated by the conqueror during military occupation, and prior to the con-

firmation of the conquest. The object of such alienation is, as already stated, to weaken the enemy and to supply ourselves with the means of carrying on the war. It is evident, therefore, that the subjects of the conquered or displaced government cannot, consistently with their duties to their own sovereign, become such purchasers. If however, they are inhabitants of the conquered territory, and their allegiance should be transferred to the new government by the confirmation of the conquest, their title would thereby be made valid, and they themselves be freed from the risk of punishment for having paid the purchase money. Subjects of the conqueror may become purchasers with no other risk than that of being evicted by the original owner on the restoration or recapture of the real property so alienated. The same may be said of foreigners, or the subjects of a neutral state.

§ 6. Purchase by a neutral state. Whether a neutral power may make such purchases and not become a party to the war, will depend upon the character of the assistance which, by the purchase, is afforded to the conqueror, to the injury of the opposing belligerent. It is certain that if he should attempt to possess himself, during the continuance of the war, of the lands so purchased, or to maintain the title so acquired, after the restoration or recapture of the property so alienated, he would assume a hostile attitude toward the original sovereign owner and make himself a party to the war.

§ 7. Movables. All implements of war, military and naval stores, and in general, all *movable* property on land, belonging to the hostile state, is subject to be seized and appropriated to the use of the captor. And the title to such personal or movable property is considered as lost to the original proprietor, as soon as the captor has acquired a firm possession; which, as a general rule, is considered as taking place after the lapse of twenty-four hours; so that, immediately after the expiration of that time, it may be alienated to neutrals as indefeasible property.

§ 8. Documentary evidence of debts. We have discussed in a former chapter the right of a belligerent state to confiscate, on the declaration of war, debts owing by its government, or by its subjects, to subjects of the enemy. We will now consider the right to *capture* them as the property of the enemy, found in hostile territory, by capturing the *documents* which constitute the evidence of such debts. It will be observed that this question is entirely distinct from the right to confiscate a debt, *ipso facto*, by the declaration of war. We have an example from classical history. When Alexander took the city of Thebes, he found an instrument by which it was shown that the Thessalians, who served with him, owed the Thebans an hundred talents. This instrument he gave to the Thessalians as a cancellation of their debt. On the restoration of the Thebans, they demanded the payment of the debt as still due and owing them. The case was referred to the Amphictyonic council, and their decision is understood to have been in favor of the Thessalians. Jurists have generally sustained the supposed decision of the Amphictyons, on the ground of the complete conquest of Thebes, and that Alexander became the universal successor of the conquered state, but not on the ground of the mere capture of the documentary evidence of the debt. The instruments cannot be regarded as the debt, because a creditor may recover his debt, though the instruments be lost or destroyed; they are the means, but not the only means of proving that it exists. It is, therefore, held that the mere fact of the conqueror possessing himself of the documents, relating to incorporeal rights, does not give to him the possession of the rights themselves; and as his rights, as derived from military force, are simply those of possession, it is not competent for him to bestow upon, or transfer to another, what he cannot physically take possession of himself.

§ 9. Public archives, etc. There is one species of movable property belonging to a belligerent state which is exempt, not only from plunder and destruction, but also from capture and

conversion, viz.: state papers, public archives, historical records, judicial and legal documents, land titles, etc., etc. While the enemy is in possession of a town or province, he has a right to hold such papers and records, and to use them in regulating the government of his conquest; but if this conquest is recovered by the original owner during the war, or surrendered to him by the treaty of peace, they should be returned to the authorities from whom they were taken, or to their successors. Such documents adhere to the government of the place or territory to which they belong, and should always be transferred with it. None but a barbarous and uncivilized enemy would ever think of destroying or withholding them.

§ 10. *Works of art, etc.* Some have contended that the same rule applies to public libraries and to all monuments of art and models of taste. But there is an obvious distinction in the two cases. No belligerent would be justifiable in destroying temples, tombs, statues, paintings, or other works of art, (except so far as their destruction may be the accidental or necessary result of military operations.) But, may he not seize and appropriate to his own use such works of genius and taste as belong to the hostile state, and are of a movable character? On this question there has been some difference of opinion, but the weight of authority is that mere works of art and taste are subject to capture, and that the captor may remove them, if he can do so without injury, their ultimate ownership to be settled by the ensuing treaty of peace. But from this rule we would except the property of churches, hospitals, or other establishments exclusively religious or charitable, and of schools, academies, colleges, and other establishments of education and learning. But such property may be taxed or used when the public service requires it.

§ 11. *Civil structures and monuments.* But whatever distinction may be drawn in regard to the capture of works of art and taste, of libraries, cabinets, philosophical instruments, belonging to the hostile state, such works cannot be wantonly or unneces-

sarily destroyed. The same rule applies to all structures of a civil character, to all public edifices devoted to civil purposes, to temples of religion, monuments of art, etc. But if such structures be devoted to military purposes, as military store-houses, magazines, works of defense, etc., they are liable to be destroyed.

§ 12. *Private property on land.* Private property on land, is now, as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest. Even where the conquest of a country is confirmed by the unconditional relinquishment of sovereignty by the former owner, there can be no general or partial transmutation of private property, in virtue of any rights of conquest. That which belonged to the government of the vanquished, passes to the victorious state, which also takes the place of the former sovereign, in respect to the right of eminent domain; but private rights, and private property, both movable and immovable, are, in general, unaffected by the operations of a war, whether such operations be limited to mere military occupation, or extend to complete conquest.

§ 13. *General exceptions to rule of exemption.* But it must also be remembered that there are many exceptions to this rule, or rather, that the rule itself is not, by any means, absolute or universal. The general theory of war is, as heretofore stated, that all private property may be taken by the conqueror, and such was the ancient practice. But the modern usage is, not to touch private property on land, without making compensation, except in certain specified cases. These exceptions may be stated under four general heads: 1st, confiscations or seizures by way of penalty for military offenses; 2d, forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants; and 3d, property taken on the field of battle, or in storming a fortress or town; and 4th, where

the mass of the people take up arms, and the entire population engage in hostilities.

§ 14. *Penalty for military offenses.* In the *first* place, we may seize upon private property, by way of penalty for the illegal acts of individuals, or of the community to which they belong. Thus, if an individual be guilty of conduct in violation of the laws of war, we may seize and confiscate the private property of the offender. So also, if the offense attach itself to a particular community or town, all the individuals of that community or town are liable to punishment, and we may either seize upon their property, or levy upon them a retaliatory contribution, by way of penalty. Where, however, we can discover and secure the individuals so offending, it is more just to inflict the punishment upon them only; but it is a general law of war, that communities are accountable for the acts of their individual members. This makes it the interest of all to discover the guilty persons, and to deliver them up to justice. But if these individuals are not given up, or cannot be discovered, it is usual to impose a contribution upon the civil authorities of the place where the offense is committed, and these authorities raise the amount of the contribution by a tax levied upon their constituents.

§ 15. *Military contributions.* In the *second* place we have a right to make the enemy's country contribute to the expenses of the war. Troops, in the enemy's country, may be subsisted either by regular magazines, by forced requisitions, or by authorized pillage. It is not always politic, or even possible, to provide regular magazines for the entire supplies of an army during the active operations of a campaign. Where this cannot be done, the general is obliged either to resort to military requisitions, or to entrust their subsistence to the troops themselves. The inevitable consequences of the latter system are universal pillage, and a total relaxation of discipline; the loss of private property, and the violation of individual rights, are usually followed by the massacre of straggling parties, and the

ordinary peaceful and non-combatant inhabitants are converted into bitter and implacable enemies. The system, is therefore, regarded as both impolitic and unjust, and is coming into general disuse among the most civilized nations,—at least for the support of the main army. In case of small detachments, where great rapidity of motion is requisite, it sometimes becomes necessary for the troops to procure their subsistence wherever they can. In such a case the seizure of private property becomes a necessary consequence of the military operations, and is, therefore, unavoidable. Other cases, of similar character, might be mentioned.

§ 16. Of hostile populations. Sometimes the people of a country, or particular district, devote themselves and property to belligerent purposes; and sometimes their own government, by conscriptions and forced contributions, bring all private persons within the list of combatants, and make all private property virtually government property, and therefore hostile. Unquestionably all private property so used, or liable to be so used, for hostile purposes, is subject to capture and confiscation. The same principle applies to cases of civil war or rebellion, where a class or portion of the people take up arms against the legal authority of their government. Such wars are usually confined to a particular section of country, the entire population of which is in insurrection or rebellion. And where a whole community become combatants, the private property of its individual members becomes hostile, and is liable to capture and confiscation. The reason for the exemption of private property on land from confiscation in ordinary international wars is that most of the individual members of the belligerent states take no active part in the war, and are therefore enemies only in the legal sense of that word. Where the reason for the exemption does not exist, the exemption itself cannot be claimed.

§ 17. Captures on the battle field. In the *third* place, private

property taken from the enemy on the field of battle, in the operations of a siege, or in the storming of a place which refuses to capitulate, is usually regarded as legitimate spoils of war. The *right* to private property, taken in such cases, must be distinguished from the *right* to permit the unrestricted sacking of private houses, the promiscuous pillage of private property, and the murder of unresisting inhabitants, incident to the authorized or permitted sacking of a town taken by storm, as described in the preceding chapter. In other words, we must distinguish between the *title* to property acquired by the laws of war, and the *accidental circumstances* accompanying the acquisition. Thus, the right of prize in maritime captures, and of land in conquests, may be good and valid titles, although such acquisitions are sometimes attended with cruelty and outrage on the part of the captors and conquerors. So with respect to the right of booty acquired in battle or assault; the acquisition may be valid by the laws of war, although other laws of the same code may have been violated by the general or his soldiers in the operations of the campaign or siege.

§ 18. Useless destruction of enemy's property. While there is some uncertainty as to the exact limit, fixed by the voluntary law of nations, to our right to appropriate to our own use the property of an enemy, or to subject it to military contributions, there is no doubt, whatever, respecting its waste and useless destruction. This is forbidden alike by the law of nature, and the rules of war. But if such destruction is necessary in order to cripple the operations of the enemy, or to insure our own success, it is justifiable. Thus, if we cannot bring off a captured vessel, we may sink or burn it in order to prevent its falling into the enemy's hands; but we cannot do this in mere wantonness. We may destroy provisions and forage, in order to cut off the enemy's subsistence; but we cannot destroy vines and cut down fruit trees, without being looked upon as savage barbarians.

§ 19. Laying waste a country. There are numerous instances

in military history where whole districts of country have been totally ravaged and laid waste. Such operations have sometimes been defended on the ground of necessity, or as a means of preventing greater evils. It was on this ground that Italy and Spain justified their destruction of the maritime towns on the coast of Africa, which had become mere nests of pirates. In 1674, and again in 1689 the French desolated with fire and sword the Palatinate, as a barrier against invasion. The czar, Peter the Great, laid waste an extent of four-score leagues of his own territory to check the advance of the Swedes. Again in 1812, the Russians laid waste a vast extent of country and burnt their capital, to prevent its affording a shelter to the French. Wellington laid waste the territory of his ally in front of Torres Vedras, to prevent the French from advancing on his lines.

§ 20. Rule of moderation. Although there may be cases of special exception, the general rule by which we should regulate our conduct toward an enemy, is that of moderation, and on no occasion should we unnecessarily destroy his property. "The pillage and destruction of towns," says Vattel, "the devastation of the open country, ravaging and setting fire to houses, are measures no less odious and detestable, on every occasion when they are evidently put in practice without absolute necessity, or at least very cogent reasons. But as the perpetrators of such outrageous deeds might attempt to palliate them under pretext of deservedly punishing the enemy, be it here observed that the natural and voluntary law of nations does not allow us to inflict such punishments, except for enormous offenses against the law of nations, and even then, it is glorious to listen to the voice of humanity and clemency, when rigor is not absolutely necessary. Cicero condemns the conduct of his countrymen in destroying Corinth, to avenge the unworthy treatment offered to the Roman ambassadors, because Rome was able to assert the dignity of her ministers, without proceeding to such extreme rigor."

§ 21. All booty belongs primarily to the state. Towns, forts, lands, and all immovable property taken from an enemy, are called *conquests*; while captures made on the high seas are called *maritime prizes*; but all movables taken on land come under the denomination of *booty*. All captures in war, whether conquests, prizes, or booty, naturally belong to the state in whose name, and by whose authority they are made. It alone has such claims against the enemy as will authorize the seizure and conversion of his property; the military forces who make the seizures are merely the instruments of the state, employed for this purpose; they do not act on their individual responsibility, or for their individual benefit. They, therefore, have no other claim to the booty or prizes which they may take, than their government may see fit to allow them. The amount of this allowance is fixed by the municipal laws of each state, and is different in different countries.

§ 22. Distribution in different states. Among the Romans, the soldier was obliged to bring into the public stock all the booty he had taken. This the general caused to be sold, and after distributing a part of the produce of such sale among the soldiers according to their rank, he consigned the residue to the public treasury. It is the general practice in modern times, under the laws and ordinances of the belligerent governments, to distribute the proceeds, or at least a part of the proceeds, of captured property among the captors, as a reward for bravery, and a stimulus to exertion. In France the distribution of booty is partly regulated by prize ordinances, and partly left to the discretion of the authorities. In Great Britain prize money is distributed by the courts under the statutes, but booty is distributed according to the regulations established by the crown. In the United States, by copying the English laws, we allow prize-money on maritime captures, but not on booty, the President not having the power of the crown, under the English constitution, to divide booty.

## CHAPTER XX.

### ENEMY'S PROPERTY ON THE HIGH SEAS.

§ 1. No relaxation of ancient rules as to maritime captures. While "the progress of civilization has slowly but constantly tended to soften the extreme severity of the operations of war by land," says Wheaton, "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."

§ 2. Attempts to modify it. Many able modern writers and statesmen have endeavored to modify the ancient rule. As already stated, the government of the United States proposed to add to the first article of the "declaration concerning maritime law," made by the conference of Paris, April 16, 1856, the following words; "and 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." But this has not been generally adopted.

§ 3. Present rule. It may therefore be stated as the existing and established law of nations, that, when two powers are at war, they have a right to make prize of the ships, goods, and effects of each other upon the high seas; and that this right of capture includes not only government property, but also the private property of all citizens and subjects of the belligerent powers, and of their allies. Whatever bears the character of enemy's property (with a few exceptions to be hereafter noticed),

if found upon the ocean, or afloat in port, is liable to capture as a lawful prize by the opposite belligerent.

§ 4. *Difficulties in its application.* Notwithstanding the clearness and apparent simplicity of this rule, there is frequently great difficulty in its application to particular cases. Where the question turns solely on the evidence as to the facts of the case, it is attended with no other difficulties than those which usually belong to a judicial investigation of facts; but, in numerous cases where the facts are admitted or clearly proved, questions of much difficulty arise as to their legal import under the laws of war, and the rules by which prize courts are, or ought to be, governed. War establishes very different relations between parties from those which exist in the ordinary transactions of trade and pacific intercourse, and from those new relations arise new duties and new obligations. Hence the rules which govern the decisions of prize courts, under the law of nations, with respect to the ownership of property, widely differ, in many respects, from those which obtain in time of peace in the courts of civil or common law. This renders necessary a special examination of the law of prizes, and the investigation of many nice and refined distinctions in the application of that law.

§ 5. *Ownership at time of capture.* For example, the legality, or illegality of the capture of goods upon the high seas, will frequently turn upon the question of ownership at the time of capture; for when property is shipped from a neutral country to an enemy's, or from an enemy's country to a neutral, the question of its national character, whether it is neutral or hostile, can only be determined, by ascertaining whether the right of property, at the time of shipment was vested in the shipper or in the consignee. If, in order to determine this question, we were to refer only to the rules established by courts of civil and common law, we should be liable to form an erroneous conclusion, as these rules differ in some respects from those which govern courts of prize, while, in others, they are precisely the same in all courts.

§ 6. Rule as to consignee. The general rule of law, both international and civil, or common, is, that goods in the course of transportation from one place to another, if they are shipped on account and at the risk of the consignee, in consequence of a prior order or purchase, are considered as his goods during the voyage. This rule may, both by the civil and common law, be varied by an express stipulation between the parties, or by the usage of a particular trade; but neither of these exceptions are admitted in courts of prize.

§ 7. Contract and shipment made in contemplation of war. This rule is not confined to cases where the contract and shipment are made in time of actual war. If they are made in time of peace, but in contemplation of war, and with the manifest intention of protecting the property from hostile capture, they are equally a fraud upon the belligerent power to which the right of capture belongs.

§ 8. Contract made before and shipment in war. And if the contract is made during a peace, and not in contemplation of war, but the shipment be made after hostilities have commenced, and with a knowledge of the war, the private agreement of the parties, by which the neutral consignor assumes the risk of delivery, will not be permitted to affect the rights of the capturing belligerent.

§ 9. If both be made in time of peace. But where the shipment of the goods, as well as the contract, laying the risk on the neutral consignor, are both made in time of peace, and not in contemplation of war, the legal ownership which was in the consignor, at the inception of the voyage, remains in him until its termination.

§ 10. Shipment at risk of neutral consignee. And, again, where the goods are shipped by an enemy consignor, during the war, and under a prior sale, or an unconditional contract of sale, the property so shipped vests absolutely in the neutral consignee, by delivery to the master, and if otherwise innocent, and the title remains unchanged, it is exempted from capture during the

voyage. The reason is obvious: the neutral violates no duties toward one belligerent by trade, otherwise lawful, with the opposing belligerent; and the only question is that of ownership, which, by the supposition, is in the neutral consignee.

§ 11. If neutral consignor become an enemy during voyage. The same considerations apply where the shipment is made in time of peace by a neutral consignor who becomes an enemy before the completion of the voyage, although there does not, perhaps, exist the same grounds of suspicion as when the consignor is an enemy at the time of shipment. Nevertheless, the courts, even in this case, require the clearest evidence of neutral ownership.

§ 12. Acceptance in transitu by neutral consignee. Where goods are shipped by an enemy consignor to a neutral consignee, not under a prior order, but with the expectation that they will be received on the terms proposed, if they are in fact accepted by the consignee previous to the capture, it was held, by Sir William Scott, that his acceptance vests and perfects his title, and that, upon proof of the fact, the property will be restored. To exempt the property from capture, however, the acceptance must be absolute and unconditional.

§ 13. Change of ownership by stoppage in transitu. Every consignor, not only at common law, but by a rule of the general mercantile law, has, in certain cases, a control over the shipment, which is technically called a *right of stoppage in transitu*; that is, a right to countermand the bill of lading, and re-possess himself of the goods, at any time after their shipment and before their arrival at their destined port. The only case in which this right of stoppage *in transitu* can be legally exercised, under the laws of war, is, in the expectation, confirmed by the event, of the insolvency of the consignee. If the consignee, previous to the arrival of the goods, communicate to the consignor his determination not to receive or pay for the goods, these facts are deemed equivalent to actual insolvency. But a revocation of the consignment, from fears of the insolvency of the consignee,

which are not confirmed by the event, is not deemed sufficient to change the ownership. The effect of this right, when duly exercised, is to save the property from its liability to capture, where the consignment is made from a neutral to an enemy; and to incur that liability, where the consignment is made from an enemy to a neutral.

§ 14. National character of goods. But these cases are properly exceptions to the general and well settled rule of the English admiralty, that, in time of war, the national character of property cannot be changed by a transfer to a neutral during the transportation. That which was enemy's property at the commencement of the voyage, remains liable to capture, until its arrival at the port of destination. Nor, is the application of the rule confined to a transfer in actual war. If it appear that the immediate motive of the transfer, although made in time of peace, was the expectation of war, and that this fact was known to the purchaser, the contract is held to be equally invalid, as against the belligerent whose right of capture was meant to be evaded.

§ 15. Transfer of enemy's ships to neutrals. The transfer, in time of war, of the vessels of an enemy to a neutral, is a transaction, from its very nature, liable to strong suspicion, and consequently is examined with a jealous and sharp vigilance, and subjected to rules of a peculiar strictness in the prize court of the opposite belligerent. Nevertheless, neutrals have a right to make such purchases of merchant vessels, when they act with good faith, and, consequently, the belligerent powers are not justified, by the law of nations, in attempting to prohibit such transfers by a sweeping interdiction, as was done in former years by both the French and English governments. Ordinances of this character form no part of the law of nations, and, consequently, are not binding upon the prize courts, even of the country by which they are issued. Nevertheless, where the sale is claimed to have been made by an enemy to a neutral, in time of war, it is not unreasonable that its motives, nature, and

terms should be an object of the most searching inquiry. The temptation to fraud, in such cases, is so great that the entire transaction should be most strictly examined, otherwise the opposing belligerent might be deprived of his just rights of capture. Hence courts of admiralty have established very severe rules respecting such transfers.

§ 16. *Ships of war, etc.* It is held that neutrals cannot purchase ships of war from either of the belligerents. And any vessel of war so conveyed to a neutral is subject to capture and condemnation by the other belligerent in the hands of a neutral purchaser, on the ground that the enemy's title is unextinguished.

§ 17. *General rule as to character of ships and goods.* It follows, from the rules of decision heretofore announced, that the character of property on the high seas, whether vessels or goods, results, as a general rule, from the character of their owners, or those who are regarded in international law as owners. If such owners are hostile, friendly or neutral, according to the particular rules of law applicable to the state of war, their property is, in general, to be considered hostile, friendly or neutral, and as such, is subject to, or exempt from, capture.

§ 18. *Effect of liens.* In determining the national character of property, courts of prize generally look only to the legal title; and when, from the papers, the right of property in a captured ship or cargo appears to be vested in an enemy, no equitable or secret liens of a neutral or a subject can be made the foundation of a claim to defeat or vary the rights of the captors. The only exception to this rule, is where the lien is immediately and visibly incumbent upon the property, and consequently, is one which the party claiming its benefit has the means of enforcing without resort to legal process. Of such a nature is the freight due to the owner of the ship, for the ship-owner has the cargo in his possession, subject to his demand of freight money, by the general law, independent of any contract. The distinction between the two classes of liens is properly ex-

pressed in the language of the civil law, by regarding one as a *jus ad rem*, and the other as a *jus in re*.

§ 19. Documentary proofs of ownership. It is stated by Mr. Wheaton that, in addition to the *certificate of registry*, which is the proof naturally to be looked to for the national character of the ship, the following proofs of property in a vessel and cargo are usually required: "1st, *The Passport or Sea-Letter*. This is a permission from the neutral state to the master of the vessel to proceed on the intended voyage, and usually contains his name and residence, the name, description, and destination of the vessel, with such other matter as the local law and practice require." "2d, *The Muster Roll, or Role d'Equipage*, containing the names, ages, quality, and national character of the ship's company." "3d, *The Charter Party*; if the vessel has been let to hire." "4th, *The Bills of Lading*, by which the master acknowledges the receipt of the goods specified therein, and promises to deliver to the consignee or his order." "5th, *The Invoices*, which contain the particulars and prices of each parcel of the goods, with a statement of the charges thereon." "6th, *The Log-book, or ship's Journal*, which contains an accurate account of the vessel's course, with a short history of the occurrences during the voyage." "As the whole of these papers may be fabricated," says Mr. Wheaton, "their presence does not necessarily imply a fair case; neither does the absence of any of them furnish a conclusive ground of condemnation, as has been most unjustly provided by the ordinances of certain belligerent powers."

§ 20. Vessels of discovery. Vessels of *discovery*, or of expeditions of exploration and survey, sent for the examination of unknown seas, islands, and coasts, are, by general consent, exempt from the contingencies of war, and therefore not liable to capture. Like the sacred vessel which the Athenians sent with their annual offerings to the temple of Delos, they are respected by all nations, because their labors are intended for the benefit of all mankind. Such expeditions must confine themselves

most strictly to the object in view ; if they commit any act of hostility they forfeit their exemption from capture.

§ 21. *Fishing-boats.* Fishing-boats have, also, as a general rule, been exempted from the effects of hostilities. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers.

§ 22. *Cases of shipwreck.* Some have contended that the rule of exemption ought to extend to cases of shipwreck on a belligerent coast, to cases of forced refuge in a belligerent harbor by stress of weather, or want of provisions, and even to cases of entering such ports from ignorance of the war. There are exceptional cases where such exemption has been granted. Notwithstanding the plea raised by French writers in such cases that "*le malheur opère de plein droit une trêve,*" the principle is neither admitted by the general law of nations nor by the maritime ordonnances of France.

## CHAPTER XXI.

### TRADE WITH THE ENEMY.

§ 1. All property of subjects engaged in trade with the enemy liable to confiscation. It may be stated, as a general proposition, that the property of a subject found engaged in trade or intercourse with the ports, territories, or subjects of a public enemy, is liable to confiscation. This rule is not founded on any peculiar criminality in the intentions of the party, or on any direct loss or injury resulting to the state, but is the necessary consequence of a state of war, which places the citizens or subjects of the belligerent states in hostility to each other, and prohibits all intercourse between them.

§ 2. Same rule applicable to subjects of an ally. The same rule is applicable to the subjects of an ally. Where two or more states are allied in a war, the relations of the subjects of the ally toward the common enemy, are precisely the same as those of the subjects of the principal belligerent. In this respect, there is no distinction between the two; and if the courts of their own country do not enforce the rights and duties of war, those of the principal or co-belligerent may do so, for the tribunals of all have an equal right to enforce the laws of war, and to punish any infractions, whether committed by the subjects of their own government, or of that of an ally.

§ 3. Rule vigorously enforced. The rule which prohibits every form of commercial intercourse or trade with the enemy, whether by the subjects of the belligerent or of his allies, is enforced in courts of prize with a stern and inflexible rigor. "No motives of compassion or indulgence," says Mr. Duer,

“prompted by the hardship of the particular case, nor any views of public utility, derived from the innocent or beneficial nature of the particular traffic, are ever allowed to suspend or mitigate its application. Such considerations are not regarded as legal distinctions that can operate to create an exception from the general rule. They may influence properly the discretion of the executive power, but must be rejected by the judicial conscience.”

§ 4. *Exceptions to rule.* There are but two exceptions to this general rule interdicting trade with the enemy: First, the mere exercise of the rights of humanity, and, second, the trade sanctioned by the license or authority of the government. The first of these exceptions would permit intercourse with the enemy, to such a limited extent, and of so rare an occurrence, as to require no particular discussion; the second, results from the fact, that on certain occasions it is highly expedient for the state to permit an intercourse with the enemy, by commerce or otherwise; but the state alone, and not individuals, must determine when it shall be permitted, and under what regulations. Without such direct permission of the state, no commercial intercourse with the enemy is allowed to subsist.

§ 5. *Withdrawal from enemy's country at beginning of war.* Many publicists have urged that, inasmuch as the enemy usually permits our citizens to withdraw with their property at the beginning of a war, we cannot with propriety regard such withdrawal as coming within the rule of prohibited trade, if it be made without unreasonable delay.

§ 6. *Distinction between cases of domicil and mere residence.* A distinction must be here noticed between the property of a citizen *resident* in a foreign country, and that of one *domiciled* in the belligerent states. The property of a citizen domiciled in a foreign country, when that country becomes involved in a war with that of his allegiance, is at once liable to be condemned as that of an *enemy*. But that of a citizen simply resident in the belligerent state, if condemned on his attempt to

withdraw it from the enemy's country, must be condemned as that of a citizen engaged in *an unlawful trade with the enemy*. The supreme court of the United States have decided that the property of American citizens *domiciled* in an enemy's country, although shipped before a knowledge of the war, was, by that event, irredeemably stamped with a hostile character, and the goods were condemned as a lawful prize. But the case of a citizen, merely resident in the enemy's country, presents a very different question.

§ 7. *Withdrawal by a mere resident.* The weight of authority seems to be in favor of the right of a mere resident in an enemy's territory to withdraw his effects, if it be done within reasonable time after the knowledge of the war. But in most cases he must obtain a permit or license from his own government, as otherwise voluntary trading will be presumed. If the circumstances be shown to be such that no license could be applied for without defeating the withdrawal, it should not be required. The slightest indication of abuse or fraud would cause condemnation.

§ 8. *Attempts to extend the exception.* Many unsuccessful attempts have been made to establish other exceptional cases, as where the property in the specific goods was acquired before the war; or where the goods were actually shipped as well as purchased before hostilities commenced; or where the ship on which the goods were found had been forcibly detained; or where the goods were the produce of funds in the enemy's country which the party had no other means of withdrawing. But all these were regarded as cases of illegal trading.

§ 9. *Where order of shipment cannot be countenanced.* Goods imported from the enemy's country during the war, if purchased under an order given previous to the commencement of hostilities, and there was no possibility of countermanding the order before shipment, have been exempted from confiscation. But it must be shown that all possible diligence was used, after the first notice of hostilities, to countermand the voyage.

§ 10. *Good faith or a mistake no defense.* The good faith or mistake of the party, affords no protection to the ship or goods engaged in illegal trade with an enemy. The entire absence of any intention to violate the law, no matter how perfect the innocence of the intent may have been, nor whether the act resulted from mistake or ignorance, cannot avert the penalty of confiscation.

§ 11. *Trade through a neutral port.* The ulterior destination of the goods determines the character of the trade, no matter how circuitous the route by which they are to reach that destination. Even where the ship in which the goods are embarked is destined to a neutral port, and the goods are there to be unladen, yet, if they are to be transported thence, whatever may be the mode of conveyance, to an enemy's port or territory, they fall within the interdiction and penalty of the law. The converse of this is also undoubtedly true; that is trade *from* an enemy's country, through a neutral port, is unlawful, and the goods so shipped through a neutral territory, even though they may be unladen and transhipped, are liable to condemnation. It is an attempt to carry on trade with the enemy, by the circuitous route of a neutral port, and thus evade the penalty of the law.

§ 12. *Continuous voyages.* A vessel engaged in unlawful trade with the enemy is liable to capture and condemnation at any time during the voyage, in which the offense is committed, but not after the voyage is completed. If, however, the voyage is continuous and entire, although consisting of separable parts, she is liable to capture while any portion of it remains to be performed, even where the part in which the offense was committed has been completed.

§ 13. *When offense is completed.* Actual trade with the enemy is not necessary to subject a ship or goods to confiscation. It is sufficient, as a general rule, that they are engaged in a voyage with that design, in order to complete the offense and to incur the penalty. So also a ship belonging to a subject, and

proceeding to an enemy's port in ballast, with no positive intention of procuring a cargo, or returning therefrom without any cargo, would be liable to capture both on her outward and return voyage. It would be in vain to allege that there was no act or intention of trading. But the mere intention to trade with the enemy is not punishable, if at the time of capture the execution of the intent is no longer practicable. Where, from fortuitous circumstances, whether known or unknown to the parties, the execution of the design can no longer be effected, the intent does not constitute the crime, for no crime could be committed.

§ 14. Share of partner in neutral house. Where the property seized for illegal traffic with the enemy, belongs to a house of trade, established in a neutral country, but of which one of the partners is a resident subject of the belligerent country, his share, notwithstanding the neutrality of the house, is condemned. The rule is equally applicable, even where the belligerent party is strictly dormant, and takes no part whatever in the direction and management of the affairs of such trading house. If he is a party interested in the property so contaminated, he must suffer the penalty of the offense. He cannot engage as a partner in a transaction in which he could not lawfully engage, if alone.

§ 15. Transfer of ships. Courts of prize regard with extreme suspicion and jealousy, the transfer of ships from subjects to neutrals, during the war. If such a ship is subsequently employed in a trade with the enemy, very slight *indicia* of fraud would cause her condemnation. Thus, an English vessel, asserted to have been sold to a neutral, after hostilities had been commenced between England and Holland, was captured while engaged in trade between Guernsey and Amsterdam, under the command of her former master, who had also been the owner, and it was held by Sir William Scott, that the transfer was colorable and void, and he condemned both ship and cargo.

§ 16. Regularity of papers not conclusive. Regularity of papers, in such cases, are not conclusive evidence of ownership ;

for, as remarked by Sir William Scott, in the case of *The Odin*, where there is an intention to deceive, the regularity of the paper documents is necessary part of the apparatus and machinery of the fraud. Although regular documents, if duly verified and supported, are presumptive evidence, yet, if the circumstances and facts of the case lead justly to the conclusion that these papers, however formal, are themselves false, the court will not be bound by them. Where the papers say one thing, and the facts of the case another, the court will exercise a sound judgment as to which the preponderance is due.

§ 17. *Trade by stranger in enemy's country.* When the trading is from a port of the belligerent, claiming the right of capture, the property is, as a general rule, liable to confiscation, if the owner at the inception of the voyage was a resident in the country, whether as a native subject, a domiciled merchant, a mere stranger, or sojourner. Every person in a country, (with the limited exception of ambassadors, etc.,) whether a native or stranger, owes obedience to its laws, and the rule of international jurisprudence, which forbids all intercourse and trade with the public enemy, is just as obligatory upon him as the municipal laws of revenue or regulations of police.

§ 18. *Distinction as to native subject.* There exists, however, an important distinction between the case of a native subject and that of a domiciled stranger or mere sojourner. "The property of the subject," says Mr. Duer, "where the trade was illegal in its origin and intent, cannot be redeemed from its guilt and penalty by any subsequent change of his own residence; but that of the domiciled merchant, or stranger, will be restored, if, previous to its capture, he had, in part, removed from the belligerent country, with the intention of returning to his own; for in this case, the illegality that arose solely from his local and temporary allegiance, by the removal of its cause, has ceased to exist." This distinction has been established in a number of decisions, both in the United States and in England.

§ 19. *Acceptance of license from enemy.* If a vessel belonging

to one of the belligerents prosecutes a voyage, even to a neutral port, under a license from the government of the enemy, both ship and cargo, while they remain under the protection of such license, are liable to capture and confiscation. Such condemnation results from the presumption, not to be resisted, that the license is granted by the enemy for the furtherance of his own interests, and the citizen or subject who lends himself to the promotion of that object, by accepting such license, violates the plainest duties of his own allegiance.

§ 20. Trade with possessions and colonies of enemy. The unlawfulness of trade with the enemy extends not only to every place within his dominions, and subject to his government, but also to all places in his possession or military occupation, even though such occupation has not ripened into a conquest or changed the national character of the inhabitants. In each case there is the same hazard to the state, and, if the hostile occupation is known when the communication is attempted, there is the same breach of duty on the part of the subject. The reasons of public policy, which forbid such intercourse, apply as fully in the one case as in the other. The same rule holds even in the case of a revolted territory, or colony of the enemy, which is known to have been for years in the hands of the insurgents.

## CHAPTER XXII.

### RIGHTS AND DUTIES OF NEUTRALS.

§ 1. *Neutrality in war.* *Neutrals* in a war are those who take no part in it, but remain the common friends of the belligerents, favoring the arms of neither to the detriment of the others. "The neutral," says Phillimore, "is justly and happily designated by the Latin expression *in bello medius*. It is of the essence of his character that he so retain this central position, as to incline to neither belligerent. He has no *jus bellicum* himself, but he is entitled to the continuance of his ordinary *jus pacis*, with, as will presently be seen, certain curtailments and modifications which flow from the altered state of the general relations of all countries in time of war." According to Bynkershoek, he has nothing to do with the justice or injustice of the war, and can show no favors to one party in preference to another.

§ 2. *Qualified neutrality.* There is, however, a qualified neutrality which forms an exception to this definition; it arises out of antecedent engagements, by which the neutral state has bound itself to one of the parties to the war, to furnish a limited succor, or to extend certain privileges. The fulfillment of such an engagement, entered into prior to the commencement of hostilities, does not necessarily forfeit the neutral character of a state, nor render it the enemy of the other belligerent party, because it does not render the neutral the general associate of the belligerent to whom the succor or privilege is due. For example, Switzerland has furnished troops to certain European powers, in virtue of treaty stipulations, without herself being

involved in the wars in which her troops were engaged. Denmark, in consequence of a previous treaty, furnished limited succors in ships and troops to Russia, in 1788, against Sweden. By the treaty of amity and commerce between the United States and France, in 1778, the latter secured to herself the special privilege of the admission for her privateers, with their prizes, into American ports, to the exclusion of her enemies; and the admission of her public ships of war, in case of urgent necessity, to refresh, victual, repair, etc., but not exclusively of other nations at war with her.

§ 3. Neutrality must be observed and enforced. States, not parties to a war, have not only the right to remain neutral during its continuance, but to do so conduces greatly to their advantage, as they thereby preserve to their citizens the blessings of peace and commerce. While, in some respects, their trade and commerce may be increased in extent and profit, it is restricted with respect to blockades and sieges, and the carrying of contraband, and their vessels are subjected to the inconvenience and annoyance of visit and search. Not only are they obliged to maintain strict impartiality toward the belligerents, but they are bound to prevent or punish any violation of their rights of neutrality, by either of the parties at war with each other. These duties of neutrality extend not only to preventing the arming of cruisers in neutral ports, and the enlistment of men in neutral territory, but also to the general sanctity of neutral jurisdiction, by redressing all injuries which one belligerent may commit upon the other within its limits.

§ 4. No hostilities to be permitted within neutral jurisdiction. The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in territory belonging to no one. Hostilities cannot be lawfully exercised within the territorial jurisdiction of the neutral state which is the common friend of both parties. To grant any such right to one would be a detriment to the other, and to extend the privilege to both would necessarily make the neutral territory

the theatre of hostile operations, and involve the state in the consequences of the war. Hence, every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful, and the party so trespassing is liable to be treated as an enemy, unless full satisfaction is made for such violation of neutral rights.

§ 5. Passage of troops through neutral territory. It was contended by some of the ancient publicists that a belligerent had an absolute right of passage for his troops through neutral territory, and that the neutral could not refuse it without injustice. But Vattel contends that such *innocent passage* through neutral territory may be granted or refused by the neutral power, at its discretion; that, if refused, the applicant has no cause of complaint, and if granted, the opposite party can only claim the same privilege for his own troops. Many modern writers, and the German publicists generally, have pronounced in favor of the views of Vattel. But Heffter, Hautefeuille, Manning, and others, express the opinion, that to grant such passage is a violation of neutral duty, and affords just cause of complaint, if not of war, to the other belligerent. This opinion seems most consonant with the general principles of neutrality.

§ 6. Pretended exception of Bynkershoek. Bynkershoek makes one exception to the general inviolability of neutral territory, and contends that if a belligerent should be attacked on hostile ground, or in the open sea, and should flee within the jurisdiction of a neutral state, the victor may pursue him *dum fervet opus*, and seize his prize within the neutral state. He rests his opinion entirely on the authority and practice of the Dutch, and not on the usage of any other nation.

§ 7. Opinion of European and American writers. But this opinion of Bynkershoek is not supported by the practice of nations, nor by writers on public law. Abreu, Valin, Emerigon, Vattel, Azuni, Sir William Scott, Martens, Phillimore, Manning, and other European writers, maintain the sounder doctrine, that when the flying enemy has entered neutral territory

he is placed immediately under the protection of the neutral power, and that there is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. Kent, Wheaton, Story, and other American writers, oppose the doctrine of Bynkershoek; and the government of the United States has invariably claimed the absolute inviolability of neutral territory.

§ 8. Cases of the "Caroline" and the "Florida." In the winter of 1838, the British armed forces pursued and destroyed in American territory the rebel steamer "Caroline." After a prolonged discussion the British minister, Lord Ashburton, admitted that the act was "a violation of territory," and regretted "that some explanation and apology for this occurrence was not immediately made." In 1864, our naval forces attacked and captured the rebel steamer "Florida," in the neutral port of Bahia. Brazil protested against the violation of her territory, and our government promptly disavowed the acts of its officers, and made due reparation for the offense committed.

§ 9. Belligerent vessels may be excluded from neutral ports. A neutral state, by virtue of its general right of police over its ports, harbors and coasts, may impose such restrictions upon belligerent vessels, which come within its jurisdiction, as may be deemed necessary for its own neutrality and peace, and so long as such restrictions are impartially imposed upon all the belligerent powers, neither can have any right to complain. This right is frequently exercised in prohibiting all armed cruisers with prizes to enter such neutral ports and waters, and, even without prizes, to obtain provisions and supplies. This usage is shown by marine ordinances and text-writers of different nations. ~

§ 10. Right of asylum. This restriction, imposed by neutrals upon the vessels of belligerents which come into their ports, is never extended to deny the rights of hospitality in case of immediate danger and want. Armed cruisers may anchor within a neutral port as a shelter from the attacks of an enemy, to

avoid the dangers of a storm, or to supply themselves with water, provisions, and other articles of pressing necessity. Asylum, to this extent, is required by the common laws of humanity, to be afforded to belligerent vessels in neutral ports. But beyond this, there is no right of asylum which the neutral may not withhold equally from all belligerents. It may prevent any free communication with the land, and, as soon as such vessels have supplied their immediate wants, the neutral may compel them to depart from its jurisdiction.

§ 11. When this right is presumed. But while the neutral state may, by proclamation or otherwise, prohibit belligerent vessels with prizes or prisoners of war from entering its ports, the absence of any such prohibition implies the right to enter for the purposes indicated, and any vessel so entering neutral waters, retains her right of ex-territoriality, both with respect to her prisoners of war and her prizes. This question was raised in the port of San Francisco, California, in the case of the Russian vessel, *The Sitka*, a prize of the British navy, during the Crimean war.

§ 12. Duties of belligerents while in neutral waters. The armed cruisers of belligerents while within the jurisdiction of a neutral state, are bound to abstain from any acts of hostility toward the subjects, vessels or other property of their enemies; they cannot increase their guns or military stores, or augment their crews, not even by the enrollment of their own countrymen; they can employ neither force nor stratagem to recover prizes, or to rescue prisoners in the possession of the enemy; nor can they use a neutral port, or waters within neutral jurisdiction, either for the purpose of hindering the approach of vessels of any nation whatever, or for the purpose of attacking those which depart from the ports or shores of neutral powers. No proximate acts of war, such as a ship stationing herself within the neutral line, and sending out her boats on hostile enterprises, can, in any manner, be allowed to originate in

neutral territory ; nor can any measure be taken that will lead to immediate violence.

§ 13. Distinction in regard to asylum to troops. Publicists make a marked distinction between the duties of neutrals, with respect to the asylum which may be afforded to belligerent ships, and that which may be afforded to belligerent forces on land. This difference, says Heffter, results from the immunity of the flag, and the principle that ships are considered as a portion of the territory of the nation to which they belong. Hence the allowable custom of asylum in neutral waters, and the want of power in the neutral to interfere with internal organization of such vessels, when not armed or equipped within its jurisdiction. On the other hand, troops are not a part of the territory of the nation to which they belong, nor has their flag any immunity on neutral soil. While, therefore, individuals, as such, are entitled, by the laws of humanity, to the right of asylum in neutral territory, such asylum cannot be demanded by, nor can it be granted, without a violation of neutral duty, to an army as a body. It is, consequently, the duty of the neutral to order the immediate disarming of all belligerent troops which enter neutral territory as an asylum, to cause them to release all their prisoners, and to restore all booty which they may bring with them. If he neglect to do this, he makes his own territory the theatre of war, and justifies the other belligerent in attacking such refugees within such territory, which is no longer to be regarded as neutral.

§ 14. United States on enlistments in neutral territory. At the commencement of the European war, in 1793, the government of the United States took strong grounds against the arming and equipping of vessels within the ports of the United States, by the respective belligerent powers, to cruise against each other, declaring such acts to be a violation of neutral rights, and positively unlawful ; and that any vessel, so armed or equipped in our ports, for military service, was not entitled to the rights of asylum. The authority of Wolfius, Vattel and other writers

on the law and usage of nations, were appealed to, in support of these declarations and rules of neutrality. The ground then assumed by the United States is now generally admitted to be correct. The same objection was made by the United States, in the war of 1793, against the enlisting of men by the respective belligerent powers within our ports, and it was declared that if the neutral state might not, consistently with its neutrality, furnish men to either party for their aid in war, it was equally unlawful for either belligerent to enroll them in the neutral territory.

§ 15. *Loans of money by neutrals.* The next question to be considered, is, whether neutrals may assist a belligerent by money, in the shape of a loan or otherwise, without violating the duties or departing from the position of neutrality? It seems to be universally conceded, that if such loan be made for the manifest purpose of enabling the belligerent to carry on the war, it would be a virtual concurrence in the war, and consequently a just cause of complaint by the opposite party.

§ 16. *Pursuit of enemy from neutral ports.* Armed cruisers, in neutral ports, are not only bound not to violate the peace while within neutral jurisdiction, but they cannot use the asylum as a shelter from which to make an attack upon the enemy. Hence, if an armed vessel of one belligerent should depart from a neutral port, no armed vessel, being within the same, and belonging to an adverse belligerent power, can depart until twenty-four hours after the former, without being deemed to have violated the law of nations. And if any attempt at pursuit be made, the neutral is justified in resorting to force, to compel respect to the sanctity of its neutrality.

§ 17. *Passage over neutral waters.* If a belligerent cruiser, in acting offensively, passes over a portion of water within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to invalidate an ulterior capture made beyond it. Permission to pass over territorial portions of the sea is not usually required or asked, because not supposed

to result in any inconvenience to the neutral power. For example, in a war between England and Russia, belligerent vessels must pass the *sound* over which Denmark claims and exercises imperial rights. So in a war between France and Russia, armed vessels might be obliged to pass through the neutral waters of the *Dardanelles*; but in neither of these cases would the passage be deemed a violation of neutral rights, nor would a capture by either power be invalidated by the fact of such passage, *animo capiendi*, to the place where his right of capture could be exercised.

§ 18. Municipal laws enforcing neutrality. The municipal laws of a state, for the protection of the integrity of its soil and the sanctity of its neutrality, are sometimes even more stringent than the general laws of war; the right of a sovereign state to impose such restrictions and prohibitions, consistent with the general policy of neutrality, as it may see fit, is undeniable. And all acts of the officers of a belligerent power against the municipal law of the neutral state, or in violation of its policy, involves that government in responsibility for their conduct.

§ 19. Laws of the United States. The congress of the United States have, by statutes, made suitable provision for the support and due observance of the rules of strict neutrality within American territorial jurisdiction. By the law of June 5th, 1794, revised April 20th, 1818, it is declared to be a misdemeanor for any citizen of the United States, within the territory or jurisdiction thereof, to accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district or people, with whom the United States are at peace, or to enlist, or enter himself, or hire or retain another person to enlist, or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, etc.; or to fit out and arm, or to increase and augment the force of any armed vessel, with the intent that such vessel be employed in the service of any foreign power at

war with another power, with whom we are at peace; or to begin, set on foot, or provide, or prepare, the means for any military expedition, or enterprise, against the territory of any foreign prince, or state, or of any colony, district, or people, with whom we are at peace. And any vessel, or vessels, fitted out for such purpose is made subject to forfeiture. The President of the United States is also authorized to employ force to compel any foreign vessel to depart, which, by the law of nations, or by treaty, ought not to remain within the United States, and to employ the public force generally in enforcing the observance of the duties of neutrality prescribed by law.

§ 20. *Laws of Great Britain.* The example of the United States was followed by Great Britain, and the act of 59 George III., chapter sixty-nine, commonly called the foreign enlistment act, was passed, supplying the defect of former laws, and extending the prohibition to those who entered the service of unacknowledged, as well as acknowledged, states. This law in 1828 was strictly enforced to intercept a Portuguese armament fitted out in Plymouth; but from a defect of its provisions, or an indisposition to execute them, it proved a dead letter in preventing the fitting out of such armaments against the United States in the war of 1861.

· § 21. *Protection of property in neutral territory.* It is not only the right of the neutral state to protect the property of the belligerents, when within the neutral jurisdiction, but it is a part of the duty of neutrality to defend such property while under neutral protection, and to punish any and every offense against the rights of neutrality, even, if necessary, by a resort to force.

§ 22. *Restitution of property captured in neutral territory.* Although it is the duty of a belligerent state to make restitution of the property captured within the territorial jurisdiction of a neutral state, yet it is a technical rule of the prize court to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory was vio-

lated in effecting the capture. 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.

§ 23. If such property be in possession of neutral. But if the property captured in violation of neutral rights comes into the possession of the neutral state, it is the right and duty of such state to restore it to its original owners. This restitution is generally made through the agency of the courts of admiralty and maritime jurisdiction.

§ 24. Decisions in the United States. It has been decided by the Supreme Court of the United States that the peculiar jurisdiction of the courts of the neutral government 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 as is done by the courts of the captor's own country. The punishment to be imposed upon the party violating the municipal statutes of the neutral state, is a matter to be determined in a separate and distinct proceeding. The court will exercise jurisdiction, and decree restitution to the original owner, in case of capture from a belligerent power, by a citizen of the United States, under a commission from another belligerent power, such capture being a violation of neutral duty; but they have no jurisdiction on a *liber* for damages for the capture of a vessel as prize by the commissioned cruiser of a belligerent power, although the vessel belong to citizens of the United States, and the capturing vessel and her commander be found and proceeded against within the jurisdiction of the court.

§ 25. Purchases in foreign ports. In the case of capture by an armed vessel, fitted out in the ports of the United States, in violation of our neutrality, the claim by an alleged *bonæ fidei* purchaser in a foreign port was rejected, and restitution decreed

to the original owners. It, however, was decided that a *bonæ fidei* purchaser, without notice, in such a case is entitled to be reimbursed the freight which he may have paid upon the captured goods; and that an innocent neutral carrier of such goods, the same having been shipped in a foreign port, is entitled to freight out of the goods.

§ 26. **If condemned in captor's country.** If such property, captured in violation of neutral immunity, be carried *infra præsidia* of the captor's country, and there regularly condemned in a competent court of prize, the question arises whether the courts of the neutral state will exercise jurisdiction, and restore such property to the original owners. If the property be found in the hands of the original wrong-doer, it will be restored by the court, notwithstanding a valid sentence of condemnation, properly authenticated. The offender's touch is said to restore the taint from which the condemnation may have purified the prize, and it is not for him to claim a right springing out of his own wrong.

§ 27. **In cases of illegal equipment and outfit.** Illegal equipment and outfit, in violation of neutral immunity, will not effect the validity of captures made after the cruise, to which the outfit had been applied is actually terminated. The offense is deemed to be deposited at the termination of the voyage, and does not effect future transactions. This rule would result from analogy to other cases of violation of public law, and has been directly announced by the U. S. supreme court.

## CHAPTER XXIII.

### LAW OF SIEGES AND BLOCKADES.

§ 1. No intercourse with a place besieged or blockaded. It is now a well settled principle of international law that neutral trade or commerce with a place besieged or blockaded is absolutely prohibited. This is an exception to the general rule of accustomed intercourse of neutrals with either of the parties to a war.

§ 2. Authority to institute sieges and blockades. The institution of a siege or blockade, is a high act of sovereignty, and must proceed, either directly from the government of the state or from some officer to whom the authority has been expressly or impliedly delegated. The general of an army, or the commander of a fleet, in a foreign country, or on a distant station, may be reasonably presumed to carry with him this authority, as the exigencies of the service on which he is employed, under the varying circumstances of the war, would often seem to require its exercise. His authority in such cases, is, therefore, implied from the nature of the service.

§ 3. Distinction between them. A *siege* is a military investment of a place, so as to intercept, or render dangerous, all communications between the occupants and persons outside of the besieging army; and the place is said to be *blockaded*, when such communication by water, is either entirely cut off or rendered dangerous by the presence of the blockading squadron. A place may be both besieged and blockaded at the same time, or its communication by water may be intercepted, while those by land may be left open, and *vice versa*. The object of a

blockade is solely to distress the enemy, intercepting his commerce with neutral states. It does not, generally, look to the surrender or reduction of the blockaded port, nor does it necessarily imply the commission of hostilities against the inhabitants of the place. The object of a military siege is, on the other hand, to reduce the place by capitulation, or otherwise, into the possession of the besiegers. It is by the direct application of force, that this object is sought to be attained, and it is only by forcible resistance that it can be defeated. Hence, every besieged place is, for the time, a military post; for even when it is not defended by a military garrison, its inhabitants are converted into soldiers by the necessities of self-defense. This distinction is not merely nominal, but, as will be shown hereafter, leads to important consequences in determining the rights of neutral commerce, and in deciding questions of capture.

§ 4. *Constructive or paper blockades.* A *constructive*, or, as it is sometimes called, a *paper blockade*, is one established by proclamation, without the actual presence of an adequate force to prevent the entrance of neutral vessels into the port or ports so pretended to be blockaded. In other words, it is an attempt on the part of one belligerent, by mere proclamation and without possessing, or if possessing, without using the means of establishing a real blockade, to close the port or ports of the opposite belligerent to neutral commerce.

§ 5. *Ancient text-writers and treaties.* The ancient text-writers all agree, that a blockade which does not really exist, but is merely declared by proclamation, is not sufficient to render commercial intercourse unlawful on the part of neutrals. Grotius forbids the carrying of anything to "a town actually invested, or a port closely blockaded;" and Bynkershoek evidently 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.*) This is shown from his remarks upon the

various decrees of the states-general. The same principle was embodied in the early treaties.

§ 6. In the wars of Napoleon. But in the wars of Napoleon, England and France resorted to mere paper blockades, seeking in this way to utterly destroy neutral commerce. The United States and other neutral powers earnestly protested against this violation of the law of nations.

§ 7. Declarations of 1854 and 1856. At the commencement of the war between the allies and Russia, in 1854, France and England declared their intention to "maintain the right of a belligerent to prevent neutrals from breaking any *effective* blockade which may be established with an *adequate force* against the enemy's ports, harbors, or coasts." This declaration was a virtual concession on the part of these powerful maritime nations of the illegality of constructive or paper blockades, for which they had formerly contended; but it was regarded as defective, in not further defining what should constitute an *effective* blockade, or an *adequate* blockading force. Moreover, the declaration was in form a mere temporary order, and not as a recognized and subsisting law of nations. But the declaration of the plenipotentiaries of France, Great Britain, Russia, Austria, Prussia, Sardinia and Turkey, on the 16th of April, 1856, at the conference at Paris, removed all doubt on this point, by announcing in the fourth proposition or principle, that "Blockades, in order to be binding, must be effective; that is to say, *maintained by a force sufficient really to prevent access to the coast of the enemy.*"

§ 8. These simply affirm former rule. These declarations are regarded as simply affirming the former rule, it being held that the words "prevent access to," etc., are equivalent to the phrases "*render it dangerous to enter,*" etc.

§ 9. De facto and public blockades. Blockades are divided, by English and American publicists, into two kinds: 1st, a simple or *de facto* blockade, and 2d, a public or governmental blockade. A simple or *de facto* blockade is constituted merely

by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts, it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence. The burden of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade. A *public*, or governmental blockade, is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral powers by the government, or officers of state, declaring the blockade. Such notice to a neutral state is presumed to extend to all its subjects; and a blockade established by public edict is presumed to continue till a public notification of its expiration. Hence the burden of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence.

§ 10. Temporary absence of blockading force produced by accident. The only exception to the general rule which requires the *actual presence* of an *adequate* force to constitute a legal blockade, is the temporary absence of the blockading squadron produced by accident, as in the case of a storm. Such accidental removal of blockading force, if it be only for a very short time, does not suspend the legal operation of the blockade. An attempt to take advantage of such an accidental removal, is regarded as a fraudulent attempt to break the blockade. But if the blockading force should be so scattered or injured by the storm, as to be unable to resume their stations without repairs, and within a reasonable time, the blockade will be considered as terminated, in the same manner as if the blockading squadron had been driven away by a superior force of the enemy.

§ 11. If driven away by force. Where the blockading squa-

dron is driven away from its station by a superior force of the enemy, the interruption operates as a legal discontinuance of the blockade, and on its renewal, the same measures are necessary to bring it to the knowledge of neutrals, either by public declaration or by the notoriety of the fact, as were legally requisite when it was first established. It is, in effect, a new blockade, and not the continuance of the old one.

§ 12. *If removed for other duty.* A blockade is dissolved by the removal of the blockading force for a different service, although the removal should be a temporary one. Even where only a portion of the force is ordered away, the legal effect is the same, unless that the force that is left is competent, by itself, to maintain and enforce the blockade, by its ability to prevent all communications.

§ 13. *If blockade be irregularly maintained.* A blockade is also dissolved by repeated instances of an improper relaxation of the application of the blockading force to the purposes intended. The mere presence of an adequate force is not sufficient to constitute and maintain a blockade, but its application must be constant and uniform, to prevent all communication with the port it incloses. If, through motives of civility, or other considerations, it should allow ships, not privileged by law, to enter or depart, the irregularity may be justly held to vitiate the blockade, as it necessarily tends to deceive other parties. Where some are suffered to pass, others will have a right to infer that the blockade is raised. To justify this presumption, however, there must be repeated instances of an improper relaxation, for one or two cases would hardly be deemed sufficient to warrant the belief that the legal restraint on neutral commerce had been wholly removed.

§ 14. *Effect of maritime blockades on interior communications.* A legal blockade can only exist, where its actual force can be applied; hence the legal effect of a maritime blockade, not accompanied by a military investment on land, applies only to a direct communication by sea, and to vessels sailing from, or

immediately destined to, the blockaded port, and cannot be construed to prohibit the conveyance of articles contraband of war, to or from the blockaded port, by interior communications. A blockade can never be a complete investment of a place, unless its force can be applied to every point by which a communication may be carried on.

§ 15. Of a siege on communications by sea. It might be inferred, by parity of reasoning, that, when a port is under a military siege, neutral commerce might still be lawfully carried on by sea, through channels of communication which could not be obstructed by the forces of the besieging army. But such inference would not be strictly correct, for the difference between a blockade and a siege, in their character and object, have led to a difference in the rules applicable, in the two cases, to neutral commerce. Although the legal effect of a siege on land, that is, a purely military investment of a naval or commercial port, may not be an entire prohibition of neutral commerce, yet it does not leave the ordinary communications by sea open and unrestricted, as a purely maritime blockade leaves the interior communications by land. The primary object of a blockade is, as we have already said, to prohibit commerce; but the primary object of a siege is, the reduction of the place. All writers on international law impose upon neutrals the duty of not interfering with this object.

§ 16. Breach of blockade a criminal act. The breach of a blockade is viewed, in all cases, as a criminal act; this necessarily implies a criminal intent, and to constitute such intent, a knowledge of the existence of the blockade, and an intention to violate it, are indispensable. These are sometimes a presumption of law which the party is not permitted to repel, in others, an inference more or less probable, but in many cases, they must be shown by positive evidence. Sometimes one will be presumed, while the other will require positive proof.

§ 17. Public notification charges parties with knowledge. It

has been held by the English courts of admiralty, that the notification of a blockade to a neutral government, is, by construction of law, a direct personal notice to each inhabitant of that country, and that he cannot be allowed to aver his own ignorance of the blockade, or otherwise contradict the legal presumption of knowledge.

§ 18. What constitutes a public notification. A question may here arise as to what constitutes a public notification. This is usually in the form of an official communication from the belligerent to the authorities of neutral states. It may be a notice that a certain port will be blockaded on and after a certain date, or that it is the intention of the belligerent to proceed to blockade certain ports or harbors. The latter form being indefinite as to time would require a subsequent notice of the commencement or time of the actual blockade. Sometimes several notifications are given, such as a notice of intention, a subsequent notice of the sailing of the naval forces for the purpose of carrying that intention into execution, and finally a notice of the actual commencement of the blockade. The two former are given as a matter of courtesy, for the information of neutrals.

§ 19. Effect of general notoriety. Instead of a direct official notification to a neutral government of the establishment of, or intention to institute, a blockade of a particular port, a general notice to that effect is sometimes given by official publication in the newspapers. By this means information is distributed among the mercantile community more generally and expeditiously than through the ordinary channels of official communication with the neutral government. Thus, where the vessel intercepted is destined to a blockaded port, and there is clear and positive proof that the existence of the blockade was generally known at her port of departure when she sailed, neither the master nor his owners, nor the shippers of the goods, will be permitted to aver their personal ignorance of that which it is scarcely possible they should not have known, or, at

any rate, by due inquiry might have ascertained. To allow proof of personal ignorance in such a case, by admitting the affidavits of the master or his crew, would be a direct invitation to perjury and fraud.

§ 20. Case which precludes denial of knowledge. Where a neutral vessel is intercepted on her passage, with a cargo *from* a blockaded port, and the cargo is proved to have been shipped after the blockade had commenced, and was known at the port, the party is precluded from denying his knowledge of its existence.

§ 21. When presumption of knowledge may be rebutted. There are many cases where the inference of a knowledge of the blockade is so probable as to create a strong presumption, but a presumption not entirely conclusive, and which may be repelled by unimpeached and positive proof. In all cases of this kind, where the presumption of knowledge is not absolute and conclusive, the neutral claimant is allowed to prove his own innocence. And the captor can judge from the nature and circumstances of each particular case, whether the neutral vessel is acting in good faith, and is really ignorant of the existence of the blockade, or whether the pretended ignorance is a mere fraudulent attempt to deceive.

§ 22. Proof of actual knowledge or warning. Where there are no legal or probable grounds for imputing to the master of a neutral vessel the knowledge of the existence of a blockade which he is charged to have violated, it rests upon the captor to establish the fact of this knowledge by positive evidence. To warrant a condemnation, the proof must be clear and definite that such vessel had been duly notified of the blockade, and had undertaken or prosecuted the voyage in defiance of the notice or warning.

§ 23. Attempt to enter a blockaded port. An actual entrance into a blockaded port is, by no means, necessary to render a neutral ship guilty of a violation of the blockade. Indeed, such a construction would essentially defeat the very object of a

blockade, by rendering the capture of a ship lawful, only after such capture had ceased to be possible. Hence it is universally held that an *attempt* to enter the port, knowing it to be blockaded, completes the offense to which the penalty of the law is attached.

§ 24. *Inception of voyage.* Several continental writers of authority contend that the inception of a voyage for a blockaded port, with a knowledge of the existence of the blockade, is not such an offense as to render the vessel subject to seizure upon the high seas. Indeed, they regard such seizure as a violation of the liberty of the seas and of the independence of the sovereign state to which the vessel belongs. But English and American publicists have generally held, and the decisions of British and American courts of admiralty seem to sustain the opinion, that the inception of the voyage, with a knowledge of the blockade, and the *intention* to enter, is sufficient in law to constitute the offense and incur penalty, and that the *intention* will be presumed from the fact of commencing the voyage with knowledge of the existence of the blockade.

§ 25. *Distant voyages.* But this general rule is subject to some important exceptions, or rather the inference, from the inception of the voyage with knowledge of the blockade, of *intention* to violate it, may, in some cases, be removed by proof to the contrary. Thus, where the vessel sails from a distant country, she may clear with a provisional destination to the blockaded port, without incurring the penalty of a breach of the blockade, provided it be clearly and positively proved that she intended to proceed to the blockaded port only in case she ascertained, by due inquiry, during the voyage, that the blockade had been raised.

§ 26. *The case of de facto blockades.* "It seems a just inference from the decisions," says Mr. Duer, "that where the blockade has been constituted simply by the fact of an investment, although its existence was known at the port of departure, previous to the sailing of the neutral ship, she may clear out, pro-

visionally, for the blockaded port; but that, in this, as in former cases, the inquiry upon the result of which the right to complete the voyage must depend, must be made at a port of the blockading state, or of a neutral power. I see no reason to doubt that the prohibition to proceed to the mouth of the blockaded port embraces all cases of a previous knowledge, from whatever source the knowledge may have been derived; and that, in all, its violation is subject to the same penalty."

§ 27. When presumption of intention to enter cannot be repelled. There are other cases where the criminal intent to violate a blockade is deduced from the facts existing at the time of capture, and forming a presumption which the party is not permitted to repel by his own denial. Thus, vessels though not ostensibly destined to the blockaded port, cannot innocently place themselves in a situation that would enable them to violate the blockade at their pleasure. Even when they are bound, by their papers to different ports, their suspicious approximation to that under blockade will subject them to condemnation.

§ 28. Neutral vessel entering in ballast. For a neutral ship to enter a blockaded port, is altogether unlawful. If she entered with a cargo, the legal presumption is, that she went in with the fraudulent intention of delivering it, and if she come out again without delivering it, that fact will not remove the presumption, because some change of circumstance may have altered that intention. If she entered in ballast, it is to be presumed that she went in for the purpose of bringing away property, and, for the same reason as above, her egress, still in ballast, will not oust that presumption.

§ 29. Declarations of master. We have already stated that any attempt to enter a blockaded port, after due information or warning, subjects the party to the penalty of the law; "but, whether the mere *declarations* of the master, when detained and warned by a ship of the blockading force, of his *intention* to persist in the voyage, notwithstanding the warning, is to be considered as evidence of an actual attempt, justifying an im-

mediate capture, is exceedingly doubtful." The mere hasty expressions of the master, resulting from resentment and surprise, certainly ought not to produce the condemnation of property entrusted to his care.

§ 30. *Delay in obeying warning.* Although the declaration of the master, during his detention, will not constitute in itself sufficient cause for condemnation, his subsequent conduct, either with or without such declaration, may determine the lawfulness of his capture. It is his duty, on being duly warned; to alter the course of his voyage, as soon as he is at liberty to resume it, and to depart at once from the vicinity of the blockaded port.

§ 31. *Disregard of warning.* If the master persist in his voyage to a blockaded port, in defiance of a sufficient and legal warning, no excuse is ever admitted for his conduct, and the ship and cargo are invariably condemned. "His misconduct may, in no degree be imputable to his owners, yet their innocence affords no protection to their property. His acts may be in direct violation of their express instructions, may even amount to fraud or barratry; yet his owners will continue to be bound by their legal consequences, to the same extent as if they had been performed under their previous sanction and authority. Indeed the rule, so far as relates to the ship, and the property of its owners, is universal, that they are concluded by the acts of the master. He is their agent, and the property they have entrusted to his care is, in all cases, responsible for his just observance of the duties of neutrality."

§ 32. *When ingress is excused.* There are but few cases where the entrance of a vessel into a blockaded port, or an attempt to enter, is ever justified or excused. A license from the government of the blockading state to enter the blockaded port is always sufficient justification, and, as will be shown hereafter, all such licenses are to be liberally construed. But a general license to enter the port before the blockade would not be available after it had commenced; to constitute a sufficient protec-

tion it must authorize the vessel to enter the port as one blockaded. Again, a physical necessity, arising from the immediate need of water, or provisions, or repairs, produced by stress of weather, which leave no other alternative for safety.

§ 33. Violation of blockade by egress. As a general rule the egress of a ship, during blockade, is regarded as a violation of the blockade, and renders her liable, in the first instance, to seizure, and to exempt her from condemnation the most satisfactory proof is required to be given.

§ 34. When egress is allowed. There are a number of cases in which the egress of the neutral vessel, during a blockade, is justified or excused: *First*, If the ship is proved to have been in the blockaded port when the blockade was laid, she may retire in ballast, for such egress affords no aid to the commerce of the enemy, and has no tendency to defeat any legitimate purpose for which the blockade was established. *Second*, If the ingress was from physical necessity, arising from stress of weather, and the immediate need of water, or provisions, or repairs. *Third*, Where the entrance of a cargo was authorized by a *license*, such license is construed to authorize the return of the ship with a cargo. *Fourth*, Where a neutral ship, arriving at the entrance of a blockaded port, in ignorance of the blockade, is suffered to pass, there is an implied permission to enter, which fully protects her egress. But this implied permission does not, of necessary consequence, protect the cargo, for its owners may be guilty of a criminal violation of the blockade even where the ship is innocent. *Fifth*, A neutral ship, whose entry into the blockaded port was lawful, is permitted to return with her original cargo that has been found unsaleable, and re-shipped during the blockade. *Sixth*, "Another, and a very equitable exception," says Duer, "is allowed in favor of a neutral ship that leaves the port in the just expectation of a war between her own country and that to which the blockaded port belongs."

§ 35. Penalty for breach of blockade. "No rule in the law of nations," says Duer, "is more certainly and absolutely estab-

lished, than that the breach of a blockade subjects all the property, so employed, to confiscation by the belligerent power whose rights are violated. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed.”

§ 36. When cargo is exempted from condemnation. But if it be clearly established, by proofs found on board at the time of the capture, that, at the inception of the voyage, the owners of the cargo stood clear, even from a possible intention of fraud, their property will be excepted from the penal consequences of the breach of the blockade. Thus, where the illegality consists in the misconduct of the master in attempting to enter a blockaded port, if it be certain that, when the voyage commenced, the existence of the blockade neither was, nor could have been, known at her port of departure, the owners of the cargo could not possibly have contemplated a breach of the blockade.

§ 37. Duration of offense. “To justify a capture for the violation of a blockade,” says Duer, “or the attempt to violate it, the offense must continue to exist at the time of seizure. In technical language, the ship must be then *in delicto*. In cases where the ship has violated the blockade by egress, the *delictum* continues during her whole voyage, till she has reached her final port of destination. But when a ship sails for a blockaded port, with a knowledge of the blockade, and the intention to violate it, the offense is so far complete as to justify her immediate capture; yet, as it exists only in an attempt, the *delictum* does not necessarily continue during the whole of her subsequent voyage. If, previous to her capture, the blockade had ceased to exist, or the master, from the information of a ship of war of the blockading state, had just grounds for believing that such was the fact, or had altered his destination, with the intention of not proceeding at all to the blockaded port, the offense no longer exists, and that which had existed is no longer punishable. To constitute the offense, three circum-

stances must be found to coëxist. The fact of a blockade, the party's knowledge of its existence, and his intention to violate it, and in each of the above cases, an indispensable circumstance is wanting. The *delictum*, therefore, at the time of capture, had wholly ceased, and both ship and cargo will be restored."

## CHAPTER XXIV.

### CONTRABAND OF WAR.

§ 1. Definition of contraband. The term *contraband* (*contrabandum*, or *contra bannum*) has been used from time immemorial to express a prohibition of certain kinds of commerce. By this term we now understand a class of articles of commerce which neutrals are prohibited from furnishing to either one of the belligerents, for the reason that, by so doing, injury is done to the other belligerent. To carry on this class of commerce is deemed a violation of neutral duty, inasmuch as it necessarily interferes with the operations of the war by furnishing assistance to the belligerent to whom such prohibited articles are supplied.

§ 2. Contraband articles confiscated. There is no difference of opinion with respect to the general rule which prohibits trade in articles contraband of war, whatever may be the extent of disagreement with respect to what articles may properly be regarded as contraband. The noxious articles themselves, (if decided to be *contraband*), are invariably condemned, and no defense or plea can save them from confiscation, when their character as contraband, and their destination to a hostile port or country, are admitted or established. Nevertheless, it may be possible to deduce from these apparently conflicting decisions of courts of admiralty, some general principle which may form the basis of the rule of international law, with respect to the carriage of such prohibited articles.

§ 3. Ancient rule in regard to ships. By the ancient laws of war, as established by the usages of European nations, the con-

traband cargo affected the ship, and involved it in the sentence of condemnation. The justice of this rule is vindicated by Bynkershoek and Heineccius, and it cannot be said that the penalty was unjust in itself, or unsupported by the analogies of the law.

§ 4. *Modern rule.* By the modern practice of the prize courts of England and the United States, and not opposed it is believed, by other nations, a milder rule has been adopted, and the carrying of articles contraband of war is now attended only with the loss of freight and expenses, except where the ships belong to the owner of the contraband cargo, or where the simple misconduct of carrying contraband articles, is connected with other circumstances which extend the offense to the ship also.

§ 5. *Cases where the ship also is condemned.* Where the transportation of the contraband articles is prohibited by the stipulations of a treaty, to which the government of the neutral ship-owner is a party, the forfeiture of the freight extended to the ship, on the ground that the criminality of the act is enhanced by the violation of the additional duty imposed by the treaty. An attempt to conceal the destination of the ship, by false papers, will lead to the same result.

§ 6. *Plea of ignorance or force.* The ordinary penalty of carrying articles contraband of war, is the confiscation of the goods and the loss of the freight and expenses to the ship. This penalty is not to be averted by the allegation that the owners or master were ignorant of the true nature of the articles, or that, by the threat or violence of the enemy, they were compelled to receive and transport them. Such excuses, if allowed, would be constantly urged, and by robbing the prohibition of contraband of its penal character, would convert it into a mere nugatory threat.

§ 7. *Inception of voyage completes offense.* The inception of the voyage is held to complete the offense; and from the moment that the vessel, with the contraband articles on board, quits her

port on a hostile destination, the capture may be legally made. It is by no means necessary to wait till the ship and goods are actually endeavoring to enter the enemy's port. The voyage being illegal at its commencement, the penalty immediately attaches, and continues to the end of the voyage, or at least so long as the illegality exists.

§ 8. Return voyage. Where the contraband goods are not taken *in delicto*, in the actual prosecution of the outward voyage and the return voyage is distinct and independent, the penalty is not generally held to attach, either upon the proceeds of the goods or on the ship upon her return voyage. But where they are both inseparably connected in their original plan, so as to form parts of a continuous voyage, the penalty is generally considered as attaching in every stage till its final completion.

§ 9. If not contraband at time of seizure. It must be observed that the offense does not necessarily continue during the entire outward voyage, even where it was completed by the mere inception with contraband articles on board. "Where there is positive evidence," says Duer, "that, previous to the capture, the voyage had been changed, by the substitution of an innocent port of destination, or that the original port, by capitulation or otherwise, had ceased to be hostile, as the goods were not contraband when seized, the capture is invalid, and restitution is decreed."

§ 10. Transfer from one port to another. The illegality of the transportation of contraband goods is not confined to an original importation into an enemy's country. The transportation of such articles from one port to another, is equally unlawful, and is subject to be treated in the same manner as an original importation. It may equally and as directly tend to assist the enemy in the prosecution of the war.

§ 11. If for enemy's use in a neutral port. In order to constitute the unlawfulness of the transportation of contraband, it is not necessary that the immediate destination of the ship and

cargo should be to an enemy's country or port. If the goods are contraband and destined for the direct use of the enemy's army or navy, the transportation is illegal, and subject to the ordinary penalty. Thus, if an enemy's fleet be lying, in time of war, in a neutral port, and a neutral vessel should carry contraband goods to that port, not intended for sale in the neutral market, but destined to the exclusive supply of the hostile forces, such conduct would be a direct interposition in the war by furnishing essential aid in its prosecution, and consequently would be a flagrant departure from the duties of neutrality.

§ 12. *Example of the Commercen.* During the war in the Spanish peninsula, while Sweden was an ally of England as against France, but neutral in regard to the United States then at war with England, a Swedish vessel, *The Commercen*, was captured in the act of carrying supplies to the British forces in the peninsula. The Supreme Court of the United States, held that the voyage was illegal, condemned the cargo, and denied the neutral carrier his freight.

§ 13. *Disagreement as to what particular articles are contraband.* There is a great diversity of opinion among writers on international law in regard to what particular articles are to be deemed contraband when captured en route to an enemy's port or destined to an enemy's use. Opinions have varied at different periods, and even those of the same period are not always reconcilable with each other.

§ 14. *Opinion of the older publicists.* Grotius held that all articles suitable to be used in war were always contraband; that those useful only for civil purposes were never contraband; and that those of indiscriminate use in peace or war, might or might not be contraband, according to the particular circumstances of the war. But neither Grotius nor his followers decided upon what particular articles belonged to each of these classes.

§ 15. *Of modern writers.* Nor have more recent writers, as Kent, Wheaton, Duer, Hautefeuille, Ortolan, Heffter, Philli-

more, Manning, Twiss, etc., been able to agree upon this point. Although there is a general concurrence of opinion in regard to the principle on which the law of contraband is based, there is much disagreement in respect to its application.

§ 16. *Discordancy of earlier treaties and ordinances.* And the same discordancy in the definition of contraband is to be found in the conventional law of nations, as established by treaties, the provisions of which are various and contradictory,—even of those made, at different periods, between the same nations. The same may be said of marine ordinances and diplomatic discussions.

§ 17. *Of those of more recent date.* More recent treaties, conventions, and local ordinances have designated as contraband of war many articles not known, or at least not used for military purposes, in former times; and in all probability this list will be continually enlarged. Nevertheless there is much disagreement in regard to many articles so used.

§ 18. *Decisions of prize courts.* Again, if we recur to the decisions of prize courts, although we shall find less discordancy, perhaps, than in the other sources of international law, we nevertheless shall encounter a diversity of sentiment on some points, which it would be vain to attempt to reconcile. Even in the same country, at different periods, the decisions have been various and contradictory.

§ 19. *There is no positive rule.* As already stated, it is not our present intention to attempt to reconcile conflicting opinions and decisions, or to deduce, from any process of reasoning, the rules of an universal law applicable to contraband of war. But we will endeavor to state what has been decided to be contraband by the prize courts of Europe and of the United States, wherein the courts are generally agreed, and wherein they have differed in opinion. It is, perhaps, of as much importance to know what has been, and is likely to be, administered as the law, in the courts of the principal commercial states, as to know

what *ought*, in theory, to be established as the conventional law of nations.

§ 20. *Munitions of war.* It is universally admitted, as already remarked, that all instruments and munitions of war are to be deemed contraband, and subject to condemnation. This rule embraces, by its terms, and by fair construction, all ordnance and arms of every description, balls, shells, shot, gunpowder and articles of military pyrotechny, gun-carriages, ammunition-wagons, belts, scabbards, holsters, all military equipments and military clothing. Any vessel, evidently built for warlike purposes, as gun and mortar-boats, and destined to be sold for such use, is clearly liable to confiscation under the same rule. To this list is to be added all articles, manufactured or unmanufactured, which are almost exclusively used for military purposes, as machinery for manufacturing arms, and saltpetre, and sulphur for making gunpowder.

§ 21. *Manufactured articles.* It is an established doctrine of the English admiralty, that all manufactured articles that in their natural state are fitted for military use, or for building and equipping ships of war, such as masts, spars, rudders, wheels, tillers, sails, sail-cloth, cordage, rigging, and anchors, are contraband in their own nature, to the same extent as munitions of war, and that no exception is admitted in their favor, unless created by express provisions of a treaty. Since the introduction of steam, as a motive power, in ships of war, the British prize courts would probably, upon the same principle, condemn as contraband all marine engines, screw propellers, cylinders, shafts, boilers, boiler plates, tubes, fire-bars, and every component part of a marine engine or boiler, and every article suitable for the manufacture of marine machinery.

§ 22. *Unwrought articles.* Articles in a rough state, which may be used for military and naval purposes, may, or may not, be contraband, according to their nature and destined use, as inferred from their immediate destination. Thus, pitch, tar, and hemp, destined to the enemy's use, are generally held to be con-

traband in their nature, but where they are the produce of the neutral country from which they are exported, and are the property of its subjects or citizens, they are exempt from confiscation, except when they are exclusively and immediately destined to warlike use. Ship-timber, in a rough state, is not *in se* contraband, but it may become so from its particular character, as masts and spars, or from the character of its port of destination. Copper is not generally contraband, but if in sheets, adapted to the sheathing of vessels, it is condemned. Hemp is more favorably considered than cordage. Rosin is not generally contraband, but is condemned if going to a port of naval equipment. Iron itself is treated with indulgence, but if of such a form as to make it suitable for military or naval purposes, and its immediate destination is for such use, it cannot claim the benefit of exemption. The same rule would probably be applied to all unwrought materials for ship building, and for the construction of marine machinery. Since the introduction of steam as the motive power in ships of war, the question has been much discussed in Europe, whether coals are to be considered as contraband. They would seem now to properly belong to the same class as ship-timber, tar, pitch, and other unwrought materials for ship building and naval stores.

§ 23. *Intended use deduced from destination.* The probable use of articles is inferred from their known destination. This rule seems neither unjust nor unequal. The remarks of Chancellor Kent on this point are exceedingly clear and appropriate. "The most important distinction," he says, "is whether the articles were intended for the ordinary uses of life, or even for mercantile ship's use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going, is not an irrational test. If the port be a general commercial one, it is presumed the articles are intended for civil use, though occasionally a ship of war may be constructed in that port. But, if the great predominant character of that port, like Brest in France, or Ports-

mouth in England, be that of a port of naval military equipment, it will be presumed that the articles were going for military use, although it is possible that the articles might have been applied to civil consumption.

§ 24. Provisions. It is universally admitted, that provisions (*commeatus belli*) are not, in their own nature, contraband. But while some contend that they never can become so under any circumstances, others hold, (and such is the uniform practice of the British admiralty,) that they may become liable to condemnation by their special destination and intended use. When they are destined to the immediate supply of the military or naval forces of the enemy, the aid thus intended to be given for the prosecution of the war, is so direct and important that the act of transportation is peculiarly noxious, and they are condemned without hesitation.

§ 25. Ancient rule of præemption. In former times many articles of *ambigui usûs* were not *confiscated*, but subjected to *præemption*, that is, converted to the use of the captor and paid for at a fixed price.

§ 26. British rule of præemption. But the British admiralty, and especially Sir William Scott, went much further, and sustained the capture of provisions which were not even *probably* destined to military use, not, indeed, confiscating as *contraband of war* on the ground of their being *ambigui usûs*, but condemning them to the use of the British government, on the payment of a price equivalent to their value, or rather, their cost and the specified mercantile profit of ten per cent. A similar rule of *præemption* was applied by Great Britain to certain *native commodities* of neutral states, found in neutral vessels, and required by her for naval purposes. In some cases, where this rule of præemption, or pretended right of purchase, was exercised, it was not claimed that the goods so captured and condemned to a forced sale, were contraband, even on the ground of being *ambigui usûs*.

§ 27. Contested by others. The arguments adduced in favor

the British right of *preëmption* failed to convince its opponents of its justness or legality, and its enforcement was, at the time, most strenuously opposed by the government of the United States and the neutral powers of Europe. Nor did this opposition cease with the war in which the rule had originated, or, at least, been called into operation. Since then, text-writers have most emphatically denied the legality of the rule, and successfully attacked the arguments by which it was attempted to be defended.

## CHAPTER XXV.

### RIGHT OF VISITATION AND SEARCH.

§ 1. General exemption of merchant vessels on the high seas. It has been stated in a preceding chapter that every merchant vessel on the high seas is regarded, in international law, as a part of the territory of the state to which it belongs. To enter into such vessel, or to interrupt its course, by a foreign power in time of peace, or (it being neutral,) by a belligerent in time of war, "is an act of force, and is, *prima facie*, a wrong, a trespass, which can be justified only when done for some purpose, allowed to form a sufficient justification by the law of nations."

§ 2. Right of search a belligerent right only. The right of *search* upon the high seas is now universally regarded as simply a belligerent right, and one which cannot be exercised in time of peace, except, when it has been conceded by treaty.

§ 3. Claim of England to visit in time of peace. The English government, however, at one time attempted to draw a distinction between the right of *visit*, and the right of *search*, and while it distinctly disavowed any claim to exercise the latter in time of peace, it insisted upon the right of visit for the purpose of ascertaining whether a merchant vessel is justly entitled to the protection of the flag which she may happen to have hoisted, such vessel being in circumstances which render her liable to suspicion; the right "to know whether the vessel pretending to be American, and hoisting the American flag, be *bona fide* American."

§ 4. Claim denied by the United States. "The government of the United States, on the other hand," said Mr. Webster,

“ maintains that there is no such well known and acknowledged, nor, indeed, any broad and generic difference between what has been usually called visit, and what has been usually called search ; that the right to visit, to be effectual, must come, in the end, to include search ; and thus to exercise, in peace, an authority which the law of nations only allows in time of war.”

§ 5. Views of the United States sustained by American publicists. All American writers on public law sustained the ground taken by our government against the claim of England to *visit in time of peace*. Mr. Wheaton said, “The distinction now set up, between a right of *visitation* and a right of *search*, is nowhere alluded to by any public jurist, as being founded on the law of nations. The technical term of *visitation and search*, used by the English civilians, is exactly synonymous with the *droit de visite* of the continental civilians.”

§ 6. By continental writers. The older continental publicists, as stated by Mr. Wheaton, do not distinguish between the right of *visit*, and the right of *search*, but discuss the general question under the terms *visit* and *visitation*, as a belligerent right, existing only in time of war. Several, however, who have written since Mr. Wheaton made the statement alluded to, have discussed the claim of Great Britain to the right of *visit* in time of peace, as distinguished from the general right of *visitation* and *search* in time of war. They unanimously oppose the British claim.

§ 7. By the older English writers. The older English writers, and English judicial decisions, are directly opposed to the pretensions of Lord Aberdeen, and generally agree with the continental writers on this question. Lord Stowell, than whom no greater authority can be found in British maritime jurisprudence, says: “I can find no authority that gives a right to the interruption of the navigation of the vessels of states on the high seas, except that which the rights of war give to both belligerents against neutrals.” Again he says: “No one can exercise the right of visitation and search upon the high seas, except a

belligerent power. No such right has ever been claimed, nor can it be exercised without the suppression, interruption and the endangering of the relations with and the lawful navigation of other countries. If the right were to exist at all, it must be universal and extend equally to all countries. If I were to proceed to consider this question further, it would be necessary for me to state the gigantic mischiefs which such a claim is likely to produce."

§ 8. *Origin of the discussion.* This discussion between the governments of Great Britain and the United States, or more properly speaking, between Lord Aberdeen and Mr. Webster, arose out of the pretensions of British cruisers on the coast of Africa to visit American vessels suspected of being engaged in the slave trade.

§ 9. *Its final settlement.* It was finally terminated by the announcement of the Earl of Malmesbury, British minister of foreign affairs, in the house of lords, on the 26th of July, 1858, that, on receiving the unanimous opinion of the law officers of the crown, "her majesty's government at once acted, and we frankly confessed that we had no legal claim to the right of visit and of search which has hitherto been assumed. Her majesty's government have therefore abandoned both these claims."

§ 10. *Visitation and search in time of war.* The right of visitation and search, in time of war, springs directly from the right of maritime capture; for without the former we must abandon the latter, or so extend it as to authorize the indiscriminate seizure of all merchant vessels that may be found upon the ocean; until they are visited and searched, it would be impossible to know whether or not they are liable to capture, either from the ownership of the vessel, the nature of the cargo, or the character of the voyage.

§ 11. *English views as to extent of search.* While all are now agreed in regard to the belligerent right of visitation and search, there is some diversity of opinion in regard to the extent to

which the search may be carried. English writers have always claimed that the examination may properly be prosecuted till the belligerent is reasonably satisfied in regard to the character of the vessel, its cargo, and destination.

§ 12. *American views.* American writers have adopted the same views, and the principle has been established by numerous decisions of the Supreme Court of the United States.

§ 13. *Continental writers.* But many of the continental writers would limit the search to an examination of the vessel's papers. Others say that if these are found to be incomplete or irregular, or there is a suspicion of fraud, the search may proceed further; but not otherwise.

§ 14. *Enforcement of the right of search.* The exercise of this right, within its true limits, whatever they may be, implies the right of using lawful force, if necessary, in its execution, the same as in the execution of a civil process on land. The *right* of search on the one side, implies the *duty* of submission on the other; and as the belligerent may lawfully apply his force to the neutral property, for the purpose of ascertaining its character and destination, it necessarily follows that the neutral may not lawfully resist the lawful exercise of the right of search.

§ 15. *It must be exercised in a lawful manner.* But, although it is the duty of the neutral to submit to the lawful search of the belligerent, and to all acts that are necessary to accomplish that object, it by no means follows that the belligerent is subject to no restraints in the exercise of this right. It is not sufficient that the right is lawful, it must be exercised in a lawful manner. The right is limited to such acts as are necessary to a thorough examination into the real character of the vessel, her cargo and voyage, and all acts that transcend the limits of this necessity are unlawful. For any improper detention of the vessel, or any unnecessary, and therefore unlawful violence to the master or crew, the belligerent court of admiralty is pretty certain to award full compensation in damages; and if this should be denied to the neutral, his own government may de-

mand and enforce the redress of his wrongs. The usual mode, adopted by most of the maritime powers of Europe, of summoning a neutral to undergo visitation, is the firing of a cannon on the part of the belligerent. This is called by the French *semonce*, *coup d'assurance*, and by the English, *affirming gun*. It is, undoubtedly, the duty of the neutral to obey such a summons.

§ 16. Penalty for resisting search. The penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation and search. This penalty is not averted by the orders of the neutral sovereign to resist the visitation and search of the belligerent cruiser.

§ 17. Vessels of war are exempted from search. The belligerent right of visitation and search, whatever its extent or limitation, is undoubtedly confined exclusively to private merchant vessels, and does not apply to ships of war. The immunity of such vessels on the high seas, from the exercise of any right of visitation and search, or of any other belligerent right, has been uniformly asserted and conceded.

§ 18. Can they exempt their convoys? One of the most common, as well as one of the most important duties of public ships of war, is the *convoy* or protection of merchant vessels on the high seas. Can such convoying ships exempt the merchant vessels under their protection, from the exercise of the right of visitation and search, from which they themselves are exempt? If so, may neutral vessels place themselves under such protection, and lawfully resist any attempt on the part of belligerent cruisers, to subject them to such visitation and search? This question is properly divided into two parts: First, the case of convoy, by ships of war, of private vessels of the same state; and second, the case of convoy of merchant vessels of other neutral states.

§ 19. English authorities. British writers and the British courts have held that the presence of an armed neutral convoy cannot deprive a lawfully commissioned cruiser of the legal

right of visitation and search. Nor do they make any distinction as to whether the convoying vessel is of the same or of another nation.

§ 20. *Continental writers.* Recent continental publicists, have generally contended that neutral convoy exempts the convoyed vessel from visitation and search. Some have stated this proposition in general terms, while others limit it to merchant vessels convoyed by ships of war of their own nation, and put it on the ground that the declaration of the commander is sufficient as to the character and cargoes of the vessels of his own country under his escort and protection.

§ 21. *American authorities.* American writers, as well as the decisions of our courts, have generally agreed that neutral convoy, even by vessels of the same state, cannot exempt from search, unless such right of exemption is secured by treaty.

§ 22. *Effect of enemy's convoy.* It seems to be universally admitted that if a neutral vessel avails herself of a belligerent convoy to escape visitation and search, she incurs the penalty of condemnation.

§ 23. *Effect of resistance of neutral master.* It is generally held that the resistance of search by a neutral master will incur the penalty of confiscation of both vessel and cargo.

§ 24. *Neutral property in enemy's vessels.* Sir William Scott held that resistance of search by an enemy's master does not forfeit neutral goods in such *enemy's merchant* vessel; but that neutral goods in *an armed enemy's* vessel is liable to confiscation. American writers have generally concurred in this distinction, but the Supreme Court of the United States has extended the exemption to both cases.

§ 25. *Documents required to prove neutral character.* The acknowledged belligerent right of visitation and search draws after it a right to the production and examination of the ship's papers. With respect, however, to the nature and character of the papers which the neutral is bound to have on board, there is some difference of opinion. Some continental writers contend

that the ordinary sea letter or passport, is all that is required, as that must establish the nationality of the vessel. But English and American writers, as well as the decisions of the prize courts of the two countries, have held, that the neutral vessel may be required to have on board, and to produce when visited, such other documentary evidence as is usually carried, and deemed necessary to establish the character of the ship and its cargo; and that the absence or non-production of such papers, may, or may not, be good cause for capture, and condemnation, according to the particular circumstances of the case.

§ 26. *Concealment of papers.* Sometimes the neutral vessel produces the principal papers necessary to show her neutrality and the innocent character of her cargo, but conceals others which might have a contrary effect, as, for example, secret instructions relating to her destination and the landing of goods, etc. Those who deny the right of search beyond the verification of her sea-letter, or manifest, justify such concealment. But English and American writers are of opinion, that concealment is in itself a serious offense against the belligerent right of visit and search. The rule of international law on this question is thus stated by Chancellor Kent: "The concealment of papers," he says, "material for the preservation of the neutral character, justifies a capture, and carrying into a port for adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause labored under heavy doubts, and there was *prima facie* ground for condemnation independent of the concealment."

§ 27. *Spoilation of papers.* The spoilation of the papers of a ship, subjected to the visitation and search of a belligerent cruiser, is a still more aggravated circumstance of suspicion than that of their denial or concealment, and, in most countries, would be sufficient to infer guilt and exclude further proof. "But it does not in England," says Kent, "as it does by the

maritime law of other countries, create an absolute presumption *juris et de jure*; and yet, a case that escapes with such a brand upon it, is saved so as by fire. The Supreme Court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation, for it may have arisen from accident, necessity, or superior force. If the explanation be not prompt and frank, or be weak and futile; if the cause labors under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply.

§ 28. Use of false papers. "The use of false papers," says Mr. Duer, "although in all cases morally wrong, is not in all cases a subject of legal animadversion in a court of prize. Such a court has no right to consider the use of the papers as criminal, where the sole object is to evade the municipal regulations of a foreign country, or to avoid a capture by the opposite belligerent. The falsity is only noxious where it certainly appears, or is reasonably presumed, that the papers were framed with an express view to deceive the belligerent by whom the capture is made, so that, if admitted as genuine, they would operate as a fraud on the rights of the captors. It is not sufficient, that the papers disclose the most disgusting preparations of fraud in relation to a different voyage or transaction. Fraud must certainly or probably relate to the voyage or transaction which is the immediate subject of investigation."

§ 29. Impressment of seamen from neutral vessels. In the wars immediately resulting from the French revolution, the British government attempted to engraft upon the right of visitation and search the right of impressment of seamen by British cruisers from American merchant vessels. The deep feeling of opposition, in the United States, to this pretended right, as claimed by England, and to the practice exercised under it,

coöperated most powerfully with other causes to produce the war of 1812 between the two countries. The war was terminated by the treaty of Ghent, on the basis of the *status quo ante bellum*, leaving the questions of maritime law which led to the war still unsettled.

§ 30. American rule on this subject. After a calm and dispassionate examination of the whole subject, the American secretary of state announces the rule which will be maintained by his government. "The American government," says Mr. Webster, "is prepared to say that the practice of impressing seamen from American vessels, cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as cannot 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 committed the seals of this department, 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, now had, of the whole subject, at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have fully convinced this government that this is not only the simplest and best, but the only rule, which can be adopted and observed consistently with the rights and honor of the United States, and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. *In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them.*"

## CHAPTER XXVI.

### VIOLATION OF NEUTRAL DUTIES.

§ 1. The rights and duties of neutrality are correlative. The rights and duties of neutrality are correlative, and the former cannot be claimed, unless the latter are faithfully performed. If the neutral state fail to fulfill the obligations of neutrality, it cannot claim the privileges and exemptions incident to that condition. The rule is equally applicable to the citizens and subjects of a neutral state. So long as they faithfully perform the duties of neutrality, they are entitled to the rights and immunities of that condition. But for every violation of neutral duties, they are liable to the punishment of being treated in their persons or property as public enemies of the offended belligerent.

§ 2. Responsibility of individuals for violation of neutral duties. As a general rule the penalty for ordinary violations of neutral duty, not whithemselves acts of positive hostility, by individuals, is imposed and enforced upon the individual, by the capture and confiscation of his property. Thus, the neutral state is not bound to restrain its subjects from engaging in contraband trade, or from violating the right of visitation and search, or the law of sieges and blockades; the law imposes upon the individual the duty of abstaining from such illegal acts, and, if guilty of a violation of this duty, he is the one to suffer the punishment due to the offense. Nor do the courts of a neutral country, as a general rule, enforce penalties for violation of neutral duty by individuals.

§ 3. Criminal character of such violations of duty. It may

be stated, as a general principle which lies at the foundation of the rules of international law relating to this subject, that the violation of neutral duties is neither innocent nor lawful. It is not simply the penalty incurred by such violation that makes it wrong, as some have asserted; nor is it correct to say that, if the neutral merchant is willing to incur the risk of capture and condemnation, he may engage, with entire security of conscience, in a trade forbidden by the law of nations. The act is wrong in itself, and the penalty results from his violation of moral duty, as well as of law.

§ 4. When the state becomes responsible. The duty of a neutral state towards those engaged in war is that of entire impartiality as well as neutrality. If it assist one of the belligerents; if it grant favors to one to the detriment of the others; if it neglect or refuse to maintain the inviolability of its territory; or if it fail to restrain its own citizens and subjects from overstepping the just bounds of neutrality, as defined and established by the law of nations,—it violates its duties toward the belligerent who is injured by such act or neglect, and is justly chargeable with hostility. Such conduct furnishes good cause for complaint, and, if persisted in, may become just cause of war.

§ 5. Neutral vessels transporting enemy's goods. The first question which presents itself for consideration, <sup>and</sup> ~~not~~ connected with neutral duties, is the transportation of goods of an enemy in a neutral vessel. The concurring testimony of text-writers is, that by the usage of the world, *neutral vessels* are not liable to condemnation for carrying *enemy's goods*, whatever rule may be adopted or enforced with respect to the condemnation of the goods themselves. The transportation of enemy's goods in a neutral vessel, cannot, therefore, be regarded in general, as a violation of any neutral duty, or as an act subject to any punishment.

§ 6. The goods so transported. English and American authorities are agreed that enemy's goods so transported are subject

to capture and confiscation ; but the rule is contested by modern continental writers.

§ 7. The United States on the rule of "Free ships, free goods." The government of the United States, while recognizing the right of capturing enemy's goods in neutral vessels as a subsisting right under the law of nations, has always endeavored to incorporate the principle of *free ships, free goods*, in its treaties with other powers.

§ 8. Neutral goods in enemy's vessels. The United States have invariably opposed the rule that *enemy's ships make enemy's goods*, and the supreme court has refused to condemn neutral goods on board an enemy's vessel. While England adopted the same rule in regard to neutral goods, France generally condemned them, although she followed the maxim of *free ships, free goods*.

§ 9. The two maxims distinct. It is thus seen that these two maxims have never been regarded as necessarily connected, for some governments have adopted the one while rejecting the other.

§ 10. France and England as allies. At the beginning of the recent war between the Allies and Russia, the different constructions put upon the law of nations by England and France, with respect to the maxims of *free ships, free goods*, and *enemy's ships, enemy's goods*, threatened to aggravate the difficulties to which war always subjects neutral commerce. 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 would protect, against France, enemy's property on board, might be sent by an English cruiser into an English port, her voyage broken up, and her cargo condemned, with no allowance for freight or damages. A compromise of principles was therefore necessary to the co-operation of their navies.

§ 11. Declaration of 1854. A declaration was accordingly agreed upon by the two powers, in April, 1854, "waiving the right of seizing enemy's property laden on board a neutral

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vessel, unless it be contraband of war," and of "confiscating neutral property, not being contraband of war, found on board enemy's ships." The obnoxious pretensions of England were thus abandoned, as a consideration for obtaining from France additional concessions on her part. Nevertheless, the arrangement was, upon its face, only for the war, and was declared to be a temporary waiving of belligerent rights recognized by the law of nations. Either party might, at the close of that war, have resumed the pretensions thus abandoned, and have claimed in any future war, the belligerent rights, the exercise of which, was thus merely "waived."

§ 12. Declaration of the Congress of Paris. All fears of such a result, however, were removed by the declaration of the congress of Paris, April 16th, 1856, by the plenipotentiaries of Great Britain, France, Russia, Austria, Prussia, Sardinia, and Turkey. The second and third articles of this declaration are as follows: "2d. The neutral flag covers enemy's goods, with the exception of contraband of war." "3d. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag."

§ 13. Proof of neutral goods in enemy's ships. It is an established rule of the law of prize, that all goods found in an enemy's ship is presumed to be enemy's property—*res in hostium navibus, præsumuntur esse hostium donec probetur*. The evidence required to repel this presumption, depends upon the particular character of the case. If the character of the ship is certainly hostile, the neutral character of the goods must be shown by documents on board at the time of capture. If these are insufficient, further proof is never allowed, and the penalty of forfeiture attaches as a matter of course.

§ 14. Neutral ships under enemy's flag and pass. Another violation of neutral duty is the use of the flag and pass of the enemy. A neutral vessel is bound by the character which she has thus assumed, and the owner is not allowed to contradict his own acts, and to redeem his vessel from condemnation, by a

disclaimer of the hostile character which, with a view to his own interests, or those of the enemy, he has elected she should bear.

§ 15. *Neutral goods in such vessels.* But while the belligerent flag and pass are in all cases, decisive, as to the owners, of the character of the ship, a distinction is made by the English courts in favor of the cargo of such ships, if the shipment were made in time of peace and plainly not in contemplation of war. Even where the goods themselves, for purposes having no relation to a future war, are clothed with a foreign character, now become hostile, the owner is not concluded, but is permitted to disprove the colorable title, and, upon due proof of his neutral character and actual ownership, his property is restored.

§ 16. *Neutral vessel in enemy's service.* If a neutral vessel is captured while in the employment of the enemy or his officers, for purposes immediately or mediately connected with the operations of the war, the owner is never permitted to assert his claim. The nature of the service or employment is very justly deemed, in such a case, conclusive evidence of its hostile character. While thus employed the neutral vessel is as truly a vessel of the enemy, as if she were such by documentary title; and the owner is not allowed, for his own protection, to divest her of the character which she has thus assumed. Nor will the prize court listen to the plea that the vessel was impressed into such service by duress and violence.

§ 17. *Transporting military persons.* So, also, if the owner of a neutral ship has suffered his vessel to be employed in transporting military persons or military stores for the enemy, the vessel and cargo are condemned. Nor in such cases is it held necessary that the privity of the master, or his owners, be shown; it is sufficient that the employment be proven; no plea of ignorance or imposition is received. Where imposition is practiced to entrap a neutral vessel into a hostile service, it operates as force, and redress in the way of indemnification must be sought against those who, by imposition or deceit, exposed the property to capture.

§ 18. Conveying enemy's dispatches. A neutral vessel fraudulently carrying the dispatches of an enemy, is, as a general rule, liable to condemnation. Public dispatches are defined to embrace all official communications of public officers relating to public affairs. "The carrying of two or three cargoes of stores," says Kent, abbreviating the language of Sir Wm. Scott, "is necessarily an assistance of a limited nature; but in the transmission of dispatches, may be conveyed the entire plan of campaign, and it may lead to a defeat of all the projects of the other belligerent in that theatre of the war. The appropriate remedy for this offense, is the confiscation of the ship; and in doing so, the courts make no innovation on the ancient law, but they only apply established principles to new combinations of circumstances. There would be no penalty in the mere confiscation of the dispatches. The proper and efficient remedy is the confiscation of the vehicle employed to carry them; and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency. If the cargo be the property of the proprietor of the ship, then, by the general rule, *ob continentiam delicti*, the cargo shares the same fate, and especially if there was an active interposition in the service of the enemy, concerted and continued in fraud."

§ 19. Exception in case of mail-packets. The mere fact that such dispatches were found on board a neutral vessel, is not sufficient to produce her condemnation; for the rule refers to a *fraudulent* carrying of the dispatches of the enemy, and it is presumed that it would not apply to regular postal packets, whose mails, by international conventions, are distributed throughout the civilized world; nor even to merchant-vessels which, in some countries, are obliged to receive letters and mail-matter sent to them from the post-offices. The master must necessarily be ignorant of the contents of the letters so received, and, in the absence of all suspicion of *fraud*, or of interposition in the service of the enemy, the mere carrying of an enemy's dispatches, under such circumstances, could hardly be regarded

as a delinquency under the law of nations, and a violation of neutral duty. The case is very different where the neutral vessel is employed by the belligerent for that purpose, or carries them fraudulently, and in the service used for the benefit of a belligerent.

§ 20. In case of enemy's ambassadors in neutral state. Another important exception to this rule, is the conveyance of the dispatches of an ambassador, or other public minister of the enemy, resident in a neutral state. In the language of Sir Wm. Scott, "They are dispatches 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."

§ 21. Case of the Trent. In 1861, the British steam packet Trent, sailing from one neutral port to another, was overhauled by an American man of war on the high seas, and four persons taken from it under the pretext that they were ambassadors and bearers of dispatches from the Rebel authorities to their agents in Europe. In the *first* place there is no process known to international law by which a hostile ambassador, or traitor, or other criminal, may be extracted from a neutral ship on the high seas. In the *second* place no hostile dispatches were found. In the *third* place, the neutral vessel was conveying mails and passengers from one neutral port to another, which was *prima facie* evidence of her innocence. She was liable generally to belligerent visitation and search; but it is doubtful if she would have been liable to condemnation, even had hostile dispatches, under the circumstances, been found on board. Certainly not unless they had been fraudulently carried. The United States

disavowed the act of its officer, and delivered up the prisoners and captured mails.

§ 22. *Rule of 1756.* If a neutral engages in a commerce which is exclusively confined to the subjects of another country, and which is interdicted to all others, so that it cannot be carried on at all in the name of a foreigner, such a commerce is considered so entirely national as to follow the situation of the country, and to impress its hostile character upon the property engaged in it. This is called the rule of 1756. Its correctness is now generally admitted.

§ 23. *Its attempted extension.* But during the wars of 1793 and 1801 Great Britain attempted to give this rule a much greater extension, and asserted that where a commerce, which had previously been regarded as a national monopoly, is thrown open in time of war to all nations, without reserve, by a general, and, on its face, a permanent regulation, neutrals have no right to avail themselves of the concession, but that their entrance into the trade thus opened, is a criminal departure from the impartiality they are bound to observe. It was formerly the policy of the great European powers to confine exclusively to their ships and subjects the trade between their own ports, and between the mother country and its colonies. During the wars referred to, some of the continental states abolished this monopoly, and opened their coasting and colonial trade to all nations without reserve. But England contended that such a change of policy by a belligerent in time of war was not sanctioned by the law of nations, and neutral vessels engaged in such trade were seized by her cruisers, and condemned by her courts of admiralty. The United States and most other powers earnestly and energetically remonstrated against this extension of the Rule of 1756, as an innovation which forms no part of the general and permanent code of international jurisprudence, and any new attempt to enforce its application to neutral commerce would probably be regarded as an act of direct and immediate hostility.

## CHAPTER XXVII.

### PACIFIC INTERCOURSE OF BELLIGERENTS.

§ 1. Object and character of *commercia belli*. The usage of civilized nations has introduced a certain friendly intercourse in war, technically called *commercia belli*, by which its violence may be allayed, so far as is consistent with its object and purpose, and a way be kept open which may lead, in time, to an adjustment of differences, and, ultimately, to peace. Were all pacific communications between armies absolutely cut off, war would not only become unnecessarily cruel and destructive, but there would be no chance of terminating it, short of the total annihilation of the belligerents.

§ 2. Military compacts and conventions. Belligerent states, and their armies and fleets, frequently have occasion, during the continuance of a war, to enter into agreements of various kinds; sometimes for a general or partial suspension of hostilities, for the capitulation of a place, or the surrender of an army, for the exchange of prisoners, or the ransom of captured property; and sometimes for the purpose of regulating the general manner of conducting hostilities, or the mode of carrying on the war. All these agreements, of whatsoever kind, are included under the general name of *compacts* or *conventions*. These compacts which relate to the pacific intercourse of the belligerents, suppose the war to continue; those which put an end to it, come under the general head of *treaties of peace*, which will be considered in another chapter.

§ 3. Suspensions of arms, truces, and conventions. If the cessation of hostilities is only for a very short period, or at a

particular place, or for a temporary purpose, such as for a parley, or a conference, or for removing the wounded, and burying the dead, after a battle, it is called *a suspension of arms*. This kind of compact may be formed between the immediate commanders of the opposing forces, and is obligatory upon all persons under their respective commands. Even commanding officers of detachments may enter into this kind of compact, but such an agreement can only bind the detachment itself; it cannot affect the operations of the main army, or of other troops not under the authority of the officer making it. A suspension of arms is only for a temporary purpose, and for a limited period. If the suspension of hostilities is for a more considerable length of time, or for a more general purpose, it is called *a truce* or an *armistice*.

§ 4. Authority to make them. A general suspension of hostilities throughout the nation, can only be made by the sovereignty of the state, either directly, or by authority specially delegated. Such authority, not being essential to enable a general or commander to fulfill his official duties, is never implied, and, in such a case, the enemy is bound to see that the agent is specially authorized to bind his principal. But a partial truce may be concluded between the military and naval commanders of the respective forces, without any special authority for that purpose, where, from the nature and extent of their commands, such authority is necessarily implied, as essential to the fulfillment of their official duties. If the commander, in making such a compact, has abused his trust to the advantage of the enemy, he is accountable to his own state for such abuse. And if he has exceeded his implied authority and stipulated for what is not within his power to control, as for troops not under his command, his acts so far as such troops are concerned are null and void. A case occurred during the Mexican War illustrative of this. By the convention of February 29th, ratified by General Butler, March 5th, and published in general orders No. 18, March 6th, 1848, it was stipulated that the

Mexican civil authorities, political, administrative, and judicial, were to be reëstablished and installed in their respective offices. The terms of the convention were general, and included the entire Republic of Mexico. But California, although a part of the Mexican territory, had been organized into a separate military department, entirely independent of the general commanding in Mexico. Pico, the Mexican Governor of California, basing himself on the words of this convention, demanded of the American military governor of that department, to be reinstated and recognized in his official position and character. The American commander not only refused to comply with Pico's demand, but adopted pretty severe measures to prevent any attempt on his part to exercise authority in California. If the convention, entered into by General Butler in the capital of Mexico, was really intended to include California, as its terms would seem to indicate, he, undoubtedly, exceeded his powers, and the armistice, so far as concerned California, was utterly null and void.

§ 5. Acts of individuals ignorant of a truce. A truce binds the contracting parties from the time of its conclusion, unless otherwise specially provided; but it does not bind the individuals of the nation so as to make them personally responsible for a breach of it, until they have had actual or constructive notice. If, therefore, individuals, without a knowledge of the suspension of hostilities, kill an enemy or destroy his property, they do not, by such acts, commit a crime, nor are they bound to make pecuniary compensation; but, if prisoners are taken, or prizes captured, the sovereign is under obligation to immediately release the former, and restore the latter.

§ 6. What may be done during a truce. During the continuance of a general truce, each party to it may, within his own territories, do whatever he would have a right to do in time of peace, such as repairing or building fortifications, constructing and fitting out vessels, levying and disciplining troops, casting cannon and manufacturing arms, and collecting provisions and

munitions of war. He may also move his armies from one part of his territory to another, not occupied by the enemy, and call home, or send abroad upon the ocean his vessels of war. And, in the theatre of hostilities, and in the face of the enemy, he may do whatever, under all the circumstances, would be deemed compatible with good faith and the spirit of the agreement. In the case of a truce between the governor of a fortress or fortified town, and the general or admiral investing it, either party is at liberty to do what he could safely have done if hostilities had continued. For example, the besieged may repair his material of war, replenish his magazines, and strengthen his works, if such works were beyond the reach of the enemy at the beginning of the truce, and if the provisions and succors are introduced into the town in a way or through passages which the besieging army could not have prevented. But the besieged cannot construct or repair works of defense, if he could not safely have done this in case the hostilities had continued; nor introduce provisions, military munitions or troops through passages which were occupied or commanded by the enemy at the time of the cessation of hostilities; nor can the besiegers continue works of attack which might have been prevented or interrupted by the besieged; for all acts of this kind would be making a mischievous and fraudulent use of the agreement, and violating its good faith and spirit; the general meaning of such compacts is, that all things within the limits of the theatre of immediate operations, shall remain as they were at the moment of the conclusion of the truce. To receive and harbor deserters within such limits, is an act of hostility, and, therefore, a violation of the implied conditions of a truce.

§ 7. *Conditional and special truces.* Where a truce is granted for a certain specified object, its effects are limited to the purpose mentioned, and if either party should attempt to perform any act to the disadvantage of the other, not comprehended in the object of such truce, this other party has the undoubted right to hinder it by force, notwithstanding the compact. So,

where the truce is conditional, and the conditions which have been agreed upon are broken by one party, the truce is no longer binding upon the other.

§ 8. *Their interpretation.* Truces, and other military compacts are to be interpreted by the same rules as treaties and other agreements. Most questions relating to such compacts may be easily determined, either by considering the nature and character of the compact itself, or by applying to it the common rules of interpretation. Nevertheless, a difference of opinion will often arise respecting the proper construction to be given to particular terms, which are in their nature ambiguous. Thus, writers on the laws of war have discussed the question whether a truce for a given period, as, for instance, from the first of January, to the first of February, will include or exclude the first day of each of these months. Grotius is of opinion, that the first day of January would be excluded, and the whole of the first day of February, included. Puffendorff, Heineccius, and Vattel, would include in the truce both the day of its commencement and the day of its termination. Rutherford can see no good reason why one day should be excluded and the other included.

§ 9. *Renewal of hostilities.* As a truce, or armistice, merely suspends hostilities, they are renewed at its expiration without any new declaration or notice; for as every one is bound to know the effect of such termination, no public declaration is required. But if the truce was for an indefinite period of time, justice and good faith require due notice of intention by the party who terminates it. If, however, the conditions of the truce be broken by one belligerent, there is no doubt that the other may immediately resume hostilities without any declaration. It is sometimes stipulated in the truce, that the violator shall pay a certain penalty for the violation. In such case the penalty should be demanded before a return to war, and, if paid, the right of hostilities does not occur. A truce is not broken by the acts of private persons, unless they are *ordered*

or *ratified* by public authority. But, unless the private offenders are punished or surrendered, and unless the thing seized is restored, or compensated for, it is legally *presumed* that the act of the private offender was duly ordered or ratified. This is the rule of public law. Where an armistice is subject to the ratification of a superior authority, hostilities may be resumed as soon as it is made known to the enemy that the ratification is refused, though by its terms a certain time has been stipulated for its cessation after the giving of such notice; for if the armistice itself is annulled, all its stipulations become void and of no effect, and the parties are free to act as if it had never been entered into.

§ 10. *Capitulation.* *Capitulations* are agreements entered into by a commanding officer for the surrender of his army, or by the governor of a town, or a fortress, or particular district of country, to surrender it into the hands of the enemy. *Capitulations* usually contain stipulations with respect to the inhabitants of the place which is surrendered, the security of their religion, property, privileges and franchises, and also with respect to the troops or garrison, either allowing them to march out with their arms and baggage, with the honors of war, or requiring them to lay down their arms and surrender as prisoners of war. The general phrase "with all the honors of war," is usually construed to include the right to march with colors displayed, drums beating, etc. It is proper, however, that such matters should be precisely stated in the articles of capitulation. From the nature of the case, a larger latitude is given to the powers of commanders in regard to capitulations than in regard to ordinary captures of prisoners of war. They are also exceptions to general cartels previously entered into, unless fairly included by the terms of the agreement. A capitulation includes all property in the place not expressly excepted, and a commander who destroys military stores or other property after entering into such agreement not only forfeits all its benefits, but he subjects himself to severe punishment for his perfidy. So

after a capitulation for the surrender of an army in the field, any officer who destroys his side-arms or his insignia of rank, deprives himself of all the privileges of that rank, and may be treated as a private soldier. The reason of the rule is manifest. The victor is entitled to all the honors and benefits of his agreement the moment it is entered into, and to destroy colors, arms, etc., thereafter, is to deprive him of his just rights. Such conduct is both dishonorable and criminal. Although all prisoners of war must surrender their side-arms, they are sometimes returned as a mark of individual and personal respect.

§ 11. Individual promises. Small detached parties or individuals, whether belonging to the military service or not, who happen to fall in with the enemy in a place distant from succor or any superior officer, are left to their own discretion and may, so far as concerns their own persons, do everything which a commander might do with respect to himself and the troops under his command. Promises made by individuals under such circumstances, if confined to their own persons and within the sphere of a private individual, are valid and binding, and the sovereign has no right to release them from their obligations, or compel them to violate the compact. For when a subject can neither receive his sovereign's orders, nor enjoy his protection, he resumes his natural rights, and may provide for his safety by any just and honorable means in his power.

§ 12. Passports and safe-conducts. A *passport* or *safe-conduct*, is a document granting to persons or property an exemption from the operations of war, for the time, and to the extent prescribed in the instrument itself. The term *passport* is applied to personal permissions given on ordinary occasions, both in peace and war, where there is no reason why the parties named in them should not go where they please; while *safe-conduct* is the name usually given to the instrument which authorizes an enemy, or an alien, to go into places where he could not go without danger, or to carry on trade forbidden by the laws of

war. The word passport, however, is more generally applied to persons, and safe-conduct to both persons and things.

§ 13. *When and how revoked.* A passport, or safe-conduct, may, for good reasons, be revoked by the authority which granted it; on the general principle of the law of nations, that privileges may always be revoked, when they become detrimental to the state. A permission granted by an officer may, for this reason, be revoked by his superior, but, until so revoked, it is as binding upon the successor as upon the party who issued it. The reasons for such revocation need not always be given; but permissions of this kind can never be used as snares to get persons or effects into our power, and then, by a revocation, hold the persons as prisoners, or confiscate the property. Such conduct would be perfidy toward an enemy, and contrary to the laws of war.

§ 14. *Their violation, how punished.* Any violation of the good faith and spirit of such instruments, entitles the injured party to indemnity against all injurious consequences. Persons violating these instruments are also subject to punishment by the municipal laws of the state by which they are issued. Section twenty-eight of the act of congress, approved April 30th, 1790, provides that if any person shall violate any safe-conduct or passport, duly obtained and issued under the authority of the United States, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.

§ 15. *Safe-guards.* *Safe-guards* are protections granted by a general or other officer commanding belligerent forces, for persons or property within the limits of their commands, and against the operations of their own troops. Sometimes they are delivered to the parties whose persons or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling. They are particularly useful in the assault of a place, or immediately after its capture, or after the termination of a battle, to protect the persons and property of friends from destruc-

tion by an excited soldiery. Violations of such instruments are usually punished with the utmost severity.

§ 16. *Cartels for prisoners.* A *cartel* is an agreement between belligerents for the exchange or ransom of prisoners of war. The actual existence of a war is not essentially necessary to give effect to cartels, but it is sufficient if they are entered into prospectively and in expectation of approaching hostilities; for the occasions for them may just as naturally arise from a view of approaching events, and parties may contract to guard against the consequences of hostilities which they may foresee. Both belligerents are bound to faithfully observe such compacts, and a cartel party sent under a flag of truce to carry into execution the provisions of a cartel, is equally under the protection of both.

§ 17. *Cartel ships.* A *cartel ship*, is a vessel commissioned for the exchange or ransom of prisoners of war, or to carry proposals from one belligerent to the other, under a flag of truce. Such commission and flag are considered to throw over the vessel, and the persons engaged in her navigation, the mantle of peace; she is, *pro hoc vice*, a neutral licensed vessel, and her crew are also neutrals; and so far as relates to the particular service in which she is employed, she is under the protection of both belligerents. But she can carry no cargo, and no ammunition or implements of war, except a single gun for firing signals.

§ 18. *Their rights and duties.* The rights, immunities and duties of cartel ships, have been matters of discussion and judicial decision in prize courts. Sir William Scott gave a very elaborate opinion on this subject, in the case of *The Daifjie*. With respect to the character of the ships employed in such service, he says it is generally immaterial whether they are merchant ships, or ships of war, but there may be extreme cases in which the nature of the ship might be material; "as, if a fire ship was to be sent on such service to Portsmouth or Plymouth, though she had prisoners on board, she would undoubtedly be

an unwelcome visitor to a naval arsenal, and her particular character might fairly justify a refusal to admit her." He was also of opinion, that the cartel protected such ships, not only *in trajectu, adeundum et redeundum*, but also in going from one port to another to be fitted up and to take prisoners on board, although the passage of ships from one port to another of an enemy, is liable to suspicion.

§ 19. Ransom of prisoners of war. In the middle ages the captor was considered as having a lawful right to demand a *ransom* for the release of his prisoners, and the money derived from this source was one of the great inducements to military service. Curious instances of the importance which was attached to this consideration occur in history. Thus, when the Maid of Orleans was brought to her disgraceful trial, the advisers of the measure thought it right to pay her captors, whose property she had become, a sum equal to what it was supposed they might be able to make by her ransom. The practice of ransom gave rise to certain rules in regard to the relations of the captor and his prisoner, to the sales and transfers of claims for ransom, and to the interpretation of agreements of ransom.

§ 20. Modern Contracts of ransom. The term *ransom* is now usually applied to property taken from an enemy in war, and surrendered or restored to the owner on the payment of, or agreement to pay, a specified sum of money, which is called *ransom-money*. This term was formerly applied to the redemption of property captured on land, as well as on the high seas; but, by general use, it is now understood to apply to the agreement made between the commander of a captured vessel or cargo, and the captor, by which the latter permits the former to depart with his vessel, and gives him a safe-conduct, in consideration of a sum of money which the former, in his own name, and in the name of the owners of the vessel and cargo, promises to pay at a future time named. This contract is usually made in writing, in duplicate, one of which is kept by the captor, which is properly called the *ransom-bill*, and the other by the captured

vessel, which is its *safe-conduct*. The general law relating to the ransom of captured property, was fully and ably discussed by Story.

§ 21. In the United States and other countries. The contract of ransom is considered in England as tending to relax the energy of war, by depriving cruisers of the chance of recapture, and several statutes in the reign of George III. absolutely prohibited to British subjects the privilege of ransom of property captured at sea, unless in a case of extreme necessity, to be judged of by the court of admiralty. "Other maritime nations," says Kent, "regard ransoms as binding, and to be classed among the few legitimate *commercia belli*. They have never been prohibited in this country, and the act of Congress of August 2d, 1813, interdicting the use of British licenses, or passes, did not apply to the contract of ransom."

§ 22. If given by one ally, is binding upon the others. Contracts of ransom are binding on allies. "From the very nature of the connection between allies," says Kent, "their compacts with the common enemy must bind each other, when they tend to accomplish the objects of the alliance. If they did not, the ally would reap all the fruits of the compact, without being subject to the terms and conditions of it; and the enemy with whom the agreement was made would be exposed, in regard to the ally, to all the disadvantages of it, without participating in the stipulated benefits. Such an inequality of obligation is contrary to every principle of reason and justice."

§ 23. If ransomed vessel be lost. As a general rule, the captor, by the safe-conduct implied in a ransom-bill, simply guarantees the ransomed vessel against being interrupted in its course, or retaken by other cruisers of its own nation or of its allies, but not against loss by the perils of the sea. There is no implied insurance in the ransom-bill against such losses. If, therefore, the ransomed vessel should founder at sea, or be wrecked, and become a total loss, the contract is still binding, and the ransom-bill payable to the captor. But it is sometimes

specified in the contract of ransom, that the loss of the vessel by the perils of the sea shall discharge the captured party from the payment of the ransom; such a clause is restrained to the case of a total loss *on the high seas*, and is not extended to stranding, which might afford the master a temptation to fraudulently cast away his vessel, in order to save the most valuable part of his cargo, and avoid the payment of the ransom.

§ 24. *If it be recaptured.* If the ransomed vessel should exceed the time, or deviate from the course, prescribed in the contract, she forfeits her safe-conduct, and is liable to recapture; and if 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. But any variation from the course prescribed, or the time limited, by the contract, caused by the stress of weather, or unavoidable necessity, does not work a forfeiture of the safe-conduct. If the captor, after having ransomed an enemy's vessel, 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 under the ransom-bill. But questions relating to maritime captures and recaptures, will be more particularly considered in the chapter on the rights and duties of captors.

§ 25. *If hostage be captured.* Sometimes a *hostage* is taken for the faithful performance of the contract on the part of the captured. The death or the recapture of the hostage, does not discharge the contract or ransom, unless there is an express stipulation to that effect; for the captor takes the hostage only as a collateral security, and the loss of such collateral security does not cancel the contract, or discharge the debtor from his obligation to pay the ransom.

§ 26. *Suits on contracts of ransom.* Contracts of ransom, like

all other agreements arising *jure belli*, and lawfully entered into between belligerents, suspend the character of enemy, so far as respects the parties to the contract? There can, therefore, be no just reason why the captor should not bring suit directly on the ransom-bill. And such appears to be the practice in the maritime courts of the European continent. The English courts, however, have decided that the subject of an enemy is not permitted to sue in the British courts of justice, in his own proper person, for the payment of a ransom, on the technical objection of the want of a *persona standi in judicio*. This technical objection is not based on principle, nor supported by reason, and the decision has not the sanction of general usage.

§ 27. *Flags of truce.* As flags of truce are sometimes sent from the enemy to forces in position, or on the march, or in action, nominally for making some convention, as for a suspension of arms, but really with the design of gaining information, it is proper that restrictions should be placed upon its use. Thus, if sent to an army in position, the bearer of said flag should never be allowed to pass the outer line of sentinels, nor even to approach within the range of their guns, without permission. If warned away, and he should not instantly depart, he may be fired on. Similar precautions may be taken by an army on the march. If the flag proceeds from the enemy's lines during a battle, the ranks which it leaves must halt and cease their fire. When the bearer displays his flag, he will be signalled by the opposing force, either to advance or to retire; if the former, the forces he approaches will cease firing; if the latter, he must instantly retire; for, if he should not, he may be fired upon. It is very rare that a bearer of a flag of truce is admitted during an engagement, and if admitted, it is no breach of faith to retain him until the battle is terminated. If while so presenting himself during an engagement he is killed or wounded it furnishes no ground of complaint. His appearance at such a time is at his own peril. If it be fairly proved that a

flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy. In entering the territory of an enemy, or territory occupied by him, it is the duty of the bearer of a flag of truce to present himself at the nearest military post; if he should, by avoiding such posts, attempt to penetrate into the interior of the country or to reach the headquarters of the commander, or some other important position, it will be presumed that he does this for an improper purpose. Where despatches are presented under a flag of truce they are to be received for and the bearer retained at the outer post or line for an answer, or he is sent back, and the answer returned by another flag.

§ 28. *Flags of protection.* It is customary to designate by certain flags, (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagements. An honorable belligerent will allow himself to be guided by such flags or signals of protection as much as the contingencies and the necessities of the contest will permit. But as such buildings and places may seriously interfere with his operations, it by no means follows that all those so designated are to be spared. The besieging belligerent sometimes requests the besieged to designate by flags, his hospitals, and also buildings exclusively devoted to science and art, as museums, picture galleries, astronomical observations, etc., so that their destruction may be avoided as much as possible. But this is by no means obligatory. The commander must be governed by the particular circumstances of the case. Sometimes it would be injurious to his plans to permit the enemy to receive any notice of his intended attack. To deceive an enemy by flags of protection, or to use them for an improper purpose, as to protect his own effective men or stores, to cover a weak point, to fire from places so designated upon the attacking party, to use them as look-outs for

observing his opponent's strength and movements,—all such acts are justly considered as infamous, and a breach of good faith. The guilty parties, if captured, are not entitled to the privileges of prisoners of war, but may be punished for violation of the laws of war.

## CHAPTER XXVIII.

### LICENSES TO TRADE.

§ 1. Licenses to trade. A *license* is a kind of safe conduct, granted by a belligerent state to its own subjects, to those of its enemy, or to neutrals, to carry on a trade which is interdicted by the laws of war, and it operates as a dispensation from the penalties of those laws, with respect to the state granting it, and so far as its terms can be fairly construed to extend.

§ 2. A general license. A *general license* is a suspension or relaxation of the exercise of the rights of war, generally or partially, in relation to any community or individuals, liable to be affected by their operation. It must emanate from the sovereignty of the state, for the supreme authority alone is competent to decide what considerations of political or commercial expediency will justify a suspension or relaxation of its belligerent rights.

§ 3. A special license. For the same reasons, a *special license* to individuals for a particular voyage, or for the importation or exportation of particular goods, must, as a general rule, also emanate from the supreme authority of the state. But there are exceptions to this rule growing out of the particular circumstances of the war in particular places. The governor of a province, the general of an army, or the admiral of a fleet, may grant licenses to trade within the limits of their own commands, and such documents are binding upon them and upon all persons who are under their authority, but they afford no protection beyond the limits of the authority of those who issue them. Thus, in the war between the United States and the Republic

of Mexico, the governor of California and the commander of the Pacific squadron, issued such licenses, but it was not pretended that such protection extended beyond the limits of their respective commands. The peculiar circumstances of the case, the great distance from the seat of the supreme federal authority, the scarcity of provisions and supplies, and the want of American vessels on that coast, were deemed sufficient reasons for the exercise of that power.

§ 4. *Judicial decisions on licenses.* There are but few American decisions on this subject, while numerous cases are reported in British courts of admiralty and of common law. Unfortunately, however, there is a great want of uniformity in the decisions.

§ 5. *Cause of want of uniformity in English decisions.* Mr. Duer has pointed out and commented on the causes of this irregularity. Prior to the peace of Amiens, licenses were regarded as an act of special grace, and most strictly interpreted, but, on the renewal of the war, the issuing of licenses by England was regarded as a matter of national policy, rather than personal favor. The courts, in consideration of this policy, gave to these instruments the largest interpretation possible. "Most of the reported cases on the subject of licenses, were decided during the period that this liberal doctrine prevailed, and in many of them it is a matter of extreme difficulty to say, whether the determination was governed by the peculiar circumstances and character of the war, or by reasons of general and permanent application."

§ 6. *Representations of grantee.* The validity of a license depends not only on the sufficiency of the authority by which it is granted, but also on the good faith of the party to whom it is issued. Like every other grant, although issued in due form, and by the proper authority, a license may be vitiated by fraudulent conduct in obtaining it. The misrepresentation or suppression of material facts—of facts that, if known, would probably have influenced the discretion of the grantor—renders

the license a nullity, and exposes the property it is invoked to protect to certain condemnation.

§ 7. *Intention of grantor.* Although a license may have been issued by competent authority, and on the good faith of the party obtaining it, in order to render it available for the protection of the property to which it relates, the intentions of the grantor, as expressed in the license, must be pursued in its mode of execution, and there must be an entire good faith on the part of the user, in executing it.

§ 8. *Persons entitled to use a license.* The *first* material circumstance to be considered in the execution of a license, with respect to the intentions of the grantor and the good faith of the user, is, *the persons entitled to use it.* A license is not a subject of transfer or assignment, unless made so by express terms. If it be by express words, made negotiable, or if no mention whatever is made of the persons upon whose application it is granted, or by whom it is to be used, it is a legitimate subject of transfer and sale, and the purchaser is as fully protected as if it had been granted to him on his personal application.

§ 9. *Where the grantee acts as agent for others.* But where the license is not made negotiable, and the persons named in the license obtained it in their own names and not as the representatives and agents of others—the license being *for themselves, their agents, or holders of their bills of lading*—it cannot protect the property of others for whom the grantees act as agents, and in which they are not interested. Thus, a license to B. & S. and their agents will not protect the property of others for whom B. & S. may see fit to act as agents. But where a license is issued to B. S. & Co., meaning under that denomination to include persons who had agreed to take part in the shipment made under such license, such persons are held to be protected.

§ 10. *Character of vessel.* The *second* point to be considered, in determining upon the proper execution of a license, is, *the character of the vessel.* The national character of the ship, as

described in the license, is, in most cases, a condition necessary to be fulfilled. Where the license directs the employment of a neutral vessel belonging to a particular nation, the substitution of a neutral ship of a different state, standing in the same political relations to the belligerent powers, would, probably, not be regarded as prejudicial. The same may be said of the employment of two ships, when the terms of the license refer only to one, if both vessels bear the same national character, and there be no variation in the quantity or quality of the goods described in the license. But, in both these changes, a good and satisfactory cause must be shown. If a neutral ship is mentioned in the license, the employment of a ship of the state issuing the license is considered an essential deviation, which will lead to a condemnation. So, the employment of a ship belonging to the enemy, when not authorized by the license, is, in all cases noxious and fatal.

§ 11. *Exception of a particular flag.* When the license authorizes the transportation of goods by any ship or ships except those under the flag of a particular nation, the exception refers to the *fact* of the nationality of the ship, and not merely to the external signs. Although the vessel may be documented as belonging to, and actually bear the flag of, another state, if it be shown that she really belonged to the excepted nation, she will not be protected by the license and the flag. The reason of this rule is, that vessels of the excepted nation might otherwise engage in the prohibited navigation, by substituting a foreign flag for their own. But the unauthorized employment of such excepted vessels is not permitted to affect the goods of shippers who were not privy to the deception, or cognizant of the fact. Where there is no ground for imputing to them a voluntary departure from the conditions of the license in this respect, their property, if embraced by its terms, retains its protection. The vessel itself is condemned.

§ 12. *Change of national character during voyage.* Again, if the vessel was, in fact, not of the excepted nation when she

sailed, but became so during the voyage, by some unexpected change of circumstances, as the conquest or annexation of the country to which she belongs, by the excepted state, such change of political relations will not deprive her of the protection of the license, where the parties have acted fairly under it. Thus, where the license was for a ship bearing any other flag than that of France, and the owners had become French subjects during the voyage by the sudden annexation to France of the port and territory in which they resided, it was held by Sir Wm. Scott, that the ship continued under the protection of the license, notwithstanding this change of national character.

§ 13. Protection before and after voyage. A license to a vessel to import a particular cargo, is held to protect a vessel, in ballast, on her way to the port of lading, for the express purpose specified in the license. So, also, a license to export a cargo to an enemy's port, covers the ship, in ballast, on her return. In each of these cases the voyage to which the license is extended by implication, has a necessary connection with that to which it expressly relates. But the protection extends no further than is *necessarily* implied in the license; the taking of any part of a cargo on board in the outward voyage in the case of importation, or in the return voyage in the case of exportation, subjects both ship and goods to confiscation.

§ 14. Quality and quantity of goods. The *third* point to be considered in the execution of a license is, *the quality and quantity of goods it protects*. A small excess in quantity, or the partial substitution of those of a different quality, if free from the imputation of concealment or fraud, will not absolutely vitiate the license, under the color of which they were introduced. The goods not protected by it are condemned, while those which it is admitted to embrace, are restored.

§ 15. Protection to enemy's goods. It was at one time held, that express words were necessary to protect the property of an *enemy*; but it was finally decided by the court of exchequer chamber, that a license containing the words, "to whomsoever

the property may appear to belong," included goods shipped on account of enemy's subjects. But Mr. Duer expresses a doubt whether this last decision was not to be referred to the peculiar circumstances of the war, and to be regarded as the fruits of the extreme liberality of construction which prevailed in England at that particular time.

§ 16. License to an alien enemy. A license to an alien enemy, removes all his personal disabilities, so far as is necessary for his protection in the particular trade which is rendered lawful by the operation of the license. In respect to the voyage and trade which the license is intended to authorize and cover, he is not to be regarded as an enemy, but has all the legal privileges of a subject. So far as that particular voyage, trade, or cargo is concerned, he has a *persona standi* in all the courts, and may maintain suits in his own name, the same as a subject.

§ 17. If cargo be injured. The protection of a license is not limited, in all cases, to the cargo originally shipped; for if the original cargo should be accidentally injured or spoiled, it may be replaced by a second one, *precisely corresponding* with that described in the license.

§ 18. If it cannot be landed. A license to export goods to an enemy's port, although limited in terms to the outward voyage, is sufficient to protect both ship and cargo on the return, if the delivery of the goods at the port of destination was prevented by some unavoidable accident, as a blockade, or a reasonable apprehension of seizure. But to entitle himself to the benefit of this liberal construction, the claimant must prove that the goods brought back are the identical goods exported under the license.

§ 19. Compulsory change of cargo. It is never admitted as a valid excuse for receiving on board goods not permitted in the license, that compulsion had been used by the hostile government, and that they were received only to avoid the seizure of the vessel. If such an excuse were admitted, it would open the door to fraud and collusion, as it would be difficult, if not im-

possible, to discover whether such a transaction, taking place in an enemy's port, was voluntary or not.

§ 20. License to import no protection for re-exportation. Where a license is given expressly for *importation*, it is held that it can be used for that purpose only, and not for re-exportation. Although the application should be made for a license to import, for the particular and special purpose of re-exportation, the permission to import would extend no further than was expressed in the instrument itself.

§ 21. Course of voyage. The *fourth* point to be considered, in determining the due execution of the license, is, *the course and route of the voyage*. The requisitions of a license as to the port of shipment or delivery, of departure or destination, must be strictly followed. The same may be said, in general, with respect to the course of the voyage. Any deviation from the prescribed course of the voyage, if produced by stress of weather, or other unavoidable accident, does not invalidate the license; if the necessity be proved, it is deemed a valid excuse.

§ 22. Change of destination. An enemy's ship and cargo, belonging to the same owner, and licensed to go to Dublin, were taken going to Leith, a place not named in the license, and to be reached by a course totally different from that indicated; both ship and cargo were condemned. The party not being within the terms of the license, the character of enemy revives, and the property, thus become hostile, is subject to the ordinary rule of confiscation.

§ 23. Intended ulterior destination. An *intended* ulterior destination does not vitiate the protection of a license, if the parties keep within the terms expressed and intended by the instrument. Thus, a vessel with a license to import a cargo into Leith from a port of the enemy, with an ulterior destination to Bergen. It was held that such ulterior destination did not vitiate the license for the voyage to Leith; but had the vessel been captured after completing the licensed part of the voyage, and on the way

from Leith to Bergen, the license would have afforded her no protection.

§ 24. Condition to call for convoy. The condition introduced in the license, that the vessel shall stop at a particular port for convoy, is regarded as fundamental, and the breach of it as fatal. The reason for introducing the condition is, that the vessel may be subject to inspection in that part of her navigation. In case where the admiral under whose direction the convoy is to be furnished orders a deviation for the purpose of taking convoy at another place, the court felt itself bound to uphold the acts of the admiral. Such a deviation was placed on the same ground as that caused by stress of weather.

§ 25. Capture before and after deviation. The effect of a deviation from the direct voyage described in the license, by touching at an intermediate port, depends in some degree upon the time of capture. If such vessel be seized on her way to such intermediate port, the presumption of law is, that she was going thither for the purpose of violating the license. But if taken after leaving the intermediate port, with the identical cargo which she carried in, and while actually proceeding for her lawful destination, the presumption of *mala fides* would be removed.

§ 26. Time limited in license. The *fifth* point to be considered is, *the time limited in the license*. There is a material distinction between the construction of a license for the exportation of goods to an enemy's port, and one for an importation merely. Where the license requires that the goods to which it relates shall be exported on or before a certain day, a delay for a single day beyond that which is specified, renders the license wholly void. But not so with respect to importations. If the party having a license, be prevented from commencing the voyage, or be delayed in its prosecution by stress of weather, the acts of a hostile government, or other similar cause, over which he has no control, the time thus consumed, is not to be considered in computing the period that the government intended to allow.

But if he takes upon himself, at his own discretion, to extend the period specified, he loses the protection to which he would otherwise have been entitled.

§ 27. A license has no retrospective action. A license does not act retrospectively, and cannot take away any interest which is vested by law in the captors. Thus, a vessel was captured on the 24th of January, with an expired license on board. Another license was obtained, and its date carried back to January 20th. It was held by the court, that the vessel at the time of capture was not protected either by the license which had expired, or by that subsequently obtained.

§ 28. If not on board or not endorsed. Moreover, a license, not on board at the time of capture, but afterwards endorsed for it by the shipper, is no protection. If the license is general in its terms, the mere fact of its being found on board is not sufficient, unless it has been appropriated to such ship by an endorsement to that effect, or by some positive evidence that this application was intended by the parties entitled to its use.

§ 29. If its date be altered. A license is vitiated and becomes a mere nullity by an alteration of its date. In this respect, licenses are governed by the same rules as other grants issued by the supreme power of the state; they are utterly vitiated by any fraudulent alteration, and any change is *prima facie* fraudulent. It may, however be explained.

§ 30. Breach of blockade, etc., by a licensed vessel. A license to trade with a port of the enemy, does not serve as a protection for a breach of blockade, in case the port is blockaded; nor does it afford any protection for carrying goods contraband of war, enemy's dispatches, or military persons, or for a resistance of the right of visitation and search; in fine, it can cover no act not expressly mentioned in the license or implied as a means necessary for its execution.

## CHAPTER XXIX.

### DETERMINATION OF NATIONAL CHARACTER.

§ 1. National character, how determined. *National character* may be determined from origin, naturalization, domicile, residence, trade, or other circumstances.

§ 2. Allegiance from origin. That which results from birth or parentage, follows the individual wherever he may be, till it is changed in one of the modes established or recognized by law: such as expatriation, naturalization, domiciliation, etc. Native allegiance is a legal incident of birth, and is the implied fidelity and obedience due from every person to the political sovereignty under which he is born. This is a principle of universal law, and is sanctioned alike by international jurisprudence and by the municipal codes of all countries.

§ 3. Naturalization. But at the same time all states claim and exercise, as an incident of their sovereignty, the right to naturalize any foreign resident within their jurisdiction.

§ 4. Apparent conflict between allegiance and naturalization. There is an apparent inconsistency in these two rules, for how can any particular state, by its municipal law, qualify a general maxim of international jurisprudence, or prevent the application to its own subjects, of an established principle of public law? This inconsistency, however, is more apparent than real. It must be remembered, that although international law recognizes the right of one state to naturalize or adopt the subjects of another, it is not *in virtue of this public law* that such citizen is naturalized or adopted, but *by virtue of the positive or municipal law of the country*, which naturalizes or adopts them. The

*newly made* citizen is entirely the *creature* of municipal law, and is invested only with such rights, privileges, and immunities as that law is capable of conferring upon him. So, on the other hand, while international law recognizes the right of one state to retain the allegiance of its subjects, or to expatriate them, the tie which binds them is not formed, or its nature determined, by *public law*, but by the *municipal code* of such state. As the municipal law *makes* the citizen by naturalization, so, also, it *retains* or *unmakes* him, by retaining or dissolving his allegiance.

§ 5. Allegiance does not affect personal domicil. But whatever may be thought of the effect of the doctrine of allegiance upon the national character of the subject within his native state, it certainly can produce no effect without the limits of its jurisdiction, for, even admitting that doctrine in its full extent, the obligations resulting therefrom are binding only within the state to which the individual originally belonged, without affecting, with reference to his adopted country, the validity of his naturalization there. And the nationality thus assumed must, according to the rules of international jurisprudence, be recognized by all other states except that which claims his primitive allegiance, until it is again changed by the municipal code of some state within whose jurisdiction he may eventually place himself. Nor does this abstract question of native allegiance affect national character, as determined by personal domicil; for it is a general rule of public law, that every person of full age has a right to change his nationality by choosing another domicil.

§ 6. Nor commercial domicil. The national character of a merchant is determined by his *commercial domicil*, and not by the country to which his allegiance is due, either by his birth, or by his subsequent naturalization or adoption. He is regarded as a political member of the nation into which, by his residence and business, he is incorporated, and as a subject of the government which protects him in his pursuits, and to the support of

which he contributes by his property and his industry. This rule of decision is adopted both in prize courts and in courts of common law, and is applied, in a belligerent country, to its own native subjects, as well as to those of a neutral power.

§ 7. *Domicil defined.* Phillimore says: "Domicil answers very much to the common meaning of our word *home*, and where a person possessed two residences, the phrase *he made the latter his home*, would point out that to be his domicil." He, however, considers the definition of Judge Rush, in the American case of *Guier v. Daniel*, as the best, viz: "A residence at a particular place, accompanied with positive or presumptive proof of intention to remain there for an unlimited time."

§ 8. *Divisions of domicil.* Various divisions have been made by the different writers who have treated of domicil. Some authors who have divided it into two kinds, *principal* and *accidental*, the former being the centre of his affairs, and the latter his place of residence for a part of his time, or for a particular purpose. Another division is into *personal* and *commercial*, the former having reference to his personal or actual residence, and the latter to his place of business or trade. Kent says: "There is a *political*, a *civil*, and a *forensic* domicil." This division is sufficiently explained by the terms employed. Others, again, divide domicil according to birth, necessity and will, as, 1. Domicil of Origin, (*Domicilium Originis*;) 2. Domicil by Operation of Law, (*Domicilium Necessarium*;) 3. Domicil of Choice, (*Domicilium Voluntarium*.)

§ 9. *Intention, the controlling principle.* The great controlling principle, however, in determining domicil is the *intention* of the party. And when his intention to reside for an indefinite period or permanently, in the place where he is found, is established by proof, the length or brevity of his actual residence is of no avail to protect him from the consequences of the national character resulting from such residence.

§ 10. *Necessity of some overt act.* But *mere intention*, without some *overt act*, is not sufficient to determine domicil, for that in-

tion is liable to be revoked every hour. Courts have, therefore, always required, in such cases, something more than a mere verbal declaration—some solid fact, to show that the party is in the act of carrying that avowed intention into effect.

§ 11. *Domicil from residence.* Where the party has avowed his intention with respect to residence, and his acts have corresponded with such declaration, the question of domicil is free from embarrassment. But, in most cases, no positive declarations of the party whose domicil is in question can be proved—or, at least, none against his own interests—and, it becomes necessary to deduce his intention from the circumstances of his residence, occupation, and business relations. And these circumstances are of so mixed and varied a character as to render it impossible to embrace them all in any general definition.

§ 12. *Effect of domestic ties.* A most material and significant circumstance in determining the intention of the party, is the residence of his family. If he is married, and established with his family in the country where he is living, the inference is highly reasonable that he intends to reside there permanently. And, although his family may not be with him, if he has made preparations to have them join him, the same inference will be drawn.

§ 13. *Exercise of political rights, etc.* The possession and exercise of political rights, and the payment of taxes, were considered by the Roman law as strong tests of domicil; but less weight seems to be given to these circumstances in England than by the civilians. Nevertheless, when taken in connection with other facts, they are not without their influence in determining national character in war.

§ 14. *Character and extent of business.* Another material circumstance by which intention is determined, is the character of the trade, or business, in which the party is engaged. If his commercial enterprises have their origin and centre in the country of his residence, although extending to other countries, or if his business is of such a character and extent as to require

an indefinite period to bring it to completion, the fair inference is, that he intends to reside there permanently, and the court will therefore regard it as his domicil.

§ 15. *Time of residence.* Another and most significant circumstance by which the intention may be ascertained, is the *time* of residence. In most cases, this circumstance is unavoidably conclusive in determining domicil. Even where the party had first gone to a foreign country for a special purpose, which would repel the presumption that he intended to make it his permanent residence, yet if he has remained a great length of time, it will be presumed that his first intention has been changed, and that a general residence has grown, as is frequently the case, upon a special purpose. Hence, the plea of an original special purpose is not to be averred against a residence continued for a long period of time.

§ 16. *Distinction in favor of American merchants.* In former times the particular situation of America, with respect to distance, was considered by the English courts as entitling the merchants of that country to some favorable distinctions in the matter of domicil, as determined by length of residence. It was, therefore, held that they might remain in an European state for a longer period than a merchant of a neighboring country, without being considered as a permanent resident. But, with the present facilities for communication afforded by steam and telegraph, it is doubtful if this favorable distinction would now be made.

§ 17. *Presumption arising from foreign residence.* The presumption of law with respect to residence in a foreign country, is, that the party is there *animo manendi*, and it lies upon him to explain it. Thus, when the property of a foreigner, who, at the time of its shipment, was living in a hostile country, is seized as that of an enemy, the captors are not bound to prove that his place of residence was his actual domicil; but it rests upon him to disprove the presumption of the law, and, to redeem his property from the noxious imputa-

tion, he must give such evidence of his intention and plans, as shall be effectual to repel it.

§ 18. Evidence to repel this presumption. In order to repel this presumption of the law, it is necessary for the party to prove that his original intention was to remain only for a short and definite period, that to accomplish the purpose of his visit, neither a long nor an indefinite period would be required ; that his past residence had not been long enough, by the mere operation of time, to establish a domicile, and that he had not been so mixed up with the trade and navigation of the country, as to have acquired its national character, by the very nature of his occupation.

§ 19. Of ministers and consuls. The national character of an ambassador, or public minister, is not affected by his residence in a foreign country, no matter what may be its duration, or the circumstances indicative of the intent of the party to render it permanent. This results from the rule of *ex-territoriality* as already discussed. Being deemed a resident within the territory of his own state, the law of foreign domicile does not apply to him. But a consul does not come within this exception, although mere residence in the performance of his official duties may not confer upon him a foreign domicile, nevertheless, his consular character affords no protection to his mercantile adventures.

§ 20. Other public officers. The French jurists have laid down the following rules respecting the domicile of officers, civil or military, employed in the public service: 1st. If the office be for life, and irrevocable, the domicile of the holder is in the place where its functions are to be discharged, and no proof of the contrary will be admitted, "for the law will not presume an intention contrary to indispensable duty." 2d. If the office be temporary or revocable, the law does not presume that the holder has changed his original domicile, but proof will be admitted to establish the fact that he has done so. These two divisions, says Phillimore, seem to warrant a 3d: Where the

office, although for life and irrevocable, requires the holder to reside only a part of the time in the place where its functions are to be discharged, the law will presume his domicile to be in that place, but this presumption will yield to proof that the seat of his family affairs,—the residence of his wife and children—is elsewhere, and that he has described himself, in all legal instruments, as belonging to the place of former domicile, and not to the place of his employment.

§ 21. A wife, minor, student, servant. It was a maxim of the Roman law, which has been incorporated into modern jurisprudence, that as the wife takes the rank, so does she also take the domicile of her husband; and, by the same analogy, the widow retains it after her husband's death. But if she marry again, her domicile becomes that of her second husband. A minor, who is not *sui juris*, cannot change his domicile of his own accord, (*propria marte*;) his domicile is that of the father, or of the mother during widowhood, or, perhaps in some cases, of the legally appointed guardian. Students, whether majors or minors, are not considered as acquiring a domicile in the place where they sojourn merely for the purpose of prosecuting their studies. Servants may, or may not, have the same domicile as their masters, according to the particular circumstances of the case.

§ 22. A soldier, prisoner, exile, and fugitive. According to the Roman law, a soldier's domicile was in the country where he served, if he possessed nothing in his own country; but if he had any property in his own country, he would be allowed a double domicile. By the law of all European countries, the prisoner preserves the domicile of his country. With respect to exiles, the civil jurists distinguish between banishment for life, and for a term of years; in the first, the exile loses his original domicile, but preserves it in the second, being regarded in the same light as a person on a long voyage. The fugitive or emigrant from his country, on account of civil war, is held not to have lost his intention of returning to it, and therefore,

retains his native domicil. But if the prisoner, exile, or fugitive continue to reside in a foreign country after the coercion has been withdrawn, and after his power of choice has been restored, he may acquire a domicil therein.

§ 23. *Effect of municipal laws on domicil.* Suppose the government of the country of residence prohibits a foreigner from acquiring a domicil? It has been decided in France that a *de facto* domicil may be acquired, notwithstanding such prohibition, even with respect to the country of residence. This is placed on the ground that, although not entitled to the privileges of a domiciled subject, he may incur the liabilities.

§ 24. *Of treaties, etc.* Treaties sometimes have the effect of preserving to the resident in a foreign country his original domicil, or of giving to him a commercial domicil, neither of the country of his origin nor that of his residence. Such has been the general effect of the treaties and commercial intercourse between Christian and Mohammedan states.

§ 25. *Temporary residence.* If a neutral merchant go into an enemy's country during the war merely to collect his debts, or to withdraw the property which he may have there, his temporary residence, *for that purpose alone*, will not confer upon him a hostile character, and the property and funds thus sought to be withdrawn will not be subject to confiscation.

§ 26. *A merchant may have several domicils.* The active spirit of commerce and enterprise in the present day, and the increased facilities for travel afforded by steam navigation and railroads, are well calculated to perplex the mind of a court in assigning accurately a merchant's national character, at different periods of a divided transaction. Thus, if he have charge of a complex mercantile business, he may be found, at no great intervals of time, in a variety of local situations, without any permanent residence in any one place. It is, therefore, held, that a merchant carrying on commerce in different countries, in time of war, has the national character of each, in his respective trades.

§ 27. Native character easily reverts. The native national character, lost, or suspended by a foreign domicile, easily reverts. The adventitious character imposed by domicile, ceases with the residence from which it arose. An actual return to his native country is not always necessary, nor even an actual departure from the country of his domicile, if he has actually put himself in motion *bonâ fide* to quit the country *sine animo revertendi*. But the commencement of the journey to return to his native country, although it may restore to the party his native national character, will exempt his property from the hostile character acquired by residence, only in cases where such property has been engaged in a trade completely lawful in the native character. The principle can never be extended to protect a trade which is illegal in a native subject or citizen.

§ 28. Leaving and returning to native country. In the application of the general rule that the native character of the party must be taken from that of the country where he resides, there is a material difference between removing from, and returning to, one's native country. Although the native character remains till a new domicile is acquired by actual residence or settlement in a foreign country, the adventitious character resulting from domicile, ceases with the residence from which it arose.

§ 29. National character during war. It seems to be a well settled principle of international law that, during the existence of hostilities, (*flagrante bello*,) no subject of a belligerent can transfer his allegiance, or acquire a foreign domicile by emigration from his own country, so as to protect his trade either against the belligerent claims of his own country, or against those of a hostile power. In other words, his allegiance continues the same, and his native character is unaffected by his change of residence. This doctrine rests on the ground that to desert one's own country in time of war, is an act of criminality, and that if a citizen remove to another state, his allegiance is still due to his sovereign, and he is as much bound to abstain from trade with a public enemy, as if he had remained

at home; and his property, as that of an enemy, continues to be just as liable to seizure and confiscation, by an opposite belligerent.

§ 30. *Effect of military occupation.* Mere military occupation of a territory by the forces of a belligerent, (without confirmation of conquest by one of the modes recognized in international law,) does not, in general, change the national character of the inhabitants. It will be shown in a subsequent chapter, that the allegiance of such inhabitants is temporarily suspended, but not actually transferred to the conqueror. They owe to such military occupants certain duties, but these fall far short of a change of the allegiance due to their former sovereign.

§ 31. *Of complete conquest.* It will also be shown hereafter that, where the conquest is confirmed, or in any other way made complete, the allegiance of the inhabitants who remain in the conquered territory is transferred to the new sovereign. The same effect is produced by an ordinary cession of such territory. In either case the national character of the inhabitants who remain, is deemed to be changed from that of the former to the new sovereign, and in their relations with other nations they are entitled to all the advantages, and are subject to all the disadvantages, of their new international *status*.

§ 32. *Of cession without occupation.* But mere cession by treaty does not of itself operate as an immediate transfer of the allegiance of the inhabitants of the ceded territory. They remain subjects of the power to which their allegiance was originally due, until the solemn delivery of the possession by the ceding state, and an assumption of the government by that to which the cession is made. The actual delivery of the possession, and the actual exercise of the powers of government must be clearly shown.

§ 33. *Of revolution and insurrection.* Revolution or possession by insurgents, as already stated, cannot be regarded by a prize court as changing the national character of the territory so possessed or occupied, until the fact has been recognized by the

political authority of the government to which the court belongs. Thus, although it was a matter of notoriety that a considerable part of the island of St. Domingo, had, by revolt, been detached from the French colonial government, and its inhabitants were in common opposition to France, then at war with England, the court of appeal, nevertheless, decided that such inhabitants must be regarded as hostile in their commercial relations, till the British government should recognize their change of national character. But where any port or part of the island had been recognized by orders in council, as not in the possession and under the dominion of France, such port or place would be so considered by the court. The Supreme Court of the United States has adopted the same rule of decision.

§ 34. Of a particular trade. In many cases, the nature of the traffic or business in which an individual is engaged, may stamp upon him a national character, wholly independent of that which his place of residence alone would impose. Thus, although a neutral merchant, residing in his own country, and trading, in the ordinary manner, to the country of a belligerent, does not thereby acquire a hostile character, yet, if he is a privileged trader, engaged in a commerce that none but the subjects of the enemy are permitted to conduct, or that can only be carried on by a special license from the government, the place of his domicil will not protect such trade, but all his property embarked in it becomes liable to confiscation, as that of an enemy.

§ 35. This character differs from that derived from domicil. There is, however, a very material distinction between the hostile character impressed by domicil, and that which results solely from the nature of the traffic in which the individual is engaged. A foreign merchant domiciled in the country of the enemy, is himself an enemy, in the same sense and to the same extent as a native subject; and all his property on the ocean, wherever it may be found, and whatever may be the nature of the commerce in which it is embarked, is liable to confiscation.

But the hostile character which arises solely from the nature of the traffic, is limited, in its noxious and penal effects, to the transactions and property that the prohibited trade embraces; in all other respects, such individual still retains all the rights and immunities of a neutral, a subject, or an ally, as the case may be.

§ 36. *Of habitual employment.* The habitual employment of an individual may also affect his national character. Thus, a person employed habitually and constantly, as a master or mariner, or as a supercargo or commercial agent, in the trade and navigation of a hostile country, although he has no domicile there, in the civil and legal sense of the term, is impressed with its national character, and this hostile character spreads itself, in its consequences, *generally* over his affairs. It follows and involves all his property, in whatever trade employed, that does not appear, from other circumstances, to have acquired a distinct national character.

§ 37. *National character of ships and goods.* The national character of ships is, as a general rule, determined by that of their owners. But, as already shown, this rule is subject to many exceptions, a hostile character being not unfrequently impressed upon the vessel, while its owners are neutrals or friends. Thus, a hostile flag and pass, the carrying of military persons or dispatches of an enemy, trading between enemy's ports, etc., will give to the vessel a hostile character, no matter what may be that of its owners. The national character of goods, as a general rule, follows that of their owner; but, as shown in the preceding chapters, this rule is sometimes varied by the character and conduct of the vessel in which they are found, by the acts of the commander or supercargo in whose hands they have been placed, and by the nature of the documentary evidence by which the ownership is attempted to be proved.

## CHAPTER XXX.

### RIGHTS AND DUTIES OF CAPTORS.

§ 1. Of captures generally. The term capture, as used in international law, embraces everything taken in war, both on land and water. We, however, shall discuss in this chapter only maritime captures.

§ 2. What constitutes a maritime capture. The courts have decided that an act of taking possession is not indispensably necessary to a capture; an obedience to the summons of the hostile force, though none of that force be actually on board, is sufficient. The real surrender, (*deditio*) of a vessel, is dated from the time of striking her colors. But there must be a manifest intention *to retain* as prize, as well as an intention *to seize*, otherwise the capture will be regarded as abandoned.

§ 3. To whose benefit it enures. The right to all captures vests, primarily, in the sovereign. When the capture enures to the benefit of individuals, it is in consequence of a grant by the state.

§ 4. Title when changed. With respect to maritime captures the modern usage, after much fluctuation, seems likely to settle upon the principle, that the captor acquires an inchoate title by possession alone, and that, to make this complete and perfect, a condemnation by a competent court of prize is necessary.

§ 5. Where prizes must be taken. It is incumbent on the captor to bring his prize, as speedily as may be consistent with his other duties, within the jurisdiction of a court competent to adjudicate upon it. But, if prevented by imperious circumstances from bringing it in, he may be excused for taking it to a foreign

port, or for selling it, provided he afterwards reasonably subjects its proceeds to the jurisdiction of a competent court of prize.

§ 6. Of joint captures generally. *Joint captures* are those made by two or more vessels acting in conjunction, or by one or more vessels with the coöperation of land forces. Where all captured property is condemned to the government, it is of very little importance who are to be considered the real captors, where several lay claim to that title; but where captured property is condemned as prize to the benefit of the captors, it becomes a question of special interest to determine who are, in law, to be considered as captors, and, consequently, to share in the prize. Municipal law may determine such questions where all the claimants belong to the same state, but in case of allies it is necessary to recur to international law.

§ 7. Constructive capture by public vessels. We will first consider joint capture *by public vessels of war*. All ships of war which are *in sight* at the time of the actual seizure, are deemed to be constructively assisting, and, therefore, are entitled to share in the prize. The reason of this rule is, that public ships are under a constant obligation to attack the enemy wherever seen, and, therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised that they are there *animo capiendi*; and this rule is additionally supported by the obvious policy of promoting harmony in the naval service.

§ 8. When actual sight is not necessary. But actual sight is not absolutely necessary to constitute constructive joint capture. If it be shown that the asserted joint captor was in sight when the darkness came on, and that she continued steering the same course by which she was before nearing the prize, and that the prize itself also continued the same course, it amounts almost to a demonstration that the vessels would have seen, and been seen by each other at the time of capture, if darkness had not intervened. In such a case, the vessel so pursuing is let into the benefit of joint capture.

§ 9. Of joint chase. In respect to *joint chase*, much depends

upon whether the vessels are acting in association, or separately with a common object in view. In the latter case, the question of actual or constructive sight will generally determine the claim to joint capture, as stated in the preceding paragraph.

§ 10. Services before and after capture. No *antecedent* or *subsequent* services in the expedition will entitle a party to the benefit of joint capture, where he would not otherwise be entitled to share.

§ 11. Vessels associated in same service. In respect to captures made by ships which are associated in the same service or joint enterprise, under the same superior officer, as a general rule all are entitled to share as joint captors, although not in sight at the time of capture. The fleet so associated is considered as one body, acting together for one single object, and what is done by a part enures to the benefit of all.

§ 12. Mere association not sufficient. But mere association is not sufficient to entitle vessels to share as constructive joint captors; they must have a military character, and be capable of rendering military service; in other words, there must be an *animus capiendi*. Thus, a ship forming part of a blockading squadron, but totally unrigged, and incapable of rendering any service at the time of capture, is held to be as much excluded as one totally unconscious of the transaction; because, by no possibility could that ship be enabled to coöperate in time.

§ 13. Convoying ships. Convoying ships are under no disability of claiming as joint captors an account of their employment, if, in other respects, entitled to share in the prize, unless the capture is made at such a distance as would remove them from the performance of the special duty of protecting their convoy.

§ 14. Detached vessels. If a vessel be detached from the fleet at the time of capture so as to separate her from the joint object, she cannot be considered as a constituent part or member of the association, and cannot claim the benefit of joint capture

with the fleet, nor can the fleet be allowed to come in as joint captors in any prize taken by her after she was detached.

§ 15. *Joint capture by land and sea forces.* It has been held that a mere general coöperation, in the same general objects, will not be sufficient to make land forces joint captors with a fleet; there must be an actual assistance and coöperation in the particular capture. Where there is preconcert, a very slight service is sufficient. So, where soldiers are landed on the coast, to coöperate with a fleet, in a conjunct expedition, or in a particular engagement, they are entitled to share in the capture.

§ 16. *By public ships of allies.* The public ships of allies, serving together, are entitled to share in captures, the same as those of a single belligerent. There is no difference in this respect, whether the benefit of joint capture goes to the government, or to the vessels, their commanders and crews. If, of two allied joint captors, the government of one has made a grant of the prize, and the other has not, the condemnation will be, in the former case, directly to the joint captor, and in the latter, to the government, according to the share of each.

§ 17. *Constructive joint captures not allowed to privateers.* As privateers are not under the same obligations as a public vessel to attack the enemy wherever seen, they are not allowed the benefit of constructive joint capture. A different rule would induce privateers to follow in the wake of public ships of war, and keeping in sight of them, merely to become entitled to the joint benefit of the captures which they might make. But a public ship of war, is entitled to the benefit of constructive joint capture, where the actual taker is a privateer, the same as though both were vessels of war.

§ 18. *Captures by revenue cutters.* Revenue cutters are sometimes furnished with letters of marque, and cruise beyond the ordinary limits of their duty as coast guards, for the purpose of capturing enemy's merchant vessels. They are public vessels, but not public vessels of war, and, with respect to the benefits of joint capture, are, by English courts, considered in the light

of privateers, and the rule of constructive assistance, from being in sight, does not apply to them; for, not being under the same obligations as kings' ships to attack the enemy, they are not entitled to the same presumption in their favor.

§ 19. By boats. With respect to captures made by *boats*, it is a general rule, that the ships to which they belong, are entitled to share as joint captors; or rather, the capture is considered as made by the ship, the boats being a part of the force of the ship. But if the capturing boat has been detached from the ship to which it belongs, and attached to another, only the ship to which it is attached at the time of capture, shares in the prize.

§ 20. By tenders. Captures made by *tenders* are regulated by the same rules as those made by boats, the ship to which the tender is attached being entitled to share, however distant she may be at the time of capture.

§ 21. By prize-masters. Prizes hold the same relation to their captors, as do the boats of the same vessel. Hence, prize interests acquired by a prize-master on board of a captured vessel, enure to the benefit of the whole ship's company.

§ 22. By non-commissioned vessels. The general rules of joint capture for commissioned privateers, are also applicable to non-commissioned vessels; with this distinction:—that all captures by the latter must be condemned to the government as *droits of admiralty*, the captors only receiving compensation in the nature of salvage, which is usually awarded by the prize court, where their conduct has been fair; and in cases where there has been great personal gallantry and merit, the whole value of the prize is given them.

§ 23. Man-of-war as joint captor cannot dispossess a privateer. Where a privateer or non-commissioned vessel is the actual captor, and a man-of-war only a joint captor, the latter has no right to dispossess the former, but is entitled to put some one on board to take care of the interests she may have in the capture.

§ 24. Effect of fraud on claims for joint capture. Any miscon-

duct or fraud on the part of the capturing vessel, intended to deceive another, in order to prevent her from taking part in a capture, is generally punished by admitting the claim of the latter to the benefit of joint captor.

§ 25. Distribution of prize to joint captors. It is a general rule of prize law that joint captors share in proportion to their relative strength. And this relative strength is usually determined by the number of men on board the actual taker, and the ships assisting in the capture.

• § 26. Of bounty or head money. The foregoing remarks respecting joint capture refer to benefit in *prize*; but some states also allow a *bounty*, or *head money*, for the taking or destroying of vessels of the enemy. Such provision is made by the fifth section of the English prize act. As grants of this description are considered as made to reward immediate personal exertion, and, moreover, are *public grants*, the courts construe them with much more rigor than they do the conflicting claims of individuals for shares of prize money. In these, as in all other public grants, the presumption is in favor of the grantor, and against the grantee. Hence, all claims of constructive joint capture, as from sight, association in chase, etc., are rejected.

§ 27. Collusive captures. In all cases of collusive captures, the captors, whether single or joint, acquire no title to the prize, and the captured property is condemned to the government. If collusion be alleged, the usual simplicity of the prize proceedings is departed from in order to discover the fraud, if any exist.

§ 28. Forfeiture of claims to prize. In all cases of forfeiture of interest in the prize by the captors, the condemnation is to the government. The captor may forfeit his right of prize in various ways: as, by an unreasonable delay in bringing the question of prize or no prize to an adjudication by a competent court; by unnecessarily taking the captured vessel to a neutral port; by cruel treatment of the captured crew; by breaking bulk on board, except in case of necessity; by embezzlement; by breach

of instructions, or any offense against the law of nations, etc. But irregularities on the part of captors, originating in mere mistake or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their right of prize.

§ 29. Probable cause of seizure usually sufficient. *Probable cause* of seizure is, by the general usage of nations and the decisions in admiralty, sufficient excuse in cases of capture *de jure belli*, and this question belongs exclusively to the court, which has jurisdiction to restore or condemn. The general principles which govern cases of this character, are embodied in the statute laws of the United States. The act of June 26th, 1812, section six, provides that the courts of the United States in which the case may be finally decided, "shall and may decree restitution, in whole or in part, when the capture shall have been made without *just cause*; and if made without *probable cause*, or otherwise unreasonably, may order and decree damages and costs to the party injured."

§ 30. When captors are liable for costs and damages. But if there were no reasonable causes for suspicion, and the capture is a mere naked trespass; if the captured vessel be lost or injured through neglect of the captor, or if he unreasonably delay to procure an adjudication, the courts may decree costs and damages against him.

§ 31. Duties of prize master. It is the duty of the prize master, immediately on his arrival in port, to institute proceedings in the proper court for the adjudication of his prize. He should also deliver over to the commissioner, or proper officer of the court, all the papers and documents found on board, and, at the same time, make affidavit that they are delivered up as taken, without fraud, addition, substitution or embezzlement. He should also have the master and principal officers, and some of the crew, of the captured vessel, brought in for examination. This examination should take place as soon as possible after the arrival of the vessel.

## CHAPTER XXXI.

### PRIZE COURTS, THEIR JURISDICTION AND PROCEEDINGS.

§ 1. Validity of a maritime capture how determined. The validity of a maritime capture must be determined by a prize court of the government of the captor, and cannot be adjudicated by the court of any other country.

§ 2. Why prize courts of other countries cannot condemn. The reason of this rule is based upon the responsibility which the law of nations imposes upon the government of the captor in case of unlawful condemnation of the captured property. If the court of any country other than that of the captor were to condemn, the government of the captor could not be held responsible to the government whose citizen is unlawfully deprived of his property. This rule necessarily excludes the jurisdiction of a prize court of an ally over captures made by his co-belligerent. The government of the captor is held responsible to other states for the acts of his own subjects, but not for those of his allies.

§ 3. Apparent exceptions where neutral rights have been infringed. There are two apparent exceptions to this exclusive jurisdiction of the prize courts of the captor's country over questions of prize; *first*, where the capture is made within the territory of a neutral state, and *second*, where it is made by a vessel fitted out within the territory of the neutral state. In either of these cases, the judicial tribunals of such neutral state have jurisdiction to determine the validity of captures so made, and to vindicate its own neutrality by restoring the property of its own subjects, or of other states in amity with it.

§ 4. If captor have no prize court or maritime ports. We have already stated that a prize or its proceeds must be brought into port of captor's country for condemnation by a proper court. But suppose the captor has no ports, or prize courts, to which he can bring his prize;—may he destroy his captures? Isolated cases may occur during the prosecution of a war where the destruction of a prize is justifiable; but where the destruction of all prizes without condemnation is adopted as a rule, it would be difficult to distinguish it from piracy. Both are equally repugnant to international law.

§ 5. Attempts of neutrals to assume prize jurisdiction. Attempts have been made by some states to give to their own tribunals prize jurisdiction of all captured property brought within their territorial limits. Such a municipal regulation was made by France, in 1681, and its justice was defended on the ground of compensation for the privilege of asylum granted to the captor and his prizes in a neutral port. But it is now universally admitted that such action of a neutral court cannot divest the exclusive prize jurisdiction of the courts of the captor's country.

§ 6. Distinction between municipal and prize courts. There is evidently a wide distinction between the ordinary municipal tribunals of the state, proceeding under the municipal laws 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. This distinction has led to the rule of international law, that no court can have prize jurisdiction unless it be expressly made a prize tribunal by the authority of the state to which it belongs.

§ 7. English prize courts. In England prize jurisdiction is given to the courts of admiralty, by special commissions, distinct from the usual commission given to judges of that court.

§ 8. Prize courts of the United States. Under the constitution and laws of the United States the distinct courts of the federal judiciary are prize courts of admiralty, with all the powers in-

cident to their character as such under the law of nations. No special commission is ever issued to these courts.

§ 9. *The President cannot confer prize jurisdiction.* It has also been decided by the Supreme Court, that neither the President of the United States, nor any officer acting under his authority, can give prize jurisdiction to courts not deriving their authority from the constitution or laws of the United States. The Alcalde of Monterey, a port of Mexico, in the possession and military occupation of the United States, as conquered territory, was appointed by the governor of California, as a judge of admiralty with prize jurisdiction, and the appointment was ratified by the President, on the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States. The supreme court held that such a court could not decide upon the rights of the United States, or of individuals, in prize cases, nor administer the laws of nations; that its sentence of condemnation was a mere nullity, and could have no effect upon the rights of any party.

§ 10. *Court may sit in country of ally.* We have already seen that the prize court of an ally cannot condemn; but may not the prize court of the captor sit in the territory of an ally? The objections made to the jurisdiction of an ally's court, do not apply to a court belonging to the country of the captor sitting in an ally's territory. Hence, Chancellor Kent says, that such court, so sitting, may lawfully condemn.

§ 11. *But not in neutral territory.* But a prize court of the captors cannot sit in a neutral territory, nor can its authority be delegated to any tribunal sitting in neutral territory. The reason of this rule is obvious. Neutral ports are not intended to be auxiliary to the operations of the belligerents, and it is not only improper but dangerous to make them the theatre of hostile proceedings. A sentence of condemnation by a belligerent prize court in a neutral port is, therefore, considered insufficient to transfer the ownership of vessels or goods captured in war, and carried into such port for adjudication.

§ 12. In conquered territory. The objections made to the establishment of a prize court in neutral territory would not apply to conquered territory in the possession and military occupation of the captors. Such territory is *de facto* within the jurisdiction of the conqueror, and a condemnation regularly made by a prize court legally established in such conquered territory would not be set aside for that reason alone. The *legality* of the court may, however, be a question of some difficulty, and must be determined by the constitution and local laws of the captor's country.

§ 13. Extent of jurisdiction of prize courts. The ordinary prize jurisdiction of the admiralty extends to all captures in war made on the high seas; to captures made in foreign ports and harbors; to captures made on land by naval forces; to surrenders made to naval forces alone, or acting conjointly with land forces; to captures made in rivers, creeks, ports and harbors of the captor's own country in time of war, and to seizures, reprisals and embargoes, in anticipation of war. It also extends to all ransom bills upon captures; to money received as a ransom, or commutation on a capitulation to naval forces, alone or jointly with land forces; in fine, to all uses of maritime capture arising *jure belli*, and to all matters incidental thereto. Prize courts also have exclusive jurisdiction and an enlarged discretion, as to allowance of freight, damages, expenses and costs, and as to all torts, personal injuries, ill-treatments, and abuse of power, connected with maritime captures *de jure belli*, and they frequently award large and liberal damages in such cases. But prize courts do not, in general, take jurisdiction of questions of mere *booty*. If, however, the jurisdiction of a prize court has once attached, that is, if the capture be such as to bring it within the jurisdiction of the admiralty, the process of the prize court will follow the goods on shore, and its jurisdiction still continues, not only over the capture, but also over all questions incident to it. So, also, if the prize

should be unwarrantably carried into a foreign port and there given up by the captors on security.

§ 14. *Location of prize.* Prize courts take jurisdiction of a prize wherever it may be conveyed, and of its proceeds wherever it may have been sold. Some writers have questioned such jurisdiction where the prize has been conveyed into a neutral port, but practice seems to have definitively settled the rule.

§ 15. *Decision of competent court conclusive.* The sentence of a competent prize court of the captor's country, is conclusive upon the question of property in the captured thing; it forecloses all controversy respecting the validity of the capture, as between the claimants and the captors of those claiming under them, and terminates all ordinary judicial inquiry upon the subject matter. The captors cannot be held responsible in the court of any other country, nor can the question of the ownership of the captured property be made a matter of judicial investigation when once decided by a competent prize court.

§ 16. *When jurisdiction may be inquired into.* We have already stated the general principle that the sentence of a prize court, of competent jurisdiction, *in rem*, is conclusive upon the title to the property condemned. It may be added, that the general presumption is, that the jurisdiction exercised by a foreign tribunal, is lawful. But the presumption may be overturned by competent evidence. Where a claim is set up under a sentence of condemnation of a foreign court, every court has a right to examine into the jurisdiction of such foreign court, so far, at least, as to ascertain its competency, in international law, to pronounce the adjudication. Whenever the jurisdiction cannot, consistently with the law of nations, be exercised, the sentence will be disregarded. If, therefore, a vessel be condemned under circumstances which show that the court could, under the rules of international law, have no jurisdiction, such sentence will be regarded as a nullity.

§ 17. *State responsible for unjust condemnation.* "Where the responsibility of the captor ceases," says Mr. Wheaton, "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." The sentence of the judge is conclusive against the subjects of the state, but it cannot have the same controlling efficiency toward the subjects of a foreign state. It prevents any further judicial inquiry into the subject matter, but it does not prevent the foreign state from demanding indemnity for the property of its subjects which may have been unlawfully condemned by the prize court of another nation.

§ 18. When indemnity may be demanded. But such indemnity can be demanded only after final decision. The subjects of a neutral state can have no right to apply to their own government 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 tribunals of this sort than one, and till the sentence has been confirmed by the highest of them.

§ 19. Laws governing prize courts. Prize courts not only differ from ordinary municipal tribunals in their character and constitution, but also in respect to the laws which they administer. They are located in the belligerent country, but they must administer the *law of nations*, which has no locality.

§ 20. Their proceedings differ from those of other courts. "No proceedings," says Mr. Justice Story, "can be more unlike than those in the courts of common law and in admiralty. In prize courts, in an especial manner, the allegations, the proofs, and the proceedings, are, in general, modeled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose." The parties in a prize case are, therefore, not limited in their recovery, *secundum allegata et probata*, as in the case of a declaration at common law; but the court having jurisdiction over the property, exerts its authority over all the incidents, and will shape its decree as the circumstances of the case may require.

## CHAPTER XXXII.

### RIGHTS OF MILITARY OCCUPATION.

§ 1. Distinction between military occupation and complete conquest. The term *conquest*, as it is ordinarily used, is applicable to conquered territory the moment it is taken from the enemy; but, in its more limited and technical meaning, it includes only the real property to which the conqueror has acquired a *complete title*. Until the ownership of such property so taken is confirmed or made complete, it is held by the right of *military occupation*, (*occupatio bellica*), which, by the usage of nations and the laws of war, differs from, and falls far short of, the right of *complete conquest*, (*debelatio ultima victoria*.) The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the constitution, or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority, and such rules, are derived directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists, and the decisions of courts—in fine, from the law of nations. But, when the conquest is made complete, in whatsoever mode, the right to govern the acquired territory follows as the inevitable consequence of the right of acquisition, and the character, form, and powers of the government established over such conquered territory, are determined by the constitu-

tion and laws of the state which acquires it, or with which it is incorporated.

§ 2. When rights of military occupation begin. We will here consider the question, when do the rights of military occupation begin, or how are we to fix the date of a conquest? Bouvier defines a conquest to be, "the acquisition of the sovereignty of a country by *force of arms*, exercised by an independent power, which reduces the vanquished to the submission of its empire." It follows, then, that the rights of military occupation extend over the enemy's territory only so far as the inhabitants are vanquished or reduced to submission to the rule of the conqueror. Thus, if a fort, town, city, harbor, island, province, or particular section of country belonging to one belligerent, is forced to submit to the arms of the other, such place or territory instantly becomes a conquest, and is subject to the laws which the conqueror may impose on it; although he has not yet acquired the *plenum dominium et utile*, he has the temporary right of possession and government. As this temporary title derives its validity entirely from the force of arms on the one side, and submission to such force on the other, it necessarily follows that it extends no further, and continues no longer, than such subjugation and submission extend and continue.

§ 3. Submission sufficient. It must not be inferred from what has just been said, that the conqueror can have no control or government of hostile territory unless he actually occupies it with an armed force. It is deemed sufficient that it submits to him and recognizes his authority as a conqueror; for conquests are in this way extended over the territory of an enemy without actual occupation with armed force.

§ 4. Effect upon political laws. Political laws, as a general rule, are suspended during the military occupation of a conquered territory. The political connection between the people of such territory and the state to which they belong is not entirely severed, but is interrupted or suspended so long as the occupation continues. Their lands and immovable property are,

therefore, not subject to the taxes, rents, etc., usually paid to the former sovereign. These, as we have said elsewhere, belong of right to the conqueror, and he may demand and receive their payment to himself.

§ 5. Upon municipal laws. The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the act of the conqueror. Important changes of this kind are seldom made, as the conqueror has no interest in interfering with the municipal laws of the country which he holds by the temporary rights of military occupation. He nevertheless has all the powers of a *de facto* government, and can, at his pleasure, either change the existing laws, or make new ones. Such changes, however, are, in general, only of a temporary character, and end with the government which made them. On the confirmation of the conquest by a treaty of peace, the inhabitants of such territory are, as a general rule, remitted to the municipal laws and usages which prevailed among them prior to the conquest. Neither the civil nor the criminal jurisdiction of the conquering state is considered, in international law, as extending over the conquered territory during military occupation. Although the national jurisdiction of the conquered power is replaced by that of military occupation, it by no means follows that this new jurisdiction is the same as that of the conquering state. On the contrary, it is usually very different in its character, and always distinct in its origin. Hence, the ordinary jurisdiction of the conquering state does not extend to actions, whether civil or criminal, originating in the occupied territory.

§ 6. Punishment of crimes in such territory. How then are crimes to be punished which are committed in territory occupied by force of arms, but which are not of a military character nor provided for in the military code of the conquering state? To solve this question it will be sufficient to recur to the principles already laid down. Although the laws and jurisdiction

of the conquering state do not extend over such foreign territory, yet the laws of war confer upon it ample power to govern such territory, and to punish all offenses and crimes therein by whomsoever committed. The trial and punishment of the guilty parties may be left to the ordinary courts and authorities of the country, or, they may be referred to special tribunals organized for that purpose by the government of military occupation; and where they are so referred to special tribunals, the ordinary jurisdiction is to be considered as suspended *quoad hoc*. It must be remembered that the authority of such tribunals has its source, not in the laws of the conquering, nor in those of the conquered state, but, like any other powers of the government of military occupation, in the laws of war; and, in all cases not provided for by the laws actually in force in the conquered territory, such tribunals must be governed and guided by the principles of universal public jurisprudence.

§ 7. Effect of military occupation under the laws of England. It is said by English writers, that when a country has been conquered by British arms, it immediately becomes a dominion of the king in right of his crown, and that the inhabitants of such conquered territory, once received under the king's protection, become his subjects and are universally to be regarded in that light, and not as enemies or aliens. In other words, foreign territory becomes a dominion, and its inhabitants the subjects of the king, *ipso facto*, by the conquest made by the British arms, without any action of the legislature,—the parliament of Great Britain.

§ 8. Under the constitution of the United States. But a different rule holds in the United States. The peculiar character of our government, and the powers vested in it by the federal constitution, have given rise to rules somewhat peculiar and anomalous, with respect to the government of conquered territory. The President, in the exercise of his constitutional power as commander-in-chief of the army, and the military officers under his authority, may, when war has been declared, seize the enemy's possessions, and establish a government and laws for

the territory so seized and occupied. Such territory is subject to the sovereignty and dominion of the United States as soon as the enemy is driven out or submits to our arms. But neither the President nor his officers can extend the limits, or enlarge the boundaries of the union. This can only be done by congress. As the institutions and laws of the United States do not extend beyond the limits before assigned to them by the legislative power, the inhabitants of a conquered territory, during its military occupation by the United States, can claim none of the rights and privileges established by such laws. And even where these institutions and laws are adopted by the government of military occupation, the rights which they confer upon the inhabitants of the conquered territory, do not extend to the states or territories of the United States. The conquered territory is under the sovereignty and authority of the union ; but it is not a part of the United States ; nor does it cease to be a foreign country, or its inhabitants cease to be aliens, in the sense in which these words are used in our laws. They are to be governed by martial law, as regulated and limited by public law.

§ 9. Relations of inhabitants in regard to foreign states. The relations between the inhabitants of such conquered territory and foreign nations, are, therefore, very different from the relations between the people of the United States and such nations, as previously established by treaties and commercial law. The intercourse of foreign nations with such territory, is regulated by the government of occupation, under the direction of the President of the United States, as commander-in-chief of the army, or, in other words, by martial law. Hence, the scale of duties on goods imported into the conquered territory, and the tonnage on vessels entering its ports, may be different from those on vessels and goods brought into the United States. The victor may either prohibit all commercial intercourse with his conquest, or place upon it such restrictions and conditions as may be deemed suitable to his purpose. To allow intercourse at all, is a relaxation of the rights of war.

§ 10. In regard to States of the union. So, also, the rules of intercourse and trade, between the inhabitants of the United States and such conquered territory, may be very different from the rules regulating the intercourse and trade between different parts of the union. An American vessel entering a port of the conquered territory, during its military occupation by the United States, must conform to the regulations adopted, and pay the duties exacted, by the government of such territory; and an American vessel, returning to the United States from a port of such territory, is regarded as coming from a foreign port, and not as engaged in the coasting trade; and the cargo is not exempt from the payment of duties as fixed by the laws of the United States, for goods imported from a foreign country.

§ 11. Collection and use of revenues in such territory. In the absence of any laws of Congress on this subject, the regulating and collecting of such revenues in enemy's territory in our possession, devolves upon the President of the United States, as the constitutional commander-in-chief, and upon the military and naval officers under his direction. The moneys derived from these sources may be used for the support of the government of the conquered territory, or for the expenses of the war.

§ 12. Transfer of private property. 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. The right to alienate is incident to the right of ownership, and unless the ownership be restricted or qualified by the victor, the right of alienation continues the same during his military possession of the territory in which it is situate, as it was prior to his taking the possession. A municipality or corporation, has the same right as a natural person to dispose of its

property during a war, and all such transfers are, *prima facie*, as valid as if made in time of peace. If forbidden by the conqueror, the prohibition is an exception to the general rule of public law, and must be clearly established.

§ 13. Our own territory in the military occupation of an enemy. It has been decided that any part of our own territory in the military occupation of an enemy, is for the time being, so far as commercial intercourse is concerned, to be regarded as enemy's territory, and subject to the enemy's laws.

§ 14. Neutral territory so occupied. So also of neutral territory. If our enemy is in military occupation of a town or port of a third power friendly to us, such place must, so long as such occupation continues, be regarded as hostile territory.

§ 15. Allegiance of inhabitants of occupied territory. It may be stated, as a general proposition, that the duty of allegiance is reciprocal to the duty of protection. When, therefore, a state is unable to protect a portion of its territory from the superior force of an enemy, it loses, for the time, its claim to the allegiance of those whom it fails to protect, and the inhabitants of the conquered territory pass under a temporary or qualified allegiance to the conqueror. The sovereignty of the state which is thus unable to protect its territory is displaced, and that of the conqueror is substituted in its stead.

§ 16. Implied obligations of the conquered. In ancient times, when a city or district of country was conquered, the principal male inhabitants, capable of resistance, were put to the sword. This was an exercise of the extreme right of war, and justified on the ground of necessity, as the hostility and continued resistance of the inhabitants of the conquered place would otherwise prevent the conqueror from pursuing his military operations, for the purpose of securing the object of the war. But, in more civilized ages, when a place is taken by one of the belligerents, and the people lay down their arms, they are allowed to continue their ordinary peaceful occupations, without hindrance or restraint, but with the tacit or implied agreement, that they will

oppose no further resistance to the power of the conqueror. They are virtually in the condition of prisoners of war on parole. No word of honor has been given, but it was implied; for only on that condition would the conqueror have relinquished the extreme right of war which he held over their lives, and have suffered them freely and peacefully to pursue their ordinary avocations.

§ 17. *Military insurrections.* When any of the inhabitants of territory in the military occupation of an enemy, violate these implied obligations, and rise upon their conquerors, they become war-rebels or military insurgents, and, as already stated, are liable to be punished with death.

§ 18. *Alienations of territory occupied by an enemy.* Military occupation, as has already been stated, suspends the sovereignty and dominion of the former owner so long as the conquered territory remains in the possession of the conqueror, or in that of his allies. The temporary dominion of the latter completely excludes, for the time being, the original dominion of the former. The vanquished sovereign, therefore, has no power, as against the conqueror, to alienate any part of his own territory which may be at the time in the possession of the latter. If the conquest be completed, or confirmed, the title passes to the conqueror precisely as it was when the latter first acquired the possession. No other party can claim any rights over it arising from any conveyance or transfer from the vanquished, while it was in the conqueror's possession. But, if it be surrendered up to the former owner, or recovered by him, such conveyances would become valid, for the alienor would not be permitted to deny his own act. It is a principle of jurisprudence that *possession of*, and the *right to*, the thing alienated—the *jus ad rem* and the *jus in re*—are necessary in the grantor in order to constitute a complete title. During military occupation these exist together neither in the original owner, nor in the conqueror. The title conveyed by either is therefore imperfect; if by the former, it is made good by a restoration of the conquest; and,

if by the latter, it is completed by a confirmation of the conquest, whether by treaty or any other mode recognized in international law.

§ 19. Effect of military occupation on incorporeal rights. In considering the effect of military occupation on incorporeal rights we must distinguish those attached to *things* and those attached to *persons*. While the possession of a house or land may include incorporeal rights belonging to the same, the possession of an enemy's person does not give us a right to the debts which may be due him. Moreover, notes, mortgages, etc., are only *evidences* of debts, but not the debts themselves.

§ 20. Debts due the displaced government. If the debt, from whomsoever owing, be paid to the government of military occupation, and the conquest is afterward made complete, no question as to the legality of the payment can subsequently arise. But should the former sovereign or government, after a lapse of time, be restored, and the debtor has received his discharge, may the original creditor demand a second payment? The burden of proof, in such a case, lies upon the debtor; and in order to render the payment valid, and make it operate as a complete discharge of the debt, he must show: 1st, that the sum was actually paid, for an acquittance or a receipt, without actual payment, is no bar to the demand of the original creditor; 2d, that the debt was actually due at the time when it was paid; 3d, that the payment has not been delayed by a *mora* on the part of the debtor, which had thus operated to defeat the claim of the original creditor. If the debtor be a citizen of the conquered country, or a subject of the conqueror, he must also show: 4th, that the payment was compulsory,—the effect of a *vis major* upon the debtor,—not necessarily extorted by the use of physical force, but paid under an order, the disobedience of which was threatened with punishment. If the debtor be a neutral or stranger, he cannot plead compulsion as a justification of his making payment to the conqueror, but he must also show: 5th, that the constitutional law of the state recognized the payment,

as made by him, to be valid ; in other words, that it was made in good faith, and to the *de facto* authority authorized by the fundamental laws to receive it. It is not a necessary condition, but it is a substantive defense against the original creditor, that the money has been applied to his benefit ; thus, in the case of a state creditor, if the money has been applied to the benefit of the state,—if there has been what the civilians term a *versio in rem*,—the payment will be regarded as valid.

## CHAPTER XXXIII.

### RIGHTS OF COMPLETE CONQUEST.

§ 1. Conquest, how completed. As already remarked, the conqueror's title to immovable property taken from the enemy, may be completed in various ways, as, by a treaty of peace or of cession, by entire subjugation and the incorporation with the conquering state, by civil revolution and the consent of the inhabitants, or by the mere lapse of time and the inability of the former sovereignty to recover its lost possessions.

§ 2. Acquisition of parts of a state. The conqueror who acquires a province or town from the enemy, acquires thereby the same rights which were possessed by the state from which it is taken. If it formed a constituent part of the hostile state, and was fully and completely under its dominion, it passes into the power of the conqueror upon the same footing. It is united with the new state upon the same terms on which it belonged to the old one; that is, with only such political rights as the constitution and laws of the new state may see fit to give it.

§ 3. Subjugation of an entire state. If the hostile nation be subdued and the entire state conquered, a question arises as to the manner in which the conqueror may treat it without transgressing the just bounds established by the rights of conquest. If he simply replaces the former sovereign, and, on the submission of the people, governs them according to the laws of the state, they can have no cause of complaint. Again, if he incorporate them with his former states, giving to them the rights, privileges and immunities of his own subjects, he does for them all that is due from a humane and equitable conqueror to his

vanquished foes. "But if the conquered are a fierce, savage and restless people, he may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their impetuosity, and to keep them under subjection."

§ 4. **Retroactive effect of confirmation of conquest.** We have already remarked, that when one belligerent acquires military possession of territory belonging to an enemy, the sovereignty and dominion of the latter is suspended. If such possession be retained till the completion or confirmation of the conquest, the temporary dominion thus acquired by the conqueror becomes full and complete, *plenum dominium et utile*. Moreover, this confirmation or completion of the conquest has, so far as ownership is concerned, a retroactive effect, confirming the conqueror's title from the date of the conquest, and, therefore, making definitively valid his acts of ownership—alienation included—during his military occupation.

§ 5. **Transfer of personal allegiance by conquest.** It is a general rule of international law that, on the transfer of territory by complete conquest or cession, the allegiance of the inhabitants of the conquered or ceded territory, is transferred to the new sovereign. Even the perpetual allegiance of the English common law yields to treaty, and it is held that when the king cedes by treaty, the inhabitants of the ceded territory become aliens. In the absence of express treaty stipulations, or legislation by the conqueror, the relations between the conquered and the conqueror, are determined by the law of nations, which establishes the general rule, that the allegiance of the conquered is transferred to the new sovereign. It was held by the early civilians that such transfer of allegiance was absolute and unconditional, unless otherwise provided by some treaty stipulation; but the rule, as now understood and interpreted, is more liberal and just towards the inhabitants of the conquered territory.

§ 6. **The assent of the subject required.** The express or implied consent of the subject is now regarded as essential to a

complete new allegiance. The ligament which bound him to the former sovereign is dissolved by the transfer of the territory, for that sovereign can no longer afford him any protection in that territory. But he is still an alien to the new sovereign, and owes to him only that kind of allegiance called in law, *local or temporary*, and which is due from any alien, while resident in a foreign country, for the protection which is afforded him by the government of such country. If the inhabitants of the ceded conquered territory choose to leave it on its transfer, and to adhere to their former sovereign, they have, in general, a right to do so. None but an absolute and tyrannical sovereign would force them to remain and become his unwilling subjects.

§ 7. Such assent determined by domicil. If they remain in the territory after its transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory, is thus determined by their own acts. This rule is the most just, reasonable and convenient, which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects, and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new state; and is not unjust toward those who determine not to become its subjects. According to this rule, *domicil*, as understood and defined in public law, determines the question of transfer of allegiance, or rather, is the rule of evidence by which that question is to be decided.

§ 8. Reason of this rule. This rule of evidence, with respect to the allegiance of the inhabitants of ceded conquered territory, may be inconvenient to those who do not become subjects of the new sovereignty, as it requires them to change their domicil; but it is necessary for the protection of the rights of those who

elect to become subjects of the new government, and especially necessary for determining the rights and duties of the government which acquires their allegiance, and is bound to afford them its protection. It would not do to leave the *status* of the inhabitants of the acquired territory, uncertain and undetermined, and to suffer a man's citizenship to continue an open question subject to be disputed by any person at any time, and to change with his own intentions and resolutions, as might best suit his convenience or interest.

§ 9. Its application to foreign residents. This modern and more benign construction of the law of nations, with respect to the allegiance of the inhabitants of conquered or ceded territory, as announced by Chief Justice Marshall, avoids all questions of the *right* of the one state to transfer, and of the other to claim, the allegiance of subjects of neutral states who are naturalized or domiciled in the territory transferred by conquest or treaty. All are alike aliens to the new sovereignty, if they elect to continue so, and all become its subjects, if it consents to receive them, and they, by remaining in the transferred territory, signify their election to become such.

§ 10. Rule may be varied by treaty, etc. The inconveniences to those who do not transfer their allegiance, arising from making the law of domicile the rule of evidence by which to determine the consent of the conquered, may be avoided by treaty stipulations, or by the municipal laws of the conqueror. Provisions are sometimes made in treaties for special modes by which the inhabitants of ceded territory shall exercise their right of election otherwise than by domicile, such as judicial declarations and public registrations of intentions.

§ 11. Right to citizenship under new sovereignty. It may be laid down as a general rule, that the inhabitants of a conquered territory who remain in it, become citizens of the new state; for justice would seem to require that the rights of citizenship should be given to them in return for their allegiance. But this general rule of justice must yield to the conditions upon which

the conquered are incorporated into the new state, and to the peculiar character of the institutions and municipal laws of the conqueror. It could not reasonably be expected that the conquering state would modify or change its laws and political institutions by the mere act of incorporating into it the inhabitants of a conquered territory.

§ 12. English law on this subject. As has already been remarked, the laws of different countries with respect to the relations between the conqueror and the inhabitants of an acquired conquered territory, are very different. The rules of English law on this subject are, that "a country conquered by the British arms becomes a dominion of the king in the right of his crown, \* \* \* that the conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens." Although they owe the allegiance of subjects, and are entitled to the protection of subjects, it does not follow that they are entitled to all the political rights of an Englishman in England. They have the rights of British subjects *in the conquered territory*, but not necessarily the political rights of British subjects *in other parts of the empire*.

§ 13. American decisions. The supreme court of the United States has also decided that, although the inhabitants of an acquired territory, are entitled to the privileges, rights and immunities of citizens of the United States, they cannot participate in political power till such territory becomes a state of the union.

§ 14. Laws of the conquered territory. "On the transfer of territory," says Chief Justice Marshall, "it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory;—the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general con-

duct of individuals, remains in force until altered by the newly created power of the state." This is now a well settled rule of the law of nations, and is universally admitted.

§ 15. Conquered territory under British law. It is held in English law that if the king comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of parliament.

§ 16. Under the United States. But the President of the United States can make no treaty without the concurrence of two-thirds of the senate, and his authority over ceded conquered territory, though derived from the law of nations, is limited by the constitution and subordinate to the laws of congress. It, however, is well settled by the supreme court, that, as constitutional commander-in-chief, he is authorized to form a civil or military government for the conquered territory during the war, and that when such territory is ceded to the United States, as a conquest, the existing government, so established, does not cease as a matter of course or as a consequence of the restoration of peace; that, on the contrary, such government is rightfully continued after the peace, and till congress legislates otherwise.

§ 17. How far laws of military occupation continue after complete conquest. We have already remarked, that the relations of the inhabitants of the conquered territory, *inter se*, are not, in general, changed by the act of conquest and military occupation; nevertheless, that the conqueror, exercising the powers of a *de facto* government, may suspend or alter the municipal laws of the conquered territory, and make new ones in their stead. Such changes are of two kinds, viz.: those which relate to a suspension of civil rights and civil remedies, and the substitution of military laws, and military courts and proceedings; and those which relate to the introduction of new municipal laws, and new legal remedies and civil proceedings. There can be no doubt that when the war ceases, the inhabitants of the ceded conquered territory cease to be governed by the code of war. Al-

though the government of military occupation may continue the rules of its authority are essentially changed. It no longer administers the laws of war, but only those of peace. The governed are no longer subject to the severity of the code military, but are remitted to their rights, privileges and immunities, under the code civil. Hence, any laws, rules, or regulations introduced by the government of military occupation during the war, which infringe upon the civil rights of the inhabitants, necessarily cease with the war in which they had their origin, and from which they derived their force.

§ 18. Laws of conquered territory opposed to constitution of the new state. There is no doubt that all municipal laws of the conquered territory in conflict with the constitution of the conquering state are annulled by the act which completes the conquest.

§ 19. To the laws of the new sovereignty. The same may be said of those which conflict with such laws of the conqueror as by their nature, or by legislative provisions, extend or apply to the newly acquired territory.

§ 20. Implied will of the conqueror. When it is said that the law political ceases on the conquest, and that the law municipal continues till changed by the will of the conqueror, it is not meant that these latter laws, *proprio vigore*, remain in force, but that, it is presumed, the new political sovereign has adopted and continued them as a matter of convenience. They do not derive any force from the will of the conquered, for the person capable of having and expressing a will—the body politic, or law-making power of the conquered—is extinguished by the conquest. When, therefore, we come to pronounce upon the force of a law of the conquered people after the conquest, and to determine whether it has been tacitly adopted by the conqueror, we must look to the character of its provisions, and compare them with the laws and institutions of the conquering state; that is, with the will of the conqueror as *expressed* by himself in similar matters. Whatever is in conflict with, or directly opposed to

such expressions of his will, we cannot presume to have been adopted by his tacit consent.

§ 21. Distinction in English law between conquered and discovered territory. The English courts make a distinction between ceded or conquered territory, and territory acquired by discovery, or occupancy, and peopled by the discoverer. British colonists are considered as carrying with them such laws of their sovereign as are beneficial to the colony and applicable to the new condition of the colonists; but penal laws, inflicting forfeitures and disabilities, laws of tithes, bankruptcy, mortmain, and police, do not extend to colonies not *in esse*. And laws passed after the settlement of a discovered or occupied country do not affect such colony, without special provisions to that effect, unless they relate to the exercise of the powers of the sovereign with regard to foreign relations, navigation, trade, revenue, and shipping. But the rule is different with respect to territory acquired by cession or conquest, for the municipal laws of such territory at the time of its acquisition remain till changed by competent authority, and the subjects of the new sovereignty who enter such newly acquired territory do not, in general, carry with them the laws of their sovereign; but with respect to their rights and relations *inter se*, they are in the same condition as the inhabitants of such territory; that is, they are governed by the laws and usages of the country at the time of the conquest or session.

§ 22. Decisions of U. S. Supreme Court. The supreme court of the United States, where questions of this kind have come before that tribunal, have adopted the decisions of the English courts, so far as applicable to our system of government.

§ 23. Title to private property. As the new state merely displaces the former sovereignty, and acquires, by cession or complete conquest, no claim or title whatever to private property, whether of individuals, municipalities, or corporations, and, as it assumes the duties and obligations of the former sovereign with respect to private property within such acquired territory,

it is consequently bound to recognize and protect all private rights in lands, whether they are held under absolute grants or inchoate titles, for *property* in land includes every class of claim to real estate, from a mere inceptive grant to a complete, absolute, and perfect title. A mere equity is protected by the law of nations as much as a strictly legal title.

§ 24. *Necessity of remedial laws.* It not unfrequently happens, however, that much injustice and inconvenience will result to the owners of property in a ceded or conquered territory, by the transfer of themselves and their property from one system of laws to another very different from the first, and wholly inadequate to afford remedies for a violation of the rights of property. And as the laws of nations and the usage of the civilized world impose upon the new sovereignty the duty to maintain and protect the property of the conquered inhabitants, it is bound to take the necessary steps to clothe equities with legal titles, so as to bring them within the scope of legal remedies under its own laws.

§ 25. *Effect of conquest on the property of the state.* It follows, from the principles laid down in this and the preceding chapters, that complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or, in other words, the conqueror, by the completion of his conquest, becomes, as it were, the heir and universal successor of the defunct or extinguished state. As his rights are no longer limited to mere occupation, or to what he has taken physically into his possession, they extend not only to the corporeal property of the state, as real estate and movables, but also to its incorporeal property, as debts, etc. And as his *imperium* has become established over the whole state, he is considered, in law, as in possession of the *things*, (*corpora*,) and the *rights* (*jura*,) to things which appertain to such *imperium*, and may use and dispose of them as his own.

§ 26. *Alienations by conqueror after complete conquest.* Hence it has been universally held that where the conquest has been

completed all alienations of public property by the conqueror are valid, and cannot be revoked by his successor, even though he be the prior sovereign.

§ 27. Payment of state debts to conqueror. The same rule applies to the payment of debts due the conquered state. The conqueror may properly claim the payment, and his receipt is a bar to all subsequent claims.

## CHAPTER XXXIV.

### TREATIES OF PEACE.

§ 1. Peace, the end and object of war. It has been laid down as "an unquestionable proposition of international law, that there is a legal as well as a moral necessity that, with the ceasing of the causes which justified the inception of the war, the war itself should cease." Vattel enforces the obligation to seek peace as the end of war, and argues that no matter how just the war may have been at the commencement, it must not be continued beyond its lawful object, which is to procure justice and safety, and the moment an equitable compromise can be procured, it should cease.

§ 2. Powers to make war and peace may be distinct. The power to declare war does not necessarily include that of making a treaty of peace. These two powers are intimately connected, and the latter would seem naturally to follow the former. They are, therefore, generally associated together, though not always.

§ 3. In the United States. By the constitution of the United States, the power to declare war is vested in congress, but the treaty-making power is vested in the President and senate.

§ 4. May a prisoner of war make a treaty of peace? Vattel holds that a captive sovereign may himself negotiate the peace, and promise what personally depends on him; but the treaty does not become obligatory on the nation till ratified by itself, or by those who are invested with the public authority during the prince's captivity, or, finally, by the sovereign himself after his release."

§ 5. Implied power of alienation of territory. The general authority to make treaties of peace, necessarily implies the power to stipulate the conditions of peace; and among these may properly be involved the cession of the territory and other property of the state, as well as the right of sovereignty or *jus eminens* over private property. "If, then," says Wheaton, "there be no limitation expressed in the fundamental laws of a 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."

§ 6. Duty of compensation to individuals. With respect to the duty of the state to make compensation to individuals, and the limits to that duty, the remarks of Wheaton are peculiarly appropriate and just. "The duty," he says, "of making compensation to individuals, whose private property is sacrificed to the general welfare, is inculcated by public jurists, as correlative to the sovereign right of alienating those things which are included in the eminent domain; but this duty must have its limits. No government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the state. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the state to control, it does not impose any obligation upon the government to indemnify those who may suffer a loss of property by the cession."

§ 7. Joint treaty of peace by allies. "The principal party," says Vattel, "in whose name the war was made, cannot justly make peace, without including his allies." The same author remarks, that states which have been associated in a war, or have directly taken part in it, are respectively to make their treaty of peace each for itself; but that the alliance obliges them to treat in concert.

§ 8. General character of a treaty of peace. Every treaty of peace, according to Vattel, is nothing more than a compromise. Were strict and rigid justice to be insisted on, it would be impossible ever to make a treaty of peace. Not only the character of the original cause of the war would have to be determined, in order to settle the question as to which of the belligerents was in the wrong, but also all of the operations of the war itself, and the expenses incurred and damages suffered by each party. This would be impossible; no other expedient, therefore, remains but to compromise all the claims and grievances on both sides, by a convention as fair and equitable as circumstances will admit of, all parties agreeing upon what terms their several pretensions are to be regarded as withdrawn or extinguished.

§ 9. It implies an amnesty. It is the usual practice to introduce a leading article in a treaty of peace declaring an amnesty or a perfect oblivion of what is past; but although the treaty should be silent on this subject, the amnesty is, by the very nature of peace, necessarily implied in it. A treaty of peace puts an end to all claims for indemnity for tortious acts committed during the war under the authority of one government against the citizens or subjects of another, unless they are specially provided for in its stipulations.

§ 10. New grievances from same cause. But while a treaty of peace extinguishes the original subject of the war, it does not prevent new complaints from the same contested right. The grievances which originally kindled the war are settled, but new grievances arising from the same right or claim, may form a new cause of war, equally just with the former.

§ 11. Claims unconnected with causes of the war. A treaty of peace does not extinguish claims unconnected with the cause of the war. Debts, existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived.

§ 12. Principle of *uti possidetes*. A treaty of peace leaves

every thing in the state in which it finds it, unless there be some express stipulations to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain with the possessor, and his title cannot afterward be called in question. The intervention of peace covers all defects of title, and vests a lawful possession in the purchaser, in the same manner as it quiets the title of the hostile captor himself. This general rule is applied, without exception, to personal property or real, and is called the principle of *uti possidetis*.

§ 13. Treaty of peace binds the whole state. Treaties of peace are equally valid, whether made with the authorities which declared the war, or with a new ruling power or *de facto* government. Other nations have no right to interfere with the domestic affairs of any particular nation, or to judge of the title of the party in possession of the supreme authority. They are to look only to the fact of possession, and the power conferred upon such authorities, by the then existing plan of government, or fundamental law. Treaties of peace, made by the competent authorities of such governments, are obligatory upon the whole nation, and, consequently, upon all succeeding governments, whatever may be their character.

§ 14. When its obligations commence. A treaty of peace binds the contracting parties from the moment of its conclusion, unless otherwise provided in the treaty itself. Hence, all hostilities are to cease from the time that the belligerent powers are restored to the normal relations of peace, and no rights of war can be subsequently acquired, or, (properly speaking,) exercised by the parties to the treaty.

§ 15. Criminal responsibility of individuals. Although a treaty of peace binds the governments of the contracting powers from the moment of its conclusion, (unless otherwise provided,) so that no belligerent right can afterward be lawfully exercised, it does not affect the citizens or subjects of such powers so as to

render them *criminally* responsible, and liable to punishment for acts of hostility, till they have actual or constructive knowledge of the peace.

§ 16. Civil responsibility for damages. But while all agree that individuals are not *criminally* responsible for acts of hostility committed after the date of the peace, so long as they are ignorant of it, there seems to be a difference of opinion among publicists whether they are responsible *civiliter* in such cases. Grotius says they are not liable to answer in damages, but it is the duty of the government to restore what has been captured and not destroyed. "But the better opinion seems to be," says Wheaton, "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."

§ 17. Constructive and actual knowledge of peace. 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, it has been a question among writers on public law whether the captured property should be restored. "The better and the more reasonable opinion is," says Kent, "that the capture would be null though made before the day limited, provided the captor was previously informed of the peace; for, as Emerigon observes, since constructive knowledge of the peace, after the time limited in different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect." Wheaton coincides in this view, but remarks that it may be questionable whether anything short of an official notification from his own government would be sufficient, in such a case, to affect the captor with the legal consequence of actual knowledge.

§ 18. Recapture after treaty of peace. Another question has

arisen with respect to the validity of a recapture of a prize, after peace, but without a knowledge of it, and before the prize had been carried *infra presidia*, and condemned. In the case of a British vessel captured by an American privateer during the war, and recaptured while at sea by a British ship of war, after peace by the treaty of Ghent in 1814, but in ignorance of it, it was decided in a British vice-admiralty court, that the possession of the vessel by the American privateer was a lawful possession, and that the British cruiser could not, after the peace, lawfully use force to divest this lawful possession. The restoration of peace put an end, for 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.

§ 19. In what condition things are to be restored. Things stipulated to be restored by the treaty are to be restored in the condition in which the treaty found them, unless there be an express stipulation to the contrary. A fortress or town is, therefore, 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 a dismantled fortress, nor to restore the former condition of a territory which has been ravaged by the operations of war. On the other hand, to dismantle a fortification or to lay waste a country, after the conclusion of peace, would be an act of perfidy. A conqueror may, however, demolish new works constructed by himself, but not repairs made by him in old works which he himself had injured during the war.

§ 20. Unpaid military contributions. The principle of *uti possidetis* being the basis of every treaty of peace, unless otherwise specially provided in the treaty itself, it follows that the conqueror (the treaty being silent on this point,) is entitled to all the contributions which he has collected, by the right of military occupation, of the belligerent territory now surrendered; but not to those which he has levied but failed to collect. His

rights over the inhabitants of such territory are *military* rights, and, consequently, terminate with the right of possession, *i. e.*, with the treaty of peace which restores the conquest.

§ 21. Breach of a treaty of peace. “The breach of a treaty of peace,” says Vattel, “consists in violating the engagements annexed to it, either by doing what it prohibits, or by not doing what it prescribes. Now, the engagements contracted by treaty may be violated in three different ways,—by a conduct that is repugnant to the nature and essence of every treaty of peace in general,—by proceedings which are incompatible with the particular nature of the treaty in question,—or, finally, by the violation of any article expressly contained in it.”

§ 22. Delays in executing it. Affected delays in performing the conditions of a treaty of peace, are, says Vattel, equivalent to an express denial, and differ from it only by the artifice with which he, who practices them, seeks to palliate his want of faith; he adds fraud to perfidy, and actually violates the article which he should fulfill. But, if a real impediment stands in the way, time must be allowed, for no one is bound to perform impossibilities. If the obstacle be utterly insurmountable, the other party should accept of an indemnification, if the case will admit of it, and the indemnification be practicable. But if no equivalent can be offered, the intervening impossibility undoubtedly cancels the particular obligation.

§ 23. War for new cause or for breach of treaty of peace. “There is,” says Kent, “a very material and important distinction made by the writers on public law, between a new war for some new cause, and a breach of a treaty of peace. In the former case, the rights acquired by the treaty subsist, notwithstanding the new war; but in the latter case, they are annulled by the breach of the treaty of peace, on which they were founded. A new war may interrupt the exercise of the rights acquired by the former treaty, and, like other rights, they may be wrested from the party by the force of arms. But then they become newly acquired rights, and partake of the operation and result

of the new war. To recommence a war by breach of the articles of a treaty of peace, is deemed much more odious than to provoke a war by some new demand and aggression ; for the latter is simply injustice, but, in the former case, the party is guilty both of perfidy and injustice.”

## CHAPTER XXXV.

### RIGHTS OF POSTLIMINY AND RECAPTURE.

§ 1. Right of postliminy defined. The *jus postliminii* was a fiction of the Roman law by which persons, and, in some cases, things, taken by an enemy were restored to their original legal *status* immediately on coming under the power of the nation to which they formerly belonged. This law among the Romans applied almost exclusively to questions of private rights; but its principles have, in modern times, been applied, with certain modifications, to the international relations of states as well as to the rights of property of individuals of the same or of different states.

§ 2. Postliminy with regard to personal status and rights. In regard to personal status, the *jus postliminii* of the Romans has but few applications in modern times, at least between Christian nations, for the reason, that prisoners of war are no longer made slaves, nor is any ransom, required or paid for their release. And although slavery was recognized by the Roman municipal law, the Digest contained the dictum, that "so far as the law of nature is concerned, all men are equal." The law of nature and of nations, or what we now call international law, does not recognize slavery, although it does not interfere with its existence under local and municipal law. Hence slaves or serfs escaping from one country into another, have, for centuries past, been held to be free by the judicial decisions of European countries, and the same principle has been applied in the United States when not overruled by constitutional provisions. And hence in time of war a slave escaping from one belligerent to

another, even though the latter be a slave-holding power, is free, and being thus placed under the shield of the law of nations, the former owner or state can have by the law of postliminy no belligerent lien or claim of service.

§ 3. Postliminy in regard to things. With respect to things taken by the enemy, the Roman law considered them as withdrawn from the category of legal relations during the period of the enemy's possession of them. If retaken by their former owner, they become his by the recapture; but, if retaken by the state they were considered as booty, or prize of war, the original right of property being extinguished by the intervening hostile possession. But, certain things were excepted from this rule, as real property, horses, vessels used for purposes of war, etc.; and to these the *jus postliminii* was accorded. This general maxim of the Roman law, although not in all its details, is engrafted into modern international jurisprudence, and is fully recognized as an incident to the state of war, and contributes essentially to mitigate its calamities.

§ 4. Right of postliminy belongs exclusively to a state of war. The right of postliminy belongs exclusively to a state of war, and no longer exists after the conclusion of a treaty of peace. The intervention of peace cures all defects of title to property of every kind, acquired in war, and such title cannot be subsequently defeated in favor of the original owner, not even in the hands of a neutral possessor, who himself becomes an enemy. Such property may be liable to capture as booty, or prize of war, the same as any other property of that neutral, now an enemy, but it is not affected by the right of postliminy.

§ 5. Postliminy in regard to allies. It is a general rule of international law, that allies in war make but one party with the principal; the cause being common, the rights and obligations are the same. It follows, therefore, that when persons and things belonging to one of the allies, which have been taken by the enemy, fall into the hands of another ally, they are subject to the right of postliminy, and must be restored to their former

condition. The recapture by an ally, is regarded the same as a recapture by the principal, and *vice versa*. So, also, with respect to territory, persons and things brought within the territory of one ally, are affected by the rights of postliminy precisely the same as if brought within the territory of their own sovereign.

§ 6. In a neutral territory. The right of postliminy, with respect to things, does not take effect in neutral countries, because the neutral is bound to consider every acquisition made by either party as a lawful acquisition, unless the capture itself is an infringement of his own neutral jurisdiction or rights. If one party were allowed in a neutral territory to enjoy the right of claiming goods taken by the other, it would be a departure from the duty of neutrality. Neutrals are bound to take notice of the military rights which possession gives, and which is the only evidence of right acquired by military force, as contradistinguished from civil rights and titles. The fact must be taken for the law. But with respect to persons, it takes effect, not only in the territory of the nation to which such persons belong, and in that of his allies, but also in a neutral country; so that if a belligerent brings his prisoners into a neutral territory he loses all control of them. So, if prisoners escape from their captors, and reach a neutral territory, they cannot be pursued and seized in such territory, and consequently, are restored to their former condition.

§ 7. Upon movables on land. Naturally, property of all kinds is recoverable by the right of postliminy, and there is no intrinsic reason why movables should be excepted from the rule. Such, indeed, was the ancient practice, and by the *jus postliminii* of the Romans, certain articles, on being recovered from the enemy, were required to be restored to their former owners. But the difficulty of recognizing things of this nature, with any degree of certainty, and the endless disputes which would spring from a revindication of them, have introduced a contrary practice in modern times; and the title of the former owner to

all *booty* is considered as completely divested by a firm possession of the captor of twenty-four hours.

§ 8. Upon real property. Real property is easily identified, and is not of a transitory nature; it is, therefore, considered to be completely within the right of postliminy. The rule, however, cannot be frequently applied to the case of mere private property, which, by the general rule of modern nations, is exempt from confiscation. There are some exceptions to this general rule, and wherever private real property has been confiscated by the enemy, and again comes into the possession of the nation to which the individual owner belongs, it is subject to the right of postliminy.

§ 9. Upon towns and provinces. Towns, provinces, and territories, which are retaken from the conqueror during the war, or which are restored to their former sovereign by the treaty of peace, are entitled to the right of postliminy, and the original sovereign owner on recovering his dominion over them, whether by force of arms or by treaty, is bound to restore them to their former state. In other words, he acquires no new rights over them either by the act of recapture or of restoration. The conqueror loses the rights which he had acquired by force of arms; but those rights are not transferred to the former sovereign, who resumes his dominion over them precisely the same as though the war had never occurred. He rules, not by a newly acquired title which relates back to any former period, but by his ancient title, which, in contemplation of law, has never been divested.

§ 10. If a state be entirely subjugated. A state is sometimes entirely subjugated and its personality extinguished by compulsory incorporation into another sovereignty. As the towns, provinces and territories of which it was composed now become subordinate portions of another society, their relations to each other and to the new state result from the will of the new sovereign.

§ 11. If the subjugated state regain its own independence. If, by a subsequent revolution, the extinguished state resumes its

independence, and again becomes a distinct and substantive body, its constituent parts may resume their former relations, or assume new positions and rights, according to the character of the society which is restored, and the constitution or government which it adopts. This is a question of local public law, rather than of international jurisprudence.

§ 12. If it be released by a friend or ally. But if the subjugated state is delivered by the assistance of another, the question of postliminy may arise between the restored state and its deliverer. There are two cases to be considered: first, where the deliverance is effected by an ally, and second, where it is effected by a friendly power unallied. In either case, the state so delivered, is entitled to the right of postliminy. If the deliverance be effected by an ally, the duty of restoration is strict and precise, for an ally can claim no right of war against its co-ally. If the deliverance be effected by a state unallied, but not hostile, the reëstablishment of the rescued nation in its former rights is certainly the moral duty of the deliverer. He can claim no rights of conquest against the friendly state which he rescues from the hands of the conqueror. How much stronger, then, is the duty of restoration where the deliverance is effected with the concurrence and assistance of the subjugated people, and under the expectation on their part of recovering their ancient rights and privileges! A denial of the right of postliminy, in such a case, would be contrary to the law of nations and a breach of public morality.

§ 13. Case of Genoa in 1814. The history of Genoa furnishes an illustration of this principle. The ancient republic of Genoa had been subverted, in consequence of the French invasion and conquest of Italy, and was annexed to the French empire in 1805. In 1814, the city of Genoa was surrendered to the British troops under the command of Lord Bentinck, who issued a proclamation that the Genoese state resumed the privilege of its original constitution. Nevertheless, by the second article of the treaty of Paris, of the 30th of May, 1814, the states of

Genoa were ceded to the king of Sardinia. The provisional government of Genoa remonstrated against this cession, and appealed to the guarantee of its independence contained in the treaty of Aix-la-Chapelle, 1745. The conduct of England was severely censured in parliament at the time, and has since been condemned by publicists generally.

§ 14. *Application of postliminy to maritime captures.* There is a manifest difficulty in applying the right of postliminy to maritime recaptures, on account of the uncertainty of the time when the title of the original proprietor is completely divested. If all nations had adopted the principle, that condemnation, by a competent court of prize, was necessary, in all cases, to effect a change of ownership, the rules of postliminy applicable to prizes, would be the same in all countries; but as this principle has not been universally adopted, there is not, in practice, any well established rule of maritime recapture.

§ 15. *Regulated in part by treaty stipulations.* This difficulty has been obviated in part by treaty stipulations. But as these stipulations bind only those who have entered into them, and cannot affect the rights of third parties, it becomes necessary as towards them to adopt some fixed rule. No difficulty can occur in regard to those who admit the necessity of condemnation by a prize court.

§ 16. *Rule of reciprocity.* To others it is usual to apply the rule of reciprocity. Sir William Scott considered this the most liberal and rational rule that could be applied. "To the captured," he said, "it presents his own consent, bound up in the legislative wisdom of his own country; and 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."

§ 17. *Military and civil salvage.* There is an obvious distinc-

tion between *military* and *civil* salvage, the former being allowed for rescuing vessels or goods from an enemy, and the latter for assistance rendered to a vessel or its cargo derelict at sea. Thus, if 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. The same salvors, however, may, in some cases, be entitled to both these kinds of salvage; thus, where, upon a recapture, the parties have entitled themselves to a *military* salvage under the prize law, 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 sea.

§ 18. On neutral property not subject to condemnation. Neutral property recaptured from the enemy, if not subject to condemnation by the rules of international law, is not subject to pay salvage to the recaptor. This rule is founded upon the supposition that justice would have been done if the vessel had been carried into the enemy's port, and that if injury had been sustained by the act of capture, it would have been redressed by the tribunal of the country to whose cognizance the case would have been regularly submitted.

§ 19. Where restoration is not of strict right. The allotment of salvage, where the recaptured property is claimed by subjects of the same state, is properly regulated by municipal law; but where it is claimed by subjects of allies or alien friends, the allotment of military salvage is properly a question of international law; so, also, of civil salvage, where the *quantum meruit* is the only rule for apportioning the remuneration. But, as already remarked, there being no well-established rule of international law universally acknowledged, with respect to the legal *status* of captured property, between the time of pernoctation, or twenty-four hours possession, and the condemnation by a competent court of prize, restitution, in case of recapture between these periods, is not regarded as a matter of strict right, but, in a measure, one of favor and relaxation; and the bellig-

erent recaptor certainly is justifiable in annexing conditions to his liberality.

§ 20. *Where of strict right.* But where the restitution is regarded as a positive obligation on the part of the recaptor, and as a right which may be demanded by the owner of the recaptured property, it seems unreasonable and contrary to the principles of postliminy, that any heavy salvage should be allowed. Where, however, a positive benefit has been conferred, it is proper that the recaptor should be rewarded for his risk and trouble.

§ 21. *Recapture by convoying ships.* If a convoying ship recaptures one of the convoy, which has been previously captured by the enemy, the recaptors are entitled to salvage; but a mere rescue of a ship engaged in the same common enterprise, gives no right to salvage.

§ 22. *Military salvage not allowed without actual rescue from the enemy.* Military salvage will not be allowed in any case where the property has not been actually rescued from the enemy. It is not necessary that the enemy should have actual possession; it is sufficient if the property is completely under his dominion: nor is it necessary that the recaptors should have actual possession; it is sufficient if the prize be actually rescued from the grasp of the hostile captor. Where a hostile ship is captured, and afterwards recaptured by the enemy, and again recaptured from the enemy, the original captors are entitled to restitution on paying salvage, but the last captors are entitled to the whole rights of prize, for by the first recapture, the right of the original captors is entirely divested. Where the original captors have abandoned their prize, and it is subsequently captured by other parties, the latter are solely entitled to the property.

§ 23. *If original capture be unlawful.* If the original capture was unlawful, the recaptor, says Emerigon, acquires no property in the recapture. Thus, the French bark *Victoire*, chased by an English privateer, took refuge under the castle of the island

of Majorca, and was taken by the privateer while at anchor within pistol shot of the castle. Some days after, the bark was recaptured by another French vessel. The original capture was held to have been unlawful and void, for having been made in neutral territory, and, consequently, in violation of the law of nations.

§ 24. *Recapture of ransom-bill.* The recapture of a ransom-bill, is neither the recapture of the vessel ransomed, nor of the ransom itself. But if the ransom-bill be accompanied by a bill of exchange drawn by the captain of the ransomed vessel and negotiated in good faith, it must be paid by the owners of the ransomed vessel.

§ 25. *A vessel recaptured by her master and crew.* Emerigon held that, it being the duty of the captain and crew of a captured vessel to retake her, when possible, they cannot claim her by the right of recovery when so retaken. By throwing off the yoke of the captor, they have merely rendered themselves master of their own vessel, and reëntered upon their former rights, but have acquired no new rights of property in the recovered vessel or cargo. But, in a case decided in the British court of admiralty, large salvage was decreed for such recapture. The circumstances, however, were somewhat peculiar, and perhaps formed an exception to the general rule.

§ 26. *Recapture from pirates.* Captures by pirates being unlawful, no title can properly vest either in the captors or their vendees, and, in case of recapture, the original owner is, on principle, entitled to complete restitution. But on account of the risk incurred and the benefit conferred, courts have usually allowed a pretty large salvage to the recaptors, where not regulated by municipal law. Some states have left this matter of salvage for rescue from pirates discretionary with the courts, while others have regulated it by law or ordinance.

§ 27. *Joint recapture.* The rules of joint capture, given in a preceding chapter, are equally applicable to joint recapture. It is held in England, that although the prize act only mentions

recaptures by ships and boats, it does not intend to exclude those made by the assistance of land forces. Where an island was taken by a joint naval and military force, the ships recaptured were held liable to be adjudged under this act, and to be condemned to the captors, or to be restored on payment of salvage, as the case might be. Moreover, a land force may be entitled to sustain a claim of salvage for recapture of vessels in a maritime port, without the coöperation of a naval force, where the recapture is a necessary and immediate result of a military occupation directed to the capture of the place within whose port the property is lying.

## CHAPTER XXXVI.

### THE OBSERVANCE AND INTERPRETATION OF TREATIES.

§ 1. Violation of the faith of treaties. Vattel says that nations may combine together to punish a state which violates its treaty obligations. The doctrine of modern publicists is that only the parties who suffer by such violations are justified in making war to redress the injury.

§ 2. Conditions to make a treaty binding. Martens says, that in order to make a treaty obligatory, the following five things are necessarily supposed: 1st, That the parties have power to contract. In other words, that the person or authority making the treaty, or ratifying it, had full power for that purpose. 2d, That they have consented. The form of such consent is entirely unimportant, provided it is fully and clearly declared. 3d, That they have consented freely. The consent must have been a voluntary act of the contracting party. The plea of *fear*, however, cannot be opposed to the validity of treaties between nation and nation, except, at most, in cases where the injustice of the violence employed is so manifest as not to leave the least doubt. 4th, That the consent is mutual. 5th, That the execution is possible.

§ 3. Use of an oath in treaties. The use of an oath, in treaties, does not constitute a new obligation, nor does it strengthen the obligation already contracted. The most that could ever be said of it was, that it gave some additional solemnity to the act, and imposed a *personal* obligation upon the sovereign who took the oath, or gave commission to another to swear for him. It could neither give validity to an invalid treaty, nor a præmi-

nence to one treaty above another. The custom, once generally received, of swearing to treaties, has now entirely passed away. The most modern example of the use of the oath, was in the alliance between France and Switzerland, in 1777.

§ 4. Use of asseverations. Asseverations are sometimes used in engagements or treaties between sovereigns; such as, *we promise in the most sacred manner; with good faith; solemnly; irrevocably; and pledge our royal words, etc.* These are now regarded as mere forms of expression, showing that the parties entered into the engagement with reflection, deliberation, and a full knowledge of what they were doing. The words added nothing to the obligation of the treaty. But the formal and deliberate manner in which treaties are now made and ratified, render such forms of expression entirely superfluous.

§ 5. Attempts of the popes to annul the obligations of treaties. The popes at one time claimed the authority to absolve sovereigns from their engagements and to annul the obligations of treaties, under whatsoever solemnities they might be contracted. Vattel mentions a number of instances where, he says, they have undertaken to break the treaties of sovereigns, “to unloose a contracting power from his engagements, and to absolve him from the oaths by which he had confirmed them.” But no such assumption of power would be recognized in the present age.

§ 6. Guarantees and sureties. To secure the fulfillment of treaties, guarantees and sureties have sometimes been given by the contracting parties. We have discussed these in a former chapter.

§ 7. Dissolution and termination of treaties. Treaties may be dissolved, or their stipulations may terminate in various ways. Some expire by their own limitation, while others are terminated by war between the contracting parties; some are permanent in their nature, and although their operation may be suspended during war, they revive on the return of peace, unless expressly abrogated or altered by a new compact; while others again have reference to both peace and war, or exclusively to a

state of war, and consequently continue in force, notwithstanding an entire interruption of pacific relations between the contracting parties. Thus, treaties made for a fixed period of time, or for a specified object, expire on the termination of the time designated, or the accomplishment of the object specified.

§ 8. *Effect of loss of sovereignty, etc.* But the obligations of treaties, even where some of their stipulations are, in their terms, perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things.

§ 9. *Debts and obligations previously contracted.* A distinction must be made between obligations and debts already incurred, and those which would be incurred if the treaty had not been terminated before its time by such a change in the circumstances of one of the contracting parties as to render it inapplicable. A change of condition, as the partial loss of its sovereignty and independence,—will not, in general, release such a state from obligations already incurred, although it may prevent any new ones from occurring out of the same instrument, the stipulations of which are no longer applicable or obligatory.

§ 10. *Kent on interpretation.* “Treaties of every kind,” says Kent, “are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.”

§ 11. *Wheaton on technical rules.* The same general rule is laid down by Wheaton, but he adds: “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 toward explaining the 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.”

§ 12. Grotius on interpretation. Grotius has devoted an entire chapter to the interpretation of difficult and ambiguous terms. He sets out with the saying of Cicero, that, “When you promise, we must consider rather what you mean, than what you say.” But as inward motives are not in themselves discernible, we can determine what they were only from the *words* used, and *conjectures* drawn from other parts of the treaty, and from the peculiar circumstances of the particular case. These, he says, must sometimes be considered together, and sometimes separately. Words are not to be strictly construed according to their etymology, but according to their common use, as, “Use is the judge, the law, and rule of speech.” Technical words, or terms of art, are to be construed according to their meaning in such art. Conjectures are to be drawn from the subject matter, the effect of the term used, and the circumstances under which the engagement was entered into. He divides things promised into three classes, *favorable*, *odious*, and *mixed*. Favorable promises are those which carry in them an equality and a common advantage; odious promises are those where the charge and burden is all on one side; and mixed promises are those which partake of both characters, but in which the favorable predominates. In the first, he says, the words must be taken in their full propriety, as they are generally understood, and if ambiguous, they must be allowed their largest sense. In the second, the words are to be taken in a stricter sense, whether they have reference to subject matter, time, or circumstances. In the third kind of promises, the words are to be taken according to the character of the particular stipulation in which they occur, or of the particular matter or circumstance to which they refer.

§ 13. Vattel's rules. Vattel has commented largely on the distinctions of Grotius, and laid down twelve general rules of his own in regard to the interpretation of treaties, and some ten addi-

tional rules applicable to treaty stipulations which are in collision or opposition with each other. Many of these rules are mere truisms, obvious at first sight, while others are by many deemed erroneous, and all very diffusely discussed.

§ 14. Rutherford on interpretation. Rutherford has discussed this subject with his usual perspicuity and ability, but in a manner somewhat diffuse. We will attempt but a brief outline of his remarks, referring the reader to his chapter on interpretation, the perusal of which will afford both pleasure and profit. A promise, he says, gives us a right to whatever the promiser designed or intended to make ours. But his design or intention, if it be considered merely as an act of his mind, cannot be known to any one beside himself. When, therefore, we speak of his design or intention as the measure of our claim, we must necessarily be understood to mean the design or intention which he has made known or expressed by some outward work; because a design or intention, which does not appear, can have no more effect, or can no more produce a claim, than a design or intention which does not exist. Hence, the way to ascertain our claims, as they arise from promises or contracts, is to collect the meaning and intention of the promiser or contractor, from some outward signs or marks. The collecting of a man's intention from such signs or marks is called *interpretation*.

§ 15. Paley on promises. The remarks of Dr. Paley, in his work on Moral and Political Philosophy, are well worthy of attention, being as applicable to questions of international law as to questions in ethics. He says: "Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time that the promisee received it." "It is not the sense in which the promiser actually intended it, that always governs the interpretation of an equivocal promise, because, at that rate, you might excite expectations which you never meant, nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule,

you might be drawn into engagements which you never designed to undertake. It must, therefore, be the sense, (for there is no other remaining,) in which the promiser believed that the promisee accepted the promise. This will not differ from the actual intention of the promiser, where the promise is given without collusion or reserve; but we put the rule in the above form to exclude evasion in cases in which the popular meaning of a phrase, and the strict grammatical signification of the words differ; or, in general, wherever the promiser attempts to make his escape through some ambiguity in the expressions which he used. Zemures promised the garrison of Sebastia, that if they would surrender, no blood should be shed. The garrison surrendered—and Zemures buried them all alive. Now Zemures fulfilled the promise in one sense, and in the sense, too, in which he intended at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Zemures himself knew that the garrison received it; which last sense, according to our rule, was the sense in which he was, in conscience bound to have performed it.”

§ 16. Other modern writers. Many efforts have been made by other writers to lay down precise and positive rules, and to frame formulæ for the various modes of interpretation. Those of Domat and Lieber exhibit much learning and ingenuity, and are well worthy of attention; but they are too complicated and metaphysical to afford much assistance to the common reader. Those of Mackelday, Story, and Phillimore, are fewer in number, and of a more general and simple character.

§ 17. Objections to arbitrary rules and formulæ. Savigny regards the civil law rules of interpretation—which are substantially those of Domat—as affording little aid beyond that which an intelligent and dispassionate consideration of each particular case would furnish. Sedgwick thinks it “as vain to attempt to frame positive and fixed rules of interpretation, as to endeavor, in the same way, to define the mode by which the mind shall draw conclusions from testimony.”

§ 18. Importance of well-established principles of interpretation. But while we fully agree with Savigny and Sedgwick, that metaphysical classifications, minute sub-divisions, and arbitrary formulæ, are not calculated to facilitate the interpretation and construction of laws, it must not be inferred that all rules established for that purpose should be rejected. On the contrary, general rules, which restrain from latitudinarian construction, and from extravagant and false interpretation, have received the approval of the most learned jurists and most distinguished publicists of all ages. Indeed, the very necessity and importance of such rules, for the interpretation of constitutional and statutory laws, have led some authors into the extravagant nomenclature and minute classification which are here objected to. Sedgwick, notwithstanding his objection to rules, very justly remarks that "there must be some general principles to control" the construction and interpretation of laws, the subject being too important "to be left to the mere arbitrary discretion of the judiciary."

And if the necessity of well-established rules for the interpretation of laws be generally admitted, it certainly will hardly be denied that such rules are equally important in connection with international jurisprudence. Some of the bloodiest wars that have been inflicted upon the human race have originated in a conflict of opinions respecting the interpretation of treaty stipulations.

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