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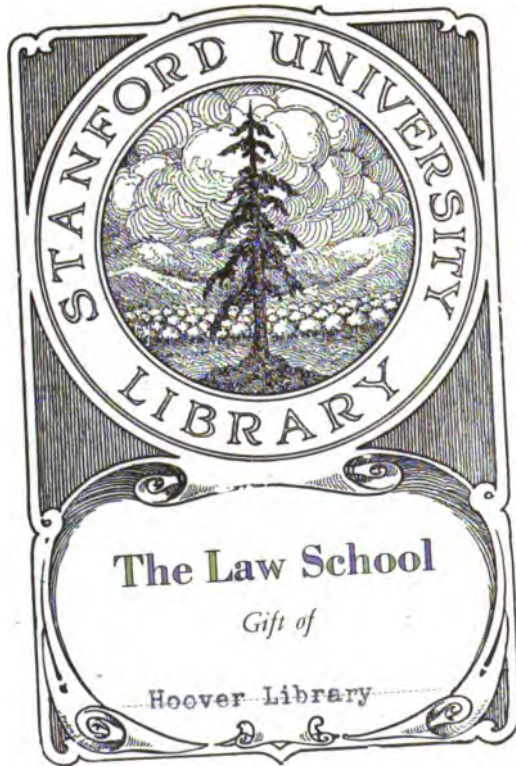
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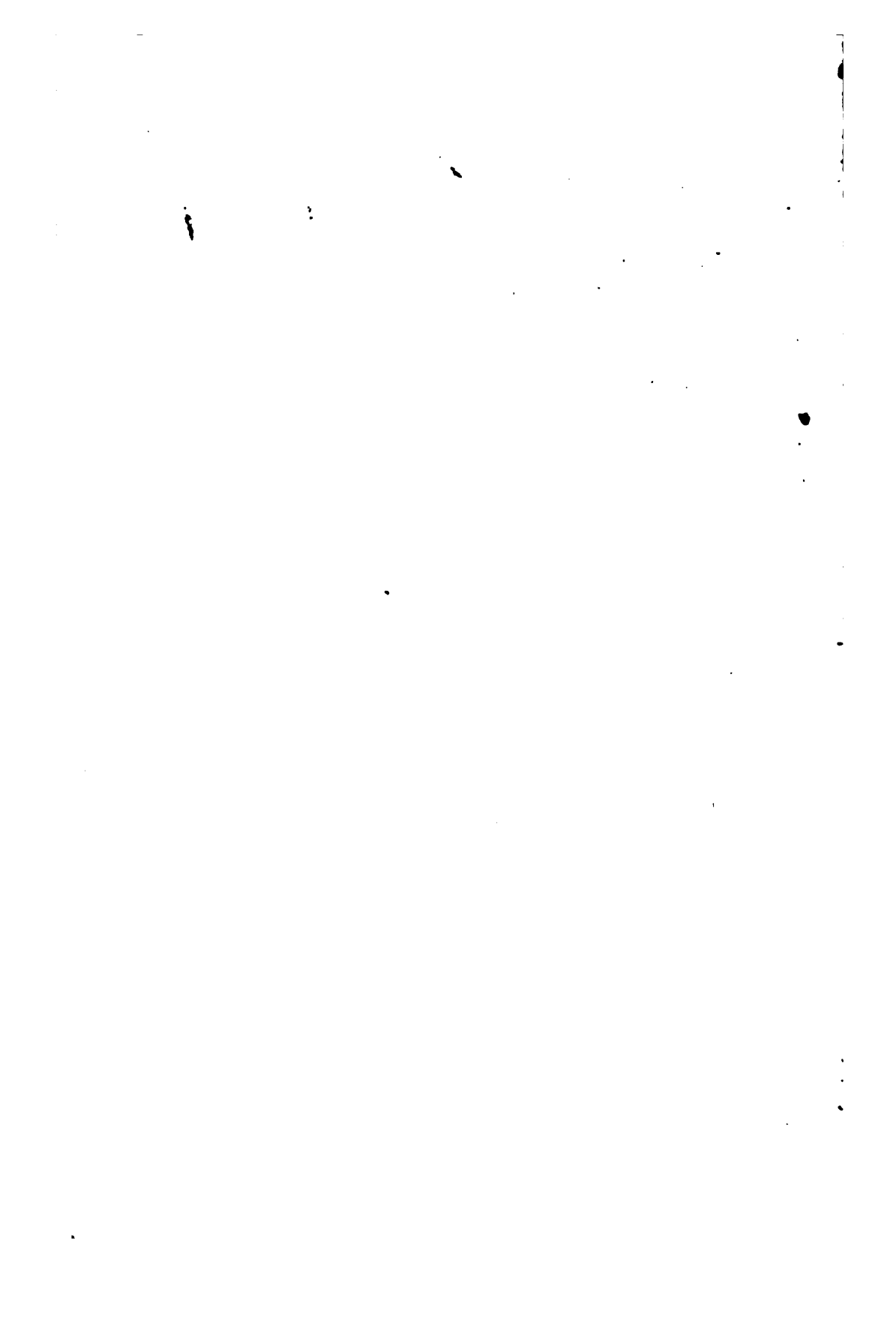
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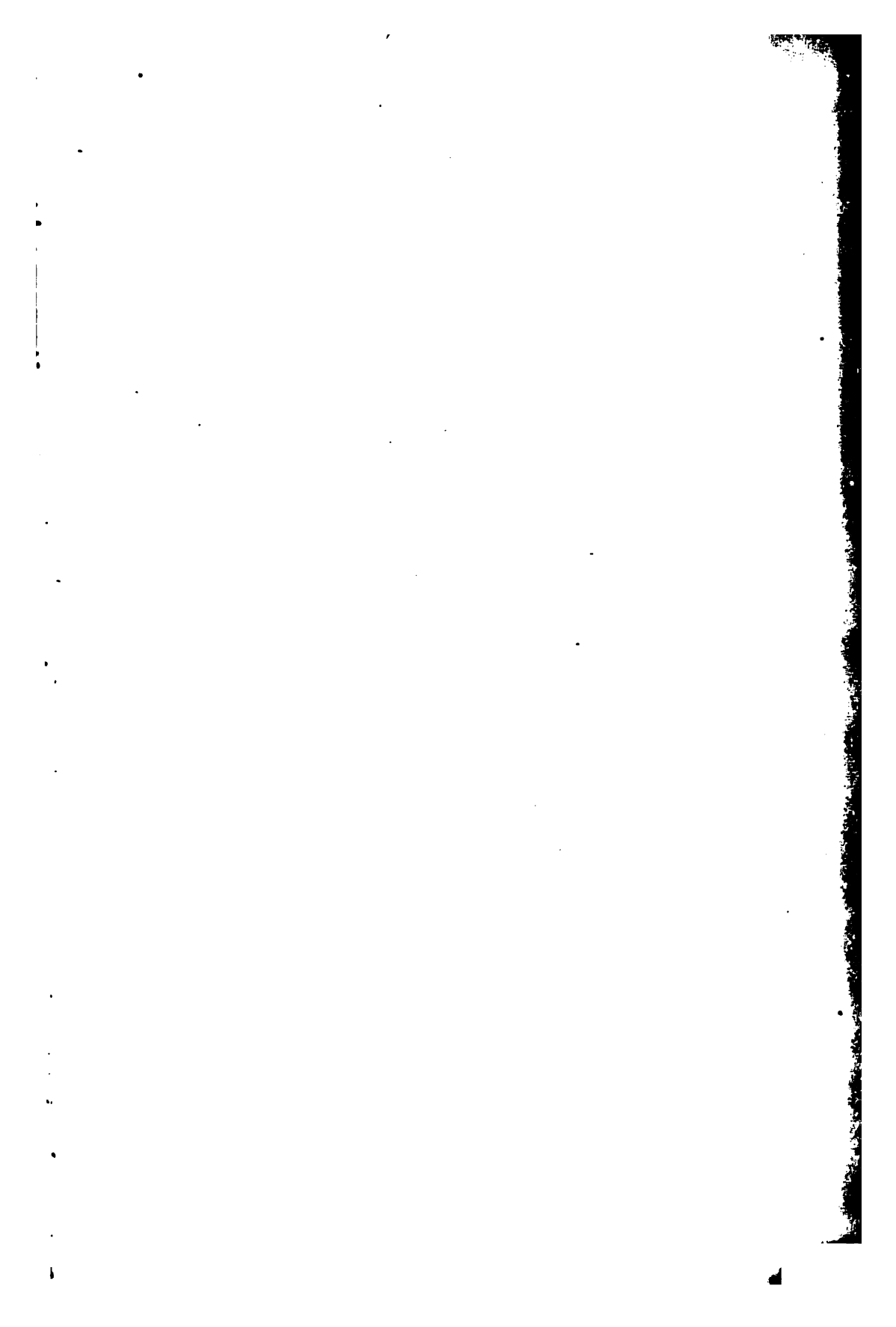
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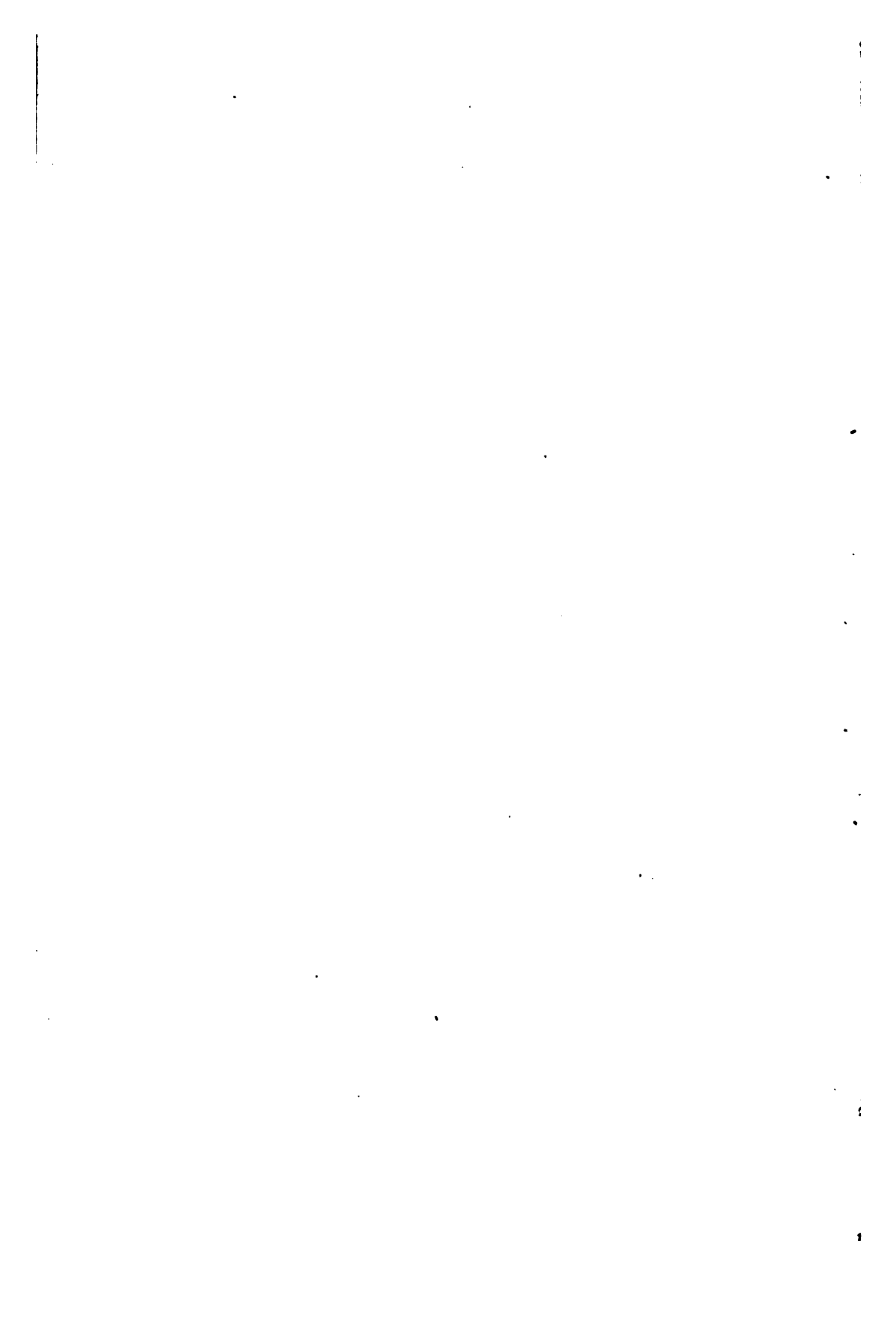
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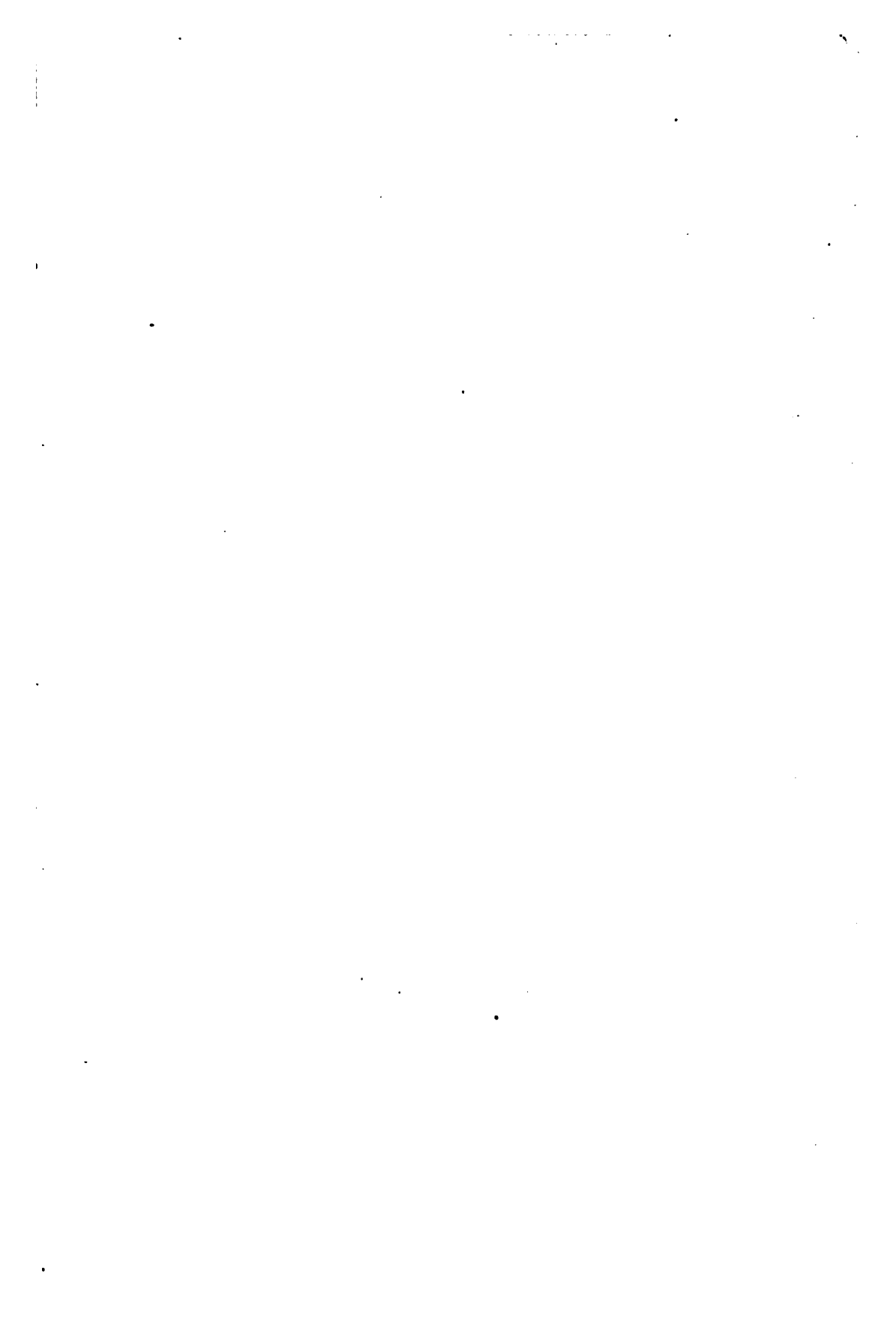
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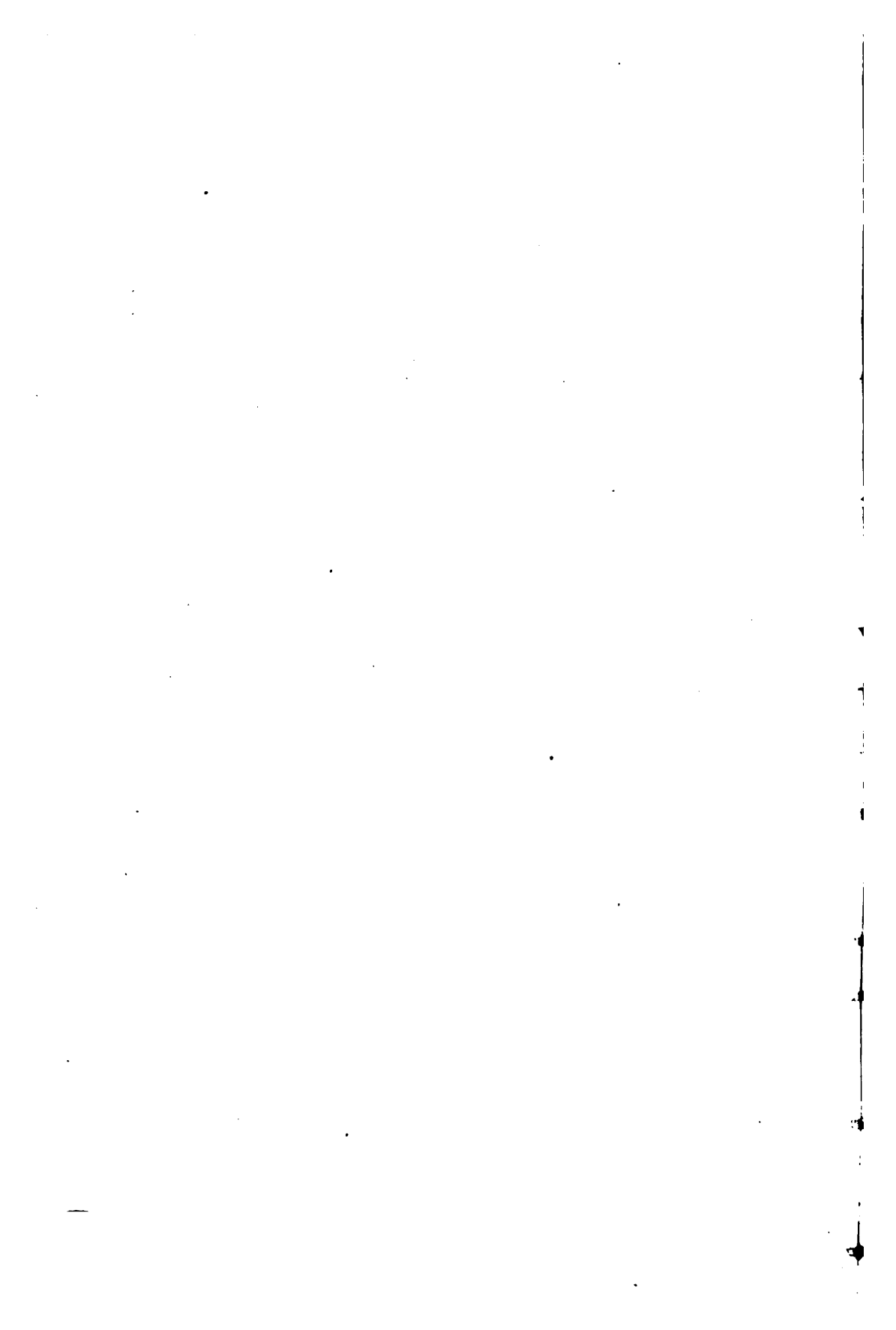
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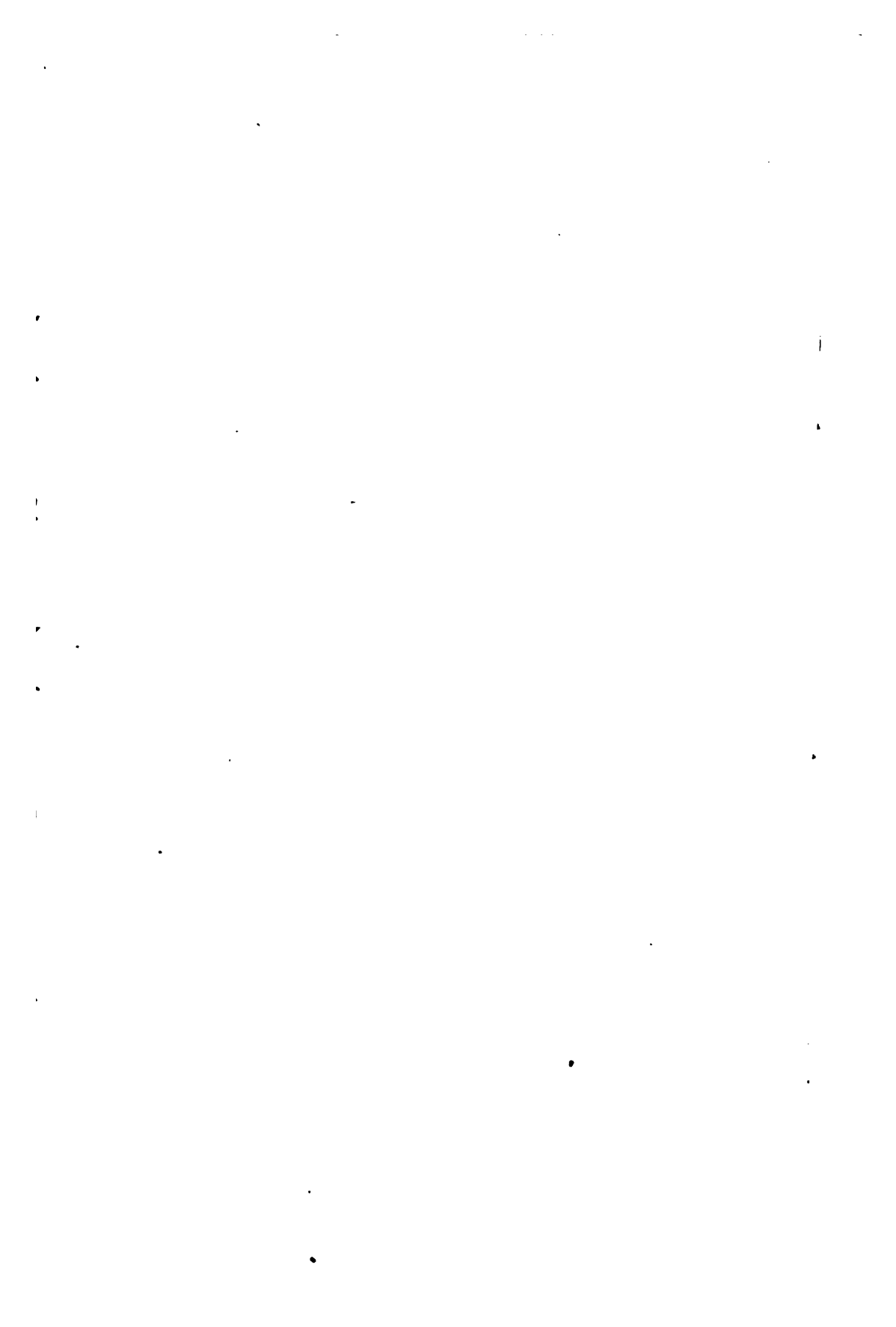


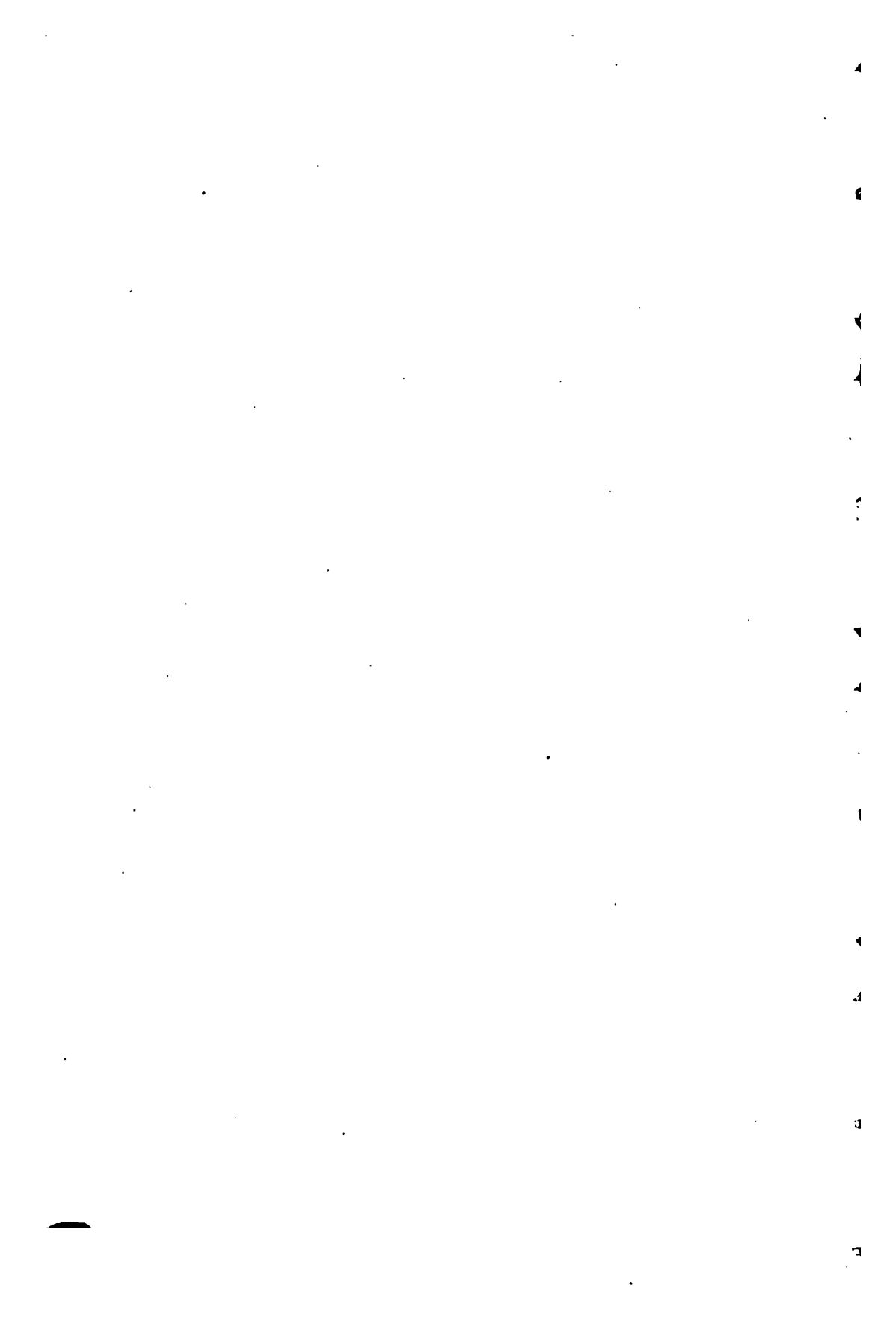














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HAND-BOOK
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INTERNATIONAL LAW

BY CAPTAIN EDWIN F. GLENN
Acting Judge Advocate United States Army

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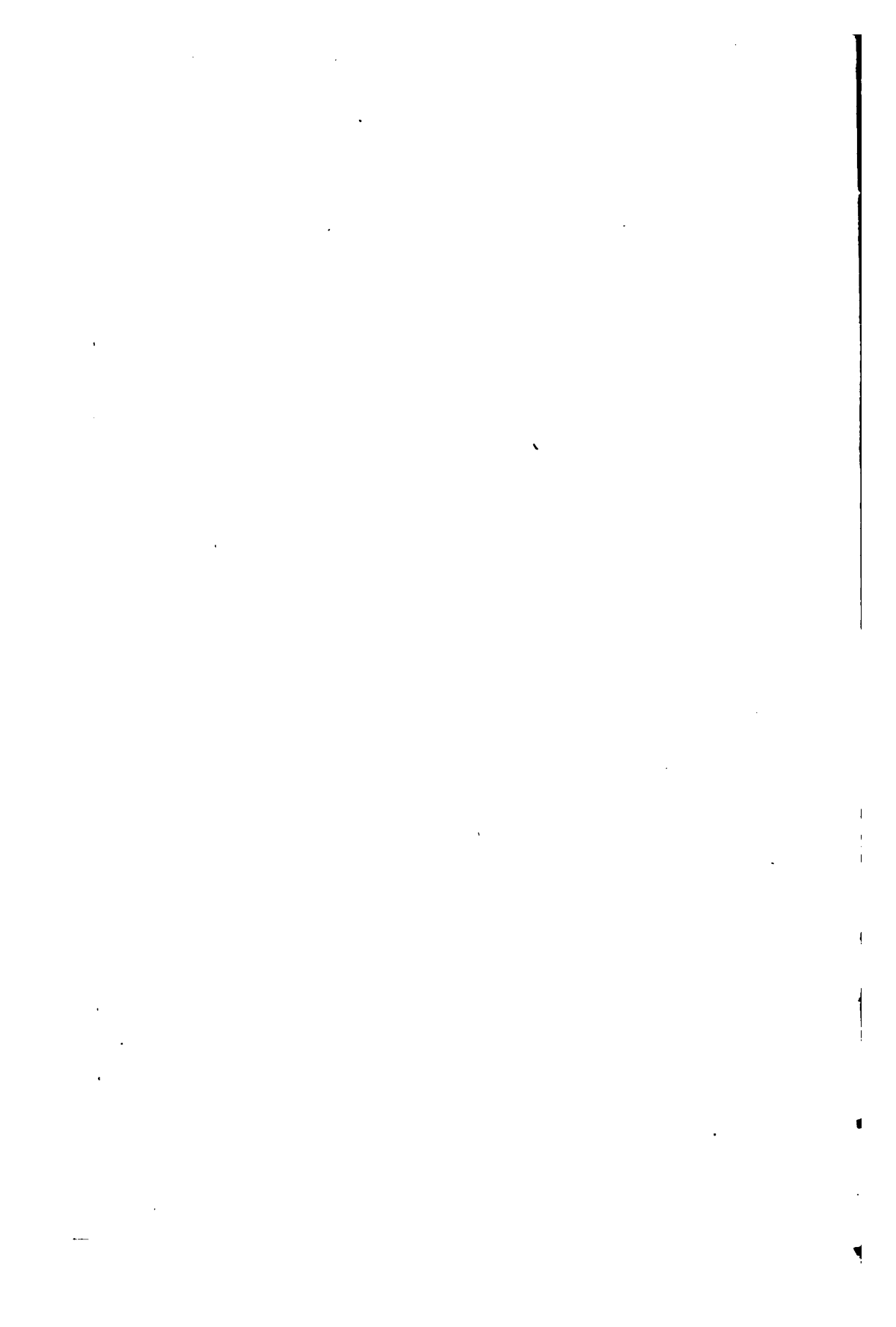
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TO
MAJOR GENERAL WESLEY MERRITT,
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In recognition of his high qualities as a man and soldier,

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(iii)*



PREFACE.

In the preparation of this work the controlling purpose has been to so place the leading principles of Public International Law before the student's mind that they can be readily grasped. The book is intended primarily for the use of students in their law school work, and such others as may wish to find the principles governing international relations stated in a brief and concise manner. It is not intended to follow and discuss these principles in their many ramifications of actual practice, but their application has been illustrated with well-considered cases stated in as brief a manner as possible. It is believed that, having the principles clearly stated and well fixed in the mind, the student will be all the better prepared to follow the reasoning of the eminent jurists, statesmen, and writers in their practical application of them. No attempt has been made to prepare a substitute for the many excellent text-books which treat this subject in an exhaustive manner, but rather to prepare the student's mind for the more ready and complete comprehension of them.

With this object in view, reference has been made in the notes to most, if not to all, of the leading authorities. These references have been prepared with great care for the purpose of enabling those who are called upon to instruct, as well as those who may desire to further pursue the subjects treated, to ascertain the exact place of treatment in the works referred to. In the citation of cases every effort has been made to select such as will illustrate in the clearest and most concise manner the principle enunciated. The definitions selected and placed in the body of the work are such as appeared to be the most accurate, but these, certainly the more important, will be found supplemented with others which have been collected and placed in the notes.

There has been no attempt to treat this subject chronologically, so that for a history of international relations, which is most in-

teresting and important to the international lawyer, reference will have to be made to the excellent works of such authors as Messrs. Wheaton, Ward, Hosack, and others. No attempt has been made to be original in statements of the principles of the law, but these have been freely copied from authorities of recognized standing. In fact, it is believed that nothing should more promptly cause the condemnation of a book upon any branch of the law than the fact that it attempts the statement of fixed rules of law in an original manner, merely for the purpose of originality. This is particularly true of international law, so much of which is formulated custom, requiring sanction and judicial determinations for such an extended period before being accepted into this body of rules. In this body of law neither new rules, nor modifications of existing rules, should be stated except with the greatest care, since their adoption by the states forming the international community must be well established in order to warrant such a course. It will be observed that the practice of the United States and England—especially that of the former—has been given most prominence, in some instances, even where the practice of the majority of the states does not accord with it.

Advantage has been taken of the opportunity presented to draw information and material from the labors of others. Among the list of authorities cited herein, while all have been freely consulted and used, special mention is due to Messrs. Woolsey, Halleck, Davis, Wheaton, and Snow of this country, to Messrs. Bluntschli and Calvo of the continental writers, and to Messrs. Pitt Cobbett, Lawrence, and Hall of England. The treatise on this subject by the last-named gentleman is considered so excellent, both as to statement and arrangement of material, that great benefit has been derived from it. The analysis of this subject and selection of cases by Mr. Snow, both of which are excellent, have been freely used. With the exception of the two authors named, full credit has been given them for quotations from their works.

EDWIN F. GLENN.

St. Paul, Minnesota, July 11, 1895.

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HAND-BOOK

OF

INTERNATIONAL LAW.

INTRODUCTION.

1. Division into Public and Private International Law.
2. Definition of Public International Law or the Law of Nations.
3. Definition of Private International Law.
4. Views as to Nature of these Rules of Conduct.
5. Sources of International Law.
6. International Law a Part of the Municipal Law.
7. International Law a Branch of True Law.

DEFINITION OF INTERNATIONAL LAW.

1. International law is either
 - (a) Public, or
 - (b) Private.
2. **PUBLIC**—Public international law, or, as it is otherwise called, the “law of nations,” consists in certain rules of conduct which modern civilized nations regard as binding on them in their relations with one another, and enforceable by appropriate means in case of infringement.¹

¹ Some other definitions are as follows: The rules of conduct regulating the intercourse of states. 1 Halleck, Int. Law, 41. Consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations, with such definitions and modifications as may be established by general consent. Wheat. Int. Law, D, § 14. The aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other, and to each other's subjects. The rules also which they unite as in treaties to impose on their subjects, re-

3. PRIVATE—Private international law consists in the rules by which courts determine within what national jurisdiction an action or proceeding equitably falls, or by what national law it is just that it should be decided.²

From the foregoing definition it will be noticed that certain concessions or relaxations of sovereign rights by civilized states have given rise to the body of usage known as "private international law." This affects more particularly the relations of individuals, and is not so much concerned with the relations of states as such. Naturally, in so far as individuals are affected, it is as members of their state, and this more particularly in regard to their private rights and relations. From this fact the term "private" is applied, since it is more descriptive of the class of subjects treated. It is called "international," because, where municipal laws clash, civilized states have quite generally adopted the same principles in their judicial decisions. It is generally held, for instance, that a debtor residing in one state cannot claim the benefit of the exemption laws of that state in garnishment proceedings in another state, and that a person who furnishes materials in one state for a building in another state cannot claim the benefit of the mechanic's lien law of the latter state, since the exemption laws and the me-

spectively, for the treatment of one another, are included here, as being in the end rules of action for the states themselves. Wools. Int. Law (6th Ed.) § 5. International law is the collection of recognized facts and principles which unite different states into a juridical and humanitarian association, and which, in addition, assures to the citizens of the several states common protection in the enjoyment of the general rights pertaining to them as human beings. Bluntschli, *Droit International*, art. 1.

² "Private international law is that branch of municipal law which determines before the courts of what nation a particular action or suit should be brought, and by the law of what nation it should be determined; in other words, it regulates private rights as dependent on a diversity of municipal laws and jurisdictions applicable to the persons, facts, or things in dispute, and the subject of it is hence sometimes called the 'conflict of laws.' Thus, questions whether a given person owes allegiance to a particular state where he is domiciled, whether his status, property, rights, and duties are governed by the *lex situs*, the *lex loci*, the *lex fori*, or the *lex domicilii*, are questions with which private international law has to deal." Black, *Law Dict.* tit. "International Law"; Sweet, *Law Dict.*

chanic's lien laws have no extra territorial effect. The validity of contracts is governed by the law of the state in which they are made; the enforcement of them, by the law of the state in which action is brought. These are rules of private international law. Since this body of laws derives its force from the sovereignty of the state administering it, it is in effect a subdivision of municipal law. In consequence, it forms no part of international law proper or public international law, and further discussion or consideration of it will not be undertaken.

In illustration of a question of public international law may be cited the Case of General Barrundia, Ex-Secretary of war of Guatemala. He had been exiled for certain revolutionary acts in connection with placing himself in power. In 1890 he took passage in a steamer from the Mexican port of Acapulco for Panama, but this steamer en route put in, as was customary, at the port of San José, in Guatemala, and the authorities of Guatemala decided to arrest him. In attempting to do so on board this steamer, the general was killed by the police, because he resisted arrest. This arrest was made with the sanction of the American minister, Mr. Mizner, who attempted to justify his action mainly upon the ground that there was imminent danger of the destruction of the vessel itself, his fears being based upon threats that had been made by the authorities. This involved the question of the right of asylum, and there is no question but that, since the offenses of General Barrundia were exclusively of a political nature, the action of the Guatemalan authorities was a flagrant violation of the right of asylum on board of a vessel flying the flag of the United States. The correspondence upon this subject was closed by a warning from the Executive of the United States that protection would be afforded in such cases by stationing vessels of war in the vicinity, if necessary.

Origin of the Terms "Law of Nations" and "International Law."

The English appellation of this science was formerly the "law of nations" from the *jus inter gentes* of Professor Zouch, of Oxford, in the seventeenth century. This *jus inter gentes* must not be confounded with the *jus gentium* of the Romans. The latter term was applied by them to the laws common to both the Roman

and Italian law, and sprung into existence from the fact that the Romans were unwilling to extend to strangers the full benefits of their *jus civile*, and from the necessity that existed for some laws to regulate trade and commerce with foreigners. Maine says: "The sum of the common ingredients made up a body of law called the '*jus gentium*.'" It was the common law of all men; that which is equally observed among all people.³ Neither should the term be confounded with the *jus naturale* which Grotius defines to be "the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational and social nature [of man], has in it a moral turpitude or a moral necessity; and consequently that such act is forbidden or commanded by God, the author of nature."⁴ Much study and research has been expended upon ascertaining the true signification of the foregoing expressions, and has resulted in more or less confusion of ideas, particularly in regard to the term "law of nations," which many recent writers upon this subject claim does not express with sufficient accuracy the characteristics of that system of rules of conduct which obtains between independent societies of men. In consequence, Jeremy Bentham, in suggesting the term "international law" (*droit international*) as being well adapted in our language to express in a more significant manner that system of jurisprudence which commonly goes under the name of "law of nations," speaks of the latter as "a denomination so uncharacteristic that, were it not for the force of custom, it would rather seem to refer to internal or municipal jurisprudence."⁵ At present, however, these terms are used interchangeably in our language without confusion.⁶

³ Maine, *Anc. Law*, p. 47.

⁴ Gro. *De Jure B.* p. 1, c. 1, § 10.

⁵ 2 *Benth. Leg.* 256.

⁶ For more extended discussions of the origin of these terms, see *Wheat. Int. Law*, D, 4-6, 16-21; *Wools. Int. Law*, 10; *Creasy, Int. Law*, 17-21; *Westl. Int. Law*, p. 18 et seq.; *Maine, Anc. Law*, p. 45; *Walk. Int. Law*, 62-79, 104; *Maine, Int. Law*, 20, 26-28.

VIEWS AS TO NATURE OF THESE RULES OF CONDUCT.

- 4. These rules of conduct may be considered either**
- (a) As an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered, or**
 - (b) As a reflection of the moral development and the external life of the particular nations which are governed by them.**

Many text writers adopt the former view, and frequently prescribe what they think ought to be, instead of what is, the practice of nations; and this has tended very much to lessen the esteem in which the rules of conduct forming the body of international law are held. Mr. Hall says, in speaking of this view: "A distinction must be drawn between international right and international positive law; the one being the logical application of the principles of right to international relations, and furnishing the rules by which states ought to be guided; the other consisting in the concrete rules actually in use, and possessing authority so far only as they are not in disagreement with international right. According to the latter view, the existing rules are the sole standard of conduct or law of present authority; and changes and improvements in these rules can only be effected through the same means by which they were originally found, namely, by growth in harmony with changes in the sentiments and external conditions of the body of states."⁷ Is there an absolute right applicable to human affairs, and, if so, where are we to find it? Suppose it is granted that there is such a right, the next question that presents itself is, what standard is to be set up to determine it? There is greater trouble in answering this question when we have to deal with the relations of states inter se than when the internal affairs of a state are under consideration, because, in regard to the latter relations, there is in each state a superior invested with authority to declare what the law is and to enforce it. On the other hand, states are independent beings, recognizing no superior, being subject to no control, and having no

⁷ Hall, Int. Law, 1, 2.

person or persons to declare what is the law applicable in the regulation of their external affairs. Under such conditions, there can be no rules applicable to their conduct of these affairs which have not been arbitrarily adopted by the general consent of these independent states, or the general principles applicable to such affairs must be agreed to by them. Granting that the theory of the existence of an absolute right is generally acknowledged, we still have no measure of the obligations of a state except in the rules of positive law accepted by the body of states as such. No moral obligation can be enforced against a state unless the recognized legal obligation coincides with it, any more than can an obligation of an individual of the state be measured by the moral idea of the society of which he is a member, which is not expressed in the legal rules, or which is in advance of the municipal law defining his obligation. If, then, international law consists of those principles and definite rules which states agree to regard as obligatory, where are we to find the proof that these principles and rules have received the sanction necessary to constitute international law? Since no code has been adopted with international sanction, and since these rules are unexpressed, the evidence of their existence must be sought in national acts. And here it may be further observed that there will be found some uncertainty and want of authority in regard to these international rules, due to changes in the science growing out of changes in the intellectual and moral development of successive generations, and to the fact that states set up different rules of action according to their temporary or permanent interests. The same uncertainty and want of authority, however, attend other political and jural sciences.

SOURCES OF INTERNATIONAL LAW.

5. The following are the chief sources of information to which reference may be made to ascertain what national acts constitute international law:

(a) Treaties and conventions, which are either:

(1) Declaratory of common international law, as understood by the parties.

(2) Stipulatory for practices which the parties desire to incorporate into international law, although they are aware that the present rule is otherwise.

(3) Mere personal contracts.^b

(b) The works of eminent jurists upon this and kindred subjects.

(c) The decisions of prize courts, of tribunals of international law in each state, and of boards of arbitration.

(d) The Roman law.

(e) The histories of important epochs; histories both of war and peace; state papers on controverted points, etc.

Treaties and Conventions.

Treaties of the first class mentioned above, by their nature invaluable as being in their inception directly intended by the parties to them to express their view of actually existing law, are equally by their nature exceedingly rare. Some examples cited as of this class are the Declaration of Paris, 1856; Conference of London, 1870; Treaty of Washington, 1870. Those of the second class are unreliable and uncertain as evidence because they imply the existence of international law in the sense contrary to that from which they stipulate, or that international law is silent or has not sufficiently declared itself on the point. When made, these treaties can have effect only as between the parties to them; and yet, when their number is large, they can be cited as an argument in favor of the popularity of the practice they represent. The third class, being mere bargains, possess no especial value, and scarcely any of the states are consistent in their treaties with other states. If their treaties for an extended period are examined, it will be found that diametrically opposite doctrines or principles are embodied in those covering the same subjects with different states, and many treaties are made incorporating an agreement which is contrary to the estab-

^a Walk. Int. Law, 50, note 2.

lished practice of one of the contracting parties. Treaties do not make international law, are not a source of international law, and are not even conclusively binding, but are evidence as to the existence of certain rules observed as international law, and valuable to the international lawyer because the doctrines and principles contained in them are set forth in concise form.

The Works of Eminent Jurists.

The works of eminent jurists upon this and kindred subjects are, of course, a most obvious source of information to which we have recourse. "In cases where the principal jurists agree, the presumption will be very great in favor of their maxims, and no civilized nation that does not arrogantly set all law and justice at defiance will venture to disregard the uniform sense of the established writers on international law."¹² These eminent jurists are very generally appealed to as authorities by Europe and America in the settlement of their difficulties. It is not only to text-books of authority that reference is made, but other writings of eminent jurists. Manuals of the usages of war, the oldest of which is "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber during the American Civil War, are useful, recent productions, being to a certain extent codifications of the laws of war; and perhaps the most singular feature of these manuals is the number of rules adopted in them which have been literally borrowed from the "De Jure Belli et Pacis,"¹³ and specially from its third book.

The Decisions of Prize Courts, etc.

Another source of information is in the decisions of prize courts, and of other tribunals of international law in each state, and of boards of arbitration. Prize courts are not merely courts of the country in which they sit, but also courts of international law. Many cases of international law are adjudicated by other courts in each country, and their opinions, especially in England and the United States, are much respected. The respect paid to the conclusions of boards of arbitration depends upon the character and fitness of the men selected by the states for the amiable settlement of their differences.

¹² 1 Kent, Comm. p. 18.

¹³ Maine, Int. Law, p. 24.

The Roman Law.

The Roman law may be said to be the basis of international law. It has been said that 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 states. From this law is derived the doctrine of the absolute equality of states considered, until recently, so essential to the modern conception of the rules of conduct governing their external relations. The system of international rules, as well as the municipal laws of many European states, have been copied directly from the Roman law.

The Histories of Important Epochs, etc.

The histories of important epochs, histories both of war and peace, and state papers on controverted points will prove not only a fruitful, but an interesting, source of information as to the body of rules of international law, and contain a reflection of the moral development of the society of states at any given period. "Ubi societas ibi jus est."

INTERNATIONAL LAW A PART OF MUNICIPAL LAW.

6. International law is a part of the municipal law of states.

Every nation, on being received at her own request into the circle of civilized government, must understand that she not only retains the rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war.¹⁴ "The law of nations, wherever any question arises which is properly the object of its jurisdiction, is here [England] adopted in its full extent by common law, and is held to be a part of the law of the land."¹⁵ The common law of England forms an essential part of American jurisprudence.

The law of the United States ought not, if it be avoidable, so

¹⁴ 1 Whart. Dig. p. 8.

¹⁵ Bl. Comm. bk. 4, c. 4.

to be construed as to infringe on the common principles and usages of nations and the general doctrines of international law. Even as to municipal matters the law should be so construed as to conform to the law of nations, unless the contrary be expressly prescribed.¹⁶ An act of the federal congress ought never to be construed so as to violate the law of nations if any other possible construction remains, nor should it be construed to violate neutral rights or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.¹⁷ The intercourse of the United States with foreign nations and the policy in regard to them being placed by the constitution in the hands of the federal government, its decisions upon these subjects are by universally acknowledged principles of international law obligatory on everybody.¹⁸ The law of nations, unlike foreign municipal law, does not have to be proved as a fact. The law of nations is part of the municipal law of separate states,—an integral part of the laws of the land.¹⁹

From the above American doctrine it will be seen that international law has precedence of both federal and municipal law, unless in exceptional cases where federal law has deliberately departed from it. This American view of the conditions upon which a state is originally received into the family of civilized nations does not differ from that entertained by the founders of international law, and is practically submitted to by the sovereign communities of our day. Any nation which disclaims the authority of international law would probably place herself outside of the circle of civilized nations.

¹⁶ *Talbot v. Seeman*, 1 Cranch, 1; *The Amelia*, 4 Dall. 34; *The Charming Betsy*, 2 Cranch, 64.

¹⁷ *The Charming Betsy*, 2 Cranch, 118.

¹⁸ *Kennett v. Chambers*, 14 How. 38.

¹⁹ *Res Publica v. De Longchamps*, 1 Dall. 111; *The Scotia*, 14 Wall. 170. Vide, also, *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 198; *Snow*, Cas. 1-5; *Wools*. Int. Law, § 29.

INTERNATIONAL LAW A BRANCH OF TRUE LAW.

7. The rules of conduct governing the relations of states are legal rules, and constitute a body of true law.

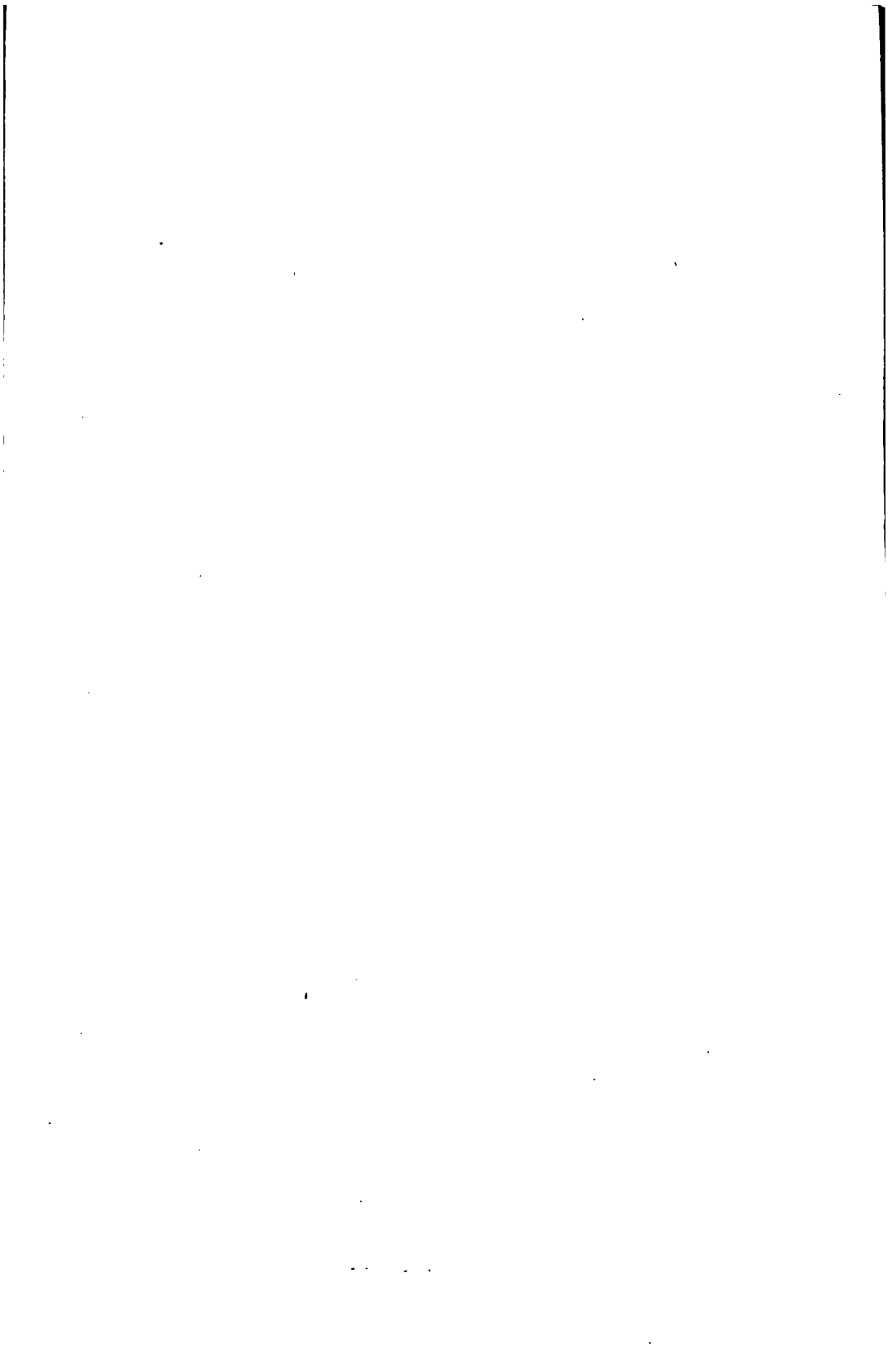
Objection to this view is based upon Austin's definition of "law," which is, in substance: "A rule laid down for the guidance of an intelligent being by an intelligent being having authority over him."²⁰ From this it is easy to draw the conclusion that international law is excluded. It is true that no one nation lays down a law for the guidance of all the other members of the international community, and calls it "international law." It is equally true, however, that this definition is not strictly applicable to municipal law, which is formulated custom, and grows out of the moral convictions, needs, and history of a people, and is imposed, not by the ruler upon the people, but by the people on the ruler, and is, as stated, formulated custom; that that is law, and that nothing else is law, in the larger sense of the word. It may seem that the king or ruler makes the law, but this is not true, except in a very limited way, because he is restrained by the usages of the nation. The greater part of the laws have grown up from long usage and custom. The common law of England and America consists of nothing more than usages, some of which have never been placed on the statute books; yet the judges have decided that they are just, and, although unwritten, they are regarded as just as binding as an act of congress. The Austin definition of "law" is not accepted by writers of authority at the present time. Although some admit that international law does not conform to the most perfect type of law, still, notwithstanding all that may be said in regard to its want of sovereign authority and a tribunal, or of its want of

²⁰ Following the Austin doctrine vide 2 Stephens, Cr. Law, p. 32 et seq. Holl. Jur. 96, 97, 291-293. J. K. Stephens' "International Law" which is a very interesting essay in two parts,—the first, called "International Law," is a criticism at some length upon the use of the expression "International Law," and the second, called "International Relations," points out an alternative method of dealing with international rules of conduct. Vide, also, "The Franconia" or *The Queen v. Keyn*, 2 Exch. Div. 63, and discussion of same in Maine, Int. Law, p. 38 et seq.

definiteness of sanction, it is not strictly correct to define it as "international morality"; for it is habitually treated as law, and a large part of it is acknowledged to be law, and is not distinguishable from it. Further than this, the doctrines of international law are founded on legal, and not on ethical, ideas; they purport to be rules of strict justice, and not counsels of perfection; they have been elaborated and discussed by the methods appropriate to jurisprudence, and not by those of moral philosophy; the framers of state papers concerning foreign policy appeal to precedents, to treaties and opinions of specialists in a strictly legal manner; the conduct of states is attacked, defended, and judged within the range of international law by reference to legal considerations only. Furthermore, there is actually an international morality, distinct from and compatible with international law, violation of which, however discourteous, high-handed, or odious the same may be, gives no formal ground of complaint. If, therefore, we find that our definition of law fails to include international law, the proper conclusion should be, not that we must class these rules under the term "international morality," but that our definition is inadequate, and should be changed.²¹

²¹ Law Mag., Nov., 1882. Lecture by Sir Frederick Pollock; Hall, Int. Law, 15.

PART I.
PEACE.



CHAPTER I.**PERSONS IN INTERNATIONAL LAW.**

8. Who are Persons in International Law.
9. Definition of a State.
- 10-11. Personality or Identity of State—How Affected.
12. Union of States.
13. Personal Union.
14. Real Union.
15. Federal or Centralized State.
16. Confederated States, or Confederate Union.
17. Protected States—States under Suzerainty.
18. Neutralized States.
19. What States the Subjects of International Law.
20. De Facto States—Belligerency.
21. Right of Belligerent States to Demand Recognition.
22. When Recognition of Belligerency Permissible.
23. Effect of Recognition of Belligerency.
24. Equality of States.

WHO ARE PERSONS IN INTERNATIONAL LAW.

8. The persons of international law are communities known as sovereign or independent states that voluntarily subject themselves to it.

To a certain extent, international law affects and governs the relations of individuals and communities possessing characteristics analogous to states.

It is assumed of the sovereign states, who are the persons in international law, that they have a moral nature corresponding to that of individuals, and that in their relations towards one another they occupy a corresponding position to that of individuals towards each other. The international person must possess a sense of right, and recognize an obligation to act in accordance with this right, in order that we may have a true conception of the existence of law. It follows that any community, to become a person in international law, must possess characteristics of such a nature as to convince other similar communities that it can be held responsible for its

acts. Therefore, no society whose existence is uncertain can offer sufficient evidence of its ability to carry out its obligations to warrant other states in entering into contractual or similar relations with it.

Men, as individuals, are not international persons in the true sense of the word, although they have a right to the protection of international law, when the rights guaranteed to each individual by this law have been violated in their persons. Man considered as a citizen possesses private rights which are protected by the public laws of his own state, but, considered in his quality as a human being, he has rights which go beyond the limits of the state of his citizenship, and the protection of these pertains to international law. These international rights are protected by or through the representatives of his own government when violated or threatened in a foreign state, provided any such are accredited to such state. In certain instances the United States and Germany have offered their protection to citizens of Switzerland in countries where no proper representatives were accredited by her. England and Russia have gone further, and perhaps exceeded their strictly legal authority, in Asia, by offering their protection to individuals whose rights they were not duly authorized to protect.

Political parties, even though engaged in war, as, for instance, trying by force of arms to form a new state, are not considered international persons in the true sense of the word, although they may be required to respect the obligations imposed by international law, and can, under certain circumstances, place their demands under the protection of this law.

The Christian churches are not international persons in the true sense of the word, but they have entered into relations with states similar to those entered into by states with each other. The history of the Roman Catholic Church, especially during the middle ages, shows the very close connection of this church with all international relations in Europe. This church was at that epoch regarded as of the highest authority in such relations.

It is scarcely necessary to point out that sovereigns, princes, and diplomatic agents of states are not international persons, although they enter into relations with states. They do so simply as agents of the state or person *par excellence*.

DEFINITION OF A STATE.

9. A state is a community of persons occupying a fixed territory, and living under a stable and responsible organization, for a political end, in accordance with justice. The organ of a state by which its relations with other states are managed is the government.¹

As soon as a community of persons shows that it possesses the following attributes, viz.: That it exercises undisputed and exclusive control over all persons and things within its territory of fixed and determined limits; that it regulates its external affairs independently of the will of any other community; that it gives sufficient guaranty of its stability; and that it intends to conform to the requirements of international law,—it becomes at once a person or subject of this law, and is a sovereign state.² Mr. Woolsey, after reciting substantially the above requirements, says: “We find it necessary for the conception of states, and for their occupying the sphere which the author of society has marked out for them, to predicate of them sovereignty, independence, and the equality³ of each with the rest. And these its attributes or rights each has a right to preserve; in other words, to maintain its state existence. These three attributes cannot exist apart, and perhaps the single conception of sovereignty or of self-protection may include them all.” Mr. Hall asserts that neither the absolute independence of states nor the possession of a fixed territory is strictly a necessary requirement to the conception of a legal relation existing between communities independent with respect to each other, but is conceived to be so on account of the condition of society at the time international law assumed its shape. Since a state must show that it is in possession of these attributes before it becomes an inter-

¹ For other definitions, vide Bluntschli, §§ 18-21; Gall. Int. Law, p. 62; Wools. Int. Law, § 36; Halleck, Int. Law, vol. 1, p. 58; 1 Phillim. Int. Law, p. 81; Vatt. Int. Law, bk. 1, c. 1; Calvo, Int. Law, § 39; Pitt-Cobbett, Cas. Int. Law, pp. 3, 4; Wheat. Int. Law, D, 20, 30; Cherokee Nation v. Georgia, 5 Pet. 1.

² Wools. Int. Law, § 37; Hall, Int. Law, pp. 10-21.

³ Vide post, p. 31, § 24.

national person, it follows that international law has nothing to do with matters anterior to the acquisition of these attributes; so that, when they have been acquired by a duly organized community, thereby conferring upon it the legal status of an international person, it is a matter of perfect indifference as to what faults may have been committed or what rights violated in the accomplishment of this result, provided there was nothing done to indicate an unwillingness or inability to perform the duties attaching to this status.

PERSONALITY OR IDENTITY OF STATE—HOW AFFECTED.

10. The identity or personality of a state is not affected in any manner by internal changes, because the international association is composed of states monarchical and republican, absolute and representative, large and small, having no special constitution and no prescribed amount of territory.⁴

11. A state may lose its identity, however, in the following ways :

- (a) By being entirely absorbed by another state as a result either of conquest or of agreement.
- (b) By being divided up into two or more states in such a manner that no subdivision represents the original state.
- (c) By uniting with another state upon equal terms to form a new state.

The government is regarded as the agent of the community for expressing its will, and, although duly authorized, may be superseded by the community at any time. It is evident that the idea of the permanency of a particular form of agency must be entirely disconnected from the state person, for otherwise there would be a change in a state's international affairs with every change of state

⁴ Vide, as to state identity, Hall, Int. Law, 22, 23; Wheat. Int. Law, D, § 22; Bluntschli, §§ 39, 40; Wools. Int. Law, §§ 38, 39; Pitt-Cobbett, Cas. Int. Law, p. 5.

agent, and the independence of the state itself would be seriously affected at the same time. This is true to the extent that a state under anarchy for a short period of time, and unable to perform its international duties, does not on that account lose its state existence, so long as this anarchistical condition is not permanent. So also the established order of things may be disturbed by a revolution or other similar uprising, and yet the state existence remains intact until it becomes evident that it is manifestly impossible to re-establish the original state of things upon the same territory with the same population. A state's identity is not therefore in general affected by any internal changes in its affairs.

A state's identity is not in general affected by external modifications, such as the loss or acquisition of territory. In the case of acquisition of territory there can scarcely a question arise as to the ability of the acquiring state to perform its international obligations, and the acquired territory is simply merged in that of the acquiring state. The principal questions arising under such change of circumstances are as to the responsibility for the debts or obligations of the affected territories. The acquired territory becomes subject to the obligations of the acquiring state, while the latter is not bound by the personal obligations of the former except in case of the absorption of an entire state with the whole of its property, in which case its obligations would naturally attach to the acquiring state. In the case of loss of territory by a state its identity is not lost, provided enough of its territory is retained to enable the remaining state to perform its obligations. A state can also voluntarily subject its action in regard to external matters to the will of another state without loss of identity, provided this action is not permanent, or is revocable by unilateral action.

JOINDER OR UNION OF STATES.

12. Where one state joins or unites with another, the international relations of each are affected more or less according to the nature of the union; but the identity of neither is necessarily lost.⁵ The joinder of states may result in either:

- (a) **A personal union.**
- (b) **A real union.**
- (c) **A federal or centralized state.**
- (d) **Confederated states, or a confederate union.**
- (e) **Protected states, or states under suzerainty.**
- (f) **Neutralized states.**

Where states are joined to other states by unions, the effect of the union upon the independence of the individual states composing it depends upon the nature of the bond which unites them. The independence of a state can be impaired to a certain extent, and the individual state still be partially subject to international law. In other words, the personality of a state forming a union with another is not necessarily wholly merged, and in those matters which have not been committed to the will of the other by the articles of union it retains its personality. It is true, perhaps, that the nature of this bond of union pertains more to public law than to international law; but it is necessary to understand its nature in order to determine the relation of the individuals composing the unions to the international society.

SAME—PERSONAL UNION.

13. **A personal union exists when two or more states, distinct in every respect, are united under one sovereign.**

The states composing such a union are properly considered in international law as separate and independent states, who have em-

⁵ For general discussion of the classification of states, vide Creasy, *Int. Law*, 135-142; 1 Phillim. *Int. Law*, 94-101; Calvo, *Int. Law*, § 44 et seq.; Pitt-Cobbett, *Cas. Int. Law*, 7; 1 Halleck, *Int. Law*, 62-66; Bluntschli, §§ 70-76; Hall, *Int. Law*, 25-31; Wheat. *Int. Law*, D, § 40 et seq., note 32.

ployed the same ruler or agent for the transaction of a certain class of their affairs. Being wholly independent of each other, and in no sense responsible for the acts of the other, they can be and are represented by different diplomatic agents, and in a congress of nations each has of right a representation. Great Britain and Hanover from 1714 to 1837 were ruled by the same Prince, and Charles V. was Emperor of Rome and King of Spain for about 40 years, commencing in the early part of the sixteenth century. During these periods the individual states composing these unions retained their separate identity as sovereign states.

SAME—REAL UNION.

14. A real union exists when two or more states become politically united permanently under the same sovereign, even though they do not possess the same constitution.

In such a case there is, as a rule, but one personality, and one diplomatic representative; but each state composing the union could be authorized to have its own diplomatic representative under conditions which show that the individual interests of each require such representation. It is quite apparent that a personal union may develop into a real union by having the conditions last sufficiently long to clearly indicate permanency. The union of England with Scotland and Ireland was formerly a personal union; that of Russia and Poland from 1815 to 1830 was the same. The three first named became an incorporate or real union, which included all three states in 1801; the first two, England and Scotland, were so united in 1707. Russia and Poland have formed a real union since 1863. One of the best examples of a real union to-day is that of Sweden and Norway, who have the same king, but have not the same government nor the same legislative body. The relations of these two countries are of such a nature as to indicate durability, even though there be an extinction of the present dynasty, as provision is made for permanent succession.

SAME—FEDERAL OR CENTRALIZED STATE.

15. A federal state is one composed of two or more states joined together under a central government, which conducts all the external affairs of the state, no single member of the union possessing the right to withdraw therefrom.

The state resulting from such a union is the international person, for this central government expresses the joint will of all the individuals, and the citizens of each of the individual states are citizens of the federal state. The United States furnishes one of the greatest and at the same time one of the best examples of such a state. To this federal government under the constitution is granted the power of regulating commerce, accrediting diplomatic representatives, providing for the common defense, making treaties, declaring war, concluding peace, granting letters of marque and reprisal. Another example of such a state is the German empire under the constitution of 1871. Although some of the states composing the empire have the privilege of receiving ministers at their courts, and accrediting ministers to foreign courts, yet they possess but limited powers. Other federal states now in existence are Mexico, Venezuela, Colombia, Argentine and Swiss confederations.⁶

SAME—CONFEDERATED STATES, OR CONFEDERATE UNION.

16. Confederated states are those which are joined together for certain purposes of protection, which are consistent with their retaining their individuality as states.

This is the most ancient form of union of states. In it there exists in general no absolute central sovereignty for the combined

⁶ For description of Germanic confederation with the powers under the constitution, vide section 55 of 1 Calvo, "Droit International"; for that of the Swiss or Helvetique, sections 56 and 57; for the points of resemblance between the constitutions of the Argentine confederation and the United States, sections 58-61; and the differences between these two, in section 62 et seq.

states. The diplomatic representation pertains to the individual states who have consented to give up permanently only a part of their freedom of action, so that the central government does not appear to their exclusion. The central government can and does cause itself to be represented, and is authorized to conclude treaties, etc.; but the essential difference, in so far as international relations are concerned, between this union and a federal union, is that the central sovereignty in the former case has not the power to enforce its decrees, and does not enter into direct relations with the inhabitants of the different states. Another test to be applied is to determine whether each state of the union has reserved the right to determine for itself whether it will be at peace or war with a foreign state. If such right is reserved, the union is confederate. The Swiss confederation from 1804 to 1848, the confederation of the thirteen original states of the United States from 1776 until the adoption of the present constitution, and the German confederation of 1815 to 1866 are types of this class of union.⁷

⁷ For more complete understanding of the relations existing between the states of the German empire under the diet, vide Hall, *Int. Law*, pp. 28, 29; Calvo, *Int. Law*, §§ 52-55; the ancient Swiss confederation, vide Calvo, *Int. Law*, § 57 et seq. The Articles of Confederation of the thirteen original colonies declared: Article 1: The style of the confederacy to be "The United States of America." Article 2: That each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right which was not by this confederation expressly delegated to the United States in congress assembled. Article 3: That the purposes of the confederation were to form a league of friendship for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any pretense whatever. Article 4: That citizens of the several states enjoy the privileges of citizenship, trade, and commerce in each state; and that full faith and credit be given in each state to the records and judicial proceedings of every other state. The following articles provided for a general congress, the individual representation, mode of election, and the powers thereof. Congress was solely and exclusively empowered to determine upon peace and war, except in case of invasion or imminent danger, of sending and receiving ambassadors, entering into treaties and alliances, regulating captures on land and water, disposition of prizes by land or naval forces, appointing courts of prize and appeal courts concerning captures, courts of appeal for determining disputes between states, power of regulating the value of

SAME—PROTECTED STATES—STATES UNDER SUZERAINTY.

17. A protected state is one which has placed itself under the protection of another, or has been so placed by other powers.

There is a multitude of gradations between the state of complete liberty and the state of dependence, permitting diplomatic relations by a state with others only through the medium of another sovereign state. The protected state is usually called the *vassal state*, and the other the *protecting* or *sovereign* state. In the case of a protected state the presumption, *prima facie*, is that it is independent and in possession of all the rights that it has not resigned; while, in the case of a state completely under the suzerainty of another, the fact of its being a part of another state precludes the presumption of rights except such as may have been granted to it by the suzerain. If the citizens of a protected state retain a distinct nationality, and can remain neutral in the case of a war undertaken by the sovereign power, it is considered to be sufficiently independent to be a subject of international law. Sovereignty tends naturally to unity, and the relation existing between sovereign and vassal states cannot subsist for an extended time. Either the vassal rises to the rank of an independent state, or the suzerain gradually absorbs more and more of the vassal's powers, until there is only one sovereignty.

In the middle ages there existed both in Europe and Asia a number of vassal states which to-day are either independent or completely absorbed by the sovereign power. One of the best examples of a protected state is the Ionian Islands, since 1864 a part of Greece, but previous to that time under the protection of England. Colonies, although dependent politically upon the mother country, possess a certain amount of independence, and are in a limited degree subjects of international law. The mother country, at the

coin of the United States, fixing the standard of weights and measures, regulating trade with and affairs of the Indians, regulating postal affairs, making rules for government of the land and naval forces, the appointment of all naval officers, and of all army officers except regimental officers, and some other minor powers. Vide 1 Story, Const. § 229 et seq.

outset, is usually the only sovereignty; but, as the colony develops, a greater degree of freedom of action is necessary for it. Sometimes also on account of distance, as in the case of Canada and Australia from England, and for other reasons, a separate government and distinct representation become necessary. The history of America shows how these colonies gradually develop into independent states.

The Indian empire and Algeria are under the protection of England and France, respectively; but these, on account of the nature of their civilization, are not subjects of international law.

SAME—NEUTRALIZED STATES.

18. A neutralized state results when its territory has been declared by convention to be neutral.

A state thus situated gives up of necessity some of its liberty of political action. It must remain in a state of absolute impartiality in the event of a war, entering into no engagements that can interfere with this relation. The histories of Switzerland and Belgium afford instances of such states.

WHAT STATES THE SUBJECTS OF INTERNATIONAL LAW.

19. States possessing the modern European civilization, and such others as have been formally admitted by them, constitute the international community.

International law is a product of the special civilization of modern Europe, which is a highly artificial system, understood and appreciated only by the inhabitants of those countries which have built it up, and by those who have inherited it directly from them. The presumption in favor of these two classes being subjects of international law is so strong as to require some positive act of withdrawal to free them from its burdens; and a new state coming into existence in possession of this civilization is at once assumed to have voluntarily become an international person, until it shows positively a contrary purpose. On the other hand, states possessing a different civilization must, in order to gain admittance into this

community, perform some act or acts acquiesced in by this community or some of its members, which indicates an acceptance of this law in its entirety. By the treaty of Paris in 1856, Turkey was admitted by express declaration, and this treaty was actually signed in her behalf. In the absence, however, of this express declaration to that effect, it is not believed that her signature to this treaty would be considered as sufficient to admit her into this community of nations. It is safe to state, also, that the act of sending and receiving diplomatic representatives is not sufficient to signify the acceptance of the state into this community.⁸

DE FACTO STATE—BELLIGERENCY.

20. A community which, in attempting to separate from the parent state, sets up its own government, is, under certain conditions, recognized as a belligerent community, and a *de facto* state results.⁹

This recognition must be accorded either by the parent state from which the community attempts to separate itself, or by one or more foreign powers. It is entirely consistent with uncertainty as to result of the struggle for independence, its effect being merely to accord to the recognized community the privileges of the law. In case this recognition comes from a foreign power, the effect, assuming that the recognition is made in good faith, is to compel the parent state to treat this power as a neutral between two legitimate combatants, and to confer upon the belligerent community the rights and duties of a state, for the purposes of its warlike operations, as between it and the recognizing country. In case the parent state recognizes this community, the effect is to at once confer the character of enemies upon her revolted subjects, and to confer upon foreign powers the rights, and impose upon them the duties, of neutrality. In the first case the parent state ceases to be responsible to the

⁸ Hall, Int. Law, pp. 42-44.

⁹ For general subject of belligerency, vide Hall, Int. Law, pp. 31-42; 1 Halleck, Int. Law, p. 68 et seq., note 2; Wheat. Int. Law, D, note 15; Wools. Int. Law, §§ 41, 180; Bluntschli, § 512; 1 Whart. Dig. § 69; The Lilla, 2 Spr. 177, Fed. Cas. No. 8,348.

recognizing state, and in the second case to all other states, for acts of the insurgents, and for the losses and inconveniences of these foreign states and their citizens by reason of inability to perform its international obligations in such parts of its territory as may not be under its control. With such important results attaching to the status of recognized belligerency, it is very necessary to determine under what circumstances this recognition can be properly accorded, and whether it can be demanded by the community seeking independence.

RIGHT OF BELLIGERENT COMMUNITIES TO DEMAND RECOGNITION.

21. Belligerent communities are not legal persons, and do not possess permanent independence, so that there is no legal ground upon which they can demand recognition. When accorded, it is an act of pure grace.

Those who claim ¹⁰ that, when a considerable portion of the inhabitants of a state are in arms against the remaining portion for

¹⁰ Bluntschli, § 512. The quality of belligerent is, however, accorded to armed parties who, without having received from an already existing state the right to combat with armed forces, have militarily organized themselves, and struggle in good faith, in their own state, for a political right.

Note 1. Here is an exception to the rule that the war exists only between the states. But, when a political body pursues the realization of certain public ends, and has organized itself into statehood, it becomes in a certain measure a state. The laws of humanity require that the quality of belligerent be accorded to the party, and that it be not considered as a gathering of criminals. The party who is strong enough to create powers analogous to those of the state, and who, by its military organization, offers sufficient guaranty of order, and proves by its political conduct its determination to become a state, such party has a natural right to be treated in the same manner as an already existing state. The dangers of war are thus diminished, not only in favor of the new community, but again in favor of its adversaries. If, on the contrary, these insurgents are pursued criminally, the struggle becomes more savage, and that the two adversaries will seek mutually to surpass each other in their acts of barbarism and the cruelty of their retaliatory measures is to be feared.

Note 3. It is indispensable to respect in wars the above mentioned principle. The party in possession of the constitutional authority will more readily

the attainment of a political end, and are conducting hostilities in accordance with international usage, resemble a state so nearly as to be entitled to recognition as belligerents, base this claim upon moral instead of legal grounds. The obligations imposed both upon the parent state and foreign states by these authorities flow from the moral duties of human conduct, and from the fact that a foreign state has no right to inflict a penalty where it has no right to judge.

WHEN RECOGNITION OF BELLIGERENCY PERMISSIBLE.

22. To warrant recognition of belligerency, there must be an actually existing war, and the interests of the foreign state must be so affected as to render such action a reasonable measure of self-protection. Three classes of cases arise, namely:

- (a) Where the conflict is solely upon land, and the foreign state is not contiguous.
- (b) Where the conflict is solely upon land, and the foreign state is contiguous.
- (c) When there is a maritime war, and the commercial interests of foreign powers and the parties at conflict are large.

allow itself to treat its adversaries as rebels. The insurgents on their part will seek to accuse the governing power of high treason or of violating the constitution. When the criminal tribunals cease to be respected, and in fact the communities are at war, it will be more logical to suspend the application of the penal laws, and consider politically and militarily its adversaries as insurgents. Actual international law has then progressed in showing itself disposed to accord the quality of insurgents to a revolutionary body. But for this the following rules must be observed: (1) They must have military organization. (2) They must respect the laws of war and struggle for a political right.

A civil war is never declared. It becomes such by its accidents,—the number, power, and organization of the persons who carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. Prize Cases, 2 Black, 637.

In the first class of cases recognition can scarcely be justified under any conditions that may be conceived, and it is contrary to the practice of nations to accord it. The interest of foreign states are not usually affected, and, if at all, in so slight a degree as to render recognition of belligerency unnecessary.

In the second class, each case must be dealt with as it arises. The foreign state is entitled to determine for itself whether its interests will be best served by granting or refusing recognition. The usage of nations is to exercise their rights in this respect in each case as it arises.

In the third class of cases the interests of other nations, especially those in possession of a mercantile marine, are such as to render it not only advisable, but necessary, to have the status of the parties to the conflict determined as soon as practicable. This status must be determined by the political department of the government, to which all the private citizens, executive and judicial officers, look, so as to regulate their conduct. It is customary for this department of the government to decide whether the contest is or is not a war.¹¹ If this decision is announced prematurely, it may be properly considered as a gratuitous and unfriendly act.

On the other hand, it is due to its own citizens, to the contending parties, and to the world at large, to arrive at a decision seasonably. The recognition of the belligerency of a revolted community against the established government assumed great political importance during the great Civil War in the United States. The early recognition of the belligerency of the Southern Confederacy by the proclamation of neutrality of Great Britain on May 13, 1861, was considered by the United States as hasty and an unwarranted act of intervention. From the facts, we find a number of states, whose territories made a continuous whole, seceding from the Union, forming a constitution, and choosing public officers, a president among the rest. This president made a proclamation touching letters of marque and reprisal, and told his congress that two vessels had been

¹¹ When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government as it is viewed by the legislative and executive departments of the government of the United States. U. S. v. Palmer, 3 Wheat. 610.

purchased for naval warfare. We find next two proclamations of the president of the United States, one of April 15th, calling for a large force of the militia of the states, and another of April 19th, announcing the intention to set on foot a blockade, after the proclamation of the Confederate president, inviting letters of marque and reprisal, had become known at Washington. The action of the Confederate president was ratified by his congress on May 6th. Intelligence of President Lincoln's blockade reached London on May 2d, copies of it being received between May 5th and May 11th. Two days afterwards the proclamation of neutrality was published. The effect of the proclamation of blockade was to declare that a maritime war existed, and to recognize the belligerency of the states in rebellion. In addition to this it may be added that there existed, as stated by Mr. Hall, every element of a state of war between a legitimate government and a de facto sovereignty, of such a nature as to render it necessary for Great Britain, on account of the large and incessant intercourse between the two countries and the large value of the cargoes belonging to her subjects in American ports, to warn her traders of the existence of a state of things which affected them with duties, and by which a restraint was placed upon their commerce. In conclusion, it is noted that the supreme court of the United States in the Prize Cases¹² decided that this blockade was an act of war, and these decisions in effect sustained the validity of the act declaring neutrality.¹³ In the case of "The Lilla," a vessel condemned by a prize court of the Confederate States, and afterwards sailing under the British flag, it was held that the federal courts would not acknowledge the validity of the decisions of the prize courts of the Confederacy, although they had recognized the belligerency of the government.

¹² "Alabama Question," *New Englander*, July, 1869; *Prize Cases*, 2 Black, 635; *Wheat Int. Law*, D, 374, 375; *Wools. Int. Law*, § 180; *Case of United States before Tribunal of Arbitration at Geneva*, p. 17; *Bluntschli, Rev. du Droit Int.*

¹³ For full discussion of the recognition of belligerency, vide *Whart. Dig.* § 6, with cases and authorities cited; *Hall, Int. Law*, pp. 39-42.

EFFECT OF RECOGNITION OF BELLIGERENCY.

23. When accorded, recognition of belligerency is irrevocable, except by agreement, during the continuance of the same state of things.

This is not because, as between grantor and grantee, there is any legal obstacle to revocation, but because this act creates new legal relations affecting third parties, which, so long as the state of war exists, cannot be determined at will. The fact of according recognition, being an act of grace, is assumed to be an advantage to the state at the time the action was taken by it, and this state must accept the corresponding burdens, even though they prove to be out of proportion to the benefits.

EQUALITY OF STATES.

24. All sovereign states are generally considered politically equal.¹⁴

In international law, from the time of Grotius all sovereign states have been considered as politically equal. Equality among states is the same as equality among men. Differences in extent of territory, of power, of rank, do not modify this equality, for it consists in the fact of recognizing in states the quality of judicial persons, and in the application of the principles of international law to all without distinction.¹⁵ Mr. Lawrence, in his lecture upon the "Primacy of the Great Powers," after tracing the "Concert of Europe" (which means nothing more than the agreements of the great powers) from its origin, March, 1814, until the present time, says: "it is impossible to hold any longer the old doctrine of the absolute equality of independent states before the law; it is dead; and we ought to put in its place the new doctrine that the great powers have

¹⁴ Vide Wools. Int. Law, § 54; Bluntschli, § 81; 1 Halleck, Int. Law, c. 5; Man. Law Nat. bk. 3, c. 1, p. 100; Wheat. Int. Law, D, § 33.

¹⁵ Bluntschli, § 81; Wools. Int. Law, § 52; Halleck, Int. Law, 99 et seq.; Wheat. Int. Law, D, 52; Calvo, Int. Law, § 210; Creasy, Int. Law, 114; Walk. Int. Law, 112; Vattel, Int. Law; Gro. De Jure B.

by modern international law a primacy among their fellows, which bids fair to develop into a central authority for the settlement of all disputes between the nations of Europe. * * * No doubt, it [the Concert of Europe] is at present in a very rudimentary condition, and there are often jealousies and intrigues among the states which compose it. Its decisions often fall short of the demands of justice. They are patched up as compromises between opposing views, rather than delivered as the judgment of an impartial tribunal. Still, with all its faults, it has done great good by settling, on the basis of mutual concession, disputes which might otherwise have led to war; and, above all, it is a natural and healthy growth. It has sprung without any forcing out of the circumstances of modern Europe, and therefore it possesses a chance of permanence. It is probably destined to become more and more effective as the desire for a peaceful settlement of their quarrels increases among the nations, and it may in some far distant time develop into that supreme court of international appeal for which statesmen, philosophers, and divines have longed throughout the last three centuries."¹⁶ This doctrine of equality of states has not only been considered a fundamental principle of the law, but has been a source of great good in transactions between states, in that it has tended to save the weak from the strong, and has arrayed the public opinion of nations upon the side of justice.

¹⁶ Lawr. Int. Law, pp. 232, 233; Creasy, Int. Law, p. 117.

CHAPTER II.**THE COMMENCEMENT OF STATES—FUNDAMENTAL RIGHTS AND DUTIES.**

- 25. Date of Commencement of State.
- 26. When Recognition of New State by Third States Proper.
- 27. Methods of Recognition of New State.
- 28. Effect of Change of Sovereignty—Upon Public Rights and Obligations.
- 29. Upon Private Rights.
- 30. The Fundamental Rights of States—To Maintain and Develop State Existence.
- 31. Alienating and Using Territory, etc.
- 32. Independence.
- 33. The Fundamental Duties of States.

DATE OF COMMENCEMENT OF STATE.

25. A new state dates its commencement from the time of its recognition by the previously existing powers.¹

The question of the actual existence of a state pertains to public law. It of right enters into the community of nations as soon as it possesses the necessary attributes of a state. There is, however, the right of ascertaining, each for itself, by the existing powers, whether these attributes are possessed, before according recognition; and, until this is accorded, the legal relations have not been established. As new states generally come into existence by separation from an already existing state,² recognition of the new state, like recognition of belligerency, may be accorded either by the parent state or by third powers. Authorities are not in accord as to the effect of recognition in the two cases. When this recognition is accorded by the parent state, third powers will more readily do so, because this action implies the abolition of all claims to authority over the insurgent community, and renders more clear the

¹ Vide Wheat. Int. Law, D, § 27, and note 16; Bluntschli, § 20; 1 Halleck, Int. Law, 7, note 1; Hall, Int. Law, 87 et seq.

² As an example of a state created under different circumstances, vide "Creation of Congo State," Hall, Int. Law, 88, note.

fact that the pretensions of this community to independence are well founded. Furthermore, the parent state, after having accorded recognition, cannot place other states in a false position by claiming that they have acted prematurely or unjustly. It is not necessary, however, for other states to wait for the parent state to take action before according recognition; as it is generally more difficult for this state to take such action in consequence of a tendency to delay longer than others less interested, or than the circumstances warrant. France in her recognition of the United States, England in her recognition of the South American states, and third powers in their recognition of these latter states, acted before the parent state; but, unless some question of policy intervenes, or the propriety of doing so is beyond dispute, the practice is to avoid giving cause of complaint by refraining from acting hastily.

WHEN RECOGNITION OF INDEPENDENCE BY THIRD STATES OF A NEW STATE PROPER.

26. When, in a revolutionary contest, the party struggling for independence has, as a matter of fact, established its independence so as to leave the chance of the opposite party to recover dominion utterly desperate, recognition of its independence may be properly and safely accorded to it.³

This is the American and English doctrine upon this subject. Mr. Adams, in recognizing the South American republics, says: "Under these circumstances, the government of the United States, far from consulting the dictates of a policy questionable in its morality, yielded to a duty of the highest order by recognizing, as independent states, nations which, after deliberately asserting their right to that character, have maintained and established it against all the resistance which had been or could be brought to oppose it. This recognition is neither intended to invalidate any right of Spain, nor to affect the employment of any means which she may yet be disposed or enabled to use with the view of reuniting

³ 1 Whart. Dig. § 121; Bluntschli. § 31 et seq.; Creasy, Int. Law, 677-681; Pitt-Cobbett, Cas. Int. Law, pp. 4, 5.

these provinces to the rest of her dominion." ⁴ When a sovereign has a reasonable hope of maintaining his authority over the insurgents, the acknowledgment of their independence would be an act of intervention,—an international wrong. It is otherwise when the parent state is manifestly unable to maintain the contest. Neutral powers must determine for themselves when the independence of an insurgent community has been established as a fact, and, in arriving at such determination, should consider the past relations, the present condition, and, as far as practicable, the future.

METHODS OF RECOGNIZING NEW STATE.

27. A new state may be recognized in the following ways, namely:

- (a) By express declaration addressed to the new state, issued separately or contained in a convention with it.
- (b) By a protocol.
- (c) By being admitted as a party to a treaty with the great powers as signatories.
- (d) By the official reception of ministers accredited by the new state, and by dispatching ministers thereto, or by the grant of an exequatur to its consul, or any other act which clearly indicates the intention to accord this recognition.

The first method was employed by England and Germany in the recognition of the Congo State; the second method, in the recognition of Greece by England, France, and Russia, and also in the recognition of the German empire in 1871. The third method was employed in the case of Belgium. The treaty in question, being one to fix the boundaries, also declared Belgium to be a neutral state. The fourth method has been generally considered to be sufficient to acknowledge independence of a new state. In regard to its effect, Mr. Adams, in a letter to the president of January 28;

⁴ Mr. Adams, secretary of state, to Mr. Anduaga, Whart. Dig. § 70. Vide, also, Hall, Int. Law, 91, 92.

1819, said: "Consuls are, indeed, received by the government from acknowledged sovereign powers with whom they have no treaty. But the exequatur for a consul general can obviously not be granted without recognizing the authority from whom his appointment proceeds as sovereign."

EFFECT OF CHANGE OF SOVEREIGNTY—UPON PUBLIC RIGHTS AND OBLIGATIONS.

28. Three classes of cases arise, namely:

- (a) When a new independent state is formed by separation from an existing state.**
- (b) When a portion of a state is lost by cession.**
- (c) When a state is wholly absorbed.**

In the first case two separate and distinct international persons exist instead of one, and the new state has nothing to do with the personal rights and obligations of the parent state, which still possesses its identity. So, also, the parent state remains in sole possession and enjoyment of its separate property and the rights connected therewith. Treaties of alliance, of guaranty, or of commerce are not binding upon the new state, nor is it liable for the general debt of the parent state. The new state comes into possession of rights, including those under treaties, and obligations connected with the property within it. It is entitled to the privileges of navigating rivers that its citizens possessed by virtue of being citizens of the parent state, and is bound by the obligations connected therewith, such as regulations in regard to the dues, etc. It becomes liable for local debts, including those for local objects and those secured by local revenues. In the latter case the debts should be apportioned by the two states, as the revenues from customs, etc., of both states have been hypothecated. Certain properties are transferred by the separation, and consist of public buildings, museums, and art collections, communal lands, charitable and other endowments connected with the state, etc. When a portion of the land belonging to a commune or to an endowment lies within the boundary of the new state, it is only considered that a right to the value of the property is transferred. Convenience may dictate expropriation from the property itself, and it is

only then necessary to pay its full value by way of compensation.⁵

In the case of cession of a portion of the territory of one state to another, the state losing the territory is in the same position with regard to rights, obligations, and property as it would be were the lost territory to have become an independent state. The acquiring state assumes the same local obligations and acquires the same local rights and property as would belong to the ceded portion were it independent. The ceded portion by incorporation acquires a share in all the rights, and is bound by all the corresponding obligations, pertaining to the acquiring state. This is illustrated by the annexation of Texas to the United States. Previous to the annexation, which occurred in 1845, Texas had issued several million dollars of bonds, some of which were held in England; and an attempt was made before the claims commission of 1853, organized for the adjustment of claims between England and the United States, to hold the federal government responsible for the payment of the Texan bonds. The indebtedness of Texas was a distinct agreement by the terms of the Union. The vacant and unappropriated lands within the limits of Texas were to be retained by her, and applied to the payment of the debts and liabilities of the republic of Texas; and the residue of the lands, after discharging these debts and liabilities, was to be disposed of as the state might direct; but in no event were the debts and liabilities to become a charge upon the government of the United States.⁶ The lands of Texas were thus specifically set apart by agreement of the two governments in addition to any separate pledge previously made by Texas of this property, for the payment of these debts. Subsequently, for the consideration of \$10,000,000, large tracts of this land were ceded by Texas to the United States. \$5,000,000 of this

⁵ Bluntschli, §§ 47, 55-60; Hall, *Int. Law*, 96, 97, note; 1 Kent, *Comm.* 25, "States." "So, if a state should be divided in respect to territory, its rights and obligations are not impaired; and, if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common." This is true in the one case of the state so splitting up into parts as to completely lose its identity. See, also, to same effect, Whart. *Dig.* p. 19. Vide, also, discussion of "British-American Fisheries," "The Mosquito Protectorate," "The Maine Boundary," Hall, *Int. Law*, pp. 97-102.

⁶ 5 Stat. 798.

amount was to be retained by the United States until holders of bonds, for which duties on imports were specifically pledged, should file releases of all claims against the United States.⁷ The United States had from the outset acted in concert with Texas in making express provision for the payment of these debts. A difficulty arose in carrying out this law because the pledge of payment of the debts of Texas was made generally upon her revenues, and was not specific on imposts *eo nomine*, and for the further reason that doubts arose whether any portion of the debts could be paid under this contract, unless the whole could be discharged. It certainly would not be satisfactory to say that the United States discharges its obligation to the creditors of Texas, to whom her customs were pledged, by paying only the amount of customs received. The United States determines what those duties shall be in reference to the interest and policy of the whole republic. The condition of Texas is changed by her annexation. The new government has a large control over the material resources of the inhabitants, in the way of internal revenues, excise, or direct taxation, in its demands on the services of the people, and in the debts it can impose. In fact, the entire public system of Texas has passed into other hands, and no such state of things any longer exists as that to which the creditor looked. It may be better or worse, but it is not the same; and, if the duties laid by the United States and collected in Texan ports did not in fact pay the debts, it would be unjust for the United States to limit the payment of the creditor to them. The truth is, by the annexation the United States changed the nature of the thing pledged, and is bound generally to do equity to the creditor.⁸

In the acquisition of Lombardy and Venice by Italy in 1859 and 1866, respectively, no part of the general debt of Austria was assumed, but only the local debts of the ceded provinces. Also, in the acquisition of the provinces of Alsace and Lorraine, in 1871, Germany assumed no part of the general debt of France. Two instances are noted by Mr. Hall in which a part of the general debt of a state was assumed by the state which had seized a part of its

⁷ 9 Stat. c. 49, p. 446.

⁸ Whart. Dig. pp. 19-21; Wheat. Int. Law, D, § 30, note 18; Id. L. (Ed. 1863) p. 54, note.

territory,—the first in 1866, when the debt of Denmark was divided between that country and Schleswig-Holstein; and, in the same year, Italy, by convention with France, took upon herself so much of the papal debt as was proportionate to the revenues of the papal provinces which it had appropriated.

In the third case the absorbing state acquires all the local rights, obligations, and property of the absorbed state, and the latter is affected by all the treaty obligations which have been concluded by the annexing state. In regard to the treaties which have been concluded by the annexed state, it is certainly clear that wherever these conflict with the constitution of the annexing state they are annulled, and such is conceived to be the case in regard to all those which are in conflict with the practice of the annexing state. The absorbing or annexing state also becomes liable for the whole of the debts of the acquired state, because it has come into possession of all of the property of this state.⁹

SAME—EFFECT OF CHANGE OF SOVEREIGNTY UPON PRIVATE RIGHTS.

29. A mere change of sovereignty does not produce any change in private rights of property in the soil, whether the interest was acquired by a grant from the state or by individual contract.¹⁰

It is very unusual for a conqueror to do more than displace the sovereign, and assume dominion over his country. Any other action would be contrary to the modern international usage or law. The effect of this is to cause the people of the acquired territory to change their allegiance to the new sovereign upon the dissolution of their relations with the deposed sovereignty, but their relation to each other and their property rights remain undisturbed. This being the effect in the case of acquisition by conquest, it would certainly be the rule in case of an amicable transfer of territory. The sovereign never transfers more than he possesses, and, having already granted his title to the individual citizen, it remains in the latter's possession.

⁹ Vide Whart. Dig. pp. 23, 24, § 5.

¹⁰ Mutual Assur. Soc. v. Watts, 1 Wheat. 279; U. S. v. Percheman, 7 Pet. 51.

"A mere change of sovereignty does not produce any change in private rights of property in the soil, whether the interest was acquired by law under a grant from the state, or by individual contract."¹¹ Mr. Bayard says: "The right of conquest cannot affect the property of private persons. War being only a relation of state to state, it follows that one of the belligerents who makes conquests in the territory of the other cannot acquire more rights than the one for whom he is substituted; and that thus, as the invaded or conquered state did not possess any right over private property, so also the invader or conqueror cannot legitimately exercise any right over that property. Such is to-day the public law of Europe, whose notions have corrected the barbarism of ancient practices which place private as well as public property under military law."¹²

THE FUNDAMENTAL RIGHTS OF STATES.

30. From the nature of a state, it possesses the right to maintain and develop its existence, and this includes the right—

- (a) **To select its own organization.**
- (b) **To do within its own dominions anything which it deems advisable to promote its prosperity or strength.**
- (c) **To occupy unappropriated territory, and to acquire new provinces with the free consent of the inhabitants, provided the rights of another state over such provinces are not thereby violated.**

It has already been stated that international law is not concerned with the particular form of government adopted by any member of the community, and it may be here added that every state has the right to live its state life in such manner as may be most

¹¹ Strother v. Lucas, 12 Pet. 410.

¹² Mr. Bayard, secretary of state, to Mr. Roberts, March 20, 1886, MSS. Instr. Chili; Leitensdorfer v. Webb, 20 How. 176; U. S. v. Moreno, 1 Wall. 400; U. S. v. Auguisola, Id. 352; Townsend v. Greeley, 5 Wall. 320; Dent v. Emmeger, 14 Wall. 308; Airhart v. Massien, 98 U. S. 491; Delassus v. U. S., 9 Pet. 117; Mitchell v. U. S., Id. 711.

acceptable to it, without interference from any other state, so long as it does not interfere with the rights of others in this respect. So, likewise, a state may pursue such course as it may deem desirable to promote its commercial interests; may erect fortifications to the extent deemed necessary within its dominions; may organize and maintain a military and naval force in such manner and to such extent as its judgment may dictate to be necessary or advisable, provided there is no menace to the existence of other states in so doing. There is a point beyond which it is conceived that it is not safe for a state to pursue its right of organization of land and naval forces, which point is reached when this right is carried so far as to indicate clearly, even if taken in connection with other acts or ambitions, that the right of self-preservation pertaining to other states authorizes them to interfere with and prevent further measures, and to demand security against the natural consequences of this policy. This right of self-preservation will, under certain circumstances, warrant these other states in demanding the abandonment of the measures pursued, and even to resort to arms in case of failure to satisfy them that their fears are groundless.

31. Another fundamental right of a state is the right of acquiring, using, and alienating territory and other property susceptible of being held and owned by a state.

By this is not meant the absolute right of property as understood in public law, or as is generally understood in speaking of the absolute rights of property of individuals; for, when a state holds property in this manner, it is subject to municipal law. A state has in the property of the members of the community what is known as the right of eminent domain, or more generally the rights pertaining to or derived from sovereignty, among which may be mentioned the right of disposition for the public good. But a state, considered as an international person, possesses the absolute right of property within its dominions, to the exclusion of all other international persons or states, and, in so far as other states are concerned, can acquire rights in property in any manner not inconsistent with the rights of other states, and the property acquired can be held and peaceably enjoyed. It may be noted that, as individuals are not

recognized internationally except through their state, any rights they may wish to assert of an international character must be assumed and asserted by the state.

In regard to the alienation of property by a state, Mr. Bluntschli says: "In order that a cession of territory may be valid, there must be: (a) The agreement of the ceding and acquiring states. (b) An effective taking of possession by the acquiring state. (c) At least the recognition of the cession by the persons who, inhabiting the territory and enjoying political rights there, pass to the new state. (d) The absence of grave obstacles of an international nature."¹³ Calvo says that "henceforth, in order to render valid and definite the cession, transfer, or sale of a territory, the inhabitants thereof must give their express or tacit consent to the change," and says that a new rule of international law has been established and has prevailed since the treaty of Turin, March 24, 1860; citing treaty of London 13th July, 1863, and the treaty of Prague in 1866.¹⁴ It is not believed that either statement is correct or gives the exact law upon this subject, as no citizen or community of citizens in a given territory short of the whole community, and acting as such, has any right to confirm or reject the action of the state, since an act done by the state is binding upon the whole of the community. If the rule is as stated by either authority, then there is an end to acquisition of title by conquest.

32. Another fundamental right of states is the right of independence. This is the right of exercising its will freely at all times, and in all affairs with regard to which it acts as a state community, without interference from any foreign state.

Thus, in regard to other states the right of independence incorporates the privilege of making treaties of a political or commercial nature, the forming of special alliances, especially those of friendship, regulating its intercourse with other states, making any contracts that are not repugnant to the law, and making demands for reparation, or making war, for acts done by other states. In re-

¹³ Bluntschli, § 286.

¹⁴ 1 Calvo, Int. Law, § 290.

gard to persons and things coming under its direct control or the rights pertaining to sovereignty, a state can exercise an exclusive jurisdiction over all persons within its own dominions, deciding what acts shall or shall not be done there, either by its own citizens or by foreigners, so long as they remain within the bounds of the state, also over all property situated within its limits to whomsoever it may belong. Subjects of a state do not by absence free themselves from allegiance to it. They are subject to its laws, and can be punished for infringement thereof after they return, should their state desire to act; but this action cannot be taken upon the territory of another state without its consent. Their domestic relations are regulated by the laws of their own state, such as marriage, divorce, legitimacy, or illegitimacy of their children, and their attainment of majority, in so far as they concern their effects at home, and they are even liable for crimes committed by them. The sovereignty rights of a state logically confer upon it exclusive jurisdiction over foreigners temporarily within its limits, but this is limited in practice for various reasons which will be noted more fully in the discussion of jurisdiction, noting here that a foreigner is required during his sojourn in a state to conform to its laws especially in regard to police regulations, and he must do nothing prejudicial to the political interests of the country. Foreigners are in general amenable to the criminal jurisdiction of the country in which they find themselves temporarily; and this state can by its laws regulate the formalities necessary to give legal effect to their contracts, and determine their competency in regard to contract and property rights within its limits.

12.16

THE FUNDAMENTAL DUTIES OF STATES.**33. States owe to other states:**

- (a) The duty of enacting, and using reasonable diligence in the enforcement of, laws to protect the rights of foreigners within their territory.
- (b) The duty of respecting the independence of other states subject to the right of self-preservation.
- (c) The moral duty of good faith.¹⁵

International law contemplates that members of the international community shall provide themselves with laws, the enforcement of which will place foreigners in such a position that they can have reasonable justice as between themselves and subjects of the state, and as between themselves; and, when a state fails to insure this protection, it is within the power, and it is the duty, of other states to provide for it by suitable means. This is now done in many countries, such as Turkey, Roumania, Servia, and others whose civilization is such as to render their civil and criminal jurisdiction out of harmony with European ideas. The duty of good faith is applicable more especially to the subject of contracts or their enforcement.

¹⁵ The duty of good faith is applicable more particularly to state contracts. For discussion of the "Duty of Permitting Commercial and Other Intercourse," "The Duties of Courtesy," vide Hall, *Int. Law*, pp. 58-62. Vide, also, on general subject of fundamental rights and duties of states, Wheat. *Int. Law*, D, §§ 60-62; 1 Halleck, *Int. Law*, 80-82.

CHAPTER III.

TERRITORIAL PROPERTY OF A STATE.

- 34. In General.
- 35. Modes of Acquiring Territorial Property—Occupancy.
- 36. Area Affected by Occupation.
- 37. Cession.
- 38. Prescription.
- 39. Accretion.
- 40. Acquisition of Rights in Foreign Territory—Servitudes.
- 41. The Navigation of Rivers.
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- 43. Territorial Waters of a State.
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IN GENERAL.

34. The territorial property of a state consists of all the land and water within that portion of the earth's surface which it claims by legal title, and, when it abuts upon the sea, together with a certain margin of water.¹

MODES OF ACQUIRING TERRITORIAL PROPERTY²—OCCUPANCY.

35. When a state takes actual possession of an unoccupied territory, or of one that is occupied by a barbarous

¹ Hall, Int. Law, § 30. Woolf, Int. Law, § 56, says: "(1) The territory of a state includes all that portion of terra firma which lies within the boundaries of a state, as well as the waters; that is, the interior seas, lakes, and rivers wholly contained within the same lines. (2) The mouths of rivers, bays, and estuaries furnishing access to the land. (3) The coast line to the distance of a marine league." Wheat, Int. Law, D, § 162. Vide, also, Lawrence, Handbook, p. 41.

² Field Int. Code, p. 17, says: A nation may acquire territory (1) by occupation; (2) by accession; (3) by transfer; (4) by conquest. A nation may lose territory (1) by abandonment; (2) by destruction; (3) by transfer; (4) by conquest. Vide 1 Halleck, Int. Law, c. 6, p. 131 et seq.; Hall, Int. Law, §

people, and indicates clearly an intention to hold the territory thus seized, she acquires a right of property therein or title by occupancy.

This title, by continued holding, ripens into title by prescription. States, in their eagerness to acquire as much territory as possible, have based their claims to exclusive title or right to this territory upon acts which show but an intention coupled with momentary enjoyment, and not an actual possession and enjoyment, and also by considering as attendant upon that occupied by colonies large tracts of unoccupied territory. The bare fact of discovery, which for an extended period was claimed to confer absolute title to land previously unknown, is now, and for a long time has been, determined to be an insufficient claim to territory.³ The inchoate title acquired by discovery must, in order to be converted into a definite title, be accompanied by possession within a reasonable time. "There must be also beneficial occupation. This may be by a fur-trading post, by a fishing station, or by agricultural settlement."⁴ If discovery is coupled with an assertion of ownership and further explorations or temporary lodgments in the country, the inchoate title may be kept alive for a long time, provided some other state does not in the meantime acquire, without protest, a more perfect title. The occupation must be effected by the state itself, either through its duly authorized agents or by the ratification of acts by colonists in its behalf. The declaration of a commissioned officer, and probably the acts of a corporation duly authorized by the state to make settlements, etc., in an uncivilized country, which indicate an intention to take possession, are sufficient to create them acts of the state itself. If an uncommissioned navigator, in attempting to take possession on behalf of his state, fails to take actual possession by establishing a settlement, no legal validity attaches to his act by ratification thereof by the state.⁵

31; Wools. Int. Law, § 55; Walker, Int. Law, pp. 158, 159; Wheat. Int. Law, D, § 161.

³ Johnson v. McIntosh, 8 Wheat. 543.

⁴ Wools. Int. Law, p. 67, § 55.

⁵ Bluntschli, §§. 278, 279. "The sovereignty of territories which form no part of a state is acquired by taking possession of them by an existing

SAME—AREA AFFECTED BY OCCUPATION.

36. When a settlement has been made, the colony is entitled to all land actually occupied and controlled by it, to all that is necessary for the security of the settlement, and to all that is fairly attendant upon it.

When, as is usually the case, a settlement is made upon the coast, and the territory occupied is a moderate sized island, the whole of it is usually considered as belonging to the settlement. In case the island is large or the settlement is made upon a continent, the rule is that the settlement does not extend inland further than

state. The simple intention of taking possession, and even the symbolic or formal expression of this intention, as also the provisional taking of possession, are insufficient. The taking of possession can be effected by individuals in the name and by direction of their state, but on condition that the colonists organize a government in the recently occupied country. If the colonists act without powers, their acts should be ratified by their state." See, also, the Oregon question, Wheat. Int. Law, D, §§ 172, 173. The claim of the United States to this territory rested upon the following grounds: (1) The first discovery of the mouth of the Columbia river by Capt. Gray, of Boston, in 1792; (2) the recognition by Great Britain of the title of the United States in the restitution of the settlement of Astoria or Ft. George; (3) the acquisition by the United States of all titles of Spain which were based upon the discovery of the coast of the region in question; (4) Lewis and Clarke's exploration of the Columbia river in 1805-06; (5) contiguity, the dominion of the United States being acknowledged as far as the Rocky Mountains. This claim was resisted by Great Britain on the following grounds: (1) That Capt. Gray had not discovered the Columbia river, but only entered its mouth, which was discovered four years previously by Lieut. Meares; that Lewis and Clarke's expedition was not confirmatory, because the British Northwest Company had established their posts upon the head waters of the main branch the same and subsequent years, if not before; (2) the restitution of Astoria in 1818 was accompanied by an express reservation of Great Britain to that territory; (3) that the Spanish titles conferred only the rights to settle on any part of that territory, to fish in their waters, and trade with the natives; (4) that the charters by British sovereigns to colonies on the Atlantic coasts were simply cessions to the grantees, and required confirmation by treaties. This controversy was finally settled by the treaty of June 15, 1846. Vide *Treaties and Conventions of United States with Other Powers, 1776-1887*, p. 438.

the crest of the watershed; and in regard to the lateral boundaries, which are more difficult to determine, it seems to be generally acknowledged that the occupation of the coast carries with it the right to the territory drained by the waters emptying within the lines occupied by the settlers. The rule laid down by the United States commissioners to settle the boundary of Louisiana is "that, when any European nation takes possession of any extent of seacoast, that possession is understood as extending into the interior country to sources of the rivers emptying themselves within that coast, to all their branches, and the country they cover, and to give a right in exclusion of all other nations to the same."⁶ This rule must be construed so as to have the territory claimed bear some reasonable relation to the extent of coast occupied. For instance, the simple establishment of a fort or settlement at the mouth of a river is not in itself sufficient to establish a valid claim to the whole of a large basin of this river, nor would the occupation of one side of a river be sufficient to bar another state from acquiring a claim to the territory on the other side of the stream. When two states have established settlements upon a coast, and the extent of their claims has not been determined, the usual course followed for the determination of their respective claims is to have the boundary line established midway between the last settlements of each, without any regard to the natural features of the intervening country.⁷ The only country of any great extent that is at present subject to the acquisition of territory therein by other states is the continent of Africa, and this has been made the subject of a special agreement by those countries that are liable to acquire territory therein by occupation, from which agreement it will be noted that there is a tendency to require more solid grounds upon which to base title to territory thus claimed. This should be so because the reasons for the laxity in the rules in this respect no longer exist, as the present means of communication are such as to do away with the necessity that existed for giving undue value to acts upon which states relied to perfect their claims to territory. The question as

⁶ Walker, *Int. Law*, 161; Hall, *Int. Law*, 111; Snow, *Cas.* 12, note 1.

⁷ Vide Bluntschli, §§ 278, 279; the Oregon question, Wheat. *Int. Law*, D, § 172 et seq. See, also, for illustration, the Louisiana question (Texas), Hall, *Int. Law*, pp. 111, 112.

Re cession of territory may be made either to individuals or to a state. A state is a political power and its property is any when acquired, transfer or yield to it, but its title to its property is not absolute power as only when necessary. But the power of this country have an null in respect to a person's government by the constitution expressly or by necessary implication.

Exam?

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to whether a state can abandon rights acquired by discovery and occupation can best be explained by a statement of facts in regard to Santa Lucia. In 1639 this island was occupied by an English colony, which was massacred by the Caribs in 1640, and no attempt was made by the English during the next ten years to recolonize the island. In 1650 the French took possession of it as unappropriated land, and remained in possession until 1664, when they were attacked by the English, and driven into the mountains, where they remained until the English retired, three years later, when they returned and reoccupied their lands. It does not appear what became of this French colony, for at the treaty of Utrecht it was regarded as a "neutral island," and by the terms of the peace of 1763 it was declared to belong to France. Mr. Hall says: "There can be little doubt, considering the shortness of the time during which the English colony had existed, and the length of the period during which no attempt was made to re-establish it, that the French were justified in supposing England to have acquiesced in the results of the massacre, and that their occupation was consequently good in law."⁸ In the case of the Delagoa Bay, claimed by England through a cession of the natives, and by Portugal on the ground of continuous occupation, the award was made to the last named country principally on the ground of first discovery in the sixteenth century, and of continued control and occupation of the territory since that time, although the actual occupation had not been continuous. The interruption therein in 1823 had not been sufficient to oust a title supported by occasional acts of sovereignty extending through three centuries.⁹

SAME—CESSION.

37. Territory is acquired by cession where one state assigns, transfers, or yields up territory to another, either in time of peace, or as the result of war.

The cession of territory is generally consequent on war, and ratified by treaties which conclude it, but instances are numerous where these have been made in time of peace. The transfer may

⁸ Hall, Int. Law, p. 119.

⁹ Hall, Int. Law, pp. 119, 120.

be made by way of sale, gift, and exchange, and formerly by will; but the alienation by way of testamentary devise is no longer considered possible, because the sovereign does not possess a proprietary right in the territory. The United States acquired, by cession, Louisiana, Florida, and Alaska; and the latest example of acquisition by conquest is that of Alsace and Lorraine, after the war of 1870-71, by Germany from France.¹⁰

SAME—PRESCRIPTION.

38. Title by prescription arises from the uninterrupted possession of territory or other property by a state for a certain length of time.

That title by prescription has any place in international law has been denied;¹¹ but, as Mr. Hall says, "a denial of title by prescription has as yet rarely been formulated in international law, but there can be little doubt that the sense of its value has diminished of late years mainly under the influence of the sentiment of nationality."¹² On the other hand, Phillimore quotes approvingly Burke, who speaks of "the solid rock of prescription" as "the soundest, the most general, the most recognized title between man and man that is known in municipal or public jurisprudence,—a title which, though not fixed in its terms, is rooted in its principles in the law of nature itself; for all property in soil will always be traced back to that source, and will rest there. In England we have always had a prescription or limitation, as all nations have against each other."¹³ There is no doubt that long continued, peaceable possession and enjoyment of a territory confers upon the state so holding a sovereign title to the same, so that an attempt to subvert it by subjects would be a rebellion, and by other nations an attempted conquest. The principle upon which it rests is the same in international law as in municipal law, being modified by the fact that in

¹⁰ For other instances in illustration, vide 1 Phillim. Int. Law, §§ 268-270; also, § 275; also, 1 Calvo, Int. Law, §§ 291-299.

¹¹ Kluber, §§ 6, 125; Martens, bk. 2, c. 4, § 71.

¹² Hall, Int. Law, p. 122, note 1.

¹³ 1 Phillim. Int. Law, § 258.

the former there is no tribunal to decide finally, as there is in the latter. The object in all cases is to give security to title, and prevent litigation (or, in international law, quarrels) by the efflux of time. Quarrels among nations are so serious in their nature, and so much more to be dreaded and avoided than quarrels among individuals, especially as they are liable to result in war, that the maintenance of peace and harmony among nations, as well as human progress, demand that, when title to territory has received the consecration of time, it should be declared valid. It is true that prescription has been appealed to by nations to cover claims to territory that are based upon immoral acts of acquisition, as in the case of Poland; but these claims of ownership have been acquiesced in by other nations because the acquisition promises to be permanent, which is a much desired end.

Length of Time Necessary.

The length of time that must elapse in order to perfect title by prescription, or what is a reasonable time under such circumstances, has never been determined. Field recommends a uniform period of fifty years as a necessary period to found a national prescription. The lapse of time necessary for a generation to be born, educated, and come into possession of the powers and duties of the state has been given as the negative limit. Phillimore says: "To the question, what duration or lapse of time is required by the canons of international jurisprudence in order to constitute a lawful possession? it is enough to reply: First, that the title of nations in the actual enjoyment and peaceable possession of their territory, *however originally obtained*, cannot be at any time questioned or disputed; secondly, that a forcible and unjust seizure of a country, which the inhabitants, overpowered for the moment by the superiority of physical force, ineffectually resist, is a possession which, lacking an originally just title, requires the aid of time to cure its original defect; and if the nation so subjugated succeed, before that cure has been effected, in shaking off the yoke, it is legally and morally entitled to resume its former position in the community of states."¹⁴ The best and most generally accepted

¹⁴ Wools. Int. Law, § 55; Grotius, De Jur. Bel. bk. 2, c. 4; Vatt. Int. Law, bk. 2, c. 11; Wheat. Int. Law, D, § 164, note 101; Creasy, Int. Law, 250-

idea is that no arbitrary rule as to time can be fixed, nor is it desirable that such a general rule should be adopted.

SAME—ACCRETION.

39. Accretion is the formation of new land by the action of water by alluvion or dereliction. This may occur as follows :

- (a) Upon land that is actually appropriated by a state.
- (b) In a river or lake which forms the boundary between two states.
- (c) Near the territory of a state, either in the open sea or in the waters lying between the state and a neighboring state.

In the first case, the new land belongs, of course, to the state to which it attaches itself. In the case of rivers which form the boundary, and the bed of which belongs equally to the bordering states, an island forming wholly on one side of the center of the deepest channel belongs to the state owning the nearer shore, and one forming in midstream is divided between the two states, the dividing line following the original center of the channel. If the river forming the boundary should suddenly change its bed, and form a new channel, wholly within the territory of one of the states, no change of ownership of territory occurs, as the boundary would remain in the deserted river bed. The same is true in regard to a lake which belongs wholly to a state, which suddenly overflows into the lowlands belonging to another state. In the last case the new land belongs to the nearest state, and this has been held to be true whatever be the nature of the soil of which the new land is composed, whether it be of earth or solid rock, as the right of dominion does not depend upon the nature of the soil.¹⁵ In case an island is formed by alluvion in the sea, it becomes a part of the state to which the coast belongs, even though formed outside of the territorial limits. It can-

255; Bluntschli, § 200; Calvo, Int. Law, p. 386, § 264; 1 Phillim. Int. Law, § 255 et seq.; Field, Int. Code, p. 22; Rhode Island v. Massachusetts, 4 How. 639.

¹⁵ The Anna, 5 C. Rob. Adm. 373; also, Snow Cas. p. 393.

not be occupied by foreign states, and is so completely a part of the state to which the coast belongs that the waters surrounding it become territorial to the recognized radius. This is true even though its soil be of mud, and can serve no useful purpose. When the boundary between two states is a fixed line, accretions belong to the state on whose side of the boundary they form.¹⁶

ACQUISITION OF RIGHTS IN FOREIGN TERRITORY— SERVITUDES.

40. Restrictions upon the complete and entire sovereignty of a state, consisting either in the prohibition of certain acts by it, or in the permission to a foreign state to perform certain acts otherwise prohibited upon its territory, are servitudes.

Assuming that only those restrictions that arise from immemorial usage or prescription are to be considered as servitudes, it is probably correct to state that only the following have a general or customary basis: (1) The right of innocent use of territorial seas; (2) military passage through a foreign state to outlying territory; (3) customary rights over forests, pastures, and waters for the benefit of persons living near a frontier which exist in some places. But, when is included under this title the restrictions arising from treaty or equivalent agreement, we have the subdivision into negative and positive servitudes; the former being those by which the servient state is under obligation not to do certain things, and the latter being those by which the servient state is under obligation to permit the owner of the *jus servitutis* to do something upon its territory that would not be lawful without the existence of the servitude.¹⁷

¹⁶ Vide 1 Phillim. Int. Law, §§ 238-240; Calvo, Int. Law, § 294; Bluntschli, §§ 295-299; 1 Halleck, Int. Law, 146; Creasy, Int. Law, 241, 249,—for more extended discussions of title by accretion.

¹⁷ Bluntschli:

"Sec. 356. The negative servitudes are: (a) The obligation of a state to have no more than a certain number of soldiers, not to construct any war vessels but of a determined kind, or to have but a certain number of war vessels, fortified places, etc.; (b) the obligation of a state to abstain from all acts of jurisdiction over those under the protection of another state; (c) the restrictions brought in favor of a foreign state to the laws of the country upon

The most important of these servitudes is the right of innocent passage through territorial waters which are so situated as to render their free navigation necessary or convenient to the navigation of the open seas. In regard to these it may be said that this right of innocent use for commercial navigation of such waters is and has been for centuries well established. This right of innocent use is not extended to include vessels of war, and this because the same reasons cannot be advanced, and such a privilege may be of serious hurt to a third state, and is at best of advantage only to the state to whom the vessels of war belong. A state, therefore, always has the right to refuse the use of its territorial waters to the armed vessels of another state.

SAME—THE NAVIGATION OF RIVERS.

41. The navigation of rivers presents the following phases:

- (a) A river wholly within the boundaries of a state is territorial water, and its navigation is not a recognized international right.
- (b) A navigable river which forms the boundary of two or more states is of right open to the free

the exercise of religious worship; (d) the exemption of taxes granted by treaty with a foreign power, to certain persons, corporations, or classes of persons; (e) the obligation for a state not to establish any custom-houses along the frontier of another state."

"Sec. 357. As example of positive servitudes, the treaties mention: (a) The right of way through another state for the passage of troops; (b) the right, in certain cases, to occupy with its troops a part of the foreign territory; (c) the right to exercise law and order, or of collecting the taxes upon a part of the foreign territory; (d) the right to establish and maintain custom-houses, and to take the necessary steps for the discovery of frauds [smuggling]; (e) the right to organize and maintain postal services."

"Sec. 359. The international servitudes cease: (a) By treaty between the two states; (b) by waiver on the part of the state who has the right of servitude (the non-exercise of the liability during a generation, when occasion to use it occurred several times, is equivalent to a waiver); (c) when the liability is no longer compatible with the development of international law; (d) when the liability is incompatible with the development of the constitution, with public order, and the needs of the state."

navigation of each, even though it desert its channel and form a new one wholly within the territory of one of the states.

- (c) When a river rises in one state, and, before emptying into the sea, passes through one or more other states, the state upon the upper waters has no strictly legal right to its navigation through the lower states, but a strong moral claim thereto.

In regard to navigable rivers wholly within the territory of a state, it can safely be said that but few, if any, such rivers, are now open to the free navigation of other nations. It has been claimed that not only riparians, but non-riparians, have a right of free navigation of rivers upon the ground of *innocent use*, or that things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated by a state as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor; and that, in the case of those living upon the upper waters of a river, a servitude is possessed by them over nature's pathway, through the property of their neighbor, to reach the great highway of nations, provided security be given against trespass and all equitable charges are paid; and that as those who live upon the upper waters would have no right to divert the stream so those on the lower cannot rightfully exclude them from its use.¹⁸ Should a state force its passage over the waterway of another which is situated between itself and the sea on the grounds above stated, there can be no doubt that it would commit a trespass upon the property of this

¹⁸ Wools. Int. Law, § 62; Wheat. Int. Law, D, § 193; Hall, Int. Law, p. 134, note 1. "If the freedom of the sea is a principle of justice definitely established in the law of nations, and recognized by the practice of nations, it seems logical and natural, at first view, to apply it equally to the navigation of rivers, in which one is compelled to see a necessary means of communication between progressive and civilized people. There is no reason which prevents placing rivers upon the same basis as the sea." Calvo, Int. Law, § 302. And see 1 Halleck, Int. Law, 147, 148. "Waters and navigable rivers which communicate with the open sea are open in time of peace to all nations. The right of free navigation can be neither abridged or restrained to the detriment of other nations." Bluntschli, § 314.

neighboring state, however much might be the wants or necessities of the upper state, or however just such action might be upon moral grounds. International law does not recognize any such right, and, in so far as this law is concerned, it is correct to say that a state may open or close its rivers at will, and that it may tax or regulate transit over them as it chooses.¹⁹ It is true that practically the same result has been attained by other means, as the navigation of all or nearly all streams flowing through Christian states is now free to all mankind, which is probably due to the tendency to do away with the prohibition or restriction of river navigation by foreigners; and this tendency dates from the beginning of the present century. In the United States all of the great rivers are open to navigation by foreigners; yet the right of navigation is expressly denied.²⁰

BOUNDARIES OF STATES—HOW DETERMINED.

42. State boundaries are either arbitrary lines connecting natural or artificial points, or consist of natural features, such as lakes, rivers, mountains, etc. They are determined as follows:

- (a) **When two states are separated by a range of hills or mountains, the water divide is the boundary line or frontier.**
- (b) **When a river, not the exclusive property of one of the riparian states, separates two states, the middle of the stream in non-navigable rivers, and the center of the deepest channel, or "thalweg" in navigable rivers, is the boundary or frontier.²¹**

¹⁹ 1 Twiss, Law Nat. § 141: "A nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream while it is passing through its territory." 1 Phillim. Int. Law, § 170; Hall, Int. Law, p. 139.

²⁰ Hall, Int. Law, p. 137. For discussion of the opening of the Mississippi, St. Lawrence, European, and South American rivers, vide Snow, Cas. pp. 33-41, and Wools. Int. Law, § 62.

²¹ Vide opinion Atty. Gen. Cushing, 8 Op. Attys. Gen. 175, as to river boundary between United States and Mexico.

- (c) When the boundary is a lake, unless one of the states can show that another line has been established by usage or treaty, a line through the middle of this lake constitutes the frontier.

The above rules may be said to be established for application in determination of frontiers that have not been fixed by agreement, or where there is for any reason a doubt as to the true frontier. A state that claims to own the whole of a stream or lake must give evidence of its title, either by treaty or by showing the exercise of continuous ownership over the waters claimed; and, if the ownership of the entire stream is established, the ownership of the opposite bank goes with it, being necessary to the use of the stream itself. As to how much of this shore should be considered as accessory to this use has never been determined. In the case of the river Oder, which was ceded to Sweden in 1648, the claim to territory on the opposite shore to the extent of two German miles was established as an inseparable accessory. Prussia, in 1773, established a claim to the opposite shore of the Netze, under a cession of the stream.²² In the United States the question of territorial boundaries, in a controversy with a foreign government, are determined by the political departments, and not by the judicial departments, and the latter will follow the decisions of the former.²³

TERRITORIAL WATERS OF A STATE.

43. The ocean or open sea is free and open to all nations.

The above is the consensus of the opinions of all modern text writers and jurists, although this conclusion has not been reached by the same course of reasoning. With some it is claimed that the open sea, on account of its nature, cannot become property, or is insusceptible of occupation; that it is indivisible, inexhaustible, and productive without the labor of man; that its destination is

²² Hall, *Int. Law*, 126; 1 Twiss, *Law Nat.* §§ 143, 144.

²³ Whart. *Dig.* § 22, and cases cited. Vide, also, *In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453. As to general question of boundaries, vide Hall, *Int. Law*, 125, 126; Bluntschli, §§ 296-303.

for the common benefit of mankind; and that it is a common pathway intended for all alike. Others maintain that up to the present century the sea could be and was effectively appropriated in some instances, but that as this appropriation, particularly of large areas, was burdensome to strangers and to the appropriating states as well, without sufficient compensating advantages attending it, these states gradually abandoned their claims by exercising inadequate or intermittent control, until the larger claims entirely disappeared or narrowed down to those waters which were regarded as necessary to the safety of the state, and which were looked upon as being within the power of the state to command. Among the extravagant claims that were advanced to proprietary rights over the sea may be mentioned the claim of Spain to dominion over the Pacific Ocean and Gulf of Mexico, and that of Portugal to the Indian Ocean and to all of the Atlantic Ocean south of Morocco, during the fifteenth century. It was on account of these pretensions that Hugo Grotius was induced to write his celebrated work "Mare Liberum," which appeared in 1609. In the beginning of the seventeenth century it is believed that all of the seas surrounding Europe were subject to some claim of proprietary right. In this century England claimed all of the sea surrounding Great Britain as far as the coasts of the surrounding countries, in support of which claims, and in answer to the "Mare Liberum," Selden, in 1635, wrote his "Mare Clausum." One of the most interesting and at the same time most recent claims is that advanced by the United States to territorial property in the waters of Kamschatkan Sea, which gave rise to what is known as the "Behring Sea Controversy" between the United States and England, wherein the United States claimed the right to prevent British subjects from sealing in the waters of this sea, basing the claim upon territorial property in the waters thereof, which waters are not even inclosed by American territory. This claim is not quite so extensive, but fully as valueless, as that of Russia to territorial property in all of the Pacific Ocean north of the fifty-first parallel. This claim is placed on the ground that it was inclosed between shores which were exclusively within her jurisdiction, and was successfully resisted by both the United States and Great Britain in 1824 and 1825. The result of the reasoning of all the authorities is summed up in the statement made

as to the freedom of the open sea, and the rule in regard to the proprietorship of territorial waters is that a maritime occupation, in order to be valid, must be effective, and these territorial waters are subject to the free navigation by other states.²⁴

SAME—PRESENT RULE AS TO MARGINAL WATERS.

44. The jurisdiction of a state over its marginal waters extends from the shore to such distance as the power of the state is effective, the generally accepted distance, being a marine league (3 1-2 English miles), is determined by the effective range of cannon.

Whatever may be said to be the reason for the appropriation of these marginal waters, whether it is because a state has the right to protect the lives and property of its citizens on the land against the acts of violence of persons whose states could not be held responsible unless the right of pursuit and capture be recognized, or whether it be that the state has the right to preserve for its own citizens the natural products of the sea within these belts, or whether it be that this right is necessary for the proper administration of its revenue laws, etc., there can be no doubt that states can effectively control from the shore the present accepted extent of marginal waters, which consideration has in all probability had a large, if not a controlling, influence in the determination of this rule. In the acceptance of the marine league as the limit of territorial property in marginal waters, the controlling factor was that, at the time it was determined, this distance was the accepted effective range of cannon. At the present time, however, the effective range of cannon has been very much increased, and modern guns are effective for at least double this distance; and there can be little, if any, doubt as to the absolute right of a state to extend its territorial waters to correspond with this increased range.²⁵

²⁴ For history of attempts to maintain ownership of the open sea, vide Wheat. Int. Law, D, note 113; Wheat. Hist. Nat. 152-162; 1 Phillim. cc. 6, 8; Wools. Int. Law, § 59; Walk. Int. Law, 163-171; Hall, Int. Law, § 40; Creasy, Int. Law, 226-231; Calvo, Int. Law. § 347 et seq.

²⁵ Hall, Int. Law, p. 153, says of the three-mile rule: "As it has been determined, if determined at all, upon an assumption which has ceased to hold

SAME—BAYS, GULFS, AND STRAITS.

45. Bays and gulfs running wholly within the territory of a single state can be included in its territorial waters.

46. The rule in regard to marginal seas is applied also to straits as follows:

- (a) If the strait is more than six miles wide, the space between the marine league from each shore is free.
- (b) If it is less than or only six miles in width, the whole of the strait belongs to the state or states to whom the shores belong.

Bays and Gulfs.

The rules in regard to these waters are as stated above, but an examination of the claims of different states and their practice does not show a very close adherence to them. The United States at one time claimed, as territorial, all the waters inclosed within lines stretched from quite distant headlands, the most extensive claim being from the south cape of Florida to the Mississippi; and to-day they claim that the waters of the Chesapeake and Delaware Bays and similar inlets are territorial.²⁶ France and Germany claim that all bays, inlets, and recesses that are not more than ten miles wide at their entrance, measured in a straight line from headland to headland, and in the case of the Bay of Cancale, which is seventeen miles wide at its entrance, are territorial waters. England holds that the whole of the British Channel between Somerset and Glamorgan is British territory,²⁷ and that Conception Bay, in Newfoundland, which

good, it would be pedantry to adhere to the rule in its present form; and perhaps it may be said without impropriety that a state has the right to extend its territorial waters from time to time at its will with the increased range of guns, though it would undoubtedly be more satisfactory that an arrangement upon the subject should be come to by common agreement." Whart. Dig. § 32; Bluntschli, § 302; Creasy, Int. Law, 233-240; Calvo, Int. Law, § 356. Vide, also, *Queen v. Keyn*, 2 Exch. Div. 63; *Wools*, Int. Law, 68-70; 1 *Halleck*, Int. Law, pp. 134-138.

²⁶ Whart. Dig. § 28; Hall, Int. Law, p. 154; *The Grange*, 1 Op. Attys. Gen. 32.

²⁷ *Reg. v. Cunningham*, Bell, Cr. Cas. 72.

is over fifteen miles wide, and extends from forty to fifty miles into the interior, is a British bay, and forms a part of the territorial waters of Newfoundland.²⁸ In the settlement of the northwest boundary line between the United States and Great Britain, declared in a protocol at Washington on March 10, 1873, in accordance with the decision of the emperor of Germany, it was determined that this line passes down the middle of a strait that is fifteen miles wide, and further inland it passes through the middle of a body of water that is thirty miles long and twenty miles wide.²⁹ It is impossible to state with any great amount of definiteness just what rule will be followed in regard to all bays and gulfs, especially if they extend for any great distance into the territory of a state, and have relatively small inlets, further than to say that the present tendency is to limit these claims much more than formerly, and in future it is not likely that very broad gulfs with large mouths will be seriously claimed by any state.

Straits.

The most celebrated and at the same time one of the best illustrations of claims to territorial property in this class of waters is that of Denmark to the Baltic Sound. Her claim to the right of collecting what is known as "Sound dues" was based upon immemorial prescription extending over a period of 600 years, and upon the sanction of a long list of treaties. The collection of these dues became finally so troublesome to other nations that American and European states, by treaty of 1857, capitalized and forever abolished them by paying Denmark 35,000,000 rix-dollars. The United States declined to be a party to this treaty, because "Denmark does not offer to submit to the convention the question of her right to levy the Sound dues," and, further, because the proposition contained a political result,—“the balance of power among the governments of Europe.” The same result was accomplished by this country in the following year (1857) by a separate convention, in which the recognition of the right of Denmark to collect the dues was avoided, as the United States agreed to pay 717,829 rix-dollars (\$393,011 in the currency of

²⁸ *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas. 394.

²⁹ *Treaties and Conventions of United States and Other Powers*, p. 495.

the United States) in consideration that Denmark keep up lights, buoys, and pilot establishments.³⁰

The Black Sea was formerly wholly within the territory of Turkey, and at that time was regarded as the property of that state; but, after the acquisition of rights by Russia, she, with all other maritime states, acquired the right to participate in the commerce of this sea, and with it the right of free navigation of the Dardanelles. The treaties regulating this were in 1829, 1841, 1856, and 1871. The last named, which modified that of 1856, threw open the Black Sea to the merchant vessels of all nations; and by it the sultan was authorized to pass ships of war in time of peace to carry out the provisions of the treaty of Paris. The last named treaty (1871) also enlarged the powers of both Russia and Turkey in regard to the fleets that could be maintained in the Black Sea. The United States was not a party to this treaty, and has never recognized the abstract right of the Turkish government to obstruct the navigation of the Dardanelles; yet the practice is for all American Men-of-war to obtain permission of the Sultan before passing through.³¹

Suez Canal.

n. 13.
The Suez Canal occupies a unique position in international law, as, being a narrow waterway, connecting two open seas, it can be looked upon as having the same international position as a strait, and again, since it is wholly within the territory of a single state, as being an internal waterway, under the complete control of the sovereign, except in so far as his rights have been parted with by contract. In accepting either theory, a mistake is made, because each disregards certain important facts in connection with this artificial channel. Regarding it as a strait, it would, under the present state of the law, be subject to the servitude of innocent passage, because such passage is necessary to the free navigation of the high

³⁰ Snow, Cas. pp. 41-43; Treaties and Conventions of United States and Other Powers, p. 238.

³¹ Snow, Cas. pp. 43, 44; Schuyler's Am. Diplomacy, 317. For extended discussion, vide Hall, Int. Law, pp. 153-156; Whart. Dig. §§ 28, 29; 1 Halleck, Int. Law, c. 6, §§ 16-22; Wools. Int. Law, §§ 60, 61; Calvo, Int. Law, §§ 367-375; Bluntschli, §§ 309, 310; Direct U. S. Cable Co. v. Anglo-American Tel. Co., 2 App. Cas. 394; Pitt-Cobbett, Cas. Int. Law, p. 32.

seas which it connects, and no tolls could be collected for profit, and in fact none further than such as might be necessary for indemnification for the expense of maintaining lights, buoys, etc., which theory loses sight of the fact that this canal is an artificial instead of a natural waterway connecting two open seas. In accepting the second theory, one assumes that it is an artificial channel, constructed and operated by a commercial company, under a charter from the Khedive, confirmed by the Sultan, and that it is situated wholly within the territory of one power. This canal does possess, however, an international character, for various powers have entered into negotiations with it and with other nations in regard to it, and again it is given this character by its constitution, which declares that the governing body shall consist of members representing the principal nations interested in the enterprise.²² This fact upsets the idea of its being an internal waterway as completely as its being artificial upsets the idea of its being a strait. Several attempts have been made to neutralize this canal, the last being in 1885; but thus far all attempts have been attended with failure, although the effect has been to show the desirability of accomplishing something definite as to the rules that should govern its use. It is not believed that any treaty of neutralization can be effected because of the necessity of its use by England for the passage of her troops and ships of war in the event of a war, and on account of the further difficulty of arranging a suitable or consistent status for the local government in the event of a war by it with some other power. It has been suggested that the state itself be neutralized; and also that a new state be formed of a strip of territory several miles in width on either side of the canal, with territorial jurisdiction over it; and, further, that this proposed state be empowered to manage and control the traffic over it under agreed conditions. This last seems to be the most satisfactory solution of this intricate problem, if it could be accomplished.²³

²² Statutes Suez Canal Company, 1856, tit. 3, art. 24.

²³ For complete discussion, vide Lawr. Essays, Int. Law, 2; *Boyd's Wheat. Int. Law*, § 205, b, c; Calvo, Int. Law, §§ 377-379.

CHAPTER IV. V

TERRITORIAL JURISDICTION.

- 47. Meaning of Term "Exterritoriality."
- 48. Sovereigns and Their Suites.
- 49. Diplomatic Agents.
- 50. Criminal Jurisdiction.
- 51. Civil Jurisdiction.
- 52. Family and Suite of Diplomatic Agent.
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- 54. Right of Asylum in Legations.
- 55. Immunities as to Evidence.
- 56-58. Vessels of War, Public Vessels, and Armed Forces.
- 59. Merchant Vessels.
- 60. Right of Asylum.
- 61. Aliens—Exemptions from Military or Naval Duty.
- 62-65. Extraterritorial Acts of Persons by Direction of Their State.
- 66. Responsibility of a State in Case of Civil Commotion and Mob Violence.
- 67. Extradition of Fugitives from Justice.
- 68. Political Offenses.
- 69. Extradition of Its Own Citizens by a State.
- 70. Jurisdiction of Offenses beyond the Limits of the State.

EXTERRITORIALITY.

47. Certain persons and things, such as sovereigns, diplomatic agents, armies, vessels of war, etc., when on foreign territory, enjoy certain immunities from the local jurisdiction with respect to their persons, their retinue, and, in the case of public vessels, with respect to persons on board. The relations thus established are described by the term "Exterritoriality."¹

¹ Wools. Int. Law, § 68: "Certain classes of aliens are, by the comity of nations, exempted in a greater or less degree from the control of the laws in the land of their temporary sojourn. They are conceived of as bringing their native laws with them out of their native territory, and the name given to the fiction of law—for it seems there must be a fiction of law to explain a very simple fact—is 'extraterritoriality.' This privilege is conceded especially

The immunities conceded to persons and things as above stated are accorded by reason of the fact that they represent the sovereignty of an equally independent state, to which deference and respect are due. These immunities are accorded as a matter of comity. If a sovereign should be subjected to the jurisdiction of a foreign state, in which he happens to find himself, the interests of his own country would necessarily be imperiled. So, also, it may be said in regard to the armed forces of a foreign state, that, if interfered with, their efficiency and usefulness to their own country would disappear, as these qualities depend upon their absolute freedom of movement, uncontrolled by foreign interference. So, in regard to the duties of diplomatic agents, it is clear that they could not be satisfactorily performed if subject to the jurisdiction of the country to which they are accredited.

SOVEREIGNS AND THEIR SUITES.

48. A sovereign within foreign territory in his capacity of sovereign possesses an immunity from all local jurisdiction, to the following extent:

- (a) He is exempt from the payment of all dues and taxes, and is not subject to police or other administrative regulations.
- (b) His house cannot be entered by the authorities of the foreign state.
- (c) His personal immunities extend to members of his suite.
- (d) He can perform such acts of sovereignty as are not in derogation of the exclusive territorial rights of the state in which he finds himself.
- (e) A crime committed by a member of his suite cannot be tried and punished within the precincts occupied by him, but must be sent home for trial.

(1) to sovereigns traveling abroad with their trains; (2) to ambassadors, their suite, family, and servants; and (3) to the officers and crews of public armed vessels in foreign ports, and to armies in their permitted transit through foreign territory."

- (f) Nor can cognizance be taken of an action by a foreigner against a member of his suite, by the foreigner himself or his judges. Nor can a judgment in an action between members of his suite be enforced. Civil actions between them, or between them and subjects of other powers, must likewise be sent home for trial.
- (g) But he is bound to commit no acts against the safety or good order of the community in which he resides, and to prevent the same on the part of his attendants; and for such acts he can be placed under the necessary amount of restraint, and expelled from the country.
- (h) His house cannot be made an asylum for criminals, not members of his suite. A refusal to deliver up such a criminal to the proper authorities would justify expulsion and use of the necessary force to prevent the removal of the criminal.
- (i) A sovereign may enter a foreign country as a private individual, and as such be liable to the local jurisdiction, but such jurisdiction must cease at his will in declaring his identity.
- (j) The property of a sovereign possessed as an individual is subject to the local jurisdiction of the country in which it is situated.

When the president of a republic travels in a foreign state, he is generally considered and treated as a private citizen, but, should he be acting in his capacity as the head of his state, he assumes and is entitled to the same position as any foreign sovereign, and enjoys all the rights and privileges accorded to that status. The monarch or hereditary ruler is considered at all times the personification of the sovereignty of his state, while the rule in regard to presidents of republics is that they are, as a rule, private citizens, and but occasionally rulers or representatives of their state sovereignty. The immunities granted to sovereigns presuppose that their states are at peace with each other; that the presence of the sovereign in the foreign state is by the consent, express or

implied, of this state; and that his status as sovereign is known and recognized. The entrance can be denied to any foreign sovereign by a state, although, if such action is taken without good cause, it would constitute a lack of courtesy, and might be a cause of complaint, and even lead to war. It is scarcely necessary to add that a dethroned sovereign cannot demand these immunities, and, should he come into a foreign state, he can be considered and treated simply as a citizen. Distinctions have been made between the real and personal property of a sovereign situated and owned by him as a private citizen, in a foreign state, claiming that only personal property is exempt from the local jurisdiction; but no good reason is apparent for such distinction.²

² Bluntschli, §§ 129, 134, 136-142, 150-153; Hall, *Int. Law*, pp. 163-167; 2 Phillim. *Int. Law*, §§ 104, 108. "A foreign sovereign cannot be sued for infringement of a patent; and where a foreign sovereign has his name added as defendant in a suit against his agents, in order to be in a position to thus claim his property, he does not thereby subject himself to the jurisdiction of the court." *Vavasour v. Krupp*, 9 Ch. Div. 351. A suit cannot be maintained against a foreign sovereign. The non-appearance of the defendant sovereign does not prejudice his rights. *De Haber v. Queen of Portugal*, 17 Q. B. 196. But see *King of Spain v. Hullet*, 1 Clark & F. 348; *Rothschild v. Queen of Portugal*, 3 Younge & C. Exch. 594. Vide, also, *Prioleau v. U. S.*, L. R. 2 Eq. 659; *U. S. v. Wagner*, L. R. 2 Ch. App. 582. Vide, also, *Queen Christina of Sweden*, 1 De Marten's *Causes Célèbres*, p. 1; Pitt-Cobbett, *Cas. Int. Law*, pp. 78-87, cases cited and discussed, who says (page 80): "The exceptions to the rule that foreign sovereigns are not usually liable to be cited in the municipal courts of other countries are as follows: (1) Where the foreign sovereign is at the same time a subject of the country in which the suit is brought; (2) where he has carried on trade or entered into contracts in the apparent character of and subject to the same conditions as a private individual; (3) where he holds or acquires immovable property within the local jurisdiction; (4) where he holds or has in the hands of his agents even movable property, not connected with the *jus coronae*; (5) or finally where he has initiated the proceedings or otherwise attorned to the jurisdiction."

DIPLOMATIC AGENTS.

49. The immunities of diplomatic agents are in general terms the same as those above enumerated as pertaining to sovereigns, although in more concrete shape, on account of being more frequently the subject of discussion and judicial determination.³

SAME—CRIMINAL JURISDICTION.

50. The courts of a state to which a diplomatic agent is accredited cannot try him for a criminal offense.⁴ Nor is he subject to arrest by the state to which he is accredited except—

(a) In case of necessity.

(b) In case he commits acts of hostility or high treason against the state to which he is accredited.⁵

³ Whart. Dig. § 93a: "The prevalent view, so far as concerns civil process, is that the doctrine of exterritoriality does not apply (1) in cases where, from the nature of the case, no other jurisdiction exists than that in which the embassy holds its seat, e. g., suits for real estate; (2) in cases where the ambassador sues, and the claim against him is set up by way of set-off; (3) in cases in which the ambassador voluntarily submits to a hearing before arbitrators, in the same sense in which a sovereign may agree to an arbitration; (4) in cases where the ambassador, with the consent of his government, submits himself to the jurisdiction; (5) in cases where the ambassador is a subject or citizen of the state to which he is accredited, or when he is at the time in the service of such state; (6) in cases where the ambassador engages in trade, and the suit is brought in respect to such trading engagements. This exterritoriality ordinarily protects the diplomatic agent also from prosecutions for crime, unless the crime be of a character so outrageous and conspicuous as to forfeit his privileges, or disturb the peace of the country of his residence. But even in this case the better course is to send him home to his own sovereign, who alone has jurisdiction over him. The privilege of exterritoriality no longer gives the ambassador, as was once supposed to be the case, the power to execute penal discipline upon his subordinates."

⁴ Bluntschli, §§ 209, 210; Vattel, Int. Law, bk 4, c. 7, § 94 et seq.; 2 Phillim. Int. Law, §§ 157-170; Hall, Int. Law, 168-170; Pitt-Cobbett, Cas. Int. Law, pp. 108-110; Walk. Int. Law, 225 et seq.; 1 Halleck, Int. Law, p. 287; Snow, Cas. 83-88; Mann. Law Nat. 110; Wools. Int. Law, pp. 135, 136, § 91; 2 Ward, Law Nat. 537.

⁵ Bluntschli, § 210; Prince Cellamare's Case (in 1718) Snow, Cas. 88;

If a diplomatic agent commits a crime either against the state or against individuals, the usual and at the same time correct course to pursue is to make application for his recall; or, if the case is serious, he may be ordered to leave without making a formal application to his government; or, again, if the case is an extreme one, his arrest may be warranted. In the last mentioned case, if the state feels that such action is justified, it must be upon the ground of self defense, which, under the circumstances, takes precedence of any duty it may owe to a foreign state of granting the usual immunities to its representatives. In 1717, on the 29th day of January, England having information that Count Gyllenborg, the ambassador of Sweden, which was at that time at peace with England, had contrived a conspiracy to invade the country and overthrow the king, ordered the arrest of that minister and the seizure of his papers, which was done. This action was acquiesced in by all of the foreign ministers except Montleone, of Spain, who said that he regretted that no other way could be fallen on of preserving the peace of the kingdom than by the arrest of a public minister, and the seizure of his papers, which are the repositories of his secrets. The answer to his objection is found in the fact that there was no other way of acting, or that it was justified upon the ground of legitimate necessity and self defense.⁶ In the following year, Prince Cellamare, who was the Spanish ambassador at Paris, was arrested and conducted across the frontier for participating in

Count Gyllenborg's Case (in 1717) Pitt-Cobbett, Cas. Int. Law, p. 68. The law in the sixteenth century appears in the Case of Lesley, Bishop of Ross, Id. p. 65, who was furthering certain schemes in behalf of Mary, Queen of Scots, among others her marriage with the Duke of Norfolk, and for which he was arrested and imprisoned in England. The claim being advanced in his behalf that he was privileged by virtue of being Mary's ambassador, the question was submitted to the crown lawyers, who expressed the following opinion: (1) That an ambassador who raises rebellion against the prince to whom he is sent has forfeited the privileges of an ambassador as such, and is liable to punishment; (2) that the agent of a prince deposed from public authority, and in whose stead another is substituted, cannot challenge the privileges of an ambassador. Vide more extended report of case in Pitt-Cobbett, Cas. Int. Law, pp. 104, 105; Snow, Cas. 83.

⁶ Hall, Int. Law, p. 169; Pitt-Cobbett, Cas. Int. Law, p. 108.

a conspiracy for placing Philip V. at the head of the French government.⁷

SAME—CIVIL JURISDICTION.

51. The local jurisdiction cannot be exercised so as to interfere in any manner with the diplomatic action of, or with the property belonging to, a diplomatic agent in his representative capacity. But diplomatic agents are compelled to observe all police laws in regard to health and public safety.

In regard to these immunities of diplomatic agents there is no dispute among the authorities. The English statute upon this subject provides that "all writs and processes whereby the goods or chattels of a diplomatic agent may be seized, distrained, or attached shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever."⁸ That of the United States provides that "whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a state, or by any judge or justice, whereby the person of any public minister of any foreign state or prince, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void."⁹ Any infringement is made punishable by the subsequent section of the statute. Some writers claim that except in so far as stated above, and in respect to his real property situated in the state where he is accredited, the diplomatic agent must consent in some manner to the exercise of any local jurisdiction, and that this consent can be given either by voluntary appearance as defendant, or by bringing an action in his own behalf, and add that the effect of the action in either case must be such as not to interfere with his personal liberty, or with any property that is

⁷ 2 Phillim. § 170.

⁸ 7 Anne, c. 12. Vide *Magdalena Steam Nav. Co. v. Martin*, 2 El. & El. 111; 28 Law J. Q. B. 310.

⁹ Rev. St. U. S. § 4063; Ex parte *Cabrera*, 1 Wash. C. C. 232, Fed. Cas. No. 2,278; *U. S. v. Lafontaine*, 4 Cranch, C. C. 173, Fed. Cas. No. 15,550; *Wheaton's Case*, *Wheat. Int. Law*, D, 308-310, and note 130.

exempted by virtue of his office, and that without such action on his part recourse must be had to his own government or through its courts.¹⁰ Other authorities claim that such an agent is liable to suits of all kinds in the country to which he is accredited, and limit the effect of these suits only by the immunities that are unquestioned.¹¹ The former is the more satisfactory view, and at the same time is more in accord with the actual practice in such matters, as the diplomatic agent is liable in his own country, and the remedy afforded by diplomatic complaint will as a rule be sufficient. It may be added that diplomatic agents should not be permitted to engage in trade or the execution of official trusts which will involve litigation.¹²

SAME—FAMILY AND SUITE OF DIPLOMATIC AGENT.

52. The family of a diplomatic agent living with him, the secretaries and attachés forming part of his mission, the domestic servants and other persons in his service, enjoy the same immunities as are extended to the agent himself.

These immunities are extended to the family and suite of a diplomatic agent because of their relationship and their necessity to

¹⁰ 1 Halleck, *Int. Law*, 285-287; Hall, *Int. Law*, 170-173; Vattel, *Int. Law*, bk. 4, c. 8, §§ 110-116. Vide, also, *Taylor v. Best*, 14 C. B. 487; Bl. Comm. bk. 1, c. 7.

¹¹ Wools. *Int. Law*, § 92, says that "if he [the ambassador] chance to possess real property in the foreign country, or personal property, aside from that which pertains to him as an ambassador, it is subject to the local laws." Vide, also, section 96. In section 91 he says that in the following cases he does not possess the exemptions. "They are: (1) When he is the subject of the state where he acts; (2) when he is in its service; (3) when he voluntarily recognizes the jurisdiction of the courts by appearing before them as a plaintiff, and thus submitting himself to the defendant's court." Vide, also, Bluntschli, §§ 135-140; 3 Calvo, *Int. Law*, pp. 311, 312; 2 Phillim. *Int. Law*, §§ 194-199; Hall, *Int. Law*, § 50.

¹² For general discussion on the immunities of diplomatic agents from civil jurisdiction, vide Hall, *Int. Law*, pp. 170-174; 1 Halleck, *Int. Law*, pp. 285-287; Wheat. *Int. Law*, D, § 225, and note 129; 2 Phillim. *Int. Law*, c. 89; Bluntschli, §§ 138-140; Pitt-Cobbett, *Cas. Int. Law*, pp. 110-112; Calvo, *Int. Law*, §§ 1480-1510.

him in the performance of his official duties and in his private relations. It is customary for the agent to furnish the government to which he is accredited with a list of those for whom he claims the exemptions; and, in regard to domestic servants and others whose relations are similar, the practice is for the agent to determine whether they shall be turned over to the local authorities or sent to his own country for trial. Of course, it is necessary for such persons to be regularly employed in the capacity in which they claim the exemption in order to have the same accorded to them.¹³

SAME—HOUSE OF DIPLOMATIC AGENT.

53. The house occupied by a diplomatic agent, including the grounds and outbuildings, whether it is owned by his government or is rented or is furnished by the state to which he is accredited, and his effects, are exempt from local jurisdiction.

This immunity extends to all of his effects necessary for the comfort of himself and family, and includes his carriages and also the papers pertaining to the business of his embassy.¹⁴ These exemptions are based upon or grow out of the necessity of securing to these agents absolute freedom in the exercise of their functions, although, as previously stated, when an emergency arises affecting the existence of the nation to which he is accredited, the arrest of the ambassador would also warrant searching his papers if the search is made in good faith.

¹³ Vattel, Int. Law, bk. 4, c. 9, §§ 121-124; Wheat. Int. Law, D, notes 128, 129; Wools. Int. Law, § 95; Bluntschli, §§ 211-215; 3 Calvo, Int. Law, p. 297; Hall, Int. Law, § 50. England does not recognize this immunity as pertaining to domestic servants, and claimed the right to arrest the coachman of the United States minister in London, Mr. Gallatin, for an assault committed outside of the residence, and to make the arrest within its limits.

¹⁴ But see Wools. Int. Law, § 92.

SAME—RIGHT OF ASYLUM IN LEGATIONS.

54. The right of asylum in legations is expressly denied except in the case of political refugees in the Spanish-American states.

In certain countries where revolutions are frequent, especially in the Spanish-American states, the custom of granting asylum to political refugees by foreign legations has become firmly established, and is recognized by the local governments to such an extent that the houses of consuls are respected. The United States, in written instructions to its diplomatic agents in 1885, says: "This government does not sanction this usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its agents to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct its representatives that it will not countenance them in any attempt to knowingly harbor offenders against the laws from the pursuit of the legitimate agents of justice."¹⁵ The British government claims the right to enter the house of a diplomatic agent for the purpose of arresting an offender, admitting that the agent is entitled to notice only as a matter of courtesy, in order that he may fix a time for the arrest to be made when it will be most convenient to him, or should he so desire to turn over the offender.¹⁶ In the case of a slave who had escaped from his master, and taken service in the house of the secretary of the British legation in Washington, an officer of the District of Columbia removed the slave, and restored him to his master. The matter coming up under an order to show cause why he should not be removed from his office, this officer (a constable) was removed from office by order of the court, because he was guilty of a violation of the privileges of His Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary.¹⁷ It is safe to state that the settled

¹⁵ Snow, Cas. p. 143.

¹⁶ Hall, Int. Law, p. 179; Bluntschli, § 200; Vattel, Int. Law, bk. 4, c. 9, § 118; 2 Phillim. §§ 204, 205; Wheat. Int. Law, D, note 129. 1 Whart. Dig. pp. 650, 651, § 94.

¹⁷ U. S. v. Jeffers, 41 Cranch, C. C. 704, Fed. Cas. No. 15,471.

practice of states is that the houses of diplomatic agents furnish no protection to persons accused of crimes against the state, and it is the duty of ministers to refuse to harbor them. They must deliver them up to the local authorities upon demand.

SAME—IMMUNITIES AS TO EVIDENCE.

55. The diplomatic agent, members of his suite, and others in his employ invested with his immunities, cannot be compelled to give evidence, or to appear before the local courts for that purpose.

The above is the rule in regard to the matter of evidence, but, when such evidence is necessary in the interests of justice, it is customary for the agent to furnish the required evidence in the shape of depositions taken before the Secretary of Legation or such person as the agent may designate for the purpose. In the United States, in criminal cases the accused has the right to have the evidence taken orally in his presence, and with it the right of cross-examination, so that a written deposition would be inadmissible. It is in such cases considered proper for the person possessing immunity to submit himself for such examination, and a refusal to do so by the Dutch minister in Washington in 1856 resulted in his recall.¹⁸

VESSELS OF WAR, PUBLIC VESSELS, AND ARMED FORCES.

56. Vessels of war and other public vessels of the state, while in the ports or waters of a foreign power, and armed forces of a state while passing through or when garrisoned in a foreign state, with which their state is at peace, are not subject to the local jurisdiction.¹⁹ But a vessel of war or public vessel must respect the territo-

¹⁸ 1 Halleck, Int. Law, 294, 295; 3 Calvo, Int. Law, §§ 1519, 1520, and note 1, p. 319.

¹⁹ Hall, Int. Law, §§ 54, 57; *The Exchange v. McFaddon*, 7 Cranch, 116; *The Santissima Trinidad and The St. Ander*, 7 Wheat. 283; Whart. Dig. § 36; Bluntschli, § 321; 1 Halleck, Int. Law, pp. 176-180; *The Sitka*, 7 Op. Attys. Gen. 122; *The Parlement Belge*, 5 Prob. Div. 197.

rial law and administrative rules in regard to quarantine regulations, rules of the port, and local revenue.

57. The crew and persons on board of a vessel of war or other public vessel of the state in foreign ports or waters must respect the laws of the country in which the vessel is lying, except—

- (a) In regard to all matters pertaining to the economy of the vessel or in all matters affecting only the relations of those on board.
- (b) In cases where a special custom authorizes a contrary course.

58. Members of the crew, including the captain in respect to all matters not in his capacity as agent of his state, when on shore, are liable in every respect to the local jurisdiction.

When necessary or desirable to have armed forces pass through the territory of a friendly foreign state, the usual course is to regulate by conventions the route to be pursued and all of the details, with as much minuteness as practicable, so that the presence of the troops will be as little burdensome as practicable. It is not customary, however, in such conventions, to change the jurisdiction to be exercised by the nations interested, so that this is the same as if no convention existed. It is generally conceded to be necessary and essential that jurisdiction over the troops should be exercised exclusively by their own government, because the exercise of the foreign jurisdiction is scarcely compatible with the efficiency or discipline of an army, and would tend to destroy its usefulness to its own government. Offenses against the inhabitants of the foreign country committed by the troops are usually dealt with by the military authorities, although culprits may be turned over to the local authorities in certain cases in the discretion of the commander of the forces.²⁰

Previous to the decision of the supreme court by Chief Justice Marshall,²¹ the exemption of public vessels of war from local juris-

²⁰ Hall, *Int. Law*, p. 196.

²¹ *The Exchange v. McFaddon*, 7 Cranch, 118.

diction when within our territorial waters was not recognized. Attorney General Bradford, on June 24, 1794, delivered an opinion that a writ of habeas corpus might be awarded to bring up an American citizen on board of a foreign ship of war, the commander being fully within the reach of and amenable to the jurisdiction of the state where he happens to be.²² This opinion was followed in 1799 by the opinion of Attorney General Lee, holding that it was lawful to serve either civil or criminal process upon a person on board a British Man-of-War lying within our territory.²³ Such was also the doctrine held by England at the same period.²⁴ The courts of the United States have uniformly followed the doctrines laid down by Chief Justice Marshall, and have adopted unequivocally the doctrine that a public ship of war of a foreign sovereign, at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign.²⁵ England has also adopted, in substance, the same view of the law by stating that the laws of a state cannot be executed on board of a foreign vessel of war lying in its waters, unless by the order or permission of the commanding officer.²⁶ The general practice of nations is to accord extraterritoriality to all such vessels. If persons in possession of the immunities enumerated fail to respect the territorial law, within the limits prescribed, the course to be pursued is to seek redress through the government of the offending person, although a ship of war may be proceeded against in extreme cases by ordering it out of the territory or forcibly expelling it therefrom. If a person on board a public vessel commit some act which takes effect outside of the vessel, or if the captain harbor a person to whom he has no right to grant asylum,—as, for instance, a criminal fugitive from justice,—and refuse to give him up on demand, application for redress must be made through diplomatic channels, as the vessel cannot be entered for any purpose whatever. Instances are given in

²² 1 Op. Attys. Gen. 47.

²³ 1 Op. Attys. Gen. 87.

²⁴ 1 Phillim. Int. Law, § 346.

²⁵ *The Exchange v. McFaddon*, 7 Cranch, 116; *The Santissima Trinidad* and *The St. Ander*, 7 Wheat. 283.

²⁶ Hall, Int. Law, p. 190.

which courts have been induced to sit as a court of inquiry simply, without any attempt to enforce its decree, and with the sole purpose of determining the facts, which determination was afterwards used in support of a claim diplomatically urged, and not voluntarily recognized, by a foreign government, in case of acts which take effect outside of the vessel, and which, if done on board of a foreign merchant vessel, would have been cognizable by the local courts. The right of asylum to political refugees has been accorded in certain cases where hospitality has been extended without the vessel having sought them out, and the territorial government has no right to expel the ship for according this protection.

The immunities accorded to these vessels is to them as a whole, so that, if the vessel is abandoned, she becomes mere property; and the crew, if separated from her or her belongings, follow the rule laid down above. This is true especially of the crews of vessels which possess an exemption on account of their cargo belonging exclusively to the government of their state, as they are replaced in the same manner as crews of vessels of the merchant marine; and it is not believed that they are exempt from arrest on board of such vessels for criminal acts against the foreign state.

MERCHANT VESSELS.

59. Merchant vessels of one country visiting the ports of another, for the purposes of trade, subject themselves to the laws which govern the port they visit, so long as they remain, unless otherwise provided by treaty.²⁷

60. Merchant vessels possess no right of asylum even for political refugees.

What is known as the French rule in regard to merchant vessels lying in foreign ports is "that all matters of discipline and all things done on board which affect only the vessel or those belonging to her, or which do not involve the peace and dignity of the country or the tranquillity of the port, should be left by the local govern-

²⁷ Whart. Dig. §§ 35, 35a; Hall, Int. Law, § 58; 1 Halleck, Int. Law, c. 7, §§ 26, 27; Bluntschli, § 319; 1 Phillim. Int. Law, § 348; Pitt-Cobbett, Cas. Int. Law, p. 73; The Atalanta, 8 Op. Attys. Gen. 73; Calvo, Int. Law, §§ 469-471.

ment to be dealt with by the authorities of the nation to which the vessel belongs.²⁸ The French courts take jurisdiction in case of a murder committed on board of a foreign merchant vessel lying in a French port, on the ground that such a grave crime amounts to a disturbance of the peace of the port.²⁹ A large number of states follow the same practice as the French courts, and a large number of conventions contain the stipulation that consuls should have jurisdiction of the class of cases referred to.³⁰ Mr. Hall, after stating that the French view has no authority of law, says: "The practice which is being founded by these conventions, and by voluntary abstention from the exercise of jurisdiction, is so reasonable a one in the abstract, and so little open to practical objections, that it would be worth while to adopt it into the recognized usage of nations."³¹

Right of Asylum.

Merchant vessels possess no right of asylum even for political refugees. Several cases have arisen illustrating the views of different countries upon this subject, all of which, with one exception, announce the law as above stated. The first is the Case of Sotelo. In this case it is shown that the right of granting asylum to political refugees does not belong to merchant vessels, in the ports of such refugees' country. M. Sotelo, a Spanish political refugee, took passage on the French packet boat l'Océan, at the Spanish port Valence. This vessel afterwards entered the Spanish port Alicant, where he was recognized, seized, and imprisoned by the local authorities. The diplomatic correspondence between France and Spain showed in the most conclusive manner that the action of the local authorities was completely justified; that no disrespect was shown to the French flag, because this was the exercise upon an ordinary merchant vessel of the police power (*Haute police*) within the local port. M. Sotelo had surreptitiously embarked at Valence, a Spanish port, and was regularly seized and arrested upon the l'Océan

²⁸ The *Newton* and The *Sally*, 1 *Ortolan Dip. de la MÉR*, p. 271; Pitt-Cobbett, *Cas. Int. Law*, p. 74.

²⁹ The *Tempest*, 1 *Ortolan Dip. de la MÉR*, 455. But vide "*L'Anemone*," where supreme court of Mexico holds contrary doctrine.

³⁰ *Wildenhus' Case*, 120 U. S. 1, 7 *Sup. Ct.* 385.

³¹ Hall, *Int. Law*, pp. 200, 201.

at another port of the same country; and, finally, the fact of having navigated the open sea before entering Alicant could not alter the nature of the wrong committed at the point of departure, and confirmed upon arrival under the empire of the same laws with the same territorial legislation.³² Lord Aberdeen, on March 20, 1844, says: "There is no stipulation in existing treaties between this country [England] and Spain which can be deemed sufficient to debar the Spanish government from exercising the right which, in his Lordship's opinion, appertains to that government of claiming its own subjects when they may be found in a Spanish port as passengers on board vessels hired to convey the mails between this country and the peninsula."³³ Mr. Bayard, on March 12, 1885, in his instructions to Mr. Hall in regard to the proposed arrest of the political refugee Mr. Gomez from Nicaragua, affirmed the jurisdiction of the local authorities over a merchant vessel so long as it remained in the ports of the country. This is the law in this country, although the instructions of Mr. Blaine in regard to the Case of Barrundia in 1890 set up a different rule.³⁴

Jurisdiction over Passing Vessels.

The French rule, it is believed, should be applicable to the case of merchant vessels passing through the territorial waters of another state. It is true that in the case of *Regina v. Keyn* it was held that the jurisdiction of England did not extend over the marginal waters for the distance of a marine league; but, as previously stated, this was remedied by subsequent legislation, and that case was decided by a court as equally divided as possible, standing seven to six. The same reasons for territorial jurisdiction to be exercised in the case of these vessels being in port are applicable to the case of passing vessels of the same kind, and the interest of the state in exercising jurisdiction extends only to such acts as take effect outside of the vessel affecting either the inhabitants of the state or the state itself.³⁵

³² Calvo, *Int. Law*, § 470.

³³ *Rep. Fugitive Slave Commission*, p. 154.

³⁴ *U. S. Foreign Relations*, 1885.

³⁵ *Hall, Int. Law*, pp. 201, 202; *Pitt-Cobbett, Cas. Int. Law*, p. 72.

ALIENS—EXEMPTIONS FROM MILITARY OR NAVAL DUTY.

61. Resident aliens who have not become naturalized are exempt from military and naval service in the country of their residence, except—

- (a) When this country is threatened by an invasion of savages or uncivilized nations.
- (b) They may be compelled to maintain the social order provided the services required of them do not overstep the limits of police as distinguished from political action.

This question came up quite frequently during the American Civil War; (vide act of March 3, 1863; proclamation of the President of May 8, 1863; and section 18 of the act of February 24, 1864.) In the last named act it was provided "that no person of foreign birth shall, on account of alienage, be exempted from enrollment or draft under the provisions of this act, or the act to which it is an amendment, who has at any time assumed the rights of a citizen by voting at any election held under the authority of the laws of any state or territory, or of the United States, or who has held any office under such laws or any of them; but the fact that any such person of foreign birth has voted or held, or shall vote or hold, office as aforesaid, shall be taken as conclusive evidence that he is not entitled to exemption from military service on account of alienage." This statute was acted upon during the war after its passage, and was acquiesced in at least tacitly by the British government. In the proclamation of the President sixty-five days were allowed to all those who wished to leave the country in order to avoid the enrollment under this act. Lord Lyons received upon this subject the following instructions from his government, namely: That the government "might well be content to leave British subjects, voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile, including, when imposed by the municipal law of such country, service in the militia or national guard or local police, for the maintenance of internal peace and order, or even, to a limited extent, for the defense of the territory from foreign invasion." Mr. Hall seems to think that it was not intended to apply to any

one who was not in any sense a resident, and that, in any event, it was granting an unnecessarily large concession to the local authority.³⁶

EXTRATERRITORIAL ACTS OF PERSONS BY DIRECTION OF THEIR STATE.

62. A state is responsible for all acts or omissions which occur within its territory and result in causing injury to another state or the subjects of another state.

63. A state is also responsible for the acts of its public administrative agents, both civil and military, when acting in their official capacity, which result in injury to foreign states or subjects until such acts are disavowed, and is bound to inflict punishment and make reparation when necessary.

64. The acts of the judiciary of a state which inflict an injury or wrong upon another state or its subjects must be compensated for by the state, and laws of the state which do not insure the equal justice to foreigners that is accorded to natives must be remedied by legislation.

65. The state is responsible for the acts of its private citizens which result in injury to another state or its subjects, and which the state has not used reasonable diligence to ascertain knowledge of and to prevent.

A state can evade responsibility for its acts by showing that those complained of could not have been prevented by the use of an ordinary diligence or watchfulness under the circumstances, or that the injury resulting has been accidental, or on account of acts independent of those committed within its territorial limits. In the case of its administrative officers, since these are agents of the state under the direct control and direction of the Executive, all

³⁶ Whart. Dig. § 202. Vide, also, section 182. As to release from foreign service of naturalized American citizens, vide Hall, Int. Law, pp. 204-206. Bluntschli, § 391: "Foreigners cannot be forced into military service. An exception can be made to this rule if this is necessary to defend a locality against brigands or savages."

of their acts are considered as state acts until disavowed, punishment being awarded in suitable cases. The connection of the judiciary with the administrative branch of the government is necessarily more remote than that of the foregoing class, and yet these officials may effect an international wrong, in certain cases, by rendering a decision directly in accordance with the municipal law of their state, or again these officials may be absolutely corrupt, and the administrative branch of the government be possessed of no power to remedy the effects of the resulting wrongs. In such cases it is necessary for the state to make the necessary corrections in their laws which will insure to foreigners the equal protection of the laws, and which will render its judiciary competent, so that it cannot be said to favor injustice, and thereby render itself personally responsible. If the laws of a particular country do not recognize and respect international law, the other states will be fully justified in requiring that the laws of the country be modified and placed in harmony with international principles.

In regard to the acts of private individuals, the responsibility of the state rests upon the fact that it exercises exclusive control over all persons and things within its territory. In the Geneva Arbitration the following questions were discussed: (1) If attempts are made to disguise the true character of noxious acts, what amount of care to obtain knowledge of them beforehand, and to prevent their occurrence, may reasonably be expected? (2) Is the legal power actually possessed by the government of a state the measure of the legal power which it can be expected to possess, whether for purposes of prevention or of punishment? In answer to the first, it may be said that if a state uses the same care that it would use under similar circumstances in its own interests, or if it uses that amount of care which the circumstances, to the mind of average intelligence, indicate to be in proportion to the facts of the situation, or if the government makes the inquiries and exercises the governmental powers which have been found sufficient for state purposes, there cannot or should not be anything further required, assuming that the acts performed have been honestly performed. In reply to the second question, it may be stated that, while a state is bound to provide the necessary means for carrying out its international obligations, it is not incumbent that it should provide

itself with the most efficient means that ingenuity can devise; it being sufficient that all states shall provide the best means that its national institutions will admit of, it being understood that a state cannot avoid its international obligations on the ground that it has chosen to live under anarchy, and it being further understood that the institutions of a state are such as a well ordered state to an average extent adopts.³⁷

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RESPONSIBILITY IN CASE OF CIVIL COMMOTION AND MOB VIOLENCE.

66. In the case of civil commotions or insurrections, the state is not responsible for an injury to the person or property of a foreign subject received in the course of the struggle, either through measures rendered necessary on its own behalf or through acts on the part of the insurgents.

In the case of the riots which broke out in New Orleans in 1851, the Spanish consulate was attacked, and much injury was done to both persons and property. The Spanish government made a formal demand for reparation upon the government of the United States. Mr. Webster replied: "While this government has manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another, in cases of this kind it supposes that the rights of the Spanish consul, a public officer residing here under the protection of the United States government, are quite different from those of the Spanish subjects who have come into the country to mingle with our citizens, and here to pursue their private business and objects. The former may claim special indemnity, the latter is entitled to such protection as is afforded to our own citizens. While, therefore, the losses of individuals, private Spanish subjects, are greatly to be regretted, yet it is understood that many American citizens suffered equal losses from the same cause. And these private individuals, subjects of her Catholic Majesty, coming voluntarily to reside in the United

³⁷ 1 Halleck, Int. Law, pp. 429-432, note 2; *People v. McLeod*, 25 Wend. 483; Hall, Int. Law, pp. 213-219; Whart. Dig. § 21.

States, have certainly no cause of complaint if they are protected by the same law and the same administration of law as native born citizens of this country. They have in fact some advantages over the citizens of the state in which they happen to be, inasmuch as they are enabled, until they become citizens themselves, to prosecute for any injuries done to their persons or property in the courts of the United States or the state courts, at their election."²⁸ A state should not, from the nature of the case, be liable in such cases, as it can have no control; and it is for the best interests of the state to avoid in so far as possible such conditions as must exist, so that no carelessness will be assumed on its part under such circumstances. A case illustrating the question of governmental liability arose in New Orleans in 1891. It appears that the chief of police of the city of New Orleans had been massacred under circumstances that indicated that a certain Italian society, known as the "Mafia," was implicated in it. Certain Italians had been arraigned, tried, and acquitted, which action so incensed the inhabitants of the city that an indignation meeting was called, at which a number of the leading citizens were present, inflammatory speeches were made, and upon the following morning a mob assembled, without protest from any of the organized authorities, proceeded to the jail, took out the accused, and shot or hanged a number of them. The President promptly expressed regret at these occurrences, and promised to lay the matter before Congress, with a recommendation that the families of the murdered men be granted an indemnity. The Italian government insisted that the participators should be brought to trial and punished by the authorities of the United States; but as this, under our laws, could not be done on account of lack of jurisdiction of the United States courts, the matter was allowed to drop.²⁹ In this case, as these men were in the custody of the state authorities, and constructively in the hands of the United States, they were entitled to a special protection. Again, as a government is liable internationally for injuries done to aliens by a mob, which by due diligence it could have suppressed, and as it appeared in this case that there was no attempt upon the part of the authorities to

²⁸ Mr. Webster, secretary of state, to Mr. Calderon, November 13, 1851, Whart. Dig. § 226.

²⁹ Snow, Cas. p. 183, note.

prevent the consequences of the acts committed, the action of the federal government in the premises was certainly in accordance with right and justice.

EXTRADITION OF FUGITIVES FROM JUSTICE.⁴⁰

67. In the absence of treaty, there is no rule of international law which requires a state to deliver up a fugitive from justice from another state. When delivered up under treaty stipulations, he can be tried only for the offense for which he was extradited.⁴¹

This subject is regulated almost entirely by treaties between the different states in which is set forth the offenses for which persons are to be extradited. Among them the following will be found to be quite common, viz.: Abortion, arson, barratry, bigamy, burglary, counterfeiting, crime against nature, embezzlement, false pretenses or false tokens, forgery, kidnapping, larceny (punishable by the law of the demanding state by imprisonment exceeding one year), maiming, manslaughter, murder, perjury, piracy, rape, robbery, and slave trading. Some states have granted the request of others for persons accused of grave offenses when there existed no treaty obligation for this action, upon the ground that the general welfare demanded such action;⁴² but however desirable it may be, upon general principles of justice, that all persons accused of crime should be delivered up on demand, and that a rule of law to that effect should be recognized, there can be no doubt that, under the present practice, every state, by virtue of its right of independence, has a right to grant to foreigners the right of sojourn in its terri-

⁴⁰ For general subject of extradition, vide text-books of Spear and Moore; Walk. Int. Law, pp. 236-238; Bluntschli, § 394; Snow, Cas. pp. 151-171; Pitt-Cobbett, Cas. Int. Law, pp. 36-72; Wools. Int. Law, §§ 77-80; Whart. Dig. §§ 268-282; Wheat. Int. Law, D, pp. 180-191; Field, Int. Code, pp. 92-127; Calvo, Int. Law, § 950 et seq.; Creasy, Int. Law, p. 202. Levi, Int. Law, pp. 242-252, c. 21, gives treaties and offenses extraditable. Hall, Int. Law, p. 60; 1 Halleck, Int. Law, p. 193 et seq.

⁴¹ *Ex parte Dos Santos*, 2 Brock. 493, Fed. Cas. No. 4,016; *U. S. v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. 234; Pitt-Cobbett, Cas. Int. Law, p. 41.

⁴² Whart. Dig. § 268.

tory, and this right supersedes the right of a foreign state to have persons accused of offenses delivered up for trial. The state upon whom demand is made has the right to make a preliminary examination of the facts, and be convinced that the accused is guilty of the offense or crime with which he is charged, before acceding to the request of the state making the demand. The accused can only be transferred from one sovereignty to another under a very limited form of procedure, and demand must be made through diplomatic channels. In the United States this has been judicially determined to be exclusively a federal question.

SAME—POLITICAL OFFENSES.

68. Political offenses are not generally considered as extraditable, and a state can decline to extradite or expel persons guilty of them; but a state owes to other states the duty of preventing these exiles from menacing the public safety and public order of other states by acts upon their territory.

Political crimes are necessarily directed against the constitution and political system of the state, and are not, in consequence, a danger to other states. What might be considered an offense under the laws of one state could very easily be looked upon as a fight for liberty in another; so that, if a person be convicted and punished for the offense in the first state, he would be regarded as a martyr to liberty in another. In such cases the second named country under the plea of justice, humanity, and the political welfare, would be fully justified in according to the accused person the protection of its laws. The greatest difficulty in cases of political offenses is that they are frequently connected with some crime or common law offense which is extraditable. "Most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the government and acts against the oppressions of the government. The latter are virtues, yet have furnished more victims to the executioner than the former. * * * The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries. * * * Treasons, then, taking the simulated

with the real, are sufficiently punished with exile."⁴³ Can a distinction be drawn between acts directed against tyranny and those of a mere common law character? Since the assassination of President Garfield in this country, the United States has concluded treaties with several countries, in which it is stipulated that "an attempt against the life of the head of a foreign government or against that of any member of his family, when such attempt comprises the act either of murder or of assassination or of poisoning, shall not be considered a political offense or an act connected with such an offense."⁴⁴ The cases upon the subject of extradition show that where the offense committed is political, even though it is accompanied with the commission of some crime, such as murder, it is not extraditable.⁴⁵

SAME—EXTRADITION OF ITS OWN CITIZENS BY A STATE.

69. States do not, as a rule, and, in the absence of treaty cannot be held to, extradite their own citizens who have committed crimes in a foreign state.

In nearly all states, England and the United States being excepted, provision is made in the municipal laws for the trial of offenses committed by their subjects in foreign countries, so that there is no reason why such citizens cannot be tried and punished at home. Both of the excepted countries have expressed a willingness to incorporate into their treaties with other nations a stipulation covering the extradition of their own citizens, as all offenses committed are considered and treated as entirely local by these two countries. The United States, in considering the clause in the treaty of extradition with Mexico, which declares that "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty," while admitting that it would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished, doubted the right of the Presi-

⁴³ Mr. Jefferson to Messrs. Carmichael & Short, March 22, 1792, Whart. Dig. § 272.

⁴⁴ With Belgium, 1882; Luxembourg, 1883; Russia, 1893.

⁴⁵ In re Castioni [1891] 1 Q. B. Div. 149.

dent to extradite the citizen under the treaty, but expressed a willingness and desire to have this question determined judicially, though the matter is still undetermined.⁴⁶

JURISDICTION OF OFFENSES BEYOND THE LIMITS OF THE STATE.

70. States do assume jurisdiction over certain offenses committed by their own citizens on foreign territory, but it is not a recognized international right to exercise such jurisdiction over acts committed by foreigners on foreign territory.

As previously stated, the doctrine of England and the United States is that criminal jurisdiction is strictly territorial, although both countries do try certain specified offenses committed abroad.⁴⁷ This territorial jurisdiction extends to all persons and things within its territory, except over those that enjoy a special immunity through the fiction of extritoriality; and any acts committed by persons within this jurisdiction, whether by foreigners or citizens, are certainly cognizable by this state. Does this confer a right to jurisdiction over the offenses committed by foreigners, then under the jurisdiction, which were committed before arrival in the country? If such be the case, then the jurisdiction of two states is concurrent upon the same territory, which is contrary to the fundamental conception of a state. No good reason can be ascribed in the case of ordinary or extraditable crimes why any such jurisdiction should be assumed because the offense, being also an offense against the laws of the state where committed, could by extradition be punished there. A large number of states do claim such a jurisdiction. Russia, Norway, Portugal, and Germany claim a criminal jurisdiction over all offenses committed by their subjects anywhere, even while in foreign countries, whether committed against the state itself, its subjects or foreigners. France claims that its criminal law is a personal statute, which follows its citizens wherever they may be; and in consequence, when a Frenchman has

⁴⁶ 1 Moore, Extrad. 166.

⁴⁷ Moore, Extrad.

committed a crime in a foreign country, he can be punished for it when he returns to France.*

In 1886, A. K. Cutting, an American citizen, but for some time a resident of Paso del Norte, Mexico, engaged in editing a newspaper at the last named place. In it he inserted an article reflecting upon the character of a citizen of Mexico for which he was arrested, and required to sign a "reconciliation," which is similar to a compromise or settlement. Afterwards he caused to be published an article in the *El Paso Herald*, in Texas, for which, under the Mexican law, he was arrested, tried, and sentenced to a fine of \$600 and imprisonment for one year at hard labor. This, on appeal to the supreme court of Chihuahua, Mexico, was affirmed; but the prisoner was released, because the plaintiff had withdrawn from the suit, it appearing that the withdrawal had "for its principal object the quieting of the alarm consequent upon his complaint." The government of the United States demanded an indemnity for the imprisonment of Cutting and the abolishment or modification of the offensive article of her code, on the ground that the state of Mexico could not cause a citizen of the United States to answer in Mexican courts for an offense committed in the United States simply because the object of that offense happened to be a citizen of Mexico. Mexico defended its action on the grounds "(1) that this claim is justified by the rules of international law and the positive legislation of various countries; and (2) that, such a claim being made in the legislation of Mexico, the question is one solely for the decision of the Mexican tribunals. Each state may provide for the punishment of its own citizens for acts committed by them outside of its own territory, which makes the penal law a personal one; and, while it may give rise to inconvenience and injustice in many cases, it is a matter in which no other government has a right to interfere. To say, however, that the penal laws of a country can bind foreigners and regulate their conduct, either in their own or any other foreign country, is to assert a jurisdiction over such countries, and to impair their independence."⁴⁸ The United States has not adhered to the princi-

* Vide Hall, *Int. Law*, pp. 205-209.

⁴⁸ Mr. Bayard to the President, Whart. Dig. § 15.

ples laid down in the above case, as it has been held that acts committed outside of the state, but taking effect within the state, are to be construed to be done by persons constructively within the state.⁴⁹

⁴⁹ U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932; State v. Wyckoff, 31 N. J. Law, 68; Com. v. Macloon, 101 Mass. 1; Com. v. Blanding, 3 Pick. 304; Snow, Cas. 172-174; Whart. Dig. 15, 189.

Interstate Extrajurisdiction regulated by the Fed. Constitution which provides as follows: A person charged in any state with treason, felony or other crime, who shall flee from the same and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. (Vide U. S. Const. Art. 4 § 2)

This does not apply to crimes committed in a foreign country, in which case principles of international conditions apply. But in Kentucky vs. Demson, 24th Howard the U. S. Supreme Court held that although it is the duty of the Executive to give up the fugitive & he has no moral right to refuse, yet no power has been conferred by the Federal Courts to compel extradition.

CHAPTER V.**JURISDICTION ON THE HIGH SEAS AND UNOCCUPIED PLACES.**

- 71. Nature of Jurisdiction over Members of the State Community, and Property.
- 72. Territoriality of Merchant Ships—Jurisdiction over.
- 73-74. Piracy.
- 75. Rebels and Insurgents as Pirates.
- 76. Letters of Marque—Privateers.
- 77. The Slave Trade as Piracy.

NATURE OF JURISDICTION OVER MEMBERS OF STATE COMMUNITY AND PROPERTY.

71. States, as a general rule, exercise exclusive jurisdiction over members of the state community, and over the property belonging to the state or its subjects, while in the possession of the owner, when in places not within the territorial jurisdiction of any other state.

In regard to the jurisdiction over persons, it may be said that the state of which they are citizens possesses a better right to jurisdiction over them than can be claimed for any other state; and the ownership of property should and does form a reasonable ground for the attribution of exclusive control to the owner, when no equal or superior right of control can be shown by another. Wheaton says, "this jurisdiction which the nation has over its public and private vessels on the high seas is exclusive only so far as respects offenses against its own municipal laws";¹ while Mr. Hall, after stating that the settled usage is as stated above, says, "for special reasons, however, exceptions are sometimes made to this usage."²

¹ Wheat. Int. Law, D. § 106.

² Hall, Int. Law, p. 244.

TERRITORIALITY OF MERCHANT SHIPS.

72. A state has jurisdiction over its merchant vessels on the open seas, as follows:

- (a) Full criminal jurisdiction of all acts of subjects or foreigners, in so far as authorized under the procedure of the state itself.
- (b) Civil jurisdiction over all subjects, and over all foreigners, in so far as this jurisdiction can be exercised upon the territory of the state.
- (c) Protective jurisdiction to the extent of guarding the vessel against interference of any kind on the part of other powers.

It is admitted by all authorities that a state exercises jurisdiction over its vessels while upon the open sea, but they advance different theories for according this right. Some say "that vessels are regarded as floating portions of the territory of the state upon whose territory they depend, and whose flag they are authorized to float."³ Others say that this jurisdiction is necessarily invested in some one particular state, as inconveniences would result if such were not the case, and, as there is no jurisdiction of the open sea pertaining to any one or more states, that the owner of the vessel possesses a greater right to the exercise of this jurisdiction than can be advanced by any one else. The former theory was maintained in the United States, certainly in 1842, when Mr.

³ Bluntschli, § 317. International law has admitted for a long time the principle that when a vessel leaves the country to which it belongs, it is a floating part of the territory. There exists a natural and patriotic bond between the vessel and the land which it quits: of which the flag is the symbol. Each state is required to protect its vessels against the attacks of enemies, and to extend the national power and commercial resources of the country by means of the public and merchant marine. It is then very important to determine very clearly the nationality of vessels. English jurisconsults have endeavored for a long time to refuse to recognize these principles in regard to merchant vessels; they cannot evade the fact in regard to vessels of war through which the state affirms directly its existence and power. Merchant vessels as well as vessels of war, every one admits to-day, are portions of the state whose flag they carry.

Webster said, in writing to Lord Ashburton in regard to impressment of British subjects in American vessels: "Every merchant vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry therefore into such vessel, being neutral, by a belligerent, 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."⁴ This doctrine has always been opposed by England and all of her writers upon international law, who maintain that usage is not in accord with the theory, and that the practice in regard to the seizure of merchant vessels for carrying contraband of war, if made upon the high seas, and the exercise of jurisdiction by the state owning the territory over these vessels when in territorial waters, can be more satisfactorily explained under the second theory than under the theory of their territoriality. "It is admitted by the most thorough-going assertors of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it. The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs,

⁴ The impressment of seamen by England was for a long time maintained as a right and as firmly resisted by the United States, and, as is well known, was much discussed before and for some time after the war of 1812. This right has not been asserted by England for more than half a century, and is positively abandoned, being no longer justified or defended by recent English authorities. For discussion of this right, see Wheat. Int. Law, §§ 108, 109, note 67, D; 1 Phillim. Int. Law, p. 278 et seq.; Whart. Dig. § 331; Hall, Int. Law, p. 248, note.

and exclusiveness of jurisdiction except in so far as it is abated by the custom of exterritoriality, which of course cannot be brought into use as against a ship."⁵ The second theory seems to more satisfactorily account for the practice, in so much that the acts enumerated above as being authorized under certain conditions are made exceptional, and thrown upon their defense, instead of being placed under the sanction of the general principles of international law.

The jurisdiction of a state over its merchant vessels on the open seas may be stated to be as follows:⁶ It has (1) full criminal jurisdiction of all acts of subjects or foreigners, in so far as authorized under the procedure of the state itself; (2) civil jurisdiction over all subjects and over all foreigners, in so far as this jurisdiction can be exercised upon the territory of the state; (3) protective jurisdiction to the extent of guarding the vessel against interference of any kind on the part of other powers.

The first includes all administrative rules that a country may see fit to establish for the maintenance of disciplinary authority in virtue of state control. The question of criminal jurisdiction came up in the case of John Anderson, an ordinary seaman on board of the American bark *C. O. Whitmore*, who stabbed and killed the first officer of the ship on the 31st of January, 1879, while the vessel was on her way from New York to Calcutta, and while on the high seas. It seems that the American Consul General had invoked the aid of the local police authorities in securing the safe custody of the accused until such time as he could be sent to the United States for trial, and that while thus in temporary custody of the local authorities the colonial authorities took judicial cognizance of the matter, claiming, under the advice of the advocate general of the colony, that under a colonial statute which conferred upon the courts of the colony jurisdiction of crimes committed by a British subject on the high seas, even though such crimes be committed on the ship of a foreign nation, and that inasmuch as the accused, although appearing on the ship's articles under the name of John Anderson, subject of Sweden, had

⁵ Hall, *Int. Law*, p. 249.

⁶ Hall, *Int. Law*, pp. 244-249. Vide, also, Twiss, *Law Nat.* § 159; Mann, *Law Nat.* (Amos) pp. 117, 118; 3 Whart. *Dig.* § 331; Wools. *Int. Law*, § 58; Pitt-Cobbett, *Cas. Int. Law*, p. 71.

declared that his real name was Alfred Hussey, and that he was a native of Liverpool, and therefore a British subject, the case came within the jurisdiction of those courts. Mr. Evarts in writing to Mr. Welsh, Minister to Great Britain, stated the law upon this subject as follows: "The matter is now believed to have reached that point in the judicial proceedings where effective measures for asserting jurisdictional rights of the United States would be unavailable in this case. And whilst I entertain no doubt that the accused will receive as fair a trial in the high court of Calcutta, where it is understood that he is to be tried, as he would in the circuit court of the United States, in which tribunal he would be arraigned were he sent here for trial, I deem it proper, at the same time to instruct you to bring the question to the attention of her Majesty's Government, in order to have it distinctly understood that this case cannot be admitted by this Government as a precedent for any similar cases that may arise in the future. No principle of public law is better understood nor more universally recognized than that merchant vessels on the high seas are under the jurisdiction of the nation to which they belong, and that as to common crimes committed on such vessels while on the high seas, the competent tribunals of the vessels' nation have exclusive jurisdiction of the questions of trial and punishment of any person thus accused of the commission of a crime against its municipal laws; the nationality of the accused can have no more to do with the question of jurisdiction than it would had he committed the same crime within the geographical territorial limits of the nation against whose municipal laws he offends. The merchant ship, while on the high seas, is, as the ship of war is everywhere, a part of the territory of the nation to which she belongs." ⁷ In reply the British government expressed its "regret

⁷ Whart. Dig. p. 123 et seq., § 33a. The colonial courts in this case did not administer justice in accordance with the expectation of the United States, for Secretary Evarts says: "While the verdict of the jury, convicting the man of manslaughter, seems to have been technically right as to the degree of the crime committed, the partiality and unfairness of the proceedings, which this government had confidently hoped would be marked by the most signal impartiality and fairness, cannot but be deduced from the result of the trial. I refer especially to the keeping back of the testimony of witnesses who would have shown aggravating circumstances of guilt; in the notably strong recommendation to mercy; and, more than all, in the

that the authorities of Calcutta should have been governed by a view of the law which, in the opinion of her Majesty's Government, cannot be supported." The state whose subject is aboard the vessel of a foreign state may take cognizance of acts or occurrences in such manner as it sees fit, within its own territory, but cannot supplant the primary jurisdiction of the state which owns the vessel.

In regard to the protective jurisdiction of a state over its merchant vessels, the foregoing statement of the law must be considered in connection with the following facts, viz.: that in time of war foreign powers (belligerents) are authorized to restrain certain acts; that these vessels are bound to commit no acts of hostility against other nations, for which their country is responsible to the nation aggrieved, and the courts of the vessels' country must be open to redress wrongful acts committed against foreigners either by them or by persons on board of them. This responsibility of the vessels' state does not extend to acts which the foreign country is authorized to restrain, or to acts which constitute piracy. A foreign state can also, under certain circumstances, pursue a vessel into non-territorial waters. This right is restricted to the extent that the noxious act must have been committed on land, or in the territorial waters of the offended state, and the pursuit must commence while the offending vessel is still within these territorial waters, or has just escaped from them; but, when the vessel has escaped pursuit, it cannot be further molested by the ships of the foreign state.⁸

character of the sentence, a purely nominal punishment, such as would be usually inflicted for a slight contempt of court, and unheard of before in any British court as a measure of the penalty for manslaughter, the conviction for which rested on the verdict of a jury, the prisoner having been set free within forty-eight hours, without even the form of executive clemency." Vide, also, *The Atlanta*, 8 Op. Attys. Gen. 73. In the case of *Reg. v. Lesley, Bell*, Cr. Cas. 220, it was held that "the master of a British ship may detain Chilian outlaws on board of his ship, against their will, while in Chilian waters, by agreement with the Chilian government; but he cannot lawfully transport them on the high seas under such agreement." *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860.

⁸ Hall, *Int. Law*, p. 252, § 80; Bluntschli, § 342; Wools. *Int. Law*, p. 71, § 58. The latter author does not limit or restrict this right, but says: "For a crime committed in port a vessel may be chased into the high seas and there arrested, without a suspicion that territorial rights have been vio-

PIRACY.

73. Piracy may be said to consist of those acts of violence committed upon the sea, or by descent from the sea upon the coast, by persons acting without the authority, and independently, of any politically organized community.⁹

74. The following acts are recognized as piratical:

- (a) Robbery or attempted robbery of a vessel, by force or intimidation, either by way of attack from without, or by way of revolt of the crew, and the conversion of the vessel and cargo to their own use.

lated, while to chase a criminal across the borders and seize him on foreign soil is a gross offense against sovereignty."

⁹ Some other definitions are as follows:

"Piracy is robbery on the sea, or by descent from the sea upon the coast, committed by persons not holding a commission from, or at the time pertaining to, any established state." Wools. Int. Law, § 144.

"The offense of depredating on the seas without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other." Wheat. Int. Law, D, § 122.

"Piracy is robbery, or a forcible depredation, on the high seas, without lawful authority, and done *animo furandi*, and in spirit and intention of universal hostility." 1 Kent, Comm. p. 183.

"Piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of a state through descent from the sea, by a body of men acting independently of any politically organized society." Hall, Int. Law, p. 257.

"Sont Considérés comme pirates les navires qui, sans l'autorization d'une puissance belligérante, cherchent à s'emparer des personnes, à faire du butin (navires et marchandises), ou à anéantir dans un but criminel les biens d'autrui." Bluntschli, § 343.

"Dans le langage international, il faut entendre par ce mot (piraterie) tout vol ou pillage d'un navire ami, toute dépradation, tout acte de violence commis à main armée en pleine mer contre la personne ou les biens d'un étranger, soit en temps de paix, soit en temps de guerre." 1 Calvo, Int. Law, p. 576, § 485.

For other definitions, vide Hall, Int. Law, p. 256, note; Whart. Dig. § 380; also, note to U. S. v. Smith, 5 Wheat. 157.

- (b) Depredations upon two belligerents at war with one another under commissions granted from each of them.
- (c) Depredations committed at sea upon the public or private vessels of a state, or descents upon its territory from the sea by persons not acting under the authority of any politically organized community, notwithstanding that the objects of persons so acting may be professedly political.¹⁰

Piracy is admittedly one of the most difficult subjects to define, and there is perhaps no definition of it that is not susceptible of criticism, either in that it includes too much, or is not sufficiently broad, or in that it describes acts that constitute the offense. It has been

¹⁰ Hall, Int. Law, p. 257. Wools. Int. Law, § 144, says: "It is the act (1) of persons who form an organization for the purpose of plunder, or with malicious intent; but who, inasmuch as such a body is not constituted for political purposes, cannot be said to be a body politic; (2) of persons who, having in defiance of law seized possession of a chartered vessel, use it for the purpose of robbery; (3) of persons taking a commission from two belligerent adversaries. The reason for ranking these latter among pirates is that the *animus furandi* is shown by acting under two repugnant authorities.

Field, Int. Code:

"Sec. 82. Every person whosoever, who, being an inmate of a private ship, upon the high seas, as defined by article 53, willfully and not in self-defense: (1) destroys or seizes by force and appropriates, any other ship, or its lading, or any part of either; or, (2) kills, wounds, or seizes by force and abducts any inmate whatever of any other ship,—is deemed a pirate.

"Sec. 83. Every person whosoever, who, without authority from the owner, and with intent to injure, vex, or annoy any person whomsoever, or any nation whatever: (1) removes, destroys, disturbs, obstructs, or injures any oceanic telegraphic cable not his own, or any part thereof, or any apparatus or apparatus therewith connected, or severs any wire thereof; or, (2) destroys or injures any international railway, canal, lighthouse, or any other structure or work, the perpetual neutrality of which has been declared; (3) or who beyond the territory of any nation reduces to slavery or holds in slavery, any person whomsoever, or conveys, or receives with intent to convey, any person whomsoever as a slave,—is deemed a pirate."

maintained that the act must be done *lucri causa*, and the English common-law definition of *animus furandi* must be considered as a requisite. It is true that most of the cases of piracy possess these characteristics, but in many cases ships are destroyed, their cargoes sunk, and other similar acts committed, without any idea of gain, but through motives of gratuitous malice, or the satisfaction of private revenge for real or supposed wrongs or injuries by persons or classes of persons, or state communities. These acts constitute in effect a menace to all nations, and, notwithstanding the absence of intention of making gain, their criminality is evident. Acts of piracy have one common ingredient, which is that no state can or should with justice be held responsible for them. If the act of violence is done under the authority of a state, or in such a manner that its authority is manifest, the state is responsible, and it alone exercises jurisdiction. For instance, if a public vessel of a state commit acts of violence, recourse is had to the state itself for redress, and if a murder or similar act is committed on board of a vessel belonging to the state, by a sailor or person on board, the laws of this state must be exerted. On the other hand, when acts of violence are committed on the ocean by a body of men who are under no recognized authority, or by members of a crew who have by acts of violence displaced the constituted authority of the vessel, all states have the right to treat them as pirates. They are considered as pirates *jure gentium*, and can be seized and tried by any nation, irrespective of their nationality. They are considered as *hostes humani generis*,—enemies not of one nation or of one sort of people but of all mankind.¹¹ This common jurisdiction probably arises from the fact that the acts

¹¹The following suggestions are offered as to the elements of piracy *jure gentium*:

1. It is not necessary that a purpose to depredate on property, beyond such as belongs to one nation or one class of persons or one individual, should be proved or artificially presumed.

2. The motive need not be *lucri causa*; nor need the acts and intent square themselves to the English common-law definitions of *animus furandi*, or malice. It is enough if the *corpus delicti* exists, and the animus be one which the law of nations regards as criminal, and hostile to the rights of persons and property on the high seas.

3. Although the act and intent may be sufficient to constitute piracy, all nations have not jurisdiction to try it, unless it was committed beyond

are usually committed upon the high seas, where no one nation has jurisdiction, or in a vessel over which there is no national authority.

In the case of *U. S. v. Smith*, Judge Story says that the acts of congress of March 3, 1819, and of 1790, passed to carry out the constitutional provision authorizing congress to "define and punish piracies," which merely referred to the offense of piracy "as defined by the law of nations," was sufficiently defined to meet the requirements of the constitution. In considering whether the crime of piracy is defined by the law of nations with reasonable certainty, he said: "what the law is on this subject may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and, whatever may be the diversity of opinions in other respects, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is also held by all the great writers on maritime law, in terms that admit of no doubt. The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code but as an offense against the law of nations (which

the exclusive jurisdiction of any nation. To put it in such predicament, the act must have been committed not only on the high seas, but beyond that kind of jurisdiction which all nations concede to each nation over vessels sailing the seas under at once its *de facto* and *de jure* authority and responsibility, and in the peace of all nations. Crimes, therefore, of whatever character, committed on board by inmates of such vessels, are not justiciable of all nations. But, if such a vessel passes into the control of the robbery or murderers on board, and the lawful authority is in fact displaced, and she becomes an outlaw, any nation may seize the vessel and try the criminals. So, if the persons on board any kind of sea-craft, not in fact under any national authority and responsibility, and acting in defiance thereof, board a duly authorized vessel sailing in the peace of all nations, and commit robbery or murder on board, and depart, leaving the vessel to its regular authorities, they may still be tried as pirates by any nation in whose jurisdiction they may be found; although the cruisers of a foreign nation, by reason of the rule against international interference, could not have them taken out of such a vessel, if, after their acts were completed, they had been secured by the authorities of the vessel and confined in her, to be taken to port for trial. Wheat. Int. Law, D, note 83.

is part of the common law); as an offense against the universal law of society, a pirate being deemed an enemy of the human race." This offense is generally referred to as one committed upon the high seas, and there is no doubt that piracy cannot take place without some connection with the sea. But a pirate does not lose his piratical character by landing upon state territory, and it will be noted that Mr. Hall includes in his definition of piracy acts of violence committed upon unappropriated land; and his definition, taken in connection with the antecedent explanatory remarks, "If however a body of pirates land upon an island unappropriated by a civilized power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy. In so far as any definitions of piracy exclude such acts, and others done by pirates elsewhere than on the ocean but of the kind which would be called piratical if done there, the omission may be assumed to be accidental,"—is in accord with modern practice.¹²

SAME—REBELS AND INSURGENTS AS PIRATES.

75. Ships and their crews belonging to insurgents, while confining their acts to the parent government, are not to be treated as pirates, but they may become such by extending their hostile acts to the ships or subjects of foreign states.

Acts of rebels or insurgents, if done under the sanction of an organized community or sovereign state, would be considered as acts of war. After belligerency has been recognized they in fact become lawful as acts of war, but previous to such recognition they possess all the characteristics of piracy, or at least would be technically so classed. It is true that the test of piracy is the want of

¹² For definition: "piracy jure gentium," vide *U. S. v. Smith*, 5 Wheat. 153; *U. S. v. Palmer*, 3 Wheat. 610; *U. S. v. Klintock*, 5 Wheat. 152; *U. S. v. Pirates*, Id. 185; *U. S. v. Holmes*, Id. 412; *Woods. Int. Law*, § 144; 1 *Calvo, Int. Law*, § 485 et seq.; *Hall, Int. Law*, pp. 252-261; *Wheat. Int. Law*, D, § 122 et seq., and notes 83, 84; 1 *Phillim.* p. 388, § 357 et seq.; *Bluntschli*, §§ 342-352; *Mann. Int. Law (Amos)* pp. 120-122; 1 *Halleck, Int. Law*, p. 306, note 1; *Whart. Dig.* § 380.

competent authority, but the acts of insurgents are performed for the purpose of establishing a new order of things, or a new community, and are undertaken for a public end in contradistinction to a private pursuit for the satisfaction of personal greed or personal vengeance by means of murder or robbery on the high seas. Such persons are not, and should not be, considered as enemies of the human race, but simply as enemies of the particular country against which their acts are directed. If, therefore, the insurgents limit their acts to such as are recognized as pertaining to belligerents, they should not be considered as piratical. If, on the other hand, their acts are not limited as stated, but they are guilty of indiscriminate plunder and other acts of violence, or the society which they represent is not sufficiently stable to hold out guaranties that their acts will be so limited and controlled, they can be treated as pirates. The right to treat these people as pirates when they overstep the bounds of recognized belligerency must be recognized, because, if denied, the commerce of all nations would be at the mercy of all marauders and irresponsible insurgents, under the cloak of war. In the case of *U. S. v. The Ambrose Light*,¹³ it was held that a vessel on the high seas, in the hands of insurgents who have not been recognized as belligerents by any independent nation, may be regarded as piratical; but the decision in this case has been very much criticised, and in Wharton's Digest (section 381) the author not only severely criticises it, but cites letters to the same effect from Fiore, Martens, Baron de Neumann, Calvo, and others.¹⁴ As illustrating the foregoing, certain cases arose during the Civil War in this country, in 1861-1865. In the case of *U. S. v. Baker (The Savannah)*,* Judge Nelson instructed the jury that the offense committed by the crew was not piracy according to the law of nations, for the evidence showed, if anything, an intent to depredate upon the property of one nation only, the United States, which falls far short of the spirit and intent which are said to constitute the essential elements of the crime. If the acts consti-

¹³ *U. S. v. The Ambrose Light*, 25 Fed. 408.

¹⁴ 3 Whart. Dig. § 381; *The Magellan Pirates*, 1 Spinks, 81; 1 Calvo, Int. Law, p. 591, § 503; *U. S. v. Baker*, 5 Blatchf. 6, Fed. Cas. No. 14,501; Wools. Int. Law, § 145; Hall, Int. Law, pp. 254-256.

* 5 Blatchf. 6, Fed. Cas. No. 14,501.

tuted piracy in this case, it was only such by virtue of the act of congress of 1820, and may be denominated a statute offense, as contradistinguished from that known to the law of nations. In 1877 the crew of the Peruvian monitor Huascar revolted, and declared for the insurgent government of Pierola. This ship proceeded to sea without opposition, and on the following day the Peruvian government issued a decree stating that it would not be responsible for the acts of the persons on board of the Huascar, of whatever nature they might be. In the course of the next few days this vessel took a supply of coal from a British ship without making any arrangement for payment, and also stopped a British steamer, and took from her by force two government officials. The English admiral in charge of the Pacific squadron caused the cruiser Shah to attack the Huascar. As a result of the undecisive engagement, the latter vessel was enabled to escape and surrender to the Peruvian squadron. The Peruvian government demanded satisfaction from England for this attack, and the question was submitted to the law officers of the crown, who reported, in effect, that the acts of the Huascar were piratical. The course pursued by the English admiral was therefore approved.¹⁵

SAME—LETTERS OF MARQUE—PRIVATEERS.

76. Persons taking letters of marque from one of two belligerents are not regarded as pirates jure gentium.

The practice of fitting out privateers has been practically abandoned by all nations since the treaty of Paris, to which the largest portion of the civilized states are signatories. The United States did not sign this treaty, but the uniform practice of the country has been averse to the practice of granting such letters, and in the Civil War, although authorized by Congress, the President declined to act upon the authority; and all of the vessels of the Southern States were commissioned cruisers of the Confederate government. A privateer of an organized rebellious community, acting under letters of marque given by the supreme authority ac-

¹⁵ Hall, Int. Law, p. 262; 3 Whart. Dig. p. 474, § 381; The Carthagenæ, Whart. Dig. 466, and Hall, Int. Law, 261.

According to law, is not doing piratical work when, in a state of open war, it preys on the commerce of its enemy, although its government be as yet unrecognized, for (1) there is in this case no *animus furandi*; (2) the commission is a special one against a particular enemy, and not against mankind; (3) and thus the captures made by such a vessel will not be noticed by the courts of neutral countries as crimes against the law of nations.¹⁶

SAME—SLAVE TRADE AS PIRACY.

77. The slave trade is not piracy by the law of nations.

In the United States and England the slave trade has been declared to be piratical, and is punished as such under the municipal codes of the two states, but the effect of this extension of an international offense beyond the recognized limits of international law can have no effect upon others than subjects, or foreigners under the jurisdiction, of the enacting states. No municipal definition extending or limiting the definition of piracy by the law of nations can have any extraterritorial effect. In the United States the government maintained that the British position, "that American citizens employed on French privateers in the war with revolutionary France were pirates," and that the French decree, "importing that every privateer of which two-thirds of the crew should not be natives of England, or subjects of a power the enemy of France, shall be considered a pirate," were in conflict with settled principles of international law, and in contravention of the law of nations.¹⁷

¹⁶ Hall, *Int. Law*, pp. 258, 259; Wools. *Int. Law*, § 146; Whart. *Dig.* § 381; *Ford v. Surget*, 97 U. S. 619; *Dole v. Insurance Co.*, 6 Allen, 373; *Planters' Bank v. Union Bank*, 16 Wall. 483.

¹⁷ Whart. *Dig.* § 382; Hall, *Int. Law*, p. 264; Wools. *Int. Law*, § 146.

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CHAPTER VI.

THE AGENTS OF A STATE IN INTERNATIONAL RELATIONS.

- 78. Who are Agents in International Affairs.
- 79. Public Diplomatic Agents—Classification of.
- 80. Refusal to Receive Diplomatic Agent.
- 81. Commencement of Mission.
- 82. Rights of Diplomatic Agents.
- 83. Termination of Mission.
- 84. Rights of Diplomatic Agents in Third States.
- 85-86. Consuls.
- 87. Functions
- 88. Appointment.
- 89. Dismissal.
- 90. Privileges.

WHO ARE AGENTS IN INTERNATIONAL AFFAIRS.

- 78. The agents of a state in international affairs are:**
- (a) The person or persons to whom is delegated the management of the foreign affairs of the state by the constitution.
 - (b) All persons directly subordinate to them. The latter are generally designated as diplomatic agents.

In the United States the executive department of the government is charged with the management of foreign relations, and appoints all subordinate agents, subject to ratification by the senate. In all states there is a department known as the "Department of Foreign Affairs," which in this country is called the "State Department," whose duties are to communicate directly with foreign governments through the agents of these governments accredited to the countries. All such agents or departments are established by the public law of each state. International law has nothing to do with the particular form of government, and in consequence the only information necessary for foreign governments in this respect is as to who are

the proper agents with whom they are to establish relations of intercourse, etc. It is enough for them to know that the designated persons are in possession of the powers requisite for carrying on the business pertaining to foreign relations.

DIPLOMATIC AGENTS.

79. Public diplomatic agents are:

- (a) **Ambassadors, legates, and nuncios.**
- (b) **Envoys and ministers plenipotentiary.**
- (c) **Ministers resident, accredited to the sovereign.**
- (d) **Chargés d'affaires, accredited to the minister of foreign affairs.**

The relations of states are carried on by means of diplomatic agents, who are charged with the general affairs of their own state in the foreign state to which they are duly accredited. In some instances the diplomatic agent is accredited temporarily, for the purpose of negotiating a special treaty, etc. The right of sending diplomatic agents pertains to each sovereign state, and all states at the present time have their representatives in each of the civilized states of the world. So great and complex have become the relations of states that it is now regarded as a necessity for states to maintain diplomatic relations, and so firmly fixed is this right of intercourse that, after having once entered into diplomatic relations with a state, the dissolution of these ties is regarded as a breach of friendship, and is the step usually taken immediately preceding a war.

SAME—REFUSAL TO RECEIVE DIPLOMATIC AGENT.

80. Ordinarily one state cannot refuse to receive a diplomatic agent accredited to it by another state. To this rule there are exceptions, as follows:

- (a) **When the sovereignty of the state sending the agent is doubtful, as in the case of a civil war, when both factions claim the sovereignty, or when a new state has just been formed, the state to which he is sent may refuse to receive him.**

- (b) A state can refuse to receive an agent whose mission appears to be inconsistent with its interests or dignity.
- (c) A state may refuse to receive a particular individual as an agent without giving cause for offense.

The first class does not require any special illustration, because it is apparent that a state is entitled to know with whom it enters into relations, for reasons that have been previously explained. England refused to receive the legate or nuncio of the pope when he was a temporal sovereign. In 1875 the pope refused to receive Prince Hohenlohe as ambassador from Germany, because, being a cardinal, he was, *ex officio*, a member of the curia. Many more instances have occurred in which states have refused to receive agents when doing so would imply an acquiescence in claims that are inconsistent with the rights of the state. When the political opinions of a particular individual are known to be at variance with the established régime, also when the person appointed is a citizen of the state to which he is sent, all states can and many do make it a rule never to receive such person as an agent. Finally, any person can be refused who is personally objectionable to the sovereign of the state to which he is sent, or who is *persona non grata*. It has been suggested as a prudent and safe course to consult the nation to whom the agent is to be accredited, before designation, in order to ascertain if the appointment would be satisfactory, so as to avoid all doubt as to the acceptability of the appointee. The right of a state to send whom it pleases as its representative to a foreign state is exclusive, and, if the state to which the representative is accredited refuses to receive him, such refusal should not be based upon trivial grounds, or upon grounds that are not considered commendable by the former state. The refusal in such case need not be acquiesced in. In case the state has made the preliminary inquiry as to the acceptability of the proposed representative, and no objection is urged, a refusal to accept must be based upon good cause.¹

¹ Bluntschli, § 168; Hall, *Int. Law*, pp. 297, 298.

SAME—COMMENCEMENT OF MISSION.

81. A permanent diplomatic mission commences when proper credentials have been presented to and received by the accrediting government. A temporary mission commences when proper credentials are presented to other similar agents.

A diplomatic agent is entitled to enter upon the duties of his office only after he has presented his credentials to the government to which he is sent and they have been received by it, or, in case of a temporary mission, when these credentials have been presented to and received by the agents of the other governments. The papers with which an agent accredited to a single state is usually furnished are known as "letters of credence" and the "full power." At one time both were contained in one letter, but at the present time they are separate. The letter of credence generally contains the name of the bearer, specifies his rank, and bespeaks credit for what he will communicate in the name of his government. The "full power," or letter patent, specifies the powers conferred upon the agent, and is always furnished when the mission of the agent is special or temporary, and also when the permanent agent is charged with the negotiation of a special treaty, under which circumstances he is furnished with a separate letter patent conferring the special powers. On the other hand, ambassadors sent upon special missions are not provided with letters of credence, as their letters patent contain their full powers.

SAME—RIGHTS OF DIPLOMATIC AGENTS.

82. As soon as a diplomatic agent enters upon the exercise of his functions, he becomes possessed of all the rights pertaining to inviolability; the state to which he is accredited being bound, not only to abstain from all acts of violence, but to protect him from its inhabitants.²

² Vide "Immunities," ante, p. 68.

He is especially exempt from all violence directed against him for political reasons, from being held as a hostage, or kept as a prisoner of war. All attacks upon his person are regarded as attacks upon his state, and in some cases as an offense against all the states, or an international offense. In regard to the immunities from local jurisdiction, the subject has been sufficiently discussed under the appropriate heading. Diplomatic agents enjoy immunities previous to the time at which they assume the functions of their office. In so far as the country sending him is concerned, he becomes its representative from the moment his appointment is complete, so that, as between the appointing state and the accrediting state, he is entitled to inviolability from the time he reaches the latter state until he leaves it, and this because the passports indicate the diplomatic character of the holder.

SAME—TERMINATION OF MISSION.

83. The mission of a diplomatic agent is terminated in the following ways:³

- (a) By recall.
- (b) By dismissal by the accrediting government.
- (c) By war or the interruption of amicable relations between his own and the accrediting government.

³ Bluntschli, § 237: "The diplomatic mission can be interrupted, and the validity of letters of credence rendered doubtful, in the following cases: (a) Through difficulties resulting in the temporary suspension of diplomatic relations, without causing a complete rupture; (b) as a result of a revolution in one of the two countries, the issue of which is uncertain; (c) when personal reasons prevent temporarily the agent from fulfilling his functions."

3 Calvo, *Int. Law*, § 1363: "Les missions diplomatiques prennent fin (1) par la mort ou la démission de ceux qui les remplissent; 2 par la mort du souverain qui a accredité l'agent, ou par une modification radicale de la forme de son gouvernement; (3) par l'expiration ou la révocation des lettres de créance; (4) par la réalisation même de l'objet en vue duquel la mission a été donnée; (5) par le rappel spontané ou formellement demandé du ministre; (6) par une déclaration de guerre ou par une simple interruption des relations d'amitié."

- (d) **By death of the agent.**
- (e) **By personal departure of the agent for cause stated.**
- (f) **By expiration of letter of credence.**
- (g) **By completion of the specific duty for which letters of credence were issued.**
- (h) **Perhaps by death of the sovereign, in monarchical countries.**
- (i) **By a change of government through a revolution.**

There is a difference of opinion as to whether the death of a monarchical sovereign of either of the two countries puts an end to the mission, but the practice is to issue new letters of credence. The accredited agent continues the exercise of his functions, and does not lose rank on account of the issuing of the new letters. This does not apply to republican governments, where the death or change of the president by election causes no change in the diplomatic agents, and this is true also in the case of the election of a new pope.⁴ Mr. Calvo says that a government is bound to recall an agent who has become personally unacceptable to the government to which he is accredited, on the information being communicated that he is so, and that it has no right to ask for any reason to be assigned. Mr. Hall, on the contrary, holds that courtesy to a friendly state exacts that the representative of its sovereignty shall not be lightly or capriciously sent away; if no cause is assigned, or the cause given is inadequate, deficient regard is shown to the personal dignity of his state; if the cause is grossly inadequate, or false, there may be ground for believing that a covert insult to it is intended. A country therefore, need not recall its agent, or acquiesce in his dismissal, unless it is satisfied that the reasons alleged are of sufficient gravity in themselves. In justice to him his government also may, and usually does, examine whether his conduct in fact affords reasonable foundation for the charges brought against him; in the larger number of instances which have occurred, states have been very slow and cautious in consenting to recall, and no modern case seems to exist in which dismissal has been held to be justified.⁵ The United States main-

⁴ Calvo, *Int. Law*, § 1367; 1 Halleck, *Int. Law*, 304.

⁵ Hall, *Int. Law*, pp. 302, 303, and note.

tains the former view as the correct one. "The official or authorized statement that a minister has made himself unacceptable, or even that he has ceased to be *persona grata*, to the government to which he is accredited, is sufficient to invoke the deference of a friendly power, and the observance of the courtesy and the practice regulating the diplomatic intercourse of the powers of Christendom for the recall of an objectionable minister."⁶ The government of the United States will acquiesce in a demand of a foreign government for the recall of a minister who is personally unacceptable to such government. Mr. Yrujo, the Spanish minister to the United States in 1806, was accused of attempting to bribe a Philadelphia newspaper to advocate the Spanish view of a boundary question then in controversy between the United States and Spain, and of writing some insolent letters to the president later on. The United States demanded his recall, which was finally acceded to by Spain. Mr. Jackson's (the British minister) recall was demanded by the United States in 1809 because, in a toast at a public dinner, he had accused the administration of falsehood and duplicity. The English government consented to his recall, but maintained that Mr. Jackson had not committed any intentional offense against the United States. Again, in 1871, Mr. Cataczy, the Russian minister to the United States, by his conduct "for some time past impaired his usefulness to his own government, and rendered intercourse with him, for either business or social purposes, highly disagreeable," and his recall was demanded, but his presence was tolerated for some time afterwards, under an agreement between the two governments.⁷ The recall of Lord Sackville was demanded in 1888, and three days afterwards he was dismissed by the United States, because of interference in the internal affairs of the country. He had written a letter to a naturalized subject of Great Britain, advising him in regard to voting for a candidate for the presidency.⁸

⁶ 1 Whart. Dig. pp. 611, 612, § 84.

⁷ 1 Whart. Dig. § 84.

⁸ Mr. Fish, Secretary of State, to Baron Gerolt, November 21, 1870. For. Rel. 1870.

SAME—RIGHTS OF DIPLOMATIC AGENTS IN THIRD STATES.

84. The rights of diplomatic agents in third states are as follows:

- (a) A diplomatic agent is entitled to a right of innocent passage through a friendly third state, en route to and from the state to which he is to be accredited; but this right is qualified by the right of the third state to prescribe the route to be pursued, and by the condition that there shall be no unnecessary delay in the journey.
- (b) A diplomatic agent has no right to enter the territory of a state which is at war with his own country, even though accredited to a friendly country, and, if found on such territory, his seizure cannot be considered an offense against international law.
- (c) Diplomatic agents sent to a congress or conference are considered as directly representing their states, and, as such, entitled to complete diplomatic privileges in friendly states.
- (d) A diplomatic agent accredited to a state which is at war with a third state is accorded the usual rights of inviolability by the last-named state.

The Right of Passage through a Friendly State.

Authorities are not in accord as to the rights of an ambassador in friendly third states. According to one view, the right of inviolability depends upon the same principle as that of a sovereign coming into a friendly third state with the express or implied permission of the local government. That both are equally entitled to the protection of that government, against every act of violence and every species of restraint inconsistent with their sacred character, and permission to enter such territory, is implied, in the absence of any prohibition. The other view is that there is no practical reason for such immunities, since he does not represent his country, except when actually engaged in his diplomatic business; his diplomatic

character is separable from his personality, he having usually no functions except in the state to which he is accredited; and cases have occurred where such agents have been pursued both by civil and criminal process, while in transit through the territory of friendly powers. In 1854 Mr. Soulé, United States minister to Spain, was stopped at Calais by the French government, which, while conceding the right to pursue the direct route through France to Spain, declined to permit him, in consequence of his political antecedents, to make, on his way, a stay ("séjour") in Paris.* The rule in the United States, as expressed by Attorney General Cushing, is that "a person coming into the United States as the diplomatic representative of a foreign state, with credentials from governing powers not recognized by this government, is accorded the diplomatic privileges merely of transit, and this of courtesy, not of right, and such privilege may be withdrawn whenever there shall be cause to believe that he is engaged in, or contemplates, any act not consonant with the laws, peace, and public honor of the United States."

Diplomatic Agents of a Country at War with Another.

It is clear that such an agent is not only an enemy, but one that is particularly noxious to the state at war with his own government, on account of the nature of his duties. The leading case illustrating this is that of Maréchal de Belleisle in 1744. He was appointed ambassador from the French to the Prussian court, and when on his way to Berlin he was found upon the territory of Hanover, which country and England were at the time at war with France. His seizure and transfer to England as a prisoner of war were not complained of by himself or his government.

Agents of a Friendly State Accredited to a State at War.

This question arose during the siege of Paris in 1870, when the German authorities declined to permit a messenger with dispatches from the United States minister at Paris to pass through the lines of the German army, except upon condition that the contents of the bag containing the dispatches be left unsealed. Secretary Fish caused the American minister at Berlin to make formal complaint to the German government, maintaining that this action was an uncourteous one, which could not be acquiesced in by the United States.

* Whart. Dig. § 97; Calvo, Int. Law, § 1535.

"Blockade by both sea and land is a military measure for the reduction of an enemy's fortress, by the preventing of relief from without, and by compelling the troops and inhabitants to surrender for want of supplies. When, however, the blockaded fortress happens to be the capital of the country where the diplomatic representative of a neutral state resides, has the blockading force a right to cut him off from all intercourse by letter with the outside world, and even with his own government? No such right is either expressly recognized by public law, or even alluded to in any treatise on the subject. The right of legation, however, is fully acknowledged, and, as incident to that right, the privilege of sending and receiving messages. This privilege is acknowledged in unqualified terms. There is no exception or reservation looking to the possibility of blockade of a capital by a hostile force. * * * Indeed, the rights of legation under such circumstances must be regarded as paramount to any belligerent right. They ought not to be questioned or curtailed, unless the attacking party has good reason to believe that they will be abused, or unless some military necessity, which upon proper statement must be regarded as obvious, shall require the curtailment."¹⁰ This seems to place the rights of neutrals above those of belligerents, which, granting that all that is said in regard to the rights of belligerents in the premises, not being expressly recognized, to be true, the deductions made can scarcely be conceded to be true. The right of legation is a right existing between the two states interested, and is not of such a nature as to compel a third state to forego its belligerent rights. This is practically conceded by *Secrétary Fish* in the last sentence above quoted. As a matter of courtesy, it must be admitted that a belligerent should permit a friendly state to send and receive dispatches from its ministers, even in the country of its enemy, since the presumption is that this correspondence is carried on in good faith, and, as a rule, no military necessity will exist for interfering with such correspondence.

¹⁰ *Mr. Fish, Secretary of State, to Mr. Bancroft, American Minister to Germany, Nov. 11, 1870. MSS. Genn. For. Rel. 1870. 1 Whart. Dig. pp. 661-662, § 97.*

CONSULS.

85. Consuls are persons appointed by a government to reside in a foreign country, with permission of the latter, for the purpose of watching and protecting the interests of the subjects of the appointing state, and generally of promoting its commercial interests.

86. Consuls are classified by each country, and the duties of each prescribed, the general classification being into—

- (a) Consuls general.
- (b) Consuls.
- (c) Vice consuls.
- (d) Consular agents.¹¹

The classification is not material to international law, as all consuls, of whatever grade, are essentially commercial agents, and, while agents of the state, they occupy a different status from that of ambassadors and ministers. They are, in general, subject to local law, while the latter, as previously explained, are not; and it has been determined that they are not entitled to represent their sovereign in negotiations with foreign states, or to vindicate his prerogative.

SAME—FUNCTIONS.

87. The functions of consuls are determined by the laws of their own country, or by treaties. The more important duties are:

- (a) To watch over the commercial interests of the country he represents, and to see that the local

¹¹ Field, Int. Code, § 160: "The various classes of consuls, and their relative rank and powers, are fixed by their respective nations." By the United States consular regulations (1870, art. 1), the consular service of the United States consists of the following officers: Agents and consuls general; consuls general; vice consuls general; deputy consuls general; consuls; vice consuls; deputy consuls; consular agents; commercial agents; vice commercial agents; consular clerks; and office clerks.

laws are properly administered in reference to its subjects, and to see that commercial treaties are carried out.

- (b) To report to his own government information collected in regard to commercial, economical, and political matters.
- (c) To receive protests from masters of vessels; grant passports; act as depositary of sundry ship's papers; authenticate births, deaths, and marriages; authenticate certain judicial and mercantile instruments; and administer the property of citizens of his country within his district.
- (d) To reclaim deserters from vessels, provide for such as may be destitute, send them home if necessary, and discharge such as have been cruelly treated.
- (e) To arbitrate on differences voluntarily brought before him by his countrymen, especially in regard to matters taking place on shipboard, and commercial matters, and to exercise disciplinary jurisdiction over crews of vessels belonging to his own state, but not to the exclusion of the local jurisdiction.

In certain non-Christian countries the status of consuls is very much changed, and their duties very much enlarged. The jurisdiction of the consuls of practically all of the civilized governments in such countries as China, Japan, Turkey, and some others, is very much enlarged, and is regulated by treaties, and the municipal laws of these countries. In the United States and Great Britain, statutes have been passed conferring jurisdiction upon the diplomatic and consular agents. This, however, pertains to municipal, and not international law.

SAME—APPOINTMENT.

88. Consuls are appointed as follows:

- (a) A consul general or consul is always appointed by a commission or patent, which is commu-

nicated to the government where he is to reside. This government, upon its receipt, issues to the person named an exequatur or commission authorizing him to perform the duties of the office, and guaranties rights possessed in virtue of it.

- (b) A vice consul is usually appointed by patent, but may be nominated by the consul to whom he is subordinated, and receive recognition by the issuance of an exequatur.
- (c) A consular agent is appointed and confirmed like vice consuls, except that in the United States he does not receive an exequatur.

Consuls may be citizens of the appointing state, who accept the office solely with the view of representing their country where appointed, or they may be citizens of such state in business in the country where appointed, or they may be citizens of the country where they act as consul.

The above is the mode usually followed in the appointment of consuls, but different countries have different practices, though the result in each case is substantially the same. An exequatur does not issue as of course, and, for good cause, may be refused by the country in which commissioned.

SAME—DISMISSAL.

89. A consul may be dismissed, and his exequatur revoked, for illegal or improper conduct, and may be punished or sent out of the country, at the option of the offended country.¹²

This revocation of an exequatur is seldom resorted to, but may be, at the option of the offended government, and especially for political offenses. It is conceded that a government may, without cause given, revoke an exequatur, because, consuls not being representa-

¹² *Coppell v. Hall*, 7 Wall. 542; 2 Op. Attys. Gen. 725; *Pitt-Cobbett*, Cas. Int. Law, p. 119.

tives of their state, the country in which they reside can certainly determine when the performance of the functions of the office upon its territory shall cease. Mr. Bunch, the British consul at Charleston at the beginning of the war in 1861, being instructed by his government, in connection with the French government, to communicate with the so-called Confederate States the desire of those governments that the second, third, and fourth articles of the declaration of Paris should be observed by those states, entered upon such communication with the Confederate authorities. The government of the United States, for this, as well as for other reasons, revoked Mr. Bunch's exequatur. Great Britain sustained the action of the consul in this case, and no good reason is apparent why he should not have communicated with a de facto government in regard to the protection of the commerce of his own country, and the recall being acquiesced in by his own government shows that it recognized the right of recall without satisfactory cause being stated to the government of the consul.¹⁸

SAME—PRIVILEGES.

90. Consuls, not being diplomatic agents, are not entitled to diplomatic immunities, but are subject to both the civil and criminal jurisdiction of the country in which they perform their functions. The official position according to custom may be said to carry with it the following privileges:

- (a) Exemption from arrest for political reasons.
- (b) Exemption from personal taxes, and from having soldiers quartered in his house.
- (c) The right to attach the arms and flag of his country upon his house.
- (d) And generally such privileges as may be necessary to enable him to perform the duties of his office, which must be subordinated to his liability to local jurisdiction.

The United States has, by the constitution, placed consuls under the jurisdiction of the circuit and supreme courts; but a foreign con-

¹⁸ Whart. Dig. § 116; Hall, Int. Law, pp. 317, 318.

sul, though not amenable to the jurisdiction of a state court, may maintain a suit in any of such courts. It has been the practice of this country to accord all the privileges possible and consistent with the constitution. The privileges accorded under the last general heading consist in exemptions from the performance of such acts as will prevent the consul from being present at his consulate for the performance of his duties, or going wherever necessary for the same purpose. They are, in consequence, usually exempt from jury duty, and from service in the militia or national guard. The archives of the consulate are inviolable, as well as other papers of the consulate. If a consul is appointed chargé d'affaires, he becomes entitled to diplomatic immunities, but solely by virtue of his office as such agent, and not as a consul. When a consul is duly accredited to a particular locality, changes in the government do not affect his position as such agent, and do not require a new exequatur. This was illustrated during the Civil War in this country, when consuls in parts of the Confederate States continued to perform the duties of their office. The consulate during actual hostilities is usually designated by the raising of the flag of the country of the consul, and the combatants are bound to protect it, in so far as possible under the circumstances. This is based upon usage, and is a courtesy a failure to observe which is justified only by military necessity, or when the consulate is used as a place of refuge for the enemy.¹⁴

¹⁴ General subject of privileges of consuls, etc., vide 1 Halleck, *Int. Law*, pp. 313-324, and note 1, pp. 316-318, which see for extracts from consular regulations of the United States for 1870; Hall, *Int. Law*, pp. 318-322; 1 Whart. Dig. §§ 120-121; Bluntschli, § 272; Calvo, *Int. Law*, § 1395 et seq.

CHAPTER VII.

INTERVENTION.

IN GENERAL.

91. Intervention consists in the interference by a state or states in the relations of other states without the consent of either or all of them, or in the interference in the domestic affairs of another state, irrespective of the will of the latter, for the purpose of either maintaining or altering the actual condition of things. It differs from mediation and arbitration in that it implies the actual or threatened use of force.¹

Intervention is necessarily an attempt to limit the freedom of action of the state subjected to it, and, from the standpoint of the state upon which it is imposed, it is a hostile act, which, not being consented to, is an act of war. When this takes place within a single state, it is in the interest of a party of the state, and may be a pacific measure in the interest of the state as such. As it is a fundamental principle of international law that each state is bound to respect the independence of every other state, and interference in the affairs of a state is a direct attack upon this fundamental right, in order to justify such action it is necessary to base it upon some right which takes priority over the aforesaid right of independence. Naturally, the most satisfactory ground upon which such justification can be placed is that of self-preservation.

Self-Preservation.

When a government is not able to carry out, or will not carry out, its international obligations, and, as a result of this condition, the welfare of a neighboring state is threatened, either by actual attacks of the subjects or by stirring up revolutions or by threatening the neighboring state, the latter may take the necessary steps to preserve its safety, and in such a case may resort to war, or such

¹ Hall, Int. Law, pp. 281-283; Whart. Dig. § 45; Creasy, Int. Law, p. 278 et seq.; Wools. Int. Law, § 42 et seq.; Bluntschli, §§ 474-480.

measures short of war as will insure the same result. Upon this right of self-preservation was based the action of the United States in regard to Amelia Island, which was situated at the mouth of the St. Mary's river, and at the time in Spanish territory. It was seized by a band of buccaneers under a man named McGregor, who, in the name of the insurgent colonies, Buenos Ayres and Venezuela, preyed indiscriminately upon the commerce of the United States and Spain. The Spanish government not being able or willing to drive them off, and the nuisance being one requiring immediate action, President Monroe sent a vessel of war to the island to drive them out and destroy their vessels and works.² A distinction must be drawn between the acts of a state which result in the conditions above stated as authorizing interference by the injured state, and the acts resulting in injury to a state on account of the particular form of government or state life of another. Although this may be the direct cause of injury to the institutions of its neighbor, yet the latter has no right to demand that it be changed, because each state has the right to live its own life in its own way. It pertains to each state to cause its own constitution to be respected and public order to be maintained, and international law is not concerned with these matters. The overthrowing of a government, the dethroning of a prince, the elevating to power of an usurper, and the depriving the people of certain constitutional rights, pertain only to the internal affairs of the state affected, and do not concern the relations of states.

Against Illegal Acts, Immoral Acts, etc.

In regard to illegal acts the most conspicuous example is perhaps that of the illegal interference in the affairs of another state. In such a case a third state may be authorized to interfere for the purpose of restoring to the state whose independence is affected its freedom of action. This right is based upon the ground that a state has authority to oppose acts contrary to law, and may even use force, provided the violation of law is of a sufficiently serious nature. Under the head of immoral acts should be classed religious persecutions, massacres, grievous oppressions of the subjects of a state, proceedings repugnant to humanity, etc. In all such cases there is

² Whart. Dig. § 50a.

no legal justification for interference, and the moral grounds advanced in support of such interference are not altogether satisfactory. It has been stated that the acts of oppression or persecution must be so serious in character and so great in degree as to incur the condemnation of the civilized world, and the interference must be participated in or sanctioned by all the states of Christendom. While, however, it is settled that, as a general rule, a state must be allowed to work out its internal changes in its own fashion, so long as its struggles do not actually degenerate into internecine war, intervention to put down a popular movement or uprising of a subject race is wholly forbidden, but intervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavor. The above statement is correct, and yet the safest and best rule is that interference in the affairs of another state should not be regarded as a right, except in cases where the security of the interfering state or its immediate interests are compromised, or upon the broad ground of self-preservation. EN

*Under a Treaty of Guaranty.*³

If a state cannot legally interfere in the internal affairs of another state, no treaty stipulation can make this act lawful. The guaranty of a protecting state, and the constitutional guaranty of a federal state to maintain a certain form of government in the protected or individual states of the union, are perfectly valid and legal; but the states to whom these guaranties run are not persons in international law, and hence the cases are not applicable. Such guaranties are contained in the constitution of the United States, the Germanic confederation, and in many cases of protected states; but the guaranties contemplated are those that seek to prevent the interference of an equal sovereign state in the affairs of another sovereign state, which cannot be justified upon any satisfactory grounds.

In this connection it is well to consider the claim made by some authorities⁴ that a foreign state has under certain circumstances

³ Hall, Int. Law, § 93; Vattel, Int. Law, bk. 2, c. 12, §§ 196, 197; 2 Phillim. Int. Law, § 56; 1 Halleck, Int. Law, p. 85.

⁴ Bluntschli, §§ 476, 477; Vattel, Int. Law, bk. 2, c. 4, § 56; 1 Halleck, Int. Law, p. 87; 2 Phillim. Int. Law, § 56 et seq.

the right to interfere in the affairs of a state involved in a civil war, as, for instance, at the invitation of either party to the conflict. If this interference is accorded at the instance of the party in charge of the affairs of the state, it is an indication that the previously established government is not likely to be able to succeed against the insurgents, and the chances of the latter becoming the legal representatives of the state are clearly good. On the other hand, if the interference is accorded at the instance of the insurgents, the independence of the existing government is violated. It is difficult to comprehend upon what grounds interference can be justified in either case, as the intervening state assumes to pass upon the merits of a case involving solely the internal affairs of a state which is outside of the domain of international law. Intervention in the internal affairs of a state are greater infringements of their independence than interference with their external affairs, and consequently require more weighty reasons to justify them.

*Balance of Power.*⁵

The maintaining of the balance of power as a right of interference cannot be said at the present day to receive the sanction of jurists or authorities upon international law. The meaning of the balance of power is that any European state can be restrained from making acquisitions or planning to make acquisitions which are deemed to be dangerous to the independence or national existence of its neighbors. It is immaterial as to the justness of the means employed provided the ends sought are purely political. The development of the internal resources of the country, acquisitions by European states outside of Europe, particularly of colonies, the development of the maritime power of a country, and the acquisitions made by countries outside of Europe, have not been considered as affecting this balance of power. In regard to the first named the reason is that there is no sudden development in wealth or population, such as to excite alarm. In regard to the acquisition of colonies the political balance is affected only in an indirect manner, and heretofore these have been considered rather as an element of weakness than strength, as each adds one more vulnerable point of attack for the acquiring country. The acquisition of power at sea

⁵ Whart. Dig. § 45; Lawrence, Essay, No. 5; Hall, Int. Law, § 95.

does not and cannot so directly affect the political relations of Europe as the acquisition of a similar land force would. In regard to the actions of outside states, as these cannot control or materially influence European affairs, they have not at any time been considered as threatening their political relations. This balance of power is in reality a measure of self-protection adopted by a body of states that are situated so closely to each other that any one is liable to invasion and attack from each of the others. The English authorities maintain that more cogent reasons exist for the exercise of the right of interference by a body of states than can be advanced for an individual state, because there is a likelihood that powers with divergent individual interests, acting in common, will prefer the general good to the selfish objects of a particular state, or that there is good reason to believe that intervention under the sanction of the body of states, even on grounds forbidden to the individual state, may be useful or beneficent, or, more generally speaking, that the results accomplished are more apt to justify combined than individual action. There is no more legal ground for the action of a body of states than exists in the case of individual states under the same state of facts, and the considerations expressed in support of the foregoing theory possess value upon purely moral grounds, if any.

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CHAPTER VIII.**NATIONALITY.**

- 92. Defined.
- 93. Citizenship.
- 94. Indelible Allegiance.
- 95. Expatriation.
- 96. Naturalization.
- 97. Effect of Incomplete Naturalization—As to New State.
- 98. As to Other States.
- 99. Status of Indians in the United States.

NATIONALITY DEFINED.

92. Nationality is that condition or state of a person or thing by virtue of which he or it forms an integral part of a particular nation. As applied to an individual it may be said to be the bond by which he is joined to the political community. It comprises the right which an individual possesses to the enjoyment of the civil and political privileges pertaining to the community, as well as the corresponding obligation to fulfill the duties imposed by the community.¹

The question of the nationality of a given person is primarily a subject for municipal law. Each independent state may determine who within its borders are subjects, and as previously determined can assume responsibility for the acts of persons which affect other states and their subjects. International law is therefore directly concerned with the nationality of persons, when the question of affording protection to subjects in foreign countries is considered. It then becomes necessary to determine what the nationality of the parties affected is, and certain rules must govern this decision. Not-

¹ Hall, Int. Law, 220-232; Calvo, Int. Law, § 539 et seq.; Walk. Int. Law, pp. 204-218; Bluntschli, §§ 364-374; 1 Halleck, Int. Law, c. 12; Whart. Dig. §§ 173-174a; Gallaudet, Int. Law, pp. 138-147; Snow, Cas. 213-219; Pitt-Cobbett, Cas. Int. Law, pp. 87-98.

Blackstone lays down the principle that, at Common Law, a person born abroad whose father, or Grand-Father, by the father's side, was a native born citizen of England is himself a native born citizen of England. (1 Bl. Comm. 366 note 1). No native born citizens of the U. S. etc. see 2 Min. Dec. 1634 seq.

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NATIONALITY.

withstanding the fact that a state cannot impose its nationality or citizenship upon an individual who is clearly the subject of another state, numerous cases arise in which the question of individual nationality is doubtful, and the rules of the different states for determining this nationality in disputed cases are not always in accord. In regard to all persons born in the territory of a state, of parents who are members of the state community, and foundlings, there can be no doubt, and no difference of opinion can exist as to their nationality, upon any of the theories for the determination thereof, but a large number of persons afford ample scope for difference of opinion in determining their status. Some such are the illegitimate children born of a foreign mother, foreign women who have married subjects of a state, children born of the subjects of one state within the territory of another state, persons who lose their nationality by emigration, citizens of one state who become naturalized in another, and the children of the two last-mentioned classes, especially before the loss of nationality or naturalization is complete. Nationality of birth or origin has been made by some states to depend upon the place of birth, by others to depend upon the nationality of the parents, and in some countries both of these elements exist, one or the other predominating. By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning in the country, was an English subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during hostile occupation of any part of the territories of England. No effect seems to have been given to descent as a source of nationality. The law of England as to the effect of the place of birth in the matter of nationality became the law of America as part of the law of the mother country, which the original settlers carried with them. Anterior to the Revolution a child born on French soil was a Frenchman, though born of foreign parents, as also was a child born of French parents out of French territory. This was changed by the Code Napoleon, which introduced the principle that a child should follow the nationality of the parents. This principle has been adopted by most civilized states, but some of them have modified it

by giving to the child the power of choice. The effects of the ancient rule have been obviated by other countries in various ways.

CITIZENSHIP.

93. Citizenship and nationality are practically synonymous, and certain rules are adopted in each country for determining the status of persons who are or claim to be citizens. The following rules may be given:

- (a) The citizenship of a person is determined by his nativity, or by naturalization in accordance with municipal law.
- (b) The citizenship of a female, in case of doubt, is that of her husband, or, if unmarried, is determined by municipal law.
- (c) Legitimate children in general acquire the nationality of their father, whether born in his country of nativity or not.
- (d) Illegitimate children, in the absence of recognition by the father, usually follow the citizenship of the mother.
- (e) Foundlings usually take their citizenship from the state upon which they are found, provided their parents remain unknown.

Citizenship is determined in the United States by the fourteenth amendment to the constitution, which provides that all persons born or naturalized in the United States, and subject to their jurisdiction, shall be deemed at once citizens of the United States and of the state in which they reside, and no state shall make or enforce any law abridging the privileges or immunities of such citizens.

Married Women.

The general rule in regard to married women is not followed in the United States. In case a woman marries a foreigner, she retains her nationality, but in case a foreign woman marries an American, she becomes a citizen of his country. In most countries the nationality of a married woman is that of her husband, and in France

it is held that where a woman marries a Frenchman, though the latter in so marrying commits bigamy, she nevertheless becomes French by the marriage.

Children.

In regard to children some countries, as previously stated, permit those born abroad to select a certain time after attaining their majority what country they will regard as their place of citizenship. In regard to illegitimate children the general rule seems to be departed from in England, where it is held that the illegitimate child of an Englishwoman born abroad takes the nationality of its place of birth. In the United States children born abroad, of citizens who continue to live abroad, are not citizens unless they elect to become such upon coming of age. It has been held that the child of Chinese parents born in the United States is a citizen,² but in the case of a child born of alien parents in the United States, but who had never lived in the country, it was held that he could not elect, upon attaining his majority, to be a citizen of the United States, although his parents had since become naturalized.³ In order for such a person to become a citizen he must become naturalized.

Persons Destitute of Nationality—Heimathlosen.

No one should be without nationality, and persons who are unable to furnish proof of foreign nationality should acquire it from the state in which they have their domicile, or where they have made a prolonged sojourn. Heimathlosen, or persons whose nationality cannot be determined, have been a cause of embarrassment in certain countries, especially in Germany and Switzerland. This has been settled by convention between the Swiss cantons and between the German states,—that all such should be considered to be subjects of the state within which they are living, provided they have remained there for five years after having attained their majority, or have stayed there six weeks after marriage, or, finally, have married there. This is the position in which subjects of such countries as

² *Ex parte Chin King*, 35 Fed. 354. The status of Chinese in the United States is difficult to determine. Compare treaty of immigration with China in 1882 (Treaties and Conventions of United States, etc., p. 182), with the acts of congress of 1884 and Geary act of 1892.

³ *Hausding's Case*, Snow, Cas. 222; *Mr. Frelinghuysen to Mr. Kasson*, For. Rel. U. S. 1885; also, Whart. Dig. § 183.

Austria find themselves in case they emigrate without permission of the state, it being the law that by so doing they lose their nationality.⁴

INDELIBLE ALLEGIANCE.

94. By indelible allegiance is meant the rule once adopted that no citizen of a state was able under any circumstances to change his nationality from that of his nativity, or of which he was a subject.

This doctrine of perpetual allegiance was one of the settled principles of the common law of England which was transmitted to and for some time formed the practice of the United States. It was stated as follows by England: "No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the king's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part." In the case of Aeneas Macdonald, who was tried for high treason, for having borne arms in the Rebellion of 1745, it appeared that the prisoner had been born in England, brought up from his early infancy in France, had in his riper years been employed in France, and held a commission from the French king. The English court held that a person taking a commission from a foreign prince, and committing high treason, may be punished for such treason, notwithstanding his foreign commission; that it was not in the power of any private person to shake off his allegiance and transfer it to a foreign prince, nor was it in the power of a foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between the subject and the crown. Allegiance is no longer regarded as indelible, whether arising from birth or from subsequent acquisition. It has been shown that both the Romans and Greeks recognized the right of a citizen to shake off allegiance due to one country, and take up the same in another.⁵

⁴ Hall, *Int. Law*, p. 224; Bluntschli, § 369.

⁵ Calvo, *Int. Law*, § 577; Field, *Int. Code*, pp. 136, 137; Cockb. *Nat. pp.* 6-14, and for McDonald's Case, *Id.* p. 64, note. Also, Snow, *Cas.* 214. Vide, also, Case of Williams, *Whart. State Tr.* 652; 2 Kent, *Comm.* p. 49.

U. States allow **EXPATRIATION.** *under any circumstances*

95. Expatriation is the act of abandoning the nationality of one community with intention of acquiring the corresponding status in another.

The right of expatriation, as stated by the United States, is as follows: It is the right of every human being, who is neither convicted nor accused of crime, to renounce his home and native allegiance and seek a new home, and to transfer his allegiance to any other nation that he may choose; and that having made and perfected that choice in good faith, and still adhering to it in good faith, he shall be entitled from his new sovereign to the same protection under the law of nations that that sovereign lawfully extends to his native subjects or citizens. In 1868 congress passed an act: "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas, it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." In the same year the United States executed treaties with the North German Confederation, Bavaria, Baden, Wurtemberg, Belgium, in the following year with Hesse, and in 1870 with Austria and England, recognizing the right of expatriation, and in 1870 England passed an act which declared that "any British subject who has, at any time before, or may at any time after, the passing of this act, when in any foreign state, and not under any disability, voluntarily become naturalized in such state, shall from and after the time of his having become so naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien." Provision is made in

the same act for persons who have become naturalized in Great Britain to divest themselves of their acquired nationality and assume that of their nativity, and for persons who at the time of their birth are subjects of a foreign state to elect allegiance to such foreign state when they have arrived at maturity. Notwithstanding the law declaring the inherent right of expatriation by congress, the question is still undetermined as to what acts or formalities are necessary to accomplish this fact.* The question of the right of an individual to change his nationality is one purely of municipal law, as nationality is conferred by a state by virtue of its sovereignty within its jurisdiction. International law, in the absence of a declaration of this principle by the public law of all the states, or of a uniform custom of all the states, must accord to each state the privilege of determining the question of the nationality of persons according to its own views, which is best regulated by treaties. The practice of individual states has not been uniform, and there is no uniformity in that of the body of states.

NATURALIZATION.

96. Naturalization is the act or proceeding by which a foreigner becomes a citizen of a state, and becomes entitled to the same rights and privileges as if born in the state.

Every independent state has a right to confer its citizenship upon foreigners, but this right should not be so exercised as to do an injustice to the state of nativity, or to cause the naturalizing state to become a sort of accomplice of the person naturalized in the avoidance of obligations due to his native state. This can be done by making naturalization so easy of accomplishment as to induce persons who have no desire to change their nationality except to avoid some obligation to their mother country, to take advantage of the new nationality. It may be conceded that the above right of naturalization is inherent in an independent state, but does a person upon whom this right is exercised cease to be a subject of the state

* Mr. Seward to Mr. Johnson, Whart. Dig. § 171. Vide, also, Treaties and Conventions of United States, etc., 1776-1887; Rev. St. U. S. 1878, § 1990. Also authorities cited in note 1.

from which he emigrated? If this is answered in the affirmative, then every individual of a state, by naturalization, can cast off all obligations pertaining to his status of citizenship in his state of nativity without the consent of the latter. This is not in accord with the practice of states, practically all of whom impose certain conditions upon the recognition of a change of nationality by naturalization. If it is competent for a state to impose conditions upon its recognition of the new nationality, then no subject can of his own volition, and without the consent of his state of citizenship, cast off his obligations as such subject. Citizenship acquired by naturalization is certainly valid as to all other states except that of which the emigrant was a subject, and any conditions imposed by this latter state can have no extraterritorial effect. An interesting case illustrating the rights of a naturalized citizen arose in 1883. Mr. Wagner was born in Russia in 1852, and according to Russian law became subject to military duty in 1874. In 1869, while still a minor, and five years before he became liable to this military duty, he emigrated to the United States and became a naturalized citizen. Upon his return he was accused of the technical offense, "evasion of military duty." In the diplomatic correspondence upon this subject the United States maintained that "no nation should assert an absolute claim over one of its subjects under circumstances like these, and it is thought improbable that Russia will persist in such a claim, even if made. * * * It is tantamount to asserting a right to punish any male Russian who, having quitted Russian territory and become a citizen of another state, may afterwards return to Russia."

EFFECT OF INCOMPLETE NATURALIZATION—AS TO NEW STATE.

97. The effect of a declaration to become a citizen of a country, certainly if accompanied with the exercise of privileges pertaining to citizenship, carries with it the obligations pertaining to the status.

This question arose in the United States during the Civil War. In 1863 an act was passed by congress, rendering persons who had made the formal declaration to become citizens subject to military

service, but this act extended the privilege of renouncing their new allegiance provided they left the country within sixty-five days after the passage of the act. There was certainly no ground for complaint in such case, since all persons who had made the formal declaration, and had participated in the privileges of citizenship, should expect to bear some of the burdens pertaining to their new status. No formal objection was made on the part of the foreign states affected by the act.

SAME—AS TO OTHER STATES.

98. The right of a person who has not completed his naturalization to claim the protection of his new allegiance when in foreign states has not been determined.

In so far as all states, except the state of origin, are concerned, it would seem that the state of declared citizenship has a better right to extend privileges and to impose the correlative duties than any of them. The case that best illustrates this question was that of Martin Koszta, a Hungarian subject, who, after taking part in the rebellion of 1848-49, fled to Turkey. Here he was imprisoned by the Turkish government at the instance of Austria, but was afterwards released upon the condition that he leave the country. He chose the United States as the place of his exile, and duly declared his intention of becoming naturalized. The conditions of naturalization in the United States are five years' residence, together with a formal declaration of intention, made at least two years previous to the completion of the required term of residence. Koszta made the preliminary declaration, but before the five years had expired he returned to Smyrna, having obtained from the United States consul a traveling pass, stating that he was entitled to United States protection. While at Smyrna he was seized by persons in the pay of Austria, taken by them to sea, thrown overboard, and picked up by an Austrian Man-of-war. The American consul demanded his release, and a Man-of-war was sent to enforce this demand. The matter was compromised through the mediation of the French consul, to whom Koszta was turned over, and he was finally sent back to the United States, although Austria reserved the right to proceed against him if he returned to Turkey. In reply to the formal remonstrance

of Austria, protesting against the claim of the United States to afford protection to Koszta, and calling for a disavowal of the conduct of the United States agents, and a grant of reparation for the insult offered to the Austrian flag, Mr. Marcy replied that every citizen or subject possessed the right, having faithfully performed the past and present duties resulting from his relation to the sovereign power, to release himself at any time from the obligation of allegiance, freely quit the land of his birth and adoption, seek through all countries a home, or select anywhere that which offers him the fairest prospect of happiness for himself and his posterity; (2) that Koszta was not an Austrian subject, as, by a decree of the Emperor of Austria, Austrian subjects leaving the dominions of the Emperor without permission of the magistrate, and a release of Austrian citizenship, and with an intention never to return, become 'unlawful emigrants,' and lose all their civil and political rights at home; (3) that, although Koszta had not been naturalized and become a citizen of the United States, yet, being domiciled in this country, he was entitled to be treated in all respects as a citizen of the United States. The question as to whether the incomplete naturalization of Koszta entitled him to the protection of the United States was left unsettled, although it can scarcely be denied that Austria had no right to seize him upon Turkish soil. It was not only the right, but the duty, of Turkey to demand reparation from Austria. The use of force by the United States under the circumstances cannot be conceded as a right, certainly not in Turkish waters. Mr. Woolsey thinks that on the high seas "Austria could not have complained, if the evils of a sudden wrong on her part were in that way sought to be prevented." In regard to the effect of the passport given to Koszta, and which it was claimed conferred upon him the right of protection by the United States, there is no valid ground for such a contention, as it appears that this was given in contravention of law, and possessed no validity for any purpose.⁷

⁷ Koszta: For discussion of this case, see Hall, *Int. Law*, pp. 237-240; Pitt-Cobbett, *Cas. Int. Law*, pp. 87-90; Snow, *Cas.* pp. 226-228; 2 Whart. Dig. § 175; 3 Wheat. *Int. Law*, L, 193; 1 Halleck, 91, 92, 357; Davis, *Int. Law*, 103-106.

Wools. *Int. Law*, pp. 502-504, says:

"1. Granting that the man was an Austrian subject, could he be legally

Another case was that of Simon Tousig, a native of Austria, who had acquired a domicile in the United States, but had not become naturalized when he returned to Austria provided with an American passport and was arrested on the charge of offenses committed before leaving Austria. In this case Mr. Marcy held that a foreigner who has declared his intention to become a citizen of the United States is not entitled to their protection if he returns to his native country. This case was distinguished from that of Koszta because, "having once been subject to the municipal laws of Austria, and while under her jurisdiction violated these laws, withdrawal from that jurisdiction and acquiring a different national character would not exempt him from their operation whenever he again chose to place himself under them. Every nation, whenever its laws are violated by any one owing obedience to them, whether he be a citizen

seized in Turkey? His crime had been a political one. The Turks had refused, with the approbation of the ambassadors of the most important Christian powers, to deliver up the Hungarian fugitives, on the ground of the political nature of their offense. It was said that the extraterritorial consular jurisdiction mentioned below (section 100) authorized his arrest. The reply of Mr. Marcy to this is that such jurisdiction was intended for a different set of cases, and such is probably the fact. The Austrian officials (if this be so), in seizing him, committed an offense against the sovereignty of Turkey, and so, an offense against the law of nations.

"2. But was he an Austrian subject? Austrian nationality ceases, according to what is said in section 70, on the authority of M. Foelix, when a subject emigrates with the consent of the government. He had more than the consent of his government to the abandonment of his country. He was forced into exile. He had, then, no domicile, unless the United States gave him one, and since exile cut off all relations to citizenship, the only power that could protect him was that in whose territory he resided. This it was bound to do. But to this it might be replied that he had agreed in writing never to return to Turkey, and that the Austrian claim upon him would revive on his falling to fulfill this condition. It is indeed questioned by Mr. Marcy, whether he engaged never to return; and it might perhaps be said, that, if such an engagement existed, it related only to return for political purposes. But to this Austria might reply, that she could not know what his purposes were, and that the promise must be absolute, in order to prevent his doing political mischief in the neighborhood of Hungary. This, however, is a point upon which our diplomatist preserves silence.

"3. What were his relations to the United States? Not those of a citizen, but of a domiciled stranger. His oath, declaring his purpose to become

or stranger, has a right to inflict penalties incurred upon the transgressor, if found within its jurisdiction. The case is not altered by the character of the laws, unless they are in derogation of the well-established international code. No nation has a right to supervise the municipal code of another nation, or claim that its citizens or subjects shall be exempted from the operation of such code, if they have voluntarily placed themselves under it. The character of the municipal laws of one country does not furnish a just ground for other states to interfere with the execution of these laws, even upon their own citizens, when they have gone into that country and subjected themselves to its jurisdiction. If this country can rightfully claim no such exemption for its native-born or naturalized citizens, surely it cannot claim it for those who have at most but inchoate rights of citizens." *

a citizen, and his long stay here, put this out of the question, and his temporary absence could not shake this character off. Moreover, he had a passport, certifying to his American nationality. He would therefore be entitled, by the law of nations, to the protection of the Turkish authorities against his Austrian captors. Had he been even a fugitive prisoner of war, he could not lawfully have been seized on shore, unless treaty had so provided. He would equally be entitled to all that protection which officials of the United States were authorized to extend to him within Turkish territory.

"4. Would it have been in accordance with international law for the captain of the frigate to use force in protecting him within the port of Smyrna? Active and aggressive force certainly not. As things were, the demonstration of force saved the use of it. But to complain of such a force would have fallen to the duty of Turkey, as it would have taken place within her waters. As for force, absolutely considered, for instance, on the high seas, Austria could not have complained if the evils of a sudden wrong on her part were in that way sought to be prevented.

"At the bottom, this was a case of collision between original and transferred allegiance, the latter in its incipiency, in which the obligation to protect the person, within the limits of the law of nations, lay on the United States. How Austria could have dealt with him within her own territory is another question; and it must be admitted that his mere declaration to become a citizen of the United States did not affect his nationality."

* Case of Simon Tousig (1854) Wheat. Int. Law, L, 929, same case in Snow's Cas. 228, and Pitt-Cobbett, Cas. Int. Law, p. 90. Vide, also, Hackett's Case, 1 Halleck, Int. Law, p. 375; Case of Lucien Alibert, Pitt-Cobbett, Cas. Int. Law, p. 96.

STATUS OF INDIANS IN THE UNITED STATES.

99. The status of the Indian tribes in the United States is not that of foreign nations.

Previous to 1871 the status of the American Indian was rather peculiar, in so far that he was neither an alien nor a citizen, and yet the government negotiated treaties with the different tribes in an analogous manner to treaties with foreign nations. In *Cherokee Nation v. State of Georgia*, Chief Justice Marshall said: "Indian tribes within the United States do not constitute foreign nations. They are regarded as in a state of pupillage, and may more correctly be denominated domestic dependent nations." Again, they are held to be capable of maintaining the relations of peace and war, with ~~rights~~ of governing themselves, under their (United States) protection, and of making treaties. But not treated as foreign nations, in the ordinary sense.⁹ Again that the Cherokee Nation is not a foreign nation, but in its semicivilized state bears a close analogy to a provisional government of a territorial character. In 1871 a statute was passed providing "that no Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, 1871, shall be here invalidated." An Indian who has voluntarily separated himself from a tribe, recognized as such by the government of the United States, and who has taken up his residence among the white citizens of a state, without being naturalized, taxed, or recognized as a citizen, either by the United States or a state, is not a citizen of the United States, under the fourteenth amendment to the constitution.¹⁰ In 1885 (March 3d) an act was passed by congress making Indians subject to the jurisdiction of the United States, and in a case of murder committed on an Indian reservation within the state of California by one Indian upon another, the supreme court held that the circuit court of the United States for the district of California had jurisdiction to try the case,

⁹ *Cherokee Nation v. Georgia*, 5 Pet. 1.

¹⁰ *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41.

and that the act referred to was valid in both its branches.¹¹ It had previously been held that the only method by which an Indian could become a citizen of the United States was by naturalization, in the same manner as any foreigner. The opinion has been expressed that this act of 1885 converts or should convert Indians into citizens of the United States by birth. They are very properly subject to the jurisdiction of the United States, but it is not believed that they are or should be considered as citizens, and especially so long as they maintain their tribal relations.

¹¹ *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396; 2 Whart. Dig. § 208; *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109.

CHAPTER IX.**TREATIES.**

- 100. Treaties Defined.
- 101. Essentials of Valid Treaty.
- 102. Form of the Contract.
- 103. Ratification.
- 104. Rules for Interpretation of Treaties.
- 105. Conflicting Provisions of the Same Treaty or of Different Treaties.
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- 107. When Treaty Becomes Operative.
- 108-109. Extinction of Treaties.
- 110. Voidable Treaties.
- 111. Renewal of Treaties.
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TREATIES DEFINED.

100. Treaties are agreements made and entered into by one independent state with another, or others, in conformity to law, by which it places itself under an obligation. The following agreements are not considered treaties:

- (a) Agreements entered into by a state with private individuals.
- (b) Agreements concluded between a state and the church upon religious or political matters, and especially concordats of different states with the pope.
- (c) Agreements concluded by sovereigns or sovereign dynasties, whether among themselves or with foreign states, relative to their personal or dynastic pretensions to the government of a country.

The three classes of agreements mentioned above are all of such a nature as to form no part of public international law, as they are either made between a state and private individuals or by agents of the state in their individual character.¹

¹ Hall, *Int. Law*, p. 323, note 1; Bluntschli, § 443.

ESSENTIALS OF VALID TREATY.

101. The essentials of a valid treaty or contract between two or more independent states are:

- (a) Capacity of the parties to contract.
- (b) Duly-empowered agents to act on behalf of the states.
- (c) Freedom of consent.
- (d) The object of the contract must be in conformity to law.²

Every independent state is capable of entering into treaties with another state or states, but the fundamental law of a state may impose certain restrictions upon the method of entering into such agreements, which must be taken into consideration by the parties to the contract. In the United States and other confederations the executive or treaty-making power cannot finally conclude treaties without the consent of the legislative bodies. The latter have to concur, and up to the time that this final consent of the concurring body has been obtained the other parties to the contract can withdraw their assent, unless this right has been waived.

Powers of the Agents of the State.

In every state certain agents can, under given conditions, bind their state by their contracts. If, however, these agents exceed their powers, their state is not bound. But where their acts are not ratified, and their state has received some material advantage as a result of the agreement entered into by them, or where the other state has performed acts in pursuance of the agreement, it is the duty of the state receiving the benefits, or the action of whose agent caused the performance of the acts mentioned, to either make proper compensation or restore the former status as far as practicable. Of course, if the agent has clearly exceeded his powers in such a manner that this fact should have been known to the other party, there is no obligation upon the agent's state.

² Wools. Int. Law, §§ 101-105; Wheat Int. Law, D, §§ 252-262; Bluntschli, §§ 402-424; Hall, Int. Law, pp. 323-327; 2 Phillim. c. 6; Calvo, Int. Law, § 1567 et seq.; Mann. Int. Law, pp. 128, 129.

Freedom of Consent.

There cannot be the same strictness in regard to the freedom of consent in the treaties of states as in the contracts of individuals, because of the difference in the mode of redress of wrongs. In international law this consists mainly in the use of force, which, if a proper means of redress, cannot be made to vitiate a contract resulting from its use. The assumption that consent is freely given by a state in many cases is a fiction. A state can enter into a perfectly valid contract which has been forced upon it, as a result of a war for instance, whatever be the cost to it, or however disadvantageous its terms may be, provided it does not part with its independence. The parting with independence as a result of constraint no state can be supposed to be willing to consent to, and, when this results, the contract is assumed to be vitiated by the constraint. This assumption of consent to a contract imposed by a successful state at the conclusion of a war is said to be in the interest of peace, and is allowed for the further reason that the successful state should be compensated for past wrongs. Again, unless such contracts are declared valid, wars would all end either in the complete subjugation of one of the parties or the utter exhaustion of both. In case constraint be imposed upon the sovereign of a state, or upon a commander, or upon an agent authorized to negotiate a treaty, the state which they represent is in no manner bound by their acts, and all such contracts are absolutely void. Fraud through which the consent of a state agent is obtained also vitiates the contract resulting therefrom.

The Object of the Contract to Conform to Law.

A treaty which does not conform to international law and established usages is void, or at least voidable. For instance, a treaty which has as an object the domination of the entire world by a single power; the subjugation or partition of a state, unless the existence of the latter is a menace to the general security; the exercise of proprietary rights over the open sea; a treaty which conflicts with previously acquired rights of other states, certainly in so far as these rights of the states affected are concerned; a treaty which imposes conditions incompatible with the existence or development of a state; a treaty contrary to the recognized rights of humanity, such as those that establish or protect the slave trade, or that

deny rights to foreigners,—would be considered as void at the present time.

FORM OF THE CONTRACT.

102. Treaties can be executed in any form that will serve to express the intention of the contracting parties.³

Treaties are, as a rule, reduced to writing; but a treaty may be concluded verbally, and in time of war certain signs, having a well-understood meaning, are sufficient to conclude a contract. A signal, such as the exhibition of a white flag, for instance, establishes a truce between hostile armies. Formal agreements, which are called either treaties or conventions, after being reduced to writing, are signed either by the parties themselves or their duly-authorized agents. The difference between treaties and conventions is more in name than in fact. The former term is usually applied to the larger political or commercial contracts, while the latter is applied to those having a specific object, such as postal contracts.

RATIFICATION.

103. Ratification is the act by which the sovereign power approves and confirms that which has been agreed upon and stipulated in its name by its diplomatic agent, armed with full powers for that purpose. It may be either tacit or express.⁴

A tacit ratification may occur when a state wholly or in part carries out an agreement that has not been expressly ratified, or which was in excess of special powers of the agent, or when an agreement has been made by agents which, in conformity with custom, does not require express ratification, and it is not repudiated by the state when made known to it.

It can be safely stated that all treaties are to be ratified before becoming effective. If a treaty is concluded either by a sovereign or

³ Hall, Int. Law, pp. 327-329; Wheat. Int. Law, D, § 253; Bluntschli, §§ 417, 418.

⁴ Bluntschli, §§ 419-424; Hall, Int. Law, pp. 329-334; 1 Halleck, Int. Law, pp. 229-234.

person exercising the sole treaty-making power of the state in person, or if it is made by virtue of a power incidental to an official station, and within the limits of this power, ratification is probably unnecessary. It is now and for the past century has been regarded as established, that all treaties concluded by plenipotentiaries must be ratified by the sovereign power, however full the powers of the representative of the state may be.

A state can refuse to ratify. Mr. Bluntschli says that "the refusal, even without cause, to ratify a treaty, can, under certain circumstances, be regarded as contrary to propriety, affecting very gravely the credit of the state, and jeopardizing the relations of friendship existing between the contracting parties; but this refusal should never be considered as a violation of law, even when the person charged with the negotiations has acted within the limits of his powers, and has executed the treaty in conformity with the instructions that he has received." It is unquestionably true that a state should not without good cause refuse to ratify a treaty, but this is based upon moral, more than upon legal, considerations. The true reason for the practice requiring express ratification seems to rest upon the ground that a state should not be bound by the acts of an agent without an opportunity for consideration of the proposed agreements. Certainly in all countries like the United States, where all treaties must receive the consent of the senate or a similar body, there can be no question in regard to the necessity for express ratification; and parties contracting with such states must take notice of the municipal laws in this respect, however full may be the powers ostensibly conferred upon the agent negotiating the contract. Ratification is in some instances reserved in the proposed treaty as a right, or this right may be, and often is, reserved in the full powers conferred; but, as a state has inherently such right, there is no absolute necessity for such practice. Ratification is complete when the instruments of ratification duly executed have been exchanged by the parties to the contract. Certain stipulations in an agreement, which are understood to be at once effective, must be carried out, because the general rule is that, when treaties are ratified, they date back to the date of the final signing of the protocol by the agents, and a neglect to carry out such provisions can properly be considered as an infraction of the treaty immediately upon its ratification. The practice of having

treaties date back to the time of the signature of the definite protocol is based upon the fact that at that time the contract was actually completed, and the ratification some time later simply removes all obstacles to its immediate operation.

M.B. Strictly speaking, in the instrument of ratification should be incorporated the complete text of the treaty entered into by the parties. But the practice is to copy the preamble, the first and last article of the treaty, with the date of signature, and the names of the plenipotentiaries, which, being agreed upon by the contracting parties, is sufficient, because the contract is itself a statement of the agreement entered into. A conditional ratification is not valid unless consented to by the contracting parties, because, when a condition is imposed, a new contract, or different one from that signed by the plenipotentiaries, is suggested, and a state to which such conditional ratification is submitted is authorized to decline to ratify it.

INTERPRETATION OF TREATIES.

104. Treaties should be construed according to equitable rules, and, when there is no ambiguity in the words, the meaning being evident, and leading to no results contrary to reason, the meaning should not be rendered doubtful by attempting to destroy the practical sense by plausible arguments or conjectures. The spirit, rather than the letter, should be determined, the object being to determine the common intention of the contracting parties. The following rules have been generally accepted for interpretation:⁵

- (a) When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and

⁵ Hall, Int. Law, pp. 334-340; Clayton Bulwer Treaty, 1850; Treaties and Conventions of United States, p. 440. Vide discussion of, in Whart. Dig. § 150f.

Wools. Int. Law, § 113:

"1. The ordinary usus loquendi obtains, unless it involves an absurdity. When words of art are used, the special meaning which they have in the given art is to determine their sense.

"2. If two meanings are admissible, that is to be preferred which is least

reasonable sense, it must be taken in that sense. This is to be taken subject to the qualification that this sense does not lead to an absurdity, and that the words used have not an accepted sense when used in treaties, differing from their ordinary sense, and that accepting the ordinary sense does not cause it to conflict with a fundamental principle of law.

(b) Words which have a double or uncertain meaning should be taken in their ordinary acceptation in preference to a technical sense; words having a technical meaning in the arts and sciences being construed according to their technical sense. A word may be used in the treaty several times without requiring the same meaning to be attached each time, the sense corresponding with the end sought to be attained in each case.

(c) If the words fail to give a plain and reasonable sense, then recourse must be had to the general

to the advantage of the party for whose benefit a clause is inserted; for in securing a benefit he ought to express himself clearly. The sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer.

"3. An interpretation is to be rejected, which involves an absurdity, or renders the transaction of no effect, or makes its parts inconsistent.

"4. Obscure expressions are explained by others more clear in the same document. To discover the meaning, the connection and the reasons for an act must be considered.

"5. Odious clauses, such as involve cruelty or hard conditions for one party, are to be understood strictly, so that their operations shall be brought within the narrowest limits; while clauses which favor justice, equity, and humanity are to be interpreted broadly.

"Sometimes clauses in the same treaty or treaties between the same parties are repugnant. Some of the rules here applicable are:

"1. That earlier clauses are to be explained by later ones, which were added, it is reasonable to suppose, for the sake of explanation, or which at least express the last mind of the parties. So also later treaties explain or abrogate older ones.

"2. Special clauses have the preference over general, and, for the most part, prohibitory over permissive."

sense and spirit of the treaty, or the context of the uncertain or ambiguous parts, or by taking a reasonable, rather than the literal sense of the words. The provisions of the treaty as a whole should be harmonious.

- (d) In case a clause in a treaty between two countries has a different meaning in the two countries, it is to be interpreted according to the use of the language in the country in which it is to be operative.
- (e) Every right and obligation attendant upon something clearly conferred by agreement, including a right to whatever may be necessary to the enjoyment of things granted by it, is understood to be tacitly given or imposed by the gift or imposition of that upon which it is attendant.

The fifth rule (e) should be considered in connection with the fact that, unless the intention to grant is clearly expressed, a state is not supposed to contract itself out of fundamental rights; and, to have this effect, a treaty must confer such a right in such positive terms that they cannot be misconstrued. In the interpretation of treaties it is not, as a rule, proper to select a certain clause, and consider it as a separate part of the whole, thereby destroying its relation with the other provisions; and this is particularly true if the sense is thereby rendered inconsistent with the other provisions. Recourse can be had to usage in order to supply a lack of clearness, and sometimes to the municipal laws of a particular country and other treaties executed by it with other countries upon the same subject.

CONFLICTING PROVISIONS OF THE SAME TREATY OR OF DIFFERENT TREATIES.

105. Where there are conflicting provisions, either in the same treaty, or in different treaties, the following rules have been accepted as applicable in such cases:

- (a) Prohibitive and imperative provisions take precedence of permissive.

- (b) A special permission takes precedence of a provision generally imperative.
- (c) When provisions are prohibitive and conflict, and there is a penalty attached to one and not the other, the former takes precedence; or, in case of a more severe penalty attaching to one than the other, the one having the more severe penalty takes precedence. The one stated with most decision rules in case there is no penalty attached to either.
- (d) When the stipulations are of such a nature that no priority can be assigned, then that which is the more important must be observed by the party under obligation, the party to whom the obligation runs having the right to choose.
- (e) When two treaties between the same states are in conflict, the one of the later date is supposed to be substituted for the other, and in consequence, takes precedence.
- (f) When two treaties made with different states at different times are in conflict, the one first made governs. This because an agreement with another state cannot be made to supersede that of an earlier date with a third state without the consent of the latter.

There is an apparent exception to the fifth rule (e) in the case of two treaties made by different authorities of the same state upon different dates. In such case, if the later agreement was made by the inferior authority, the earlier one will govern. This is illustrated in the case of the surrender of Piacenza in 1800. This place, with its garrison, was surrendered to the French by the Austrian commandant, who, from the nature of his command, had authority to conclude an agreement of the kind made. The surrender took place at 3 in the afternoon, and at 8 in the morning of the same day a convention had been concluded between Generals Berthier and Melas, under which the whole Austrian forces were to retire behind the Mincio, giving over Piacenza to the French, but withdrawing the

garrison. It was claimed, and at once admitted, that the latter convention ought to be carried out to the exclusion of the former.⁶ The other rules do not seem to require any examples or explanation to make their application easy.⁷

TREATIES OF GUARANTY.

106. Treaties of guaranty are agreements through which one or more powers engage, either by an independent treaty to maintain a given state of things, or by a treaty or provisions accessory to a treaty, to secure the stipulations of the latter from infraction.⁸

- Handwritten notes:*
 → Law
 involves
 ... y.
- (a) They are mutual when one party, for a consideration to the advantage of itself, makes an assurance to the advantage of the other.
 - (b) They may be undertaken by one or more parties for the benefit of a third.
 - (c) They may be an assurance for the benefit of all the contracting parties in the observance of a special arrangement.

An example of the first class is afforded by the treaty of Tilsit between France and Russia, by which they mutually guaranteed the integrity of their respective possessions. An illustration of the second is shown in the treaty of 1856, by which England, Austria, and France guaranteed jointly and severally the independence and integrity of the Ottoman empire. And the third class is exemplified in the treaties of 1831 and 1839, by which the independence of Belgium was assured by the contracting parties. A guaranty requires of the party making it to give aid when called upon to the

⁶ Hall, Int. Law, 341.

⁷ Hall, Int. Law, pp. 340-342; Bluntschli, § 414; Calvo, Int. Law, §§ 1655-1659; Wools. Int. Law, pp. 173, 174; Davis, Int. Law, pp. 181, 182; Wheat. Int. Law, D, § 287; 2 Phillim. pp. 94-125.

⁸ Wools. Int. Law, § 109, says that treaties of guaranty, as respects their form, are to be classed as treaties, but as respects their object, as a means of securing the observance of treaties. He says that an engagement to secure the observance of all rights is not a treaty of guaranty, but rather a league or treaty of alliance.

9- extent to which he has stipulated in a case to which in his judgment the guaranty relates. If the party to whom the guaranty runs declines the assistance of the guarantor, then the obligation ceases. If the parties to the contract alter it, or add to it, so as to materially change the original contract, the guarantor is not bound, certainly as to the new matter, and probably not to the entire original agreement. There is also a distinction to be drawn between a several, a joint and several, and a joint or collective obligation of guaranty. In the case of the first two, the parties can act independently, if called upon; but in the case of a collective obligation it is unsettled as to whether one of the parties should act without consulting all the others, and securing their concurrence.⁹

WHEN TREATY BECOMES OPERATIVE.

107. A treaty becomes operative as between the parties from the time it is signed, and not from the time of ratification.

In so far as concerns the individual rights of parties interested, a treaty does not operate until there has been an interchange of ratifications, although this ratification, in so far as the relations of the contracting parties is concerned, is retroactive, and relates back to the date of signing the treaty itself. In the United States, since its organization, there has been a question in regard to that class of treaties which require an appropriation from congress to carry their provisions into effect. Some authorities have maintained that it is the duty of congress to appropriate the necessary amounts of money to carry out the provisions of a treaty negotiated by the executive and concurred in by two-thirds of the senate, as required by the constitution; and that, when a treaty has been thus negotiated and ratified, and this fact has been duly proclaimed, the United States is bound. On the other hand, it is held that Congress has the right to examine certainly those provisions of the treaty which require its action, in order to determine whether, in their discretion, action shall be taken in accordance with its terms. If a treaty, ratified by the

⁹ For discussion of the different classes of treaties of guaranty, vide Hall, *Int. Law*, pp. 343-346; Bluntschli, §§ 431-440; Wools. *Int. Law*, pp. 166, 170.

treaty-making power, is not ratified by the necessary action of congress, the question arises whether there is a breach of the contract. Can its execution be demanded, and resort be had to force to compel its execution? There is no question but that all of the powers of the different branches of the government are derived from the constitution of the state; that in the framing of this instrument it was intended that certain powers expressly conferred upon the legislative branch should be exercised solely in the manner prescribed; and that in the performance of the acts necessary to give validity to a treaty negotiated by the other powers this legislative power is permitted to exercise a discretion. It must also be apparent that other nations, in negotiating with a nation whose fundamental law requires the action of some designated body of the government, are bound to take notice of such provisions. It is true that the executive power is bound to use its utmost endeavors to see that the necessary action is taken by the other branch of the government, but the nation as a whole cannot be bound by this agreement, unless their representatives have consented to its terms in accordance with the provisions of the fundamental law of the state. One of the most noted cases of this nature arose in 1831 between France and the United States. The contract between the two governments contemplated a large amount of money to be paid by the former to the latter as an indemnity. In order to make this stipulated payment of an indemnity, it was obligatory that the chamber of deputies make the necessary appropriation, which they at first refused to do, but some time afterwards the necessary funds were appropriated, and the matter adjusted. Another treaty which required an appropriation from congress of the United States in order to carry its provisions into effect was that with Russia in 1867. In the first bill that was passed by the lower house of congress in this case was a clause: "And whereas, the subjects embraced in the stipulations of said treaty are among the subjects which by the constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress shall be given to the said treaty before the same shall have full force and effect, having taken into consideration the said treaty, and approving of the stipulations therein, to the end that the same may be carried into effect, therefore: Section 1. Be it enacted by

the Senate and House of Representatives of the United States of America in Congress assembled, that the assent of congress is hereby given to the stipulations of said treaty." The senate maintained that the house was absolutely bound to carry out the stipulations of the treaty which was duly ratified by the senate, but the matter was compromised by the substitution of the following clause in the preamble: "And whereas, said stipulations cannot be carried into full force and effect except by legislation to which the consent of both houses of congress is necessary," etc. There is still a conflict of opinion in regard to this question.¹⁰

EXTINCTION OF TREATIES.

108. Treaties are extinguished when the end for which they have been executed has been accomplished, or when they become void through circumstances, and they may be broken and renounced before their expiration. The latter implies violence.¹¹

109. They become void—

- (a) When comprising no permanent agreements, and every obligation contained therein has been completely carried out.
- (b) By mutual agreement of the contracting parties, which can be accomplished by express declaration, or by a new treaty inconsistent with a previous one; provided a third state interested is not opposed to it.
- (c) By expiration of the term for which the contracting parties agreed.
- (d) When made to depend upon a condition, and this condition ceases to exist.
- (e) By express renunciation of one of the parties interested.

¹⁰ Whart. Dig. §§ 131, 131a; Wheat. Int. Law, D, § 266, and note 139; 1 Halleck, Int. Law, 231-234.

¹¹ Bluntschli, §§ 450-461; Whart. Dig. 137a; Creasy, Int. Law, pp. 40-43; 1 Halleck, Int. Law, pp. 242, 243, 268; Hall Int. Law, pp. 348, 349; Davis, Int. Law, pp. 179, 180; Calvo, Int. Law, § 1662 et seq.

- (f) **By the complete destruction of the thing which forms the object of the treaty.**
- (g) **When its execution becomes impossible.**
- (h) **By a declaration of war, which either suspends or entirely destroys its effect.**
- (i) **By incompatibility with the general obligations of states.**

The objects of a treaty are satisfied if, having been concluded for a definite time, the period determined upon has elapsed, or in case the provisions agreed upon have been accomplished, such as the payment of an agreed amount of money. When some of the stipulations of a treaty imply perpetuity, even though the act mentioned to be performed has been accomplished according to the letter of the agreement,—as, for instance, in the recognition of a new state,—the act of recognition is complete when accorded; but the state of things contemplated implies permanency, and a state is not authorized to disregard the obligation imposed. If, however, one of the contracting parties loses its existence, or its interior constitution undergoes a change of such a nature as to render the treaty inapplicable to the new state of things, the contract expires. In the case of treaties of commerce, alliance, navigation, etc., which relate exclusively to relations of peace, they become extinguished upon the breaking out of hostilities, and even when war has not been declared, as occurred in the case of the relations between the United States and France in 1798 and 1799, when the two countries were regarded as being in a state of hostility, whereby existing treaties were regarded as broken, without actual war existing. In regard to treaties which are of a permanent nature, such as treaties of boundary, etc., they are considered as suspended during hostilities, and revive upon the restoration of peace. Again, other treaties made in contemplation of war are not altered upon the breaking out of hostilities, and can be annulled only by the method prescribed in the treaties themselves, or by a new treaty.

VOIDABLE TREATIES.

110. A treaty is voidable under the following circumstances:

- (a) **When it threatens the existence, or is incompatible with the independence, of a state.**
- (b) **When one of the parties did not retain its freedom of will, in entering into the agreement, with regard to the subject-matter.**
- (c) **Where the consent has been obtained by force or fraud.**
- (d) **When a state did not possess the capacity to contract.**
- (e) **When there is a breach by one of the parties. But the effect, when there is a breach of one or more clauses only, depends upon the circumstances of each case.**

The principle to be applied to determine whether a treaty is voidable or not is thus stated by Mr. Hall: "Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into; and, on the other hand, a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered." The fact that when one party to a treaty breaks it the other party is released from his obligations thereunder is admitted by all authorities, but when the breach of a single stipulation is considered, or any breach short of the entire contract, there is confusion in expressions of the authorities as to the result. If an authority considers the contract as an indivisible whole, then a breach of any of the stipulations, whether important or not, releases the other party from the obligations. Others make a distinction in the articles, and regard a breach of the more important ones only as justifying a release of the other party. In case the breach is of an article or stipulation which is material to the object of the treaty, then it is sufficient to liberate the other party. After Russia had declared that she would consider the treaty of Paris no longer obligatory, at a con-

ference of the signatory powers of this treaty it was declared that it is an essential principle of the law of nations that no power can liberate itself from engagements of a treaty, nor modify any of the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement.¹²

RENEWAL OF TREATIES.

111. Treaties can be renewed and become obligatory by agreement of the parties, either tacit or express.

A treaty renewed tacitly must be renewed in such a manner as to show the intention of the parties beyond mistake, and from the nature of such agreements it would be difficult to show such consent beyond mistake in the majority of cases. After suspension of hostilities it is usual to renew expressly the treaties that were in force previous to the beginning of the war. Unless treaties are expressly or tacitly renewed, they expire at the end of the term for which they were contracted.¹³

MOST-FAVORED NATION CLAUSE.

112. This is a clause inserted in many treaties of a commercial nature, and literary and art conventions. The effect is to confer upon the parties advantages which they have already, or may in future confer upon a third power.

This agreement varies with its terms, and may be a gratuitous conferring of the contemplated privileges, or it may be conditional, or depend upon like concessions on the part of the other nation. Reciprocity is at the base of this sort of agreement, and yet it does not follow that the concessions stipulated for are equivalent. A covenant to give privileges granted to the "most-favored nation" only refers to gratuitous privileges, and does not cover privileges granted on the condition of a reciprocal advantage.¹⁴

¹² Bluntschli, §§ 415, 460; Hall, Int. Law, pp. 349-351.

¹³ Calvo, Int. Law, § 1669.

¹⁴ Whart. Dig. § 134.

CHAPTER X.**AMICABLE SETTLEMENT OF DISPUTES.**

- 113. Mediation.
- 114. Arbitration.
- 115. Disregard of Award.
- 116. Measures of Restraint Short of War.
- 117. Retorsion.
- 118. Reprisals.
- 119. Embargo.
- 120. Pacific Blockade.

MEDIATION.

113. Mediation takes place when one friendly state offers its good offices in the adjustment and settlement of international questions pending between two or more other countries.

This can occur at the suggestion of the state which is to act, or it may be brought about by a previous arrangement between the interested states, in which latter case it would be an act of bad faith to decline the services of the party agreed upon. In any event, the suggestions of the mediator are not binding upon the parties to the dispute, and in this is found the essential difference between mediation and arbitration.

ARBITRATION.

114. Arbitration is a mode of settling disputes between two or more states through third or disinterested parties, either in the person of the rulers of one or more states, or private individuals.

Ordinarily it is customary to determine by a treaty, or equivalent agreement, the scope and conditions of the submission to arbitration; and when this is done the rules of procedure are fixed for the arbitrators, or they form rules for their own guidance. The prac-

tice in submitting matters to arbitration is either to present the questions to the sovereign of a disinterested state, or for each to select so many members of the convention, and leave the selection of an odd member to a disinterested sovereign, or to the members selected by the parties; or the number may be left even, although this is objectionable, because in case of an equal division of votes the arbitration falls to the ground. The arbitral committee acts as an independent and quasi judicial body, hearing both parties, and the testimony of each, and, after arriving at a conclusion, submits the same, or, in case of failure to arrive at a definite conclusion, they can submit equitable propositions to the parties for the settlement of the dispute. The decision is reached by vote, and the majority decides for the whole. When the sovereign of a country is the sole arbiter, it is not presumed that he acts in person, but that he submits the matter to one or more persons selected by him, and their decision is rendered in his name. In case private individuals are named as arbitrators, they have not the right of delegating their powers.

SAME—DISREGARD OF AWARD.

115. An arbitral decision or award can be disregarded—

- (a) **When the tribunal has clearly exceeded its powers.**
- (b) **When it is guilty of an open denial of justice.**
- (c) **When the award has been obtained through fraud or corruption.**
- (d) **When the terms of the award are equivocal.¹**

In Calvo's International Law, § 1706 et seq, will be found a history of arbitration, and he has collected the principal differences

¹ Bluntschli, § 495: "The decision of an arbitral tribunal can be considered as void (a) in the measure in which the tribunal has exceeded its powers; (b) in case of disloyalty and denial of justice on the part of the arbitrators; (c) if the arbitrators have refused to hear the parties or violated some other fundamental principle of the procedure; (d) if the arbitral decision is contrary to international law. But the decision of the arbitrators cannot be attacked under the pretext that it is erroneous or contrary to equity, save for errors of calculation."

which have been submitted to arbitration during an extensive period, commencing in the middle ages. The history of arbitration during the past century is sufficient to convince any one of the desirability of resorting to this in preference to the horrors of war. In case of the death of an arbitrator without provision for the appointment of a successor, the arbitration fails.

MEASURES OF RESTRAINT SHORT OF WAR.

116. The methods, short of war, usually resorted to for securing redress, are—

- (a) Retorsion,
- (b) Reprisal,
- (c) Embargo, and
- (d) Pacific blockade.

SAME—RETORSION.

117. Retorsion consists in certain acts by one state directed generally to the subjects of another state, to induce the latter state to cease a discrimination against the subjects of the former.

The discriminating state makes its discrimination in virtue of strict legal right, but the effect of its acts is to do injustice to the subjects of the state which resorts to retorsion. Retorsion is usually effected by means of acts on the part of the offended state of the same or analogous nature to that complained of, and is not resorted to for the purpose of avenging an injustice, but rather for the purpose of securing equitable treatment of its subjects. Retorsion is usually applied to those rights the violation or withholding of which would not afford a cause of war. For instance, in case one state withholds from the subjects of another rights which it accords to foreigners of other states, or if it imposes a tax prejudicial to the subjects of a state, this latter may resort to a similar course of conduct.²

² Wools. Int. Law, p. 181; Pitt-Cobbett, Cas. Int. Law, p. 142; Hall, Int. Law, p. 364; Calvo, Int. Law, § 1807; Whart. Dig. § 318; Bluntschli, § 505;

SAME--REPRISALS.

118. Reprisals consist in the adoption of measures of retaliation, such as the seizure, and, in certain cases, the confiscation, of the property of the offending state and its subjects, acts of violence towards the subjects of this state, and in the suspension of the operation of treaties:

Reprisals are resorted to, as a rule, because a state has been injured, and cannot secure redress by ordinary or amicable means, and the injury, not being acquiesced in, is still not of sufficient magnitude to be a cause for war. It is true that acts of reprisal are, as a rule, acts of war, except that there is a lack of intention to make them such. The distinction between reprisal and retorsion is, in general, that the latter is confined to acts injurious to the offending state, but of a similar nature to the one complained of, while reprisals are not so limited, and are undertaken on account of an injury or on account of a refusal or delay of justice,—property being seized and held until the offending nation responds to the just demands of the injured state. Reprisals are regarded and justified upon the ground that they are undertaken as an alternative for the graver effects of war, and all remedies short of war can, as a rule, be resorted to by an injured state, depending upon the degree or nature of the offense.¹ The seizing of private property of individuals of the state should not be resorted to, if another ef-

¹ Halleck, *Int. Law*, p. 422; Wheat. *Int. Law*, D, § 290; 3 Phillim. § 7; Walk. *Int. Law*, pp. 154, 155; Creasy, *Int. Law*, pp. 400, 401; Mann. *Int. Law*, 142, 143; Davis, *Int. Law*, p. 194.

² Bluntschli, § 500: "The acts of reprisals authorized without declaring war are (a) the seizing of goods belonging to the offending state, situated upon the territory of the offended state, or according to circumstances, disposing of the same; (b) the seizing of private property of the subjects of the offending state situated upon its territory, provided this state, in violation of international law, has seized private property, upon its territory, of citizens of the other state; (c) the suspension of means of communication between the two countries as by post, telegraph, railroad, etc.; (d) the sending back or expulsion of the subjects of the foreign state; (e) arresting as hostages persons who represent or are subjects of the foreign state; (f) imprisonment of officials or even of citizens of the offending state, provided the latter

fective means of accomplishing the same purpose can be found, yet such course is still recognized as legitimate.⁴ Reprisals are classified into *general* and *special*; the former being applied to cases where the state itself attempts to secure justice, and the latter to the authorized acts of individuals to right injuries suffered by them. The latter, or reprisals in which letters of marque are granted to individuals who have suffered wrongs from the offending state, are no longer made.⁵ General reprisals, or those made by the state through its authorized agents, are now the only ones recognized. Reprisal was recommended to the Congress of the United States against France, in 1834, by President Jackson, who said: "It is a well-settled principle of international law that where one nation owed another a liquidated debt, which it refused or neglected to pay, the aggrieved party might seize the property belonging to the other state, or its subjects, sufficient to pay the debt, without giving just cause of war."⁶

has previously seized unjustly citizens of the injured state; (g) declining to execute treaties, or denunciation of existing ones; (h) the withdrawing of privileges or rights granted to subjects of the offending state."

⁴ Wools. Int. Law, p. 182.

⁵ Bluntschli, § 501: "Civilized nations stigmatize to-day as contrary to the laws of humanity (a) cruelties against subjects of the offending state; (b) the granting to private individuals the right to attack citizens of the offending state, to kill them, to destroy or take their goods from them" [granting letters of marque or reprisal].

⁶ Whart. Dig. § 318; Pitt-Cobbett, Cas. Int. Law, p. 143; Hall, Int. Law, pp. 364-368; Silesian Loan, Pitt-Cobbett, Cas. Int. Law, 95-99; Snow, Cas. p. 243. In this case the King of Prussia, by way of reprisal, confiscated certain funds which had been lent by English subjects on the security of the revenues of Silesia, and which he had bound himself to repay by the treaties of Breslau, Berlin, and Dresden. The act complained of was the capture and condemnation by England (at the time engaged in war with France and Spain) of certain Prussian vessels. Prussia contended (1) that the arrest of the ships was contrary to the Law of Nature and of Nations, under which the only privilege accruing to England was to permit her war ships to ascertain that there was no contraband on neutral vessels sailing for Spain or France; (2) that the British authorities had acted illegally in capturing Prussian vessels returning laden from France, and in taking them into English ports, and requiring proof that the goods on board belonged to Prussian subjects; (3) that the capture of thirty-three other neutral vessels with Prussian goods on

SAME—EMBARGO.

119. Embargo is a special form of reprisal, and consists in the sequestration of the public or private property of another state. It is especially applied to the merchant vessels carrying its flag, or in its ports.

What is known as "civil embargo" is usually applied to subjects of the state laying the embargo, and is adopted as a measure of public welfare or safety, and consists in the arrest or detention of vessels belonging to the nation found in its waters. This was resorted to by the United States in 1807, when all vessels in port, except those

board was illegal; (4) that the goods confiscated were not contraband, according to the declaration of two English ministers; (5) that the English courts had in these circumstances no jurisdiction over neutral property; (6) that the King of Prussia was entitled to use the funds in his hands in order to indemnify his own subjects, even though the funds were hypothecated to British subjects. The matter was submitted by England to a commission, who, in their opinion, laid down the following as the recognized principles of international law: (1) That, when two powers are at war, each power had the right of capturing the vessels and effects of the other met with on the high seas, although the property ascertained to belong to neutrals could not be made prize, so long as they preserved their neutrality. Hence it followed (2) that enemy goods on neutral vessels were liable to seizure; and (3) that neutral goods on enemy ships should be restored. (4) Further, contraband, though belonging to neutrals, was good prize. (5) Before appropriation there must be condemnation. (6) The only tribunal competent to condemn was the court of the captor. (7) All proofs in the matter should, in the first instance, be taken from the vessel seized. (8) Finally, the law of nations permitted reprisals in two cases only: (a) In case of a violent wrong directed and supported by the sovereign authority; and (b) in the case of a denial of justice by all the tribunals and the sovereign himself in matters admitting of no doubt. This matter was finally adjusted by the treaty of Westminster in 1756, in which Prussia agreed to pay the debt, and England paid Prussia £20,000 in discharge of all claims. The principles laid down by the English commission in regard to neutral trade, although correct at that time, were changed by the treaty of Paris in 1856. The contention by England that private debts should not under such circumstances be confiscated was received with public approval at that time, and is generally accepted as correct to-day.

which had a public commission, and those that were already laden, or should sail in ballast, were detained as a protection from capture by belligerent powers. Hostile embargo consists of the seizure of the vessels or goods of an offending nation in the ports or waters of the offended nation, and is adopted as a measure for obtaining redress, or in anticipation of war. It was held in the case of *The Boedes Lust*⁷ that if this embargo be followed by war the things seized are confiscated, since the war is retroactive, and relates back to the time of the seizure. In case this act of seizure is followed by peace, then the vessel should be restored, and compensation made for the detention. "Although such a measure might bring an adversary to terms, and prevent war, yet its resemblance to robbery, occurring, as it does, in the midst of peace, and its contrariety to the rules according to which the private property even of the enemies is treated, ought to make it disgraceful, and drive it into disuse."⁸

SAME—PACIFIC BLOCKADE.

120. This species of reprisal consists in the establishment of a blockade without destroying pacific relations between the countries affected.

This measure of enforcing demands by one or more nations was first resorted to in 1827, when France, Great Britain, and Russia blockaded all the coasts of Greece where Turkish armies were encamped. The three powers maintained that this was a pacific measure, but it resulted in the battle of Navarino, and the destruction of the Turkish navy. In 1831 France blockaded the Tagus. In 1833 France and England blockaded the ports of Holland to compel assent to the recognition of Belgium. In 1838 France blockaded the ports of Mexico, and during this blockade the vessels of third powers were confiscated. In 1850 Great Britain blockaded the ports of

⁷ *The Boedes Lust*, 5 C. Rob. Adm. 233; also, in Snow, Cas. p. 249, and note; Pitt-Cobbett, Cas. Int. Law, pp. 141, 142.

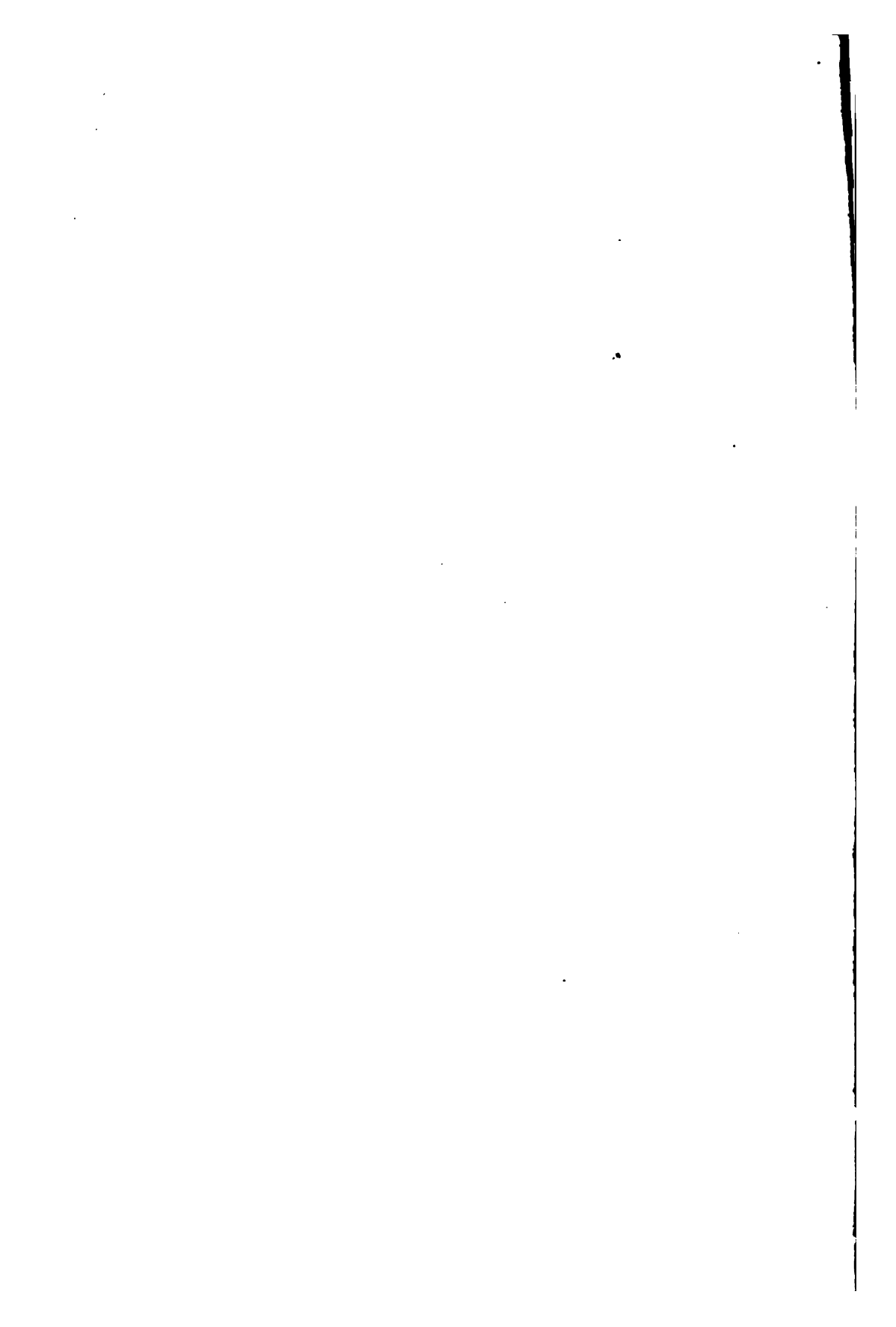
⁸ Wools. Int. Law, p. 190; 1 Kent, Comm. 61; Hall, Int. Law, 373; Wheat. Int. Law, D, § 293, note 152; 1 Halleck, Int. Law, pp. 435, 436; 3 Phillim. Int. Law, §§ 24-48.

Greece for certain alleged injuries by Greek soldiers inflicted upon officers of the British ship *Fantome*, and to compel the payment of certain other indemnities. In this blockade Greek vessels only were seized and sequestered, and even these were allowed to enter with cargoes *bona fide* the property of foreigners, and to issue from port, if chartered before notice of the blockade was given, for conveyance of cargoes wholly or in part belonging to foreigners.⁹ This precedent was followed in 1886, when the same country was blockaded by England. In the blockade of Formosa, in 1884, by France, and in many of the earlier so-called "pacific blockades," the practice was to make no distinction as to the vessels of third powers. When this pacific blockade is permitted to extend to and affect neutral vessels, there can be found nothing in international law or the practice of nations to justify it. Blockade is justified only as a war measure, at which time the rights of belligerents are conceived to preponderate to such an extent over those of neutral individuals that nations acquiesce in its enforcement. This question of pacific blockade was much discussed at the commencement of the Civil War, in 1861, in this country, when the order establishing blockade of the ports of the Confederate States was promulgated, but the other nations issued proclamations of neutrality. In conclusion it may be said that if by this pacific blockade is meant that, its effects shall extend to and affect third or neutral powers, then clearly no such reprisal is authorized, as no nation has a right to demand that the privileges attendant upon a blockade can be conceded to it under circumstances which are acknowledged by it to be neither serious nor dangerous enough to render recourse to war necessary. The inconveniences and losses resulting to third powers are too great to justify acquiescence in such conditions. If, on the other hand, the blockade is to be felt only by the blockaded and blockading countries, no reason is apparent why it should not properly be resorted to. Such a reprisal, under such restrictions, is certainly a mild measure for en-

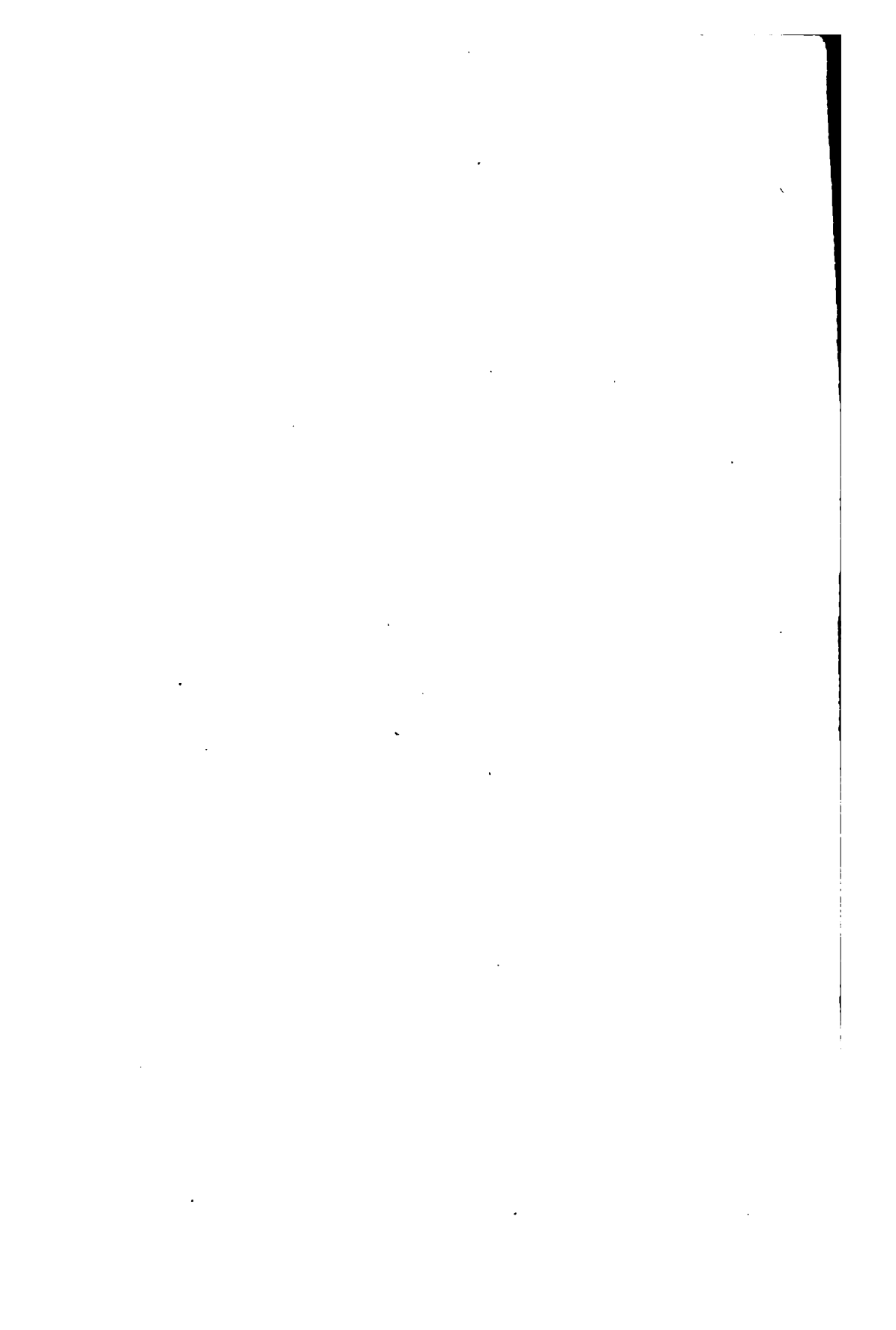
⁹ Case of *Don Pacifico*, Ann. Reg. 1850, p. 231, s. c. reported in Pitt-Cobbett, Cas. Int. Law (2d Ed.) pp. 148, 149, and in Snow, Cas. p. 246. For list of cases in which pacific blockade has been resorted to, vide Whart. Dig. § 304; Hall, Int. Law, pp. 369-372; Calvo, Int. Law, §§ 1832-1859.

forcing demands, even upon the country affected, and so much so that it has been stated that a blockade binding merely the blockaded and blockading countries would be illusory.¹⁰

¹⁰ In 1887 the majority of the Institut de Droit International adopted the following declaration upon the subject of pacific blockade: "L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit des gens que sous les conditions suivantes: (1) Les navires de pavillon étranger peuvent entrer librement malgré le blocus. (2) Le blocus pacifique doit être déclaré et notifié officiellement, et maintenu par une force suffisante. (3) Les navires de la puissance bloquée qui ne respectent pas un pareil blocus peuvent être séquestrés. Le blocus ayant cessé, ils doivent être restitués avec leurs cargaisons à leurs propriétaires, mais sans dédommagement à aucun titre."



PART II.
WAR.



CHAPTER XI.

INTERNATIONAL RELATIONS IN WAR.

- 121. Definition of War.
- 122-124. Kinds of War.
- 125. Causes of War.
- 126. Object of War.
- 127. Object not Limited to Cause for which Commenced.
- 128. Declaration of War.
- 129. Date of Commencement of War.

WAR DEFINED.

121. War is that relation of hostility which replaces the peaceable relations existing between one or more nations, or between political parties of the same nation, and which has for its object to obtain by regulated violence that which could not be acquired by peaceable or amicable means.¹

¹ Some of the other definitions are:

Bluntschli, § 510: "La guerre est l'ensemble des actes par lesquels un état ou un peuple fait respecter ses droits, en luttant par les armes contre un autre état ou un autre peuple."

§ 511: "La guerre est, en règle générale une lutte armée entre divers états, à l'occasion d'une question de droit public."

Woolf, Int. Law, § 115: "War may be defined to be an interruption of a state of peace for the purpose of attempting to procure good or prevent evil by force; and a just war is an attempt to obtain justice or prevent injustice by force, or, in other words to bring back an injuring party to a right state of mind and conduct by the infliction of deserved evil."

Field, Int. Code, p. 467: "War means a hostile contest with arms between two or more states, or communities claiming sovereign rights."

3 Phillim. Int. Law, § 49: "War is the exercise of the international right of action, to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse, in order to assert and vindicate their rights."

Count Von Moltke, in a letter to Mr. Bluntschli, says: "Perpetual peace is a dream, and it is not even a beautiful dream. War is an element of the order of things established by God. The most noble virtues of man are developed by it,—courage, disinterestedness, devotion to duty, and self-

It has been previously stated and discussed that international law has no tribunal for the adjustment of disputes that may arise, and states, in consequence, are compelled to exact redress for themselves by force. War is therefore a recognized means of carrying out or enforcing the demands of a state.

KINDS OF WAR.

122. Wars are divided by military authorities into the two general classes, namely, offensive and defensive, and in one or the other of these classes all wars properly belong.

123. Historians class wars by epochs, into ancient wars, wars of the middle ages, and modern wars, and according to their special object, into religious wars, wars of insurrection, wars of revolution, wars of conquest, wars of independence, wars of opinion, national wars, civil wars, etc. This classification, and the further classification into European, American, German, Crimean, Italian, etc., possess but little if any importance in international law.

124. Publicists classify wars into offensive, defensive, and auxiliary; into public, private, and mixed wars; and into perfect and imperfect, legal and illegal.

The classification into offensive and defensive has a different signification according to the standpoint from which war is discussed. In a military sense, the party who carries on the war within the territory of another is waging an offensive war, and the other party a defensive war, but, when considered in connection with the purpose

sacrifice. Soldiers give up their lives by it. Without war, the world would stagnate, and would perish in hideous materialism."

Ruskin, *Precious Thoughts*, 38: "War is productive of more good than evil. Nations have always reached their highest virtue in times of battle. No nation ever yet enjoyed a protracted peace without receiving ineradicable seeds of future decline."

Vide 4 Calvo, *Int. Law*, p. 16, where will be found collected other definitions of war.

of the war, the offensive may be taken for the purpose of defending against some proposed wrong. In the latter sense the party who is the aggressor is considered by some authorities as waging an offensive war. Properly this term should be applied to the party who wages war in the territory of the other. There is seldom to be found a belligerent who is willing to admit that he is the aggressor or provoker of a war, and the distinction between the two classes of wars is of little practical international value.

Auxiliary Wars.

An auxiliary war is one undertaken by one or more nations in support of the cause of one of the belligerents. This may occur from previous agreement, evidenced by treaty or similar contract, and the duties are regulated by the agreements.

Public Wars.

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A public war is one which has received the complete sanction of the sovereign power of the state, and is carried on with its complete approval. Such a war entitles both belligerents to all rights of war against each other, and this without regard to the justness of the cause of either belligerent. Everything that is permitted by the laws of war to either of the belligerents is likewise permitted to the other.

Private Wars.

A private war is one carried on by individuals or by fractions of a nation without the authority or sanction of the state or states of which they are subjects. Certainly, if the parties to such a war are members of the same state, international law has nothing to do with such a contest, but in case the parties be of different states it may be concerned; but each case must be considered as it arises. Such wars as the latter are not met with under the present organizations of societies.

Mixed Wars.

When a war is waged by different members of the same society or state, in which one of the parties represents the established government, we have what is understood as a mixed war, because, in so far as the party representing the government or sovereign power is concerned, there is a public war, while the other party is considered as waging a private war. But the terms "insurrection" or "rebel-

lion," etc., will quite frequently designate more accurately such a war.

Perfect and Imperfect Wars.

A perfect war is one in which the whole state is placed in the legal attitude of a belligerent towards 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. An example of such latter war will be found in the hostilities authorized by the United States in their war with France in 1798.

Legal and Illegal Wars.

The distinction made by Vattel between these two kinds of war seems to be that all wars are classed by him as either legitimate and formal, or illegitimate and informal, or predatory expeditions. "In order to distinguish the grounds of this distinction, it is necessary to recollect the nature and object of the lawful war. It is only as the last remedy against obstinate injustice that the law of nature allows of war. Hence arise the rights which it gives; * * * hence, likewise, the rules to be observed in it. Since it is equally possible that either of the parties may have right on his side, and since, by the law of nations, that point is not to be decided by others, the condition of the two enemies is the same, while the war lasts. Thus, when a nation or sovereign has declared war against another sovereign on account of a difference between them, their war is what is called among nations a lawful and formal war; and its effects are, by the voluntary law of nations, the same on both sides, independently of the justice of the cause. Nothing of this kind is the case in an informal and illegitimate war, which is more properly called depredation. Undertaken without any right, without even an apparent cause, it can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules prescribed in formal warfare. She may treat them as robbers." ²

² Vattel, Int. Law, bk. 3, c. 4, § 68.

Civil Wars.

In a civil war, which may be defined to be a war between members of the same state, the parties to the conflict enjoy the rights and privileges pertaining to belligerents, both as to each other and as to third or neutral powers. These wars are not to be confounded with rebellions, wherein the rebels are treated as having violated the internal laws of the country, and are regarded and punished as criminals. Many examples are found in which such persons are treated and punished as traitors and rebels, and this, too, while other or neutral states have accorded to such parties recognition as belligerents. In distinguishing between conflicts between such parties, it is necessary to take into consideration the time, place, extent, and duration of the insurrection, the gravity and complication of the matters at issue, the principles of right in the proclamation made by the party who first resorts to arms, and the attitude of neutral states. Recognition by third states has been previously discussed, and in such cases each must be considered separately.³

CAUSES OF WAR.

125. A just cause of war arises when injuries are received or threatened either by a serious breach of international rights, or in the breach of obligations contracted.⁴

International jurists mention certain rules as guides to determine when a war is just, and among them are the following: (1) To secure that which belongs to or is due to a nation; (2) to provide for

³ For definition of other classes of war mentioned, with full discussion of each, vide 1 Halleck, *Int. Law*, c. 16; Calvo, *Int. Law*, §§ 1866-1884, inclusive.

⁴ 1 Halleck, *Int. Law*, 440: "The justifiable causes of war are injuries received or threatened." Bluntschli, §§ 515-517: "War is just when international law authorizes recourse to arms; unjust when it is contrary to the principles of this law. Grave violations of the rights of a state, violent dispossessions, finally attempts directed towards the bases upon which repose order and human rights, are regarded as legitimate causes of war for the state who is the victim of or who is seriously menaced by them. It is necessary to consider as legitimate causes of war, not only attacks upon historic and acquired rights, but also obstacles unjustly interposed to the formation and development of new rights." Calvo, *Int. Law*, §§ 1884-1897; 3 Phillim. *Int. Law*, c. 4; Woolf, *Int. Law*, 177.

the future safety of a nation by obtaining reparation for injuries done to it; (3) to protect itself and property from a threatened injury. Another author says that war is just when international law authorizes recourse to arms, and unjust when it is contrary to the principles of this law. A serious menace to a state, a grave violation of its rights, a violent dispossession, a threatened overthrow of established order, or the rights of humanity, are regarded as just causes of war. In consideration of the nature of the causes of war, it will be found quite impracticable to determine in a given case whether it is just or unjust, because in the large majority of the disputes that arise between states the grounds of the quarrel are of such a complex nature that it cannot be determined with accuracy. It must also be borne in mind that in the disputes between nations force or war is the final arbiter and no other tribunal can determine the rights of either nation when it is decided to resort to war.

OBJECT OF WAR.

126. It is assumed that peace is the normal relation of Christian states, and war, being the exceptional state, is waged between nations, by authorized persons, for the redress of injuries, and should not be for conquest or plunder, and should be carried on with the smallest amount of injury consistent with the object aimed at and with the necessities of war.

The right to resort to war has received universal consent, from long usage, and is regulated by a code of rules as well established as the rules governing the pacific relations of states. "The great principle upon which these rules are framed is that of, on the one hand, compelling the enemy to do justice as speedily as possible, and, on the other hand, of abstaining from the infliction of all injuries both upon the subjects of the enemy, and upon the government and subjects of third powers, which do not, certainly and clearly, tend to the accomplishment of this object." Wantonness, either in the devastation of the enemy's territory, or in cruelty towards his subjects, is unjustifiable and illegal.⁵

⁵ Wools. Int. Law, § 131: "The rules which lie at the basis of a humane system of war are (1) that peace is the normal state of Christian nations,

OBJECT NOT LIMITED TO CAUSE FOR WHICH COMMENCED.

127. The cause for which a war is commenced is not the limit of the objects or ends of the successful belligerent at the close of hostilities.

The peculiar character of war as a means of enforcing demands, although analogous in some respects to the enforcing of the demands of individuals, renders the accomplishment of the exact object which was stated as the object of the quarrel unsatisfactory. Victory carries with it certain new rights. The expenses of carrying on a war are extremely large, in money, men, and sacrifices in many other ways. The war itself gives rise to changed conditions, so that to limit the victorious state to the accomplishment of the exact purpose named at the commencement of hostilities may not give a sufficient guaranty that peace can be maintained in the future.

DECLARATION OF WAR.

128. As between enemies, it is not necessary to give notice before entering upon active hostilities, although it is customary for a state to issue a proclamation to its own subjects, and a proclamation to neutrals.

Ex. 2
The fact that the state of war causes great changes in the relations, duties, and rights of individuals of the states interested, and those of neutral states as well, renders the determination of the question of the duties of states in this regard very important. There is no uniformity in the practice of nations in this respect, so that, however

to which they are bound to seek to return from the temporary and exceptional interruptions of war; (2) that redress of injuries, and not conquest or plunder, is the lawful motive in war, and that no rule of morality or justice can be sacrificed in the mode of warfare; (3) that war is waged between governments by persons whom they authorize, and is not waged against the passive inhabitants of a country; (4) that the smallest amount of injury consistent with self-defense and the sad necessity of war is to be inflicted; (5) that the duties implied in the improved usages of war, so far as they are not of positive obligation, are reciprocal, like very many rules of intercourse between states, so as not to be binding on one belligerent as long as they are violated by the other."

important it may be for the interests of all concerned to know that a state of war exists, the practice shows that states do not regard themselves under obligation, further than stated above. The United States began the war with England in 1812 without declaration or notice of any kind. The war with Mexico in 1846 began in the same manner. France commenced hostilities by instituting a blockade of the coasts of Mexico in 1838 without any notice. The hostilities carried on between France and China in 1884 commenced without declaration or notice, but France in this case steadily refused to admit the existence of a state of war. The Crimean war in 1853 was commenced with every formality, as did also the war of 1870 between Germany and France. The Russo-Turkish war of 1877 was formally begun by handing to the Turkish chargé d'affaires at St. Petersburg a formal dispatch. Turkish territory had been invaded some time previous to this, however. So, also, it is found that the authorities upon international law are not in accord upon this subject. Mr. Bluntschli says that "the state which commences an offensive war is bound, before having recourse to arms, and after having exhausted all pacific means, to proclaim its intention to make war before commencing hostilities, but that in case of a defensive war it is not necessary that there should be a previous declaration of war by the state which is on the defensive, when the attack of the enemy has already begun. To repel the attack of an enemy is always permissible."⁶ The great difficulty with regard to this doctrine is that it is practically impossible to determine what is and what is not an offensive war, or which state is the offender. It has been frequently determined judicially that, in order to legalize hostilities, no declaration or notice of any kind to the enemy is necessary. In the case of *The Teutonia* it was held that war may exist *de facto* without a declaration, but there must be in that case an actual commencement of hostilities.⁷ Again, in the *Prize Cases*, it was held that a civil war was never solemnly declared.⁸

⁶ Bluntschli, §§ 521, 524.

⁷ *The Teutonia*, L. R. 4 P. C. 171.

⁸ *Prize Cases*, 2 Black, 685; *The Ellza Ann*, 1 Dod. 244; *The Nayade*, 4 C. Rob. Adm. 253.

DATE OF COMMENCEMENT OF WAR.

129. Wars commence upon the date of the proclamation declaring the existence thereof by a belligerent, or, in the absence of such declaration, then at the time of the first act of hostility.

Previous to the seventeenth century, wars were always begun with great formalities, which consisted in letters of defiance or heralds sent directly to the enemy, and the authorities of that period expressly state such notice to be necessary. During the century named almost all of the wars were begun without notice of any kind, and the recent practice has been given. The individuals of the states at war are affected from the time of the commencement of hostilities, and, for the protection of their interests and that of neutrals, the fact that a state of war has begun should, whenever possible, and at as early a date as possible, be made known.⁹

* For collection and discussion of the authorities upon this subject, see Hall, *Int. Law*, pp. 375-382. Vide, also, Pitt-Cobbett, *Cas. Int. Law*, pp. 152-154; Twiss, *Law Nat.* §§ 35-37; 3 Phillim. *Int. Law*, c. 5; 1 Halleck, *Int. Law*, pp. 474-480; Whart *Dig.* § 334.

Calvo, *Int. Law*, § 1910 et seq.: "The head of the state must publish or proclaim in his own country the declaration of war for the information and guidance of his subjects, to fix the date when they must begin to exercise the individual rights which the state of war confers upon a belligerent power in its relations with the enemy, and to communicate to them the orders which he should give them in regard to the state of war."

Woolf, *Int. Law*, § 122: "But, if a declaration of war is no longer necessary, a state which enters into a war is still bound (1) to indicate in some way, to the party with whom it has a difficulty, its altered feelings and relations. This is done by sending away its ambassador, by a state of non-intercourse, and the like. (2) It is necessary and usual that its own people should have information of the new state of things; otherwise their persons and property may be exposed to peril. (3) Neutrals have a right to know that a state of war exists, and that early enough to adjust their commercial transactions to the altered state of things; otherwise a great wrong may be done them. Such notice is given in manifestoes."

CHAPTER XII.

EFFECTS OF WAR—AS TO PERSONS.

- 130. Who are Enemies.
- 131. Effect upon the Relations of Enemies.
- 132. Who are Noncombatants.
- 133. Who are Combatants.
- 134. Maritime War.
- 135. Privateers.
- 136. Volunteer Navy.
- 137. Prisoners of War.
- 138-142. Treatment of Prisoners of War.
- 143. Exchange of Prisoners of War.
- 144. Ransom.
- 145. Parole.

WHO ARE ENEMIES.

130. When one nation is at war with another nation, all the citizens or subjects of the one are deemed in hostility to the citizens or subjects of the other; they are personally at war with each other.

The above is what is known as the old and strict rule, and has the support of the writers and jurists of England and the United States, and has been judicially pronounced to be the rule of international law by the United States supreme court.¹ It is based upon the

¹ *White v. Burnley*, 20 How. 249. Vide, also, Mann. Int. Law, p. 166; 3 Phillim. § 69; 2 Halleck, Int. Law, 52, 53; Grotius, *De Jure Belli*, bk. 3, c. 3, § 9; Vattel, Int. Law, bk. 3, c. 5, §§ 70, 72; Twiss, *Law Nat.* § 43; Bynkershoek, *Laws of War*, c. 1. Kent, *Comm.* p. 55: "When war is declared, it is not merely a war between this and the adverse government in their political characters. Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations is a war between all the individuals of the one, and all the individuals of which the other is composed. * * * This is the theory in all governments; and the best writers on the law of nations concur in the doctrine that, when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other."

supposition that international law is concerned with the relations of states only, but the individuals of the state belong to the state, and have neither personal nor property rights except as members of their state. Being thus completely bound up with their state for both good and evil, when there is a state of war they become the enemy of the state which is at war with their own, and with every member of the same. There was another theory, first pronounced by Portalis in 1801, which maintains that "war is a relation of state to state, and not of individual to individual. Between two or more belligerent nations, the private persons of whom those nations are composed are only enemies by accident; they are not so as men; they are not even so as citizens; they are so only as soldiers." This doctrine has been accepted by the majority of the continental writers, but is not accepted by the other nations of the world. In addition to the decisions referred to above, the United States has declared adherence to the older doctrine, in orders promulgated for the "government of armies of the United States in the field," by Dr. Francis Lieber (articles 20 and 21):² "Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and war. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war." It has been stated with good reason that "if the individuals are not enemies as men, if they are not even so as subjects of the state, if they are so as soldiers only, or at most as officials and taxpayers, an enemy can have no right to interfere with the civil organization of the hostile country, he can have no right of doing violence directly or indirectly to civilians, he can have no right to touch a shilling of their property or to derange their daily life by using for military purposes anything which belongs to them, he can have no right to treat them in his own country in any respect less favorably than in time of peace."³ All of these things have been done in practically all of the modern wars. Furthermore, it is true that the practice of nations has improved

² Append. p. 343.

³ Hall, Int. Law, pp. 76, 77, and note.

since the beginning of this century, or the time of the first promulgation of this doctrine, but it does not follow that this is due to the establishment of this principle. It is not in accord with actual practice, nor in accord with the doctrine as advanced by the leading writers, but can be ascribed to the reaction from the wars at the beginning of the century, to the influence of the long-continued peace, and to the general advance in the humane feelings of nations.⁴

EFFECT OF WAR UPON THE RELATIONS OF ENEMIES.

131. The outbreak of war has the effect of putting an end to all nonhostile relations between belligerent states and their citizens. The modern rule in regard to persons of the enemy country in the territory of the other belligerent permits them to remain in such country during good behavior, and to carry on their business unmolested.

⁴ For statement of contrary doctrine, vide Bluntschli, §§ 530, 531; Calvo, Int. Law, § 2036. Mr. Hall says: "There are two reasons for which it is satisfactory to be able to reject the doctrine of the separability of the individual from the state. The first is that the doctrine is a fiction. * * * The state is made up of the sum of the individuals belonging to it, and its will is the sum of their wills. It is by pressure of different kinds which is brought to bear upon them individually that the state is compelled to submit to a victor. To separate individuals theoretically in respect of a number of interests, which are, nevertheless, recognized in universal practice as giving a fair hold for putting stress upon it, is simply to ignore facts. To separate the state from the individuals which compose it is to reduce it to an intangible abstraction. The second reason is that the doctrine is mischievous. It is the argumentative starting point of attack upon the right of capture of private property at sea. * * * Still more objectionable is its effect upon the legal position of the inhabitants of a militarily occupied country. If they are not enemies, they have no right of resistance to an invader. The spontaneous rising of a population becomes a crime, and the individual is a criminal who takes up arms without being formally enrolled in the regular armed force of his state. The customs of war no doubt permit that such persons shall, under certain circumstances, be shot, and there are reasons for permitting the practice; but to allow that persons shall be intimidated for reasons of convenience from doing certain acts, and to mark them as criminals if they do them, are wholly distinct things. A doctrine is intolerable which would inflict a stain of criminality on the defenders of Saragossa." Hall, Int. Law, pp. 72, 73.

What is known as the modified rule started as far back as the fourteenth century, and was first applicable to merchants who were permitted, upon the breaking out of war, a certain time within which to remove their goods from the country. This practice was extended by treaty to other persons, whose detention was not based upon necessity for political or military reasons. England, by statute of 27 Edw. III., c. 17, authorized foreigners to have a warning of forty days within which to quit the realm with their goods. The United States, by act of congress of July 6, 1798, authorized the president, in the event of war, to regulate the question of subjects of a hostile state remaining upon the territory of the United States.⁵ This usage, permitting foreign enemies to remain upon the territory of the state during good behavior, has not become an authoritative rule of law, although a well-established practice, for, apart from treaty, the right to expel them upon the outbreak of hostilities still exists. During the Franco-Prussian war of 1870, the right was exercised by the French government, which at the beginning of the war granted permission to subjects of the enemy to remain upon French territory so long as their conduct gave no ground for complaint, but later in the same year a decree was issued ordering them to quit the country within three days unless specially authorized to remain. The extreme rule, which authorized a belligerent to detain as prisoners of war enemy subjects found within his territory upon the outbreak of war, no longer has the sanction of law. The latest exercise of this extreme measure was in 1803, when Napoleon, upon the breaking out of hostilities with England, caused the arrest and detention as prisoners of all English subjects found in France. This was attempted to be justified upon the ground that England had made some captures of French vessels, prior to the declaration of war, and was undertaken as a measure of reprisal.⁶

⁵ 1 Stat. 577.

⁶ For general discussion of subject, vide 1 Kent, Comm. p. 56; Vattel, Int. Law, bk. 3, c. 4, § 63; 3 Halleck, Int. Law, pp. 483-485; Hall, Int. Law, pp. 391-393; Twiss, Int. Law, pp. 86, 87; Calvo, Int. Law, §§ 1912-1914.

WHO ARE NONCOMBATANTS.

132. All those persons who pursue their ordinary pacific avocations, including old men, women, children, and others, who are exempt or are not organized or called into the military service of their state during hostilities are classed as noncombatants.

Practically all nations at the present time maintain a regular army and navy, both of which, during a war, are increased by volunteers, militia, and new levies; every able-bodied man being available for active service with the military forces of his country. Yet there is always a very large proportion of the inhabitants who are left to pursue their ordinary avocations, and these enjoy certain immunities from violence. This immunity extends to protection from direct violence, but is not regarded as extending to a protection from death or injury indirectly resulting from an attack upon the armed forces of their state. On the other hand, should an attack be made upon them when no reasonable necessity of war warranted it, there would exist a reasonable cause of complaint in that it would be a violation of the customs of war. Noncombatants lose their character as such by laying aside their peaceful avocations and engaging, either directly or indirectly, in hostile acts towards the enemy, whether through orders of their government, or acting upon their own impulses.⁷

⁷ Hall, *Int. Law*, pp. 395, 396; 2 Halleck, *Int. Law*, pp. 2, 3; Vattel, *Int. Law*, bk. 3, c. 11, § 10, and *Id.* c. 8, § 145. Woolf, *Int. Law*, §§ 135, 136, says (section 136): "Private persons remaining quiet, and taking no part in the conflict, are to be unmolested; but, if the people of an invaded district take an active part in the war, they forfeit their claim to protection. This marked line of separation between the soldier and the non-soldier is of extreme importance for the interests of humanity."

WHO ARE COMBATANTS.

133. Lawful combatants³ comprise the following classes, who take part directly or indirectly in the operations of war:

- (a) The permanent military establishment, including the militia and reserves.
- (b) National guard, landsturm, free corps, and other bodies which fulfill the following conditions, namely,
 - (1) Who are under the direction of a responsible chief.
 - (2) Who have a uniform or distinguishing mark, or badge recognizable at a distance, and worn by individuals composing such corps.
 - (3) Who carry arms openly.
- (c) The inhabitants of non-occupied territory, who, at the approach of the enemy, take up arms openly and spontaneously to resist an invader, especially if duly authorized.

The Permanent Military Establishment.

Hostilities on land are usually carried on by the use of the regular army of the state, which, being permanently organized and under the effective control of the state itself, offers sufficient guaranties of the observance by it of the usages of war. In the case of an army

³ For general subject, vide Hall, *Int. Law*, pp. 514-525; Bluntschli, §§ 569-573; 2 Halleck, *Int. Law*, pp. 1-9. Walk. *Int. Law*, pp. 270-272, quotes the conference of Brussels, 1874, as follows: Article 9: "The laws, rights, and duties of war are applicable not only to the army, but likewise to the militia and corps of volunteers complying with the following conditions: (1) That they have at their head a person responsible for his subordinates; (2) that they wear some settled distinctive badge, recognizable at a distance; (3) that they carry arms openly; and (4) that, in their operations, they conform to the laws and customs of war. In those countries, where the militia form the whole or part of the army, they shall be included under the denomination 'army.'" Article 10: "The population of a nonoccupied

of invasion, there can be but little question as to who among such army are entitled to be regarded as lawful combatants, duly authorized to commit acts of hostility and, if captured, receive the treatment due to their status as prisoners of war. In such army all persons connected with it are to be regarded as combatants, except surgeons and some others who have by convention come to be regarded as carrying on peaceful pursuits, and are accorded a special treatment during war. The regular army includes not only the line, but also the members of the different staff departments, others who actually accompany it and assist in its movements, and all retainers to the camp.

National Guard, etc.

The conditions imposed for those of the above class are given in the black-letter type, and are the requirements agreed upon by the Brussels session of the Institute of International Law. Mr. Hall says that "the evidences of intention to form part of the combatant class that belligerents have been in the habit of exacting fall under the heads of (1) the possession of an authorization given by the sovereign; (2) the possession of a certain number of the external characteristics of regular soldiers." The reason for demanding that combatants possess certain authority and certain marks, such as a uniform, etc., is that the belligerent may know that he is confronted with a lawful body of men to whom, in case of capture, he is bound to accord the privileges of prisoners of war. The carrying on of hostilities by guerrillas entails upon those taken prisoners certain penalties that cannot be inflicted upon duly authorized combatants. Mr. Wheaton says that the acts of hostility committed by those who are authorized by either the express or implied command of the state are legalized. Such are the regularly commissioned military and naval forces of the nation, and all others called out in its defense, or spontaneously defending themselves in case of necessity, without any express authority for that purpose.

territory, who, at the approach of the enemy, of their own accord, take up arms to resist the invading troops, without having had time to organize themselves in conformity with article 9, shall be considered as belligerents. If they respect the laws and customs of war." Wools. Int. Law, § 134; Calvo, Int. Law, § 2044 et seq.

Levies.

The instructions for the government of the armies of the United States in the field distinctly establish the rule for this country as follows: "If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit."¹⁰ As the other codes which have been prepared since the above was promulgated by this country have contained similar provisions, and as practically all civilized nations have given their assent to such provisions, it may be assumed that in future such levies will be recognized by belligerents. The German army in 1870 departed from the spirit of its own institutions in this respect by declaring "that every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier by showing that he has been called out and borne on the lists of a military organized corps, by an order emanating from the legal authority and addressed to him personally," and this notwithstanding the fact that the French law, passed that year, provided that "citizens who rise spontaneously, arm themselves in defense of their country, and assume one of the distinctive signs of the national guard, in order to guarantee recognition as military corps, are considered as forming part of the national guard." The "Francs Tireurs" were a body of irregulars of France, acting without any other distinguishing marks than a blue blouse, a badge, and a cap, who operated without any military officer at their head. The Germans refused to recognize them as legitimate belligerents because they were not a part of the regular organized force of the state, and because their distinguishing marks on their dress were not sufficient, and were removable. They demanded that these marks should be irremovable at will and distinguishable. Since the Brussels conference there can be little doubt that the requirements of Germany in the last war will be insisted upon. It would seem to be sufficient, in the case of large bodies acting together,

¹⁰ Append. p. 340.

that they are under the command or direction of some military chief or other responsible person. In the case of small bodies, they should certainly have certain marks that will distinguish them as combatants, and in both cases their operations should be carried on according to the laws and usages of war.¹¹

MARITIME WAR.

134. Hostilities at sea are usually carried on by means of the regular navy of the state, by means of privateers, and by the volunteer navy.

In the rules adopted at the session of the institute of international law in 1880, in addition to the forces mentioned as being lawful combatants, was mentioned "the crews of public armed ships, and other vessels used for warlike purposes." The employment of public navies is of more recent date than that of the employment of private armed vessels. The latter, during the Middle Ages, were the main, and in many cases the only, reliance of many, especially the smaller, European states. Enough has been said of the public vessels of the state to give an idea of their employment.

PRIVATEERS.

135. A private armed vessel, owned and officered by private persons, acting under a commission from the state, is a privateer.

The commissions issued to such a vessel are usually called letters of marque. This kind of vessel corresponds to a company on land that is raised and commanded by private individuals, and which acts under rules from the supreme authority; such a company, acting without authority, corresponding to a privateer without a commission. Privateers are commissioned more for the purpose of preying upon the commerce of the enemy than for the purpose of attacking his public vessels. A private vessel, which levies war without a commission from a belligerent, would suffer materially should it fall into the hands of the enemy. The right to use privateers is still

¹¹ Am. Inst. arts. 51, 52; Append. 349; Hall, Int. Law, pp. 519-523, and notes.

recognized, and is not at all contrary to former usage, commissions being granted to privateers owned by aliens, even. The policy of the United States in regard to the employment of this extraordinary mode of warfare has been an extremely vacillating one, being influenced by the supposed necessities of the country at certain times. The general tendency has been to discourage their employment. The advantages, or reasons for the use of privateers that have been advanced, are that it affords a source of livelihood for seamen, who are thrown out of employment as a result of a war, and that a nation which maintains a small navy can thus readily and quickly call into activity a temporary force with a comparatively small expense. The objections to their use certainly outweigh the good that may result, for the motive of such vessels and their crew is plunder, and, when the war is ended, there is turned loose upon society a band of educated robbers and plunderers. The crews of such vessels, from their nature, are not subject to continued restraint, and the officers of such crews cannot be expected to maintain the same control over them as the masters of commercial vessels even; and, finally, in the execution of belligerent rights against neutrals, the foregoing evils will be brought into stronger contrast. "Privateering, under all the restrictions which have been adopted, is very liable to abuse. The object is not fame or chivalric warfare, but plunder and profit. The discipline of the crews is not apt to be of the highest order, and privateers are often guilty of enormous excesses, and become the scourges of neutral commerce. Under the best regulations, the business tends strongly to blunt the sense of private right, and to nourish a lawless and fierce spirit of rapacity."¹² Certain restrictions have been placed upon privateering, and pertain more to municipal than international law. Some of these consist in forbidding them to cruise in the rivers or within the sea line of a hostile state, and a certain portion of the crew must be natives. Again, the issuing of commissions only to subjects and requiring bonds from those to whom letters of marque are issued, or the deposit of a certain sum of money, to insure adherence to the letters of instructions. Again, certain treaties have been concluded which prohibit either of the treaty-making powers during a state of peace from taking out let-

¹² 1 Kent, Comm. 97.

ters of marque from a third power at war with the other. Finally, the treaty of Paris, which was executed by practically all of the larger powers except the United States, Spain, and Mexico, provided that "privateering is and remains abolished," so that the employment of privateers is forbidden, except in the event of war with one of the three powers named.

VOLUNTEER NAVY.

136. This was the designation given to certain vessels that were ordered to be employed by the King of Prussia by decree in 1870.

The owners of vessels were invited to fit them out for attack upon the French ships of war, for which service large premiums were offered. The crews of these vessels were to be furnished by the owners of the vessels, but were to be under naval discipline. The officers were to be in the same uniform as the regular naval officers, and furnished with temporary commissions. They were to form no part of the regular navy, but were to sail under the flag of the North German navy. The French government protested against this volunteer navy as being a violation of the treaty of Paris, which abolished privateers, but the English government found that there were substantial differences between the proposed vessels and those against which the declaration of Paris was directed. The differences between the two classes may have been substantial, but the objects to be attained by the employment of each were the same, and the objections to the employment of privateers, which caused their abolishment, exist to practically the same extent with regard to the volunteer navy as proposed by Germany. Private gain being the main purpose in each case, although the Germans professed to intend only destruction of the public vessels of France, yet there can be but little doubt that attacks would have been made upon private vessels as well. The regulation of such vessels or their discipline by the state would scarcely have been any more perfect than in the case of privateers.¹³

¹³ Vide, as to whole subject, Hall. Int. Law, pp. 525-529; Declaration of Paris, Append. 371; Whart. Dig. §§ 383-385, page 475, says: "Under the general term 'privateers' are enumerated the following: (1) Naval officers taking charge of merchant vessels, and cruising under the direction of their sovereign in time

PRISONERS OF WAR. *E.g.*

137. All persons whom a belligerent may kill, and all persons who may be separated from the mass of non-combatants by their importance to the enemy's state, or by their usefulness to him in his war, on surrendering or being captured, become prisoners of war.

The enemy is not restricted to persons whom he may legally kill in making prisoners. Under the class of persons who may be of special importance to his enemy may be classed such persons as the sovereign, ministers, important officers of the government, diplomatic agents, and any others of special importance at a given time. Under the head of persons of use to their government may be mentioned all those pertaining to the auxiliary departments, together with contractors and others present with the army on business connected with it, together with levies *en masse*, and sailors on board of trading vessels of the enemy. Count Bismarck, in the war of 1870, objected to the latter class being made prisoners of war, because the only reason for seizing sailors on board of merchant vessels was to enable the state making the seizure to fit out privateers, and since their employment was abolished, the right to seize such sailors fell with it. He threatened, and actually did make use of, reprisals, and sent the same number of Frenchmen of importance to Bremen as prisoners as captains of merchantmen were held by France. The right of France to take such men prisoners is undeniable, and was well demonstrated by Comte de Chaudordy, who showed that the usage of capturing sailors had been invariable, that such men are capable of

of war. (2) Officers of merchant vessels, subjects of a belligerent state, cruising under commission from their sovereign in time of war. (3) Volunteer officers of merchant vessels cruising against the enemy of their sovereign, but without any commission of their sovereign. (4) Subjects of neutral states, taking out for the purpose of preying on the commerce of one belligerent, commissions for this purpose from the other belligerent."

For discussion, vide Whart. Comm. Am. Law, § 201, note; Wools. Int. Law, §§ 127-129; Field, Int. Code, pp. 489, 490; 2 Halleck, Int. Law, pp. 9-20; Twiss, Law Nat. c. 10; Mann. Int. Law, 156-158; Calvo, Int. Law, § 2123 *et seq.*

being transformed at will into an instrument of war, and that in Germany all such men were subject to conscription for the navy of the state.¹⁴

TREATMENT OF PRISONERS OF WAR.

138. Prisoners of war are not criminals, and cannot be maltreated or compelled to perform acts contrary to their dignity. They may be subjected to such regulations, and their confinement be as rigorous, as their safe-keeping may demand.

139. Prisoners of war are taken in the performance of a legal act, and are prisoners of the capturing state. They cannot be punished for their acts, unless guilty of some crime in the capturing state before the commencement of hostilities.

140. Prisoners of war are usually confined in a fortress, barrack, camp, or similar place, and are not imprisoned in the full sense of the word unless such course may become necessary, as after an actual attempt to escape, or in case good reason exists for belief that such attempt will be made.

141. A prisoner of war commits no offense in attempting to escape; and cannot be punished if recaptured, although he may be killed during his pursuit. An organized attempt to escape, or a plot against existing authorities, may be punished, even with death, in grave cases. The right of punishment for the maintenance of discipline exists.

142. Prisoners of war are fed and clothed at the expense of the state capturing them, and may be required to perform work in accordance with their grade and social position, provided such work has no direct relation to the war. They may also perform work for personal compensation under regulations prescribed by the captors.

¹⁴ Am. Inst. arts. 48-50; Append. 348; Bluntschli, §§ 594-596; Hall, Int. Law, 404, note; Davis, Int. Law, 233; Calvo, Int. Law, § 2133.

The laws of war among the ancients, and among savage and barbarous nations at the present time, permit the killing or selling into slavery of prisoners of war. The modern practice does not sanction any such extreme measures, but, on the contrary, it is held that such prisoners shall not be treated with any greater harshness than is required for their proper security. The belligerent, in taking prisoners, has acquired so much of the enemy's resources, and may, during the continuance of the war, deprive him of such resources.¹⁵

EXCHANGE OF PRISONERS OF WAR.

143. Exchange consists in the simple release of a certain number of prisoners by each government under a special agreement, called a cartel.

No belligerent is compelled to enter into any such agreement, as each has a perfect right to keep all prisoners of war until the close of hostilities; so that, when such arrangements are made, it is based purely upon mutual convenience. If entered into, the cartel sets forth all of the terms of the agreement as to time, place, and method to be pursued. These agreements are strictly construed, and the basis of exchange is clearly set forth; strict equivalents must be given, such as private for private, rank for rank, and disability for disability. Officers and noncommissioned officers have a specified value in an agreed number of private soldiers, and, it may be added, that a disciplined soldier possesses more value than a recruit, and a healthy man is worth more than an invalid. Neither party to the agreement can properly turn over to the other prisoners of less value than he receives. If, after all of the prisoners have been exchanged upon the agreed basis, there is a surplus, credit may be given or payment made for this surplus. Prisoners who have been exchanged, like those who have escaped from confinement, are restored to their belligerent rights.¹⁶

¹⁵ Wools, *Int. Law*, § 134; Davis, *Int. Law*, pp. 234, 235; Hall, *Int. Law*, § 132; Bluntschli, §§ 600-611; *Am. Inst. arts.* 74-79; *Append.* p. 352; 2 Halleck, *Int. Law*, p. 74; Creasy, *Int. Law*, pp. 454-463; *The Antelope*, 10 Wheat. 120; Calvo, *Int. Law*, §§ 2134, 2135.

¹⁶ *Am. Inst. arts.* 105-110; *Append.* p. 356; Hall, *Int. Law*, pp. 411, 413; Davis, *Int. Law*, pp. 235, 236; *Vatt. Int. Law*, bk. 3, c. 8, § 153.

RANSOM.

144. Ransom, as applied to prisoners of war, consisted in the payment of an agreed compensation for their discharge from custody.

This method of securing the release of prisoners of war was quite common during the Middle Ages, but is now practically obsolete, although, in the instructions for the government of the armies of the United States in the field provision is made as follows: "The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries. Such arrangement, however, requires the sanction of the highest authority."¹⁷

PAROLE.

145. Parole is a verbal agreement, entered into by an individual of the enemy, by which he pledges his honor that he will do or refrain from doing certain things in consideration of certain privileges or advantages.

This is a privilege usually accorded to officers, and but seldom to enlisted men. The effect is to render the parties giving it innocuous to the belligerent, and the conditions imposed generally refer to their place of residence or to their refraining from further service in the army of the enemy until the end of the war or until exchanged. This latter pledge of refraining from service in the army is construed to refer to active service with the army in the field, and does not relate to certain other service, such as raising and drilling recruits and constructing military works not within the actual theater of war. The agreement contained in a parole not to serve for a specified length of time in the army of his country would be binding only during the continuance of the war, even though the agreed time is longer. No prisoner can be compelled to give his parole, nor can

¹⁷ Am. Inst. art. 108; Append. p. 357.

he be paroled by the act of his enemy alone. The punishment for breach of parole is death, if the prisoner again falls into the hands of his enemy.¹⁸

¹⁸ Hall, Int. Law, § 133; Davis, Int. Law, pp. 236, 237. For whole subject of prisoners of war, in addition to authorities cited, vide Brussels Conference; Append. p. 389; Code Recommended by Institute of International Law, Append. 376; Wheat. Int. Law, D, §§ 342-344; 3 Phillim. Int. Law, 95, 96; Mann. Int. Law, pp. 210-222; Twiss, Law Nat. p. 350; Bynk. pp. 20-23, c. 3.

CHAPTER XIII.**EFFECTS OF WAR—AS TO PROPERTY.**

- 146. The Old Rule.
- 147. Property Owned by the State—Movable Property.
- 148. Immovable Property.
- 149. Private Property in Enemy Territory—Immovable Property.
- 150. Movable Property—Contributions and Requisitions.
- 151. Foraging.
- 152. Booty.
- 153. Private Property within Enemy's Jurisdiction.
- 154. Property of the Enemy Afloat in Ports, etc.
- 155. Private Property not within the Territory of any State.
- 156. Rule as to Fishing Vessels.
- 157. What Constitutes a Valid Capture.
- 158. Disposition of Captured Property.
- 159. Ransom.
- 160. Loss of Captured Property.

THE OLD RULE.

146. The ancient rule of war, in regard to property, authorized a belligerent to seize and appropriate property of every kind belonging to an enemy, or to an enemy's subjects, in all places where war was permissible. This rule has been abrogated or modified by usage as shown in the following pages.

PROPERTY OWNED BY THE STATE—MOVABLE PROPERTY.

147. As a general rule, the movable property of the enemy state can be appropriated.

In considering the rules in regard to enemy property as modified by usage, it is well to bear in mind that custom has, in general, applied the principle that all property which is susceptible of use by the belligerent seizing it for warlike purposes, or which can be of similar use to his enemy, directly or indirectly, can be appropriated; but that property not possessing these characteristics is

not usually subject to appropriation. There is no question in regard to the following classes of property: Munitions of war, vessels of war, public vessels, state treasure consisting of moneys and checks payable to bearer, and taxes, customs, etc. The latter must be applied to administrative expenses, or to the payment of debts for which specially hypothecated, the overplus only being applied by the belligerent to his own use. In regard to certain other movable or personal property, such as checks requiring indorsement, and contract debts in other forms, which may require payment to be enforced judicially, or the seizure of which may not operate to relieve the debtor making payment of his obligation, there is some question as to the right of seizure. The seizure of certain property, such as territory, carries with it the possession of certain incorporeal rights which are inherent in the thing seized. This is not true in regard to the seizure of instruments representing a debt. The seizure of the person to whom a debt belongs does not carry with it the possession of the debt itself, nor does the seizure of the instrument evidencing the debt carry with it the right to the debt itself, since the instrument is merely the evidence of the right itself, or the title deed of the obligee. When a belligerent has made a complete conquest of the enemy country, and stands in the place of the conquered state, the conqueror, of course, occupies the position of the conquered, and can enforce the rights belonging to the latter.¹

SAME—IMMOVABLE PROPERTY.

148. Lands and buildings are not to be confiscated or alienated.

The true reason for this rule seems to be that it is impossible for the belligerent state making the seizure to give a good title to the purchaser. Of course, the profits accruing to the state owning such property may be seized by the occupant, and the latter may make use of the property for quartering troops or other purposes, and may collect and appropriate the rents, lease or make other contracts in regard to the same, which will be good during the occupation, but not afterwards. He cannot commit waste or destroy

¹ Hall, Int. Law, pp. 417-419; 3 Phillim. Int. Law, pt. 12, c. 4.

the property, except in so far as his military operations render it necessary to do so. The ultimate property passes to the conqueror after the conquest is complete, the sovereignty of the country passing at the same time. The German government in the Franco-German war of 1870 sold a large amount of timber which was growing in the French forests. After the war was over, the French government seized all of the timber thus cut which had not been removed. Upon application being made to the German government by the purchasers, they were informed that the matter must be left to the French courts. The latter annulled the sale on account of waste, and as being in excess of necessity.

There are classes of property vested in the state which, according to the rules of war, are not seized, nor the rents or profits of the same appropriated. These consist of property permanently set aside for the maintenance of hospitals, educational institutions, and scientific or artistic objects. The same is true in regard to the seizure of state papers, legal or judicial documents or archives. Works of art, libraries, scientific collections, and precious instruments, such as astronomical telescopes, should be secured against all avoidable injury, and none of them, under the instructions for armies of the United States, can be sold. The works of art which had been seized by the French previous to the peace of 1815 during the early years of this century were in that year restored to the countries to which they of right belonged. This action confirms the principle that all such collections are considered as exempt from appropriation, although such collections, under the practice of the United States, as belong to a hostile state, can be seized and removed for the benefit of said nation, provided this can be done without injury. The ultimate ownership is to be determined by the treaty of peace. Vessels engaged in exploration and scientific discovery are also granted immunity from capture by mutual consent, upon the ground that their labors are intended for the benefit of all mankind. One of the earliest and most noted examples of this was when the French government in 1776 ordered all vessels to treat Captain Cook as a neutral and friend.²

² Am. Inst. arts. 34-36; Hall, Int. Law, pp. 419-422; Wools. Int. Law, § 124; Twiss, Law Nat. § 68; 2 Halleck, p. 97; Bluntschli, §§ 646, 648.

PRIVATE PROPERTY IN ENEMY TERRITORY—IMMOVABLE PROPERTY.

149. Immovable private property—land and houses—in enemy territory is exempt from appropriation.

The same reason for this exemption exists as in the case of similar property belonging to the state, namely, the inability of the invading state to give an indefeasible title to the purchaser.

SAME—MOVABLE PROPERTY.

150. Movable or personal property is still subject to seizure under regulations governing contributions and requisitions.

- (a) **CONTRIBUTIONS**—Contributions consist in moneys levied by the invader in excess of the taxes.
- (b) **REQUISITIONS**—Requisitions consist in the enforced render of articles needed by the enemy for consumption or temporary use.³

Plunder and pillage are now abolished, and the regulated seizure of private property may be said to have taken the place of these ancient seizures and subsequent confiscations. The distinction between contributions and requisitions as drawn by de Garden is this:

³ The instructions of the Crown Prince of Germany in regard to requisitions is contained in the following regulations for occupied districts: "(4) The inhabitants will have to supply all necessaries for the support of troops. Each soldier will receive daily 750 grammes of bread, 500 grammes of meat, 250 grammes of lard, 30 grammes of coffee, 60 grammes of tobacco or 5 cigars, ½ litre of wine, or 1 litre of beer, or 1/10 of brandy. The rations to be furnished daily for each horse will be 6 kilogrammes of oats, 2 kilogrammes of hay, and 1½ kilogrammes of straw. In case of inhabitants preferring an indemnity in coin to one in kind, it will be fixed at two francs each soldier daily. (5) All commanders of detached troops will have the right to order a requisition of provisions needful to the support of their troops. The requisition of other articles deemed indispensable to the army can only be ordered by generals and officers acting as such. In all cases nothing will be demanded of the inhabitants except what is necessary for the support of the troops, and official receipts will be given for everything supplied."

"The former is a substitute for pillage. These constrained payments of money should assure the preservation of every kind of property, although contributions do not free the inhabitants from the requisitions of the enemy, and they are bound to furnish horses, carriages, etc. By 'requisitions' one understands demands for specified objects made in the form of an invitation, but pursued with force, if it becomes necessary to obtain them; this kind of services and the name given to them were invented by Washington in the American war." Calvo says: "Contribution consists of that which the inhabitants of an occupied country are compelled to pay or give in order to protect themselves from pillage; requisition is the demand made by an authority to place at his disposal things, even persons." Requisitions consist in food, clothes, forage, wagons, horses, lodging, labor, railroad material, boats, and other means of transport, all of which are levied under what is recognized as military necessity. These may be made by the commander of any detached portion of the army under a higher authority, which latter regulates the articles to be requisitioned, while the commander in chief can demand the supply of all articles subject to such demands. In regard to contributions, only the commander in chief or the commander of a detached corps can levy them. Receipts are usually given, and serve the double purpose of advising a subsequent army of the amount that has been previously taken, and to facilitate compensation to the owners in case policy dictates such a course. This, however, is not incumbent upon the state. Some authorities state that articles can be requisitioned only by compensation of the individual owners, but the safer statement seems to be that this compensation is to be arranged for in the terms of peace. In concluding this portion of the subject, attention is directed to the fact that in the Franco-German war of 1871 the right to levy both contributions and requisitions was exercised with greater severity than usual.*

Maritime Contributions and Requisitions.

In the determination of the right to levy contributions and requisitions by a naval force it is necessary to bear in mind the difference

* Calvo, *Int. Law*, § 2235 et seq., who gives the opinions of the principal authorities; *Am. Inst. art. 38*; *Hall, Int. Law*, pp. 423-430; *Bluntschli*, § 655; *Amer. Ins. 54-60*; *Append. p. 349*.

in the nature of an army and a naval force. In regard to the former, the situation in general is that it is occupying the country upon which demands are made, and is in a position to enforce these demands during the occupation. If a naval force occupies a corresponding position with respect to the place upon which requisitions are to be made, and the articles demanded are necessary, and are delivered under conditions that indicate that the force was practically in possession of the place during the time necessary to complete the possession of the goods demanded, then there is no apparent reason why such requisitions cannot be made and enforced by intimidation of different kinds, or even by bombardment under certain conditions. In regard to contributions the situation is different, because the naval force is, as a rule, in such condition as not to require these contributions on the ground of the necessity of maintaining the force in an efficient state, nor are they in a position similar to that of an occupying army, which in forcing the levy of a contribution can take hostages, seize the property, or otherwise enforce the levy by means short of absolute violence. On the contrary, such naval force will have to depend in general upon enforcing their demand by use of violence, such as destruction of the place, which in all probability it does not dare enter, which it cannot even hold temporarily, and from which it is unable to seize and carry away the contributions demanded. The slaughter of non-combatants or destruction of nonfortified places is not one of the recognized modes of warfare, and is certainly not authorized for the purpose of enforcing contributions. Contributions can be levied as a right by a maritime force, but the conditions should be practically the same as those under which a land force would levy them; and these conditions imply the landing of a sufficient force to occupy the place and to enforce the demands in the recognized manner. In concluding it is well to bear in mind that when requisitions are made by a maritime force the articles demanded should be such as may be justly seized upon the grounds of necessity, and cannot consist of articles that are taken for the purpose of sale, since such a transaction is scarcely distinguishable from a contribution.⁵

⁵ Hall, *Int. Law*, pp. 430-434.

FORAGING.

151. Foraging consists in the collection by the troops themselves of food of all kinds for men and animals, and the collection of wood, etc., for fuel, from the fields or other places where it may be.

BOOTY

152. Booty consists of all property that is susceptible of capture in war, and of such private property as may be susceptible of military use. Strictly, it comprises all articles that may be obtained by way of requisition.

This term is somewhat broader in its signification than is generally understood by private property on land, and in regard to property falling under this designation which is not taken by way of requisition some authorities lay it down as a rule that when it has been in possession of the captor for twenty-four hours the title vests in the government of the captor. The practice in regard to the disposition of booty is different in different countries. In some countries the property is sold, and the proceeds used in whole or in part as a compensation to the captors. Great Britain, in certain cases, rewards such services. The rule in the United States seems to be that the government appropriates all property captured by its armies on land.*

PRIVATE PROPERTY WITHIN THE JURISDICTION OF THE ENEMY.

153. When war breaks out between two states, the personal or movable property of citizens of either, found in the territory of the other, on land, also debts due to citizens of the enemy state, are strictly confiscable; but modern usage has rendered this rule practically obsolete.

* Hall, Int. Law, p. 435; Davis, Int. Law, p. 230; 2 Halleck, Int. Law, pp. 115-119; Am. Inst. art. 45; Walker, Int. Law, p. 88; Vattel, Int. Law, bk. 3, c. 9, § 164; The Banda and Kirwee Booty, L. R. 1 Adm. & Ecc. 109, 35 Law J. Adm. 17; Same Case, Pitt-Cobbett, Cas. Int. Law, p. 195.

In regard to debts due by a state to citizens of an enemy state the rule is now well established that they are not confiscable, nor is the interest due upon such debt sequestrated. This rule is now so well established and acknowledged by all the authorities that, in order to avoid such payments, the agreement must incorporate, as an express reservation, the right to sequestrate; since, in the absence of such reservation, a state is assumed to have contemplated payment notwithstanding the existence of war.⁷

The question of the effect of war upon property came up for consideration in the United States as a result of the war with England in 1812. In this case it appears that upon the outbreak of hostilities some timber belonging to a British subject was found within the territory of the United States, and, having been seized, was condemned by the lower court. In deciding this case upon appeal the supreme court reversed the decision of the lower court. In the opinion of the court it was not questioned that a belligerent possessed the right to seize and confiscate the property of an enemy wherever found, and it was distinctly held that modern practice or policy could not impair this right, although it might mitigate the exercise of it. The court reversed the decision of the lower court principally upon the ground that the effect of a declaration of war, or of the existence of war, alone did not confer upon the courts the power to confiscate enemy property without some expression of the will of the state itself to that effect, although it was admitted that the existence of war carried with it the right to effect such confiscation. Judge Story, who delivered the opinion in the lower court, in a dissenting opinion held that no legislative action was necessary to warrant the court in confiscating the property in this case, since, the timber in question having been seized by an officer of the government, the existence of war was sufficient to enable the court to put in effect the right.⁸ The custom of permitting the subjects of foreign countries to take up their residence within the territory of any state, and of remaining in such state during hostilities, during good behavior, having become quite general, it would seem to carry with it as a necessary consequence protection of their

⁷ Hall, Int. Law, pp. 435, 436; Wheat. Int. Law, § 300; Dana's Note, 156; 1 Kent, Comm. p. 59; 1 Halleck, Int. Law, p. 488; Ware v. Hylton, 3 Dall. 199.

⁸ Brown v. U. S., 8 Cranch, 110.

property within the jurisdiction of the state of residence. The rule of exemption from confiscation is laid down positively by some authorities, and the subject is largely regulated by treaties, but these are not binding upon all civilized nations, and usage is not sufficiently well established to make a rule of law upon the subject. It is safe to say that the modern European practice is opposed to the confiscation of personal property, and, as it is generally recognized as unwise to enforce the strict rule of law, it is believed that the law will in time be declared to be in conformity with the later practice.*

PROPERTY IN ENEMY'S PORTS OR WATERS.

154. Territorial waters being within the jurisdiction of the state, property of the enemy found within such waters, upon the outbreak of war, follows the rule and practice as stated for property within the jurisdiction of the enemy. Property of an enemy coming into territorial waters after the outbreak of hostilities is confiscable.

The course pursued by the belligerents in the Crimean War, and also in the Franco-German War, designating a certain time in which vessels then in port were authorized to depart from the territorial waters of the enemy, and of permitting enemy ships which had sailed for these ports after the declaration of war a certain time in which to come into port and remain for the purpose of loading their cargoes, indicates a tendency to depart from the strict rule of law. In the first-mentioned war, when France and England took part in the war, they allowed six weeks for Russian vessels to leave port; and allowed to Russian ships of commerce, not actually in the ports of England or France at the time of the declaration of

* For entire subject, vide, in addition to authorities cited, Calvo, *Int. Law*, §§ 1915-1925; Bynk. c. 7; Wools. *Int. Law*, § 124; Twiss, *Int. Law*, pp. 100-108; Vattel, *Int. Law*, bk. 3, c. 5, § 77; Pitt-Cobbett, *Cas. Int. Law*, pp. 154-166; *The Teutonia*, L. R. 3 Adm. & Ecc. 394, L. R. 4 P. C. 171; *Wolff v. Oxholm*, 6 Maule & S. 92; *Wheat. Int. Law*, D, note 156; 2 Halleck, *Int. Law*, c. 22, and pp. 491, 492, note; *Johanna Emille*, Spinks' Prize *Cas.* 14, cited Snow, *Cas.* p. 270, note; 3 Phillim. *Int. Law*, p. 118 et seq.; Mann *Int. Law*, 170, 171; Hall, *Int. Law*, § 144.

war, or which left any ports of Russia destined to ports in those countries previously to the declaration, to enter such ports, and remain, for the loading of their cargoes, until the expiration of six weeks from the declaration. Russia allowed French and English vessels six weeks to load and sail from ports in the Black Sea, Baltic Sea, and Sea of Azof, and six weeks from the opening of navigation to vessels in the White Sea. There is a class of vessels which is claimed to be exempted from capture, and some practice for this exemption exists. It is claimed that vessels which are driven into enemy ports by stress of weather or want of provisions should be exempt from capture, on the ground that humanity and justice demand that advantage should not be taken of the misfortune of an enemy. This is simply a question of generosity, and contrary to the rule of law.¹⁰

**PRIVATE PROPERTY NOT WITHIN THE TERRITORY OF
ANY STATE.**

155. Private property not within the jurisdiction of any state is subject to seizure and confiscation. Such property found in the ports of the enemy follows the same rule.

The modifications in regard to property on land effected by modern practice has not extended to property at sea, and it is safe to say that one of the principal reasons for adherence to the recognized rule of law is that England has at all times, and consistently, declined to accept any modification of the right to confiscate such property. The practice of civilized nations has not departed in many instances from the exercise of the right to make such captures. The United States has consistently favored the exemption of merchant vessels and their cargoes from capture, and has endeavored to secure this exemption by convention, but has thus far only one treaty (with Italy) to that effect. Germany, after finding that France had adhered to the rule of war in this regard, changed her proposed practice after the first year of the war, or in 1871. There is no question but that the property subject to capture at sea occupies an entirely different position from that of property on land.

¹⁰ Hall, *Int. Law*, pp. 441, 442; 2 Halleck, *Int. Law*, p. 152.

In regard to the latter the rule has been stated, and while it is true that, in the enforcing of requisitions of private property on land, it is usual to limit the property taken to such as will be useful to the captor for the purposes of war, yet in taking this property the noncombatant population is deprived of material necessary for the support of themselves or their animals. On the other hand, in regard to the property taken at sea, the reasons urged in support of the right are that only the material interests suffer, and no personal suffering is inflicted. Again, such property is shipped by the owners with the intention and idea of deriving a profit from the enterprise. The risks of war are appreciated and understood, and can be provided for by means of insurance. It is in the custody of men trained and paid for the purpose; and the sea upon which it is sent, is *res omnium*, the common field of war as well as of commerce. The objections, therefore, that exist to the capture of private property on land do not apply to property at sea with proportional force, yet the effect of captures at sea in deranging the trade of the enemy is very much greater than the enforcing of requisitions has ever been found to be. The effect of this rule was modified by the declaration of Paris, to the extent that "the neutral flag covers enemy's goods, with the exception of contraband of war."¹¹

RULE AS TO FISHING VESSELS.

156. A custom of rather general value has exempted vessels engaged in coast fishing from capture, but this practice cannot be stated to be so general as to have become a rule of international law.

France has protected such fishermen and their vessels very generally, and it is claimed that the United States, in their war with Mexico, extended the same concessions to them. The most noted departure from this custom was when England, in the year 1800, seized a number of French vessels on the ground that they were

¹¹ Hall, Int. Law, §§ 143, 146-148; Declaration of Paris, art. 2; 1 Kent, Comm. p. 101 et seq.; Twiss, Law Nat. § 73; Mann, Int. Law, pp. 183, 184; 2 Halleck, Int. Law, c. 22, §§ 1-7, and notes; Vattel, Int. Law, bk. 3, c. 9, §§ 160-162.

* What constitutes a valid capture: 1st - As between Belligerent States, when the title is directed to some all-sundered take place & hope of recovery has departed. 2nd - As between a capturing ship & a subsequent ship of the same nation. - Here, same act having intention to make prize of the vessel is necessary with prize of the vessel is to be treated as if the vessel is to be treated as if it has been carried into a place of safety by the original captor. - Here, vessel is to be treated as if it has been carried into a place of safety by the original captor.

being used for warlike purposes by the French, but they were afterwards unmolested. The rule seems to be that so long as they remain innocuous they are unmolested, and the reason for their exemption is that this occupation is the sole means of living for a very large portion of the inhabitants of certain countries, and so long as they confine themselves to their vocation they are harmless. This exemption is not extended to those engaged in deep-sea fishing.¹²

+ WHAT CONSTITUTES A VALID CAPTURE.

157 As between belligerents, the capture of a vessel is complete when surrender has taken place, and hope of recovery has departed.

To constitute a capture at sea, the act of taking possession is not absolutely necessary because the surrender of the master and crew or vessel is complete when the flag is lowered, and the conditions may be such as to render actual taking of possession impracticable, and yet the continuance of hostilities under the circumstances may be uncalled for. There must, however, be some act showing intention to make prize of the vessel, aside from the surrender, which is not in itself sufficient. The most effective method is to place aboard of the vessel a prize crew of sufficient magnitude to prevent an attempt at rescue. It has been held sufficient to place a prize master aboard the vessel, but captures have been effectual where no man was put on board of the vessel. It is sufficient if intention to seize and retain as a prize can be inferred from the acts of the captor. The placing of one or two men on board of such a vessel, even though they did not take possession of the ship's papers, or exercise control over the navigation thereof, was

¹² Calvo, Int. Law, § 2368; Hall, Int. Law, 449, 451. Bluntschli, § 667: "Vessels destined for coast fishing and belonging to citizens of an enemy state are not subject to capture." 2 Halleck, Int. Law, pp. 151, 152; Walker, Int. Law, pp. 317-319. Wools, Int. Law, p. 303: "Hostile ships, with whatever goods on board, have been uniformly regarded as prizes of war. But from the operations of war, one class of vessels, engaged in an eminently pacific employment, and of no great account in regard to national resources, has often been exempted. We refer to vessels engaged in coast fisheries."

been carried by captor into safe harbor. - In this case it belongs to the vessel "Naligh."

considered sufficient to retain possession as prize as against a subsequent capture by a privateer or other vessel.¹³ The question of the validity of capture is of importance to others besides belligerents, since others may acquire interests in the property seized, either through a recapture, or through a transfer by the captor. As to the latter, it is important for the transferee to know what interests he has acquired, which can certainly be no greater than that possessed by the transferrer.

In regard to the time at which the captor acquires property in the things captured, it may be said that the ancient practice was that the captor acquired property in things seized by him when he had brought them into his camp, fortress, port, or fleet; and, if a vessel was recaptured before being brought into such place of safety, it was to be restored to the owner upon payment of salvage, but, if recaptured after being brought into such place of safety, it belonged to the recaptors. Later the arbitrary rule was laid down that possession for twenty-four hours was sufficient to transfer title to the property. This rule was published in an edict by France, in 1584, and became a very general rule of practice for the greater number of civilized nations. There is at present no settled practice in regard to the two rules, although the older rule seems to be the more satisfactory and equitable.¹⁴

¹³ The Grotius, 9 Cranch, 370.

¹⁴ Twiss, Int. Law, p. 332 et seq.; Hall, Int. Law, 452-456; Bynk, c. 4. Grotius, De Jure Belli, bk. 3, c. 6, § 3: "(1) But in this question of war, it has been established as a rule of nations, that he is understood to have captured a thing who detains it in such a manner that the other has lost probable hope of recovering it, or so that the thing has escaped from its grasp, as Poponius says. And in movables, this is applied so that things are considered as captured when they are brought within the boundaries, or *intra praesidia*, under the protection of the enemy." Woolf, Int. Law, § 148, cites the 24-hour rule, and also the ancient rule, and says: "Thus, there is no settled view or principle as to the time when a title from capture begins. Perhaps no definite rule can be laid down, any more than in answering the question when occupation ends in ownership, which the laws of different states will determine differently." Pitt-Cobbett, Cas. Int. Law, pp. 207-211.

DISPOSITION OF CAPTURED PROPERTY.

158. The property in an enemy's vessel and cargo that is captured vests in the state as soon as the seizure is effective, and can be disposed of in such manner as the new owner may elect, either by sale, by destruction, or by ransom.

It is the modern custom to have all prizes sent into port for adjudication before disposition, the object being the protection of neutrals by determining judicially whether the captured vessel and cargo are entirely enemy property, and it is not customary to ransom or destroy such prizes unless the circumstances practically make such a course necessary. It is also the modern practice for the state to relinquish its interest in prizes that consist of vessels belonging to private individuals to the captors, but the relinquishment does not become effective until after adjudication by proper tribunals. In regard to the destruction of enemy's vessels made prize, the practice of the United States during the War of the Revolution, and also in the War of 1812, was to destroy all that were captured, and instructions were issued directing this action in all cases unless the prize should be very valuable, and near a friendly port. This was done because of the difficulty in manning prizes, since every prize manned created a serious diminution of the force of the capturing vessel. This course was strictly legal, and the condition of the country demanded recourse to the exercise of the right. It is true that such is not the general course pursued, especially by England and France, but destruction of such vessels was under certain conditions recognized as proper by the Institut de Droit International at Turin in 1882.¹⁵

¹⁵ "1. Lorsqu'il n'est pas possible de tenir le navire à flot, à cause de son mauvais état, la mer étant houleuse.

"2. Lorsque le navire marche si mal qu'il ne peut pas suivre le navire de guerre et pourrait facilement être repris par l'ennemi.

"3. Lorsque l'approche d'une force ennemie supérieure fait craindre la reprise du navire saisi.

"4. Lorsque le navire de guerre ne peut mettre sur le navire saisi un

RANSOM.

159. Ransom consists in the repurchase of property acquired as prize by the original owner from the captor.

This is merely a voluntary act upon the part of the owner, and the result of it is that he gains possession of his vessel, and the crew do not become prisoners of war. In such contracts in regard to vessels the commander gives what is known as a "ransom bill," by which he agrees that the owner shall pay an agreed sum to the captor. This contract is made out in duplicate, one copy of which is retained by the commander of the ransomed vessel, and serves as a safe conduct, protecting the vessel from recapture by the belligerent or his allies, provided he does not depart from the terms of the agreement, either as to the port for which he is to sail, or the course to be pursued, or in the time agreed upon for making the voyage. This refers to a voluntary departure from the terms agreed upon, and does not apply in case the vessel is driven from her course by stress of weather. The captor retains the other copy of the ransom bill, and in addition takes from the captured vessel a member of the crew—generally the mate—as a hostage for the payment of the stipulated sum of money. Should the vessel of the captor, with the hostage and bill on board, be captured by the enemy, the ransom bill is discharged. The ransom bill and hostage can be transmitted to a place of safety, and the ransom is to be paid in such case, even though the captor's vessel be afterward captured, and it is sometimes incorporated in the bill that the ransom shall be paid notwith-

équipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûreté.

"5. Lorsque le port où il serait possible de conduire le navire saisi est trop éloigné." Adopted by the Institut de droit International in 1882.

Vide Bluntschli, § 672; Wools. Int. Law, § 148.

"The laws of the United States do not admit of the sale within their jurisdiction, for any purpose of prize, goods taken by one belligerent from another, and brought into their ports. This government does not take jurisdiction at all upon the question of prize or no prize, but leaves that question exclusively to the cognizance of the tribunals of the respective belligerents." Mr. Clay, secretary of state, to Mr. Obregon, May 1, 1828, Whart. Dig. § 400.

standing "the hostage should come to die, or to desert, or that the said privateer should perish, or be taken with the hostage on board." In certain countries the captor is authorized to sue directly upon the bill, if the ransom is not paid. In England payment is compelled by or through an action brought by the imprisoned hostage for his freedom.¹⁶ The hostage is, like giving a bill of exchange by the owner of the captured vessel, regarded as collateral security for the payment of the debt, so that the escape or death of the hostage does not discharge the debt. When the vessel and cargo are insufficient to discharge the ransom debt, the master is liable to personal suit for the balance, including the expenses of the hostage; but, should the master be insolvent, the hostage would be discharged upon the proceeds of sale, under a decree, being turned over to the captor.¹⁷

LOSS OF CAPTURED PROPERTY.

160. Property acquired by seizure as booty or prize can be lost in the following ways:

- (a) **Recapture.**
- (b) **Abandonment.**
- (c) **Escape in the case of prize.**
- (d) **Rescue by the crew of the prize.**
- (e) **Discharge.**

The effect of abandonment was considered by the supreme court of the United States in the case of *The Mary Ford*. This vessel was a British vessel captured by a French squadron,—the two countries being at the time at war,—but, on account of necessity was abandoned by the French, and directed by the commander of the squadron to be burned. An American vessel—the *George*—found the *Mary Ford* in this abandoned condition, brought her into port at Boston, and there libeled her for salvage. In the decree, after

¹⁶ *Anthon v. Fisher*, 2 Doug. 650, note; *The Hoop*, 1 C. Rob. Adm. 201.

¹⁷ On the whole subject, see *Maisonnaire v. Keating*, 2 Gall. 337, Fed. Cas. No. 8,978; *Wheat Int. Law*, D, note 199; *Wools. Int. Law*, §§ 150-152; *Walk. Int. Law*, p. 280; *Twiss, Law Nat.* pp. 357-364; *Calvo, Int. Law*, §§ 2422-2429; *Cornu v. Blackburne*, 2 Doug. 640.

allowing to the crew of the *George* one-third of the proceeds of the sale as salvage, the court considered the question of ownership of the remaining two-thirds of the proceeds. The district court decreed that the residue, after paying costs therefrom, be paid into court for the British owners, etc. This, on appeal to the circuit court, was reversed, and it was decreed that the residue should be paid into court for the French republic. On appeal to the supreme court the decision was affirmed. The court expressed some doubt as to whether the entire amount should not have been decreed to the American crew as salvage. There was no question as to the fact that the British interest was shut out by the capture, and did not revive by the abandonment. The effect of abandonment by the French was not squarely in issue before the supreme court. The other methods of losing captured property will be more fully discussed in their proper headings in the chapter upon the subject of postliminium.¹⁸

¹⁸ *McDonough v. Dannery*, 3 Dall. 188.

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Postliminium is the right of a state after a war to have its affairs restored to the condition in which they were prior to the war.

CHAPTER XIV.

POSTLIMINIUM.

161. Postliminium Defined.
162. Limitations upon the Rights of Postliminium.
163. Acts in Excess of Legal Powers.
164. Effect of Expulsion of the Enemy by a Power not an Ally.
165. Recapture.
166. Salvage.
167. Rescue by Neutrals.

POSTLIMINIUM DEFINED.

161. The re-establishment of the original order of things changed by the operations of war in the following respects is called postliminium:¹

- (a) When a state throws off a foreign yoke before conquest has been completely effected.
- (b) When a state, or portion of it, is freed from foreign domination by the action of an ally before conquest has been consolidated.
- (c) When territory that has been occupied and a population which has been controlled by an enemy during the progress of the war is again possessed and controlled by the original state.
- (d) When property susceptible of appropriation is captured by the enemy during hostilities, and is recaptured by the state to which it belongs, or its individual owner belongs, or by an ally, before a title ripens in the captor, enabling him to transfer to a third person.

¹ As to general doctrine of postliminium, vide Hall, Int. Law, pt. 3, c. 5; 2 Halleck, c. 35; Dana's note to Wheat. Int. Law, note 169; Bluntschli, §§ 727-741; Phillim. Int. Law, pt. 10, c. 6; Vattel, Int. Law, bk. 3, c. 14; Davis, Int. Law, pp. 266-268; Mann. Int. Law, pp. 190-195; Bynkershoek, Int. Law, cc. 5, 15, 16; Calvo, Int. Law, §§ 3169-3186; Pitt-Cobbett, Cas. Int. Law, pp. 225-227; Wools. Int. Law, §§ 151-152.

This right of postliminium was derived from the *jus postliminii* of the Roman law, which was a fiction by which persons and things, in some cases, were restored to their original legal status immediately upon being recaptured from the enemy, and coming under the power of the nation to which they formerly belonged. There is a distant analogy to this rule of Roman law in the above rule, but when the true relation of the enemy to occupied territory, or to the inhabitants of such territory, is recalled, it will be remembered that during the continuance of hostilities the appropriation of the former and the exercise of control over the latter is incomplete and temporary, and again the relation of the original state or owner is that its rights are momentarily suspended. When the control of the enemy is removed the rights of the original owner revive, so that the effect of the removal of the enemy is similar to that of removing an intruder whose acts of temporary control are not binding upon the original, legitimate owner. The property mentioned in class d above is analogous to the classes a, b, and c, but differs in this: that after certain conditions have been complied with the property seized is completely transferred to the captor. The doctrine of postliminium "amounts to the truistic statement that property and sovereignty cannot be regarded as appropriated until their appropriation has been completed in conformity with the rules of international law."²

LIMITATIONS UPON THE RIGHTS OF POSTLIMINIUM.

162. The right of postliminium, arising when an enemy abandons occupied territory, or is driven from it by forces of the state or an ally, amounts to this: that the original state of things is re-established, but the revival of the exercise of these rights dates, as a rule, from the moment when postliminium comes into operation.

The effect of this limitation in regard to occupied territory is that certain acts done by an invader, constituting a very large class, are within his legitimate competence to perform, and greater harm

² Hall, Int. Law, pp. 486-488. For derivation of word, vide Wools. Int. Law, p. 248, note.

would result from their being wiped out than by the recognition of their validity. Political acts of the invading government are, of course, invalidated, but judicial and administrative acts, which are not of a political nature, and which take effect during the enemy's control, and certain acts done under municipal law, remain binding. Thus, criminals who have been punished under municipal law, and are undergoing sentence, should not be released. Those who are serving sentences for acts which are not punishable under the municipal laws of the state, and who have only committed acts which the invader has made punishable for the more secure administration of himself, can and should be released. Persons who have paid taxes under duress should have the payments recognized. The distinction between administrative or judicial affairs, which, on the one hand, are of importance only to private rights, and are valid, and those, on the other hand, which affect the constitution of the country, or are essentially political, and consequently invalid, is sufficiently exact for all purposes. The current affairs must be administered, and, as a rule, are not political in their nature; and to upset the judgments of the courts of the invader would lead to inextricable confusion and complications.²

ACTS IN EXCESS OF LEGAL POWERS.

163. Acts of the invading government in excess of its legal powers are null and void, as against the legitimate government.

The legitimate government is not bound to recognize the alienation of the domain of the state, or to pay debts contracted by the invading government on account of the invaded country. The invading government which made such alienations or contracted such debts, unquestionably, at the time of performance of the acts mentioned, contemplated actual conquest of the occupied territory, and the validity of its acts would depend in each case upon the success attained. Thus an alienation or debt which was recognized in a treaty of peace would be binding upon the legitimate or re-

² Hall, *Int. Law*, pp. 488, 489; Bluntschli, § 731; Calvo, *Int. Law*, § 3180 et seq.

stored government; so, also, in case this territory is restored to the latter government as a result of a war at a later period.⁴

164. EXPULSION OF THE ENEMY BY A POWER NOT AN ALLY.

The effect of the expulsion of an enemy by a power not an ally of the occupied territory has been discussed by the authorities, with the result that there is a radical disagreement. Heffter says: "In the case (and in the case only) in which the enemy forces have been driven out by a foreign power alone, the ancient state of things cannot be re-established without the consent of the latter." Mr. Bluntschli says: "When the enemy is expelled by a third power, which is neither the sovereign nor the ally of the sovereign of the liberated country, the re-establishment of the former government and constitution will not be a necessary consequence of the expulsion. The liberating country acquires, on the contrary, the right of taking part in the negotiations which determine the lot of the delivered country. It goes without saying that the liberator cannot dispose of this country at will, and in a determined manner, without taking into account the will of the inhabitants." On the other hand, Halleck says: "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. * * * A denial of the right of postliminy in such a case (second) would be contrary to the law of nations, and a breach of public morality." Mr. Hall, after citing the authorities holding the contrary doctrines in regard to this case, says: "In all cases in which conquest has unquestionably not been consolidated, and in which the territory of a state is therefore only occupied, the state recovers its existence, and all the rights attendant on it, as of course, so soon as it is relieved from the presence of the invader. Where, on the other hand, there is reasonable doubt as to whether a state is occupied or conquered, the third state must be allowed to determine the point for itself, and to act accordingly." This was illustrated in the case of Genoa, which was a republic up to 1797, when it was occupied

⁴ Bluntschli, §§ 732-735; Calvo, Int. Law, § 3181.

by the French, and annexed to the French empire in 1805, during all of which time England and France were at war with each other. In 1814 the English, under Lord Bentick, with a small Anglo-Sicilian force, landed, and succeeded in driving out the French. In the treaty of that year this republic, instead of reverting to its original status existing previous to 1797, became a part of Sardinia. Sir James Mackintosh, in parliament, offered condemnatory resolutions of this action, and wound up his discussion by the statement: "Genoa ought to have been regarded by England as a friendly state, oppressed for a time by the common enemy, and entitled to reassume the exercise of her sovereign rights as soon as that enemy was driven from her territory by a friendly force." This seems to be the view that has the most support.⁵

RECAPTURE.

165. Recapture consists in the retaking of a vessel or other property captured.

The laws of certain nations hold out inducements to their subjects for the capture of vessels, and more especially vessels of war. Commercial vessels, with their cargoes, being private property, and possessing, as a rule, considerable value, when recaptured are thus liberated by the subjects of the same state as the recaptors. That these vessels and cargo should, under the circumstances, be returned to the owners, is unquestioned, but those who have undergone the risks attendant upon making the recapture have a right to be rewarded for their trouble and risk. The title to the recaptured property is therefore considered to vest in the government of the recaptors, whose duty it is to see that those who have undertaken the risk and trouble are compensated. The recaptured property does not return unconditionally to the owner, but is subject to the claim of the captors for compensation, which is known as salvage.⁶

⁵ Heffter, §§ 184a, 188; Wools. Int. Law, p. 253, § 153; Bluntschli, § 729; 2 Halleck, pp. 520, 521; Hall, Int. Law, pp. 490-493.

⁶ Hall, Int. Law, pp. 493-495; 2 Halleck, Int. Law, pp. 521-524; Bluntschli, § 740; The Ceylon, 1 Dod. 105; The Santa Cruz, 1 C. Rob. Adm. 50; The

SALVAGE.

166. Salvage consists of the compensation made to those who have saved a vessel or her cargo, or the lives of persons belonging to her, from loss or destruction by fire or sea, or from capture by pirates or lawful enemies.

Salvage, in this connection, refers only to prize salvage, and this may be claimed at all times when a vessel belonging to a subject has been retaken from the possession of the enemy, who has made an actual or constructive capture of the property, or, in other words, if the property has been rescued from the hostile control, and the owner is entitled to restitution. This restitution is made dependent upon the payment of salvage. The rule of the United States is to restore vessels, subject to the payment of salvage, provided there has been no condemnation by a court of prize. Great Britain restores, subject to the payment of salvage, even though there may have been a valid condemnation, except in the case of a recaptured vessel which has been fitted out as an armed vessel. The rule as above stated has been generally followed by the majority of the principal states, with certain modifications made by each as conditions upon which restitution will be decreed. France restores vessels recaptured by a vessel of war, but if recaptured by a privateer, and held for 24 hours, they are left as prize. The rate of salvage to be paid varies, in the different countries, from one-twelfth to one-half of the value. In all cases where the amount is not fixed by law, it rests with the court, in its discretion.⁷

Carlotta, 5 C. Rob. Adm. 54; Wools. Int. Law, § 151; Wheat. Int. Law, D, §§ 360-382; Field, Int. Code, pp. 542, 572; 1 Kent, Comm. pp. 108, 109; Creasy, Int. Law, p. 564.

⁷ For brief statement of the laws of different nations in regard to the amount of salvage, vide 2 Halleck, Int. Law, pp. 528-531; Hall, Int. Law, p. 495. Vide, also, Field Int. Code, 222-227; Twiss, Law Nat. §§ 174, 175; Bynkershoek, Int. Law, pp. 39, 40; The Santa Cruz, 1 C. Rob. Adm. 60; The Adeline, 9 Cranch, 288; The Two Friends, 1 C. Rob. Adm. 271.

RESCUE BY NEUTRALS.

167. A neutral government is not required to restore a private vessel of one of its citizens, which has been rescued by her crew from her captors before condemnation.

This question arose in the case of *The Emily St. Pierre*, which was a British vessel captured by the United States blockading squadron in the act of breaking the blockade of Charleston, S. C., and ordered to Philadelphia for adjudication, in charge of a prize crew. The original crew regained possession of the vessel, returned her to Liverpool, and delivered her up to her original owners. Upon application for her restoration by Mr. Adams, Earl Russell refused to grant the request, giving the following reasons: First, since the rescue was not a violation of any municipal law of England, and as the vessel was not in the custody of the British government, that government had no legal right to take her from the hands of her owners, or to prosecute or proceed against the vessel or the owners for any violation of law; and, second, that in addition to the technical objection the offense was one solely against the laws of war, made for the benefit of captors, which the captors could assert and vindicate only in their own tribunals. Admitting that rescue was ground for condemnation, he contended that the decree could only be made by the belligerent prize court. The same question came up, with the two governments reversed, in 1799, in the case of *The Experience*, in which the United States declined to deliver up the vessel. It is clearly the duty of the captor to place an adequate force on board of the captured vessel, and if, upon mistake being made as to the sufficiency of this force, or by misplaced confidence, he fails in that object, the omission is considered to be at his own peril. A peculiar phase of the law in regard to prize arises in case of a vessel (prize) abandoned by the original captors, and afterwards brought in by neutral salvors to neutral ports. The neutral courts can decree salvage, but cannot restore the property to the original owners, so that when the proceeds of her sale are received the same, after deducting salvage, belongs to the original captors, whose title the neutral court cannot impugn.⁵

⁵ *The Emily St. Pierre*, Snow Cas. 361-363; Whart. Dig. § 328; 3 Op. Attys. Gen. 377.

CHAPTER XV.**MILITARY OCCUPATION.**

- 168. Military Occupation Defined.
- 169. Extent of the Rights of Military Occupation.
- 170. The Beginning of Occupation.
- 171. Constructive Occupation.
- 172. Rights Exercised over the Persons of the Occupied Territory.
- 173-174. Practice in Regard to Administrative Matters.
- 175. Duties of an Occupant.
- 176. When Occupation Ceases.

MILITARY OCCUPATION.

168. When a hostile army possesses a territory of the enemy, to the extent that it exercises actual authority over it, either through force or the acquiescence of the inhabitants, this territory is said to be occupied. The extent of occupied territory is determined by the limits over which this authority is established and can be exercised.

The effect of occupation is to suspend the authority of the state within the limits over which the authority of the hostile army extends, and to substitute for this authority the control of the invader. The national government of the invaded country exercises no authority over the inhabitants of the occupied territory, nor can it enforce its orders. The authority of the invader is not the same as that exercised formerly by the invaded government, since the sovereignty does not pass from this government until conquest of the country is complete. Occupation is quite different from conquest, the occupied territory remains a part of the state to which it belonged, and the inhabitants remain citizens of this state. Occupation is now regarded as authorizing the performance of certain acts, as incidents of war, which can be performed and are authorized upon the broad ground of military necessity. The occupied territory submits temporarily to the power of the enemy, who establishes martial law, or an administration which supersedes the regular government, enforced by military authority, and which per-

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forms only such acts as are sanctioned by the laws and usages of war.

Theories in Regard to Occupation.

Under the ancient practice, possession of territory carried with it the same rights as are attendant upon ownership and sovereignty, and no distinction was made between occupation, or temporary possession, and conquest. The mere occupation of territory implied complete ownership, and with it certain incidents in regard to the inhabitants, who could be and were required to take an oath of allegiance or of fidelity, and to render to the invader the same services that the legitimate sovereign could exact of them. History furnishes a number of examples in which active service was required of the inhabitants of invaded places, and of their being compelled even to serve in the army of the invader. The invader, also, in some instances, transferred the occupied territory before the termination of hostilities to third powers. Vattel says that: "Lands, towns, provinces, etc., become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the state to which these towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect,"—which is a distinct departure from the older doctrine.

The next step or theory in regard to occupation seems to have been that, while the sovereignty of the invaded state was not entirely replaced, yet for certain purposes the invader was supposed to possess sovereignty, or to exercise a quasi sovereignty, which carried with it a right to the obedience of the inhabitants of the invaded territory, and the obligation not to disturb the permanent institutions of the country, or recruit his army from the population. The idea that occupation carries with it a substitution of sovereignty to the extent that the people of the occupied territory, even though they have not changed their national character, owe a duty of obedience to the invader, and not to their legitimate sovereign, was prevalent up to within recent times. It was based upon the principle that, their legitimate sovereign not having the power to protect them, they no longer owed to him the duty of allegiance, which is impliedly transferred to the new sovereignty. The proclamation of the governor general of Alsace in 1870 is the most recent

illustration of this theory, and begins as follows: "The events of war having resulted in the occupation of a part of French territory by the German forces, these territories on account of this fact find themselves withdrawn from the imperial sovereignty, in lieu and in place of which is established the authority of the German powers." Mr. Hall, after repudiating any implied contract on the part of the invaded population to transfer allegiance, says: "The only understanding which can fairly be said to be recognized on both sides amounts to an engagement on the part of an invader to treat the inhabitants of occupied territory in a milder manner than is in strictness authorized by law, on the condition that, and so long as, they obey the commands which he imposes, under the guidance of custom." This is certainly in accord with the authorities and jurists of the present day. At the present time military occupation is regarded as simply a temporary holding by force, conferring in itself no proprietary rights, but merely conveying a particular or special administrative authority.¹

EXTENT OF THE RIGHTS OF MILITARY OCCUPATION.

169. The military occupant has the right to exercise such control over the occupied territory and its inhabitants as may be required for his safety and the success of his operations.

The invader, at once upon occupation, is invested with absolute authority, assuming control over the legislative and executive departments, both civil and judicial administration being replaced

¹ Hall, Int. Law, pp. 462-467; 3 Calvo, Int. Law, pp. 212-235; Vatt. Int. Law, bk. 3, c. 13, § 197; Bluntschli, §§ 539, 541; Wools. Int. Law, § 153; Creasy, Int. Law, pp. 496-516; 2 Halleck, Int. Law, c. 33; Walk. Int. Law, p. 347; Mann. Int. Law, p. 188; Whart. Dig. § 3.

U. S. v. Rice, 4 Wheat. 246: "By the conquest and military occupation of a portion of the territory of the United States by a public enemy, that portion is to be deemed a foreign country so far as respects our revenue laws."

U. S. v. Hayward, 2 Gall. 485, Fed. Cas. No. 15,336: "By the conquest and military occupation of Castine by the British on September 1, 1814, that territory passed under the temporary allegiance and sovereignty of the enemy. The sovereignty of the United States over the territory was suspended during such occupation, so that the laws of the United States could not be right-

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by military jurisdiction. It is his duty to exercise his authority within the bounds established by military necessity, and to remember that his authority is temporary in character. He can permit the maintenance of the civil and judicial administration, entirely or in part, as it existed before occupation, with the understanding that this administration is subordinate to the military authority. It is forbidden, generally, to interfere with the exercise of religion, unless in the extreme case of these ceremonies tending to cause an outbreak. It is not considered lawful to vary or suspend laws affecting property and private personal relations, or the moral order of the community, or to suppress the expression of opinion, except in so far as it may directly interfere with his plans or peace negotiations.²

THE BEGINNING OF OCCUPATION.

170. De facto occupation begins at the moment local resistance to the actual presence of the invading army has ceased.

The above does not give the exact definition of time of commencement of occupation, as actually practiced, but it states the rule that is most favored by writers of authority. It assumes that occupa-

fully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. But, on the other hand, a territory conquered by an enemy is not to be considered as incorporated into the dominions of that enemy, without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation, it is still entitled to the full benefit of the law of postliminy."

² Am. Inst. arts. 1-30 (Append. p. 339), is devoted to the rules governing the armies of the United States in regard to the important subjects of martial law, military jurisdiction, and military necessity. Article 1: "A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law or any public warning to the inhabitants has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its martial law."

For full discussion of the subjects of martial law and military government, vide treatise by this title by W. E. Birkimer, of the United States army. Vide, also, Hall, Int. Law, 469, 470; Bluntschli, §§ 539, 540; New Orleans

tion, in order to be valid, must be effective, and that the true test of its existence is the fact of exclusive possession, and that that portion of a given territory is occupied which is within striking distance of the invading force which is sufficiently strong to quell a prospective uprising, and that local resistance has for the time ceased. This places occupation on identically the same basis as blockade. It gives to an invader no greater power than he actually possesses. It requires him to prove his occupation by his ability to repress an outbreak by means of a force of sufficient strength for the purpose. It avoids the abuses which are attendant upon occupation by means of flying columns, or by means of a force entirely inadequate for the enforcement of rights attendant upon his occupation.*

CONSTRUCTIVE OCCUPATION.

171. Constructive occupation implies a liberal interpretation of the term territory, and that occupation is complete within a district forming an administrative unit, so soon as military resistance on the part of the organized forces of the state ceases, and notice is posted, or given in some other manner, at a given place.

This is the view of occupation that was practiced by the German army in France in the war of 1870-71; also by Napoleon in the wars of the early part of this century. Giving notice of occupation by placard is very similar to what is termed a paper blockade. The consequences in the case of occupation are far more serious than in that of blockade, and far more weighty reasons exist for discarding any such theory in regard to its enforcement. This practice also assumes that occupation does not cease on account of the absence of the invading force, and particularly if flying columns

v. Steamship Co., 20 Wall. 258; The Venice, 2 Wall. 258. A limitation on the right of the occupant in *Jecker v. Montgomery*, 13 How. 498: "Neither the President of the United States, nor any inferior executive officer, can establish a court of prize in territory occupied by American troops, competent to take jurisdiction of a case of capture *jure belli*."

* Vide Brussels Conference, Append. p. 389; Code Inst. Int. Law, art. 41; Hall, Int. Law, 480-485; 2 Halleck, Int. Law, c. 33, §§ 1-3; Walk. Int. Law, p. 344; Davis, Int. Law, pp. 250, 251.

can, in passing through, inflict punishments upon the inhabitants for disobedience of orders subsequently issued, or for uprisings against forces unable to resist them at the time. Nor does such occupation cease on account of a temporary overthrow of the authority of the invader, even though the original government has been re-established. The practice, as indicated above, cannot be defended upon any sufficient grounds, for all the rights that are acquired under occupation arise from the ability to enforce them effectively. Just so soon as an adequate force is present, the rights become operative, and cease to be operative with its withdrawal; and again, the assumption that an invader, who has withdrawn his forces from an occupied territory, possesses a stronger claim on this territory than the original government,—assuming that the latter does not have a force to occupy it,—which therefore occupies the same status with regard to it, is erroneous, as the presumption should be in favor of the authority of the latter. Mr. Hall very properly says: “As a matter of fact, except in a few cases, which stand aside from the common instances of extension of the rights of occupation over a district, of which part only has been touched by the occupying troops, the enforcement of those rights through a time when no troops are within such distance as to exercise actual control, and still more the employment of inadequate forces, constitute a system of terrorism, grounded upon no principle, and only capable of being maintained because an occupying army does not scruple to threaten, and to inflict, penalties which no government can impose upon its own subjects.”⁴

RIGHTS EXERCISED OVER THE PERSONS OF OCCUPIED TERRITORY.

172. All laws implying or importing obedience to the original sovereign are suspended. Certain acts not ordinarily punishable are rendered so. Summary punishment is authorized for certain acts, and the death penalty is awarded in certain cases, where the offense is such as to authorize such punishment by the laws and usages of war.

⁴ Creasy, Int. Law, p. 502; Wools. Int. Law, pp. 227-220.

The reasons for suspension of rules requiring obedience to the natural sovereign have been sufficiently discussed. The reasons for rendering acts punishable which are not ordinarily so, and for suspending to a certain extent the rights of personal liberty, are that the personal security of the new authority demands it; and as the inhabitants of the country are naturally hostile to the invader, more extensive repressive measures become necessary in order to compel obedience. Summary measures are rendered compulsory under the changed conditions. The death penalty is authorized to be imposed in cases of persons who give information to the enemy, of those who serve as guides to the troops of their own country, or of those who, serving as guides to the invader, intentionally mislead him, and of those who destroy certain classes of property, such as telegraphs, roads, canals, bridges, soldiers' quarters, etc.; also of "war rebels, who are defined as persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, or in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war, nor are they, if discovered and secured before their conspiracy has matured to an actual uprising, or to armed violence."* The classes mentioned are, as stated, punished with the death penalty, and, in addition, these and other acts are restrained by making the inhabitants of occupied districts collectively responsible. These are punished by fines, etc., or the burning of their houses, villages, etc. These inhabitants are at times punished, although they may not be in any manner responsible for the acts committed.⁵ Hostages are sometimes taken in order to guaranty the maintenance

* Am. Inst. art. 85; Append. p. 353.

⁵ The military governor (German) of Lorraine, on account of the destruction of a certain bridge, ordered the district in which located to pay a fine of 10,000,000 francs, and that the village of Fontenoy be burned; and it was ordered by proclamation that a special contribution would be levied in those districts where railways or telegraphs were destroyed, irrespective of whether these communes were in any manner responsible. Hall, Int. Law, pp. 471-475; 4 Calvo, Int. Law, § 2186 et seq., for full discussion of effect upon persons in occupied territory. Creasy, Int. Law, p. 516.

The following proclamation of the Crown Prince upon entering France in

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of order in occupied territory. This was resorted to by the Germans, during their occupation of France in 1870, to an extent far beyond the recognized usages of war, and their treatment has been very justly condemned. These hostages were required by the German authorities to be seized and placed upon the engines of trains to insure against accidents, it being announced that, in case of such accidents, their compatriots would be the first to suffer. The present treatment of hostages recognizes only the right to confine them, and certainly does not contemplate exercising any such power over them as the foregoing indicates.*

August, 1870, gives a very correct and connected idea of the German construction of their rights:

"1. Military jurisdiction is established by this decree. It will be applicable to the entire extent of territory occupied by German troops, to every action tending to endanger the security of those troops, to causing them injury, or lending assistance to the enemy. Military jurisdiction will be considered as in force and proclaimed through all the extent of a canton as soon as it is posted in any locality forming part of it.

"2. All persons not forming part of the French army, and not establishing their quality as soldiers by outward signs, and who (a) shall serve the enemy as spies; (b) shall mislead the German troops when charged to act as guides for them; (c) shall kill, wound, or rob persons belonging to the German troops or forming part of their suite; (d) shall destroy bridges or canals, damage telegraph lines or railways, render roads impassable, set fire to munitions and provisions of war or the quarters of troops; (e) shall take up arms against the German troops,—shall be punished with death. In each case the officer ordering the procedure will institute a council of war charged to investigate the affair and pronounce judgment.

"3. The communes to which the culprits belong, as well as those whose territory may have been the place of the offense, will be fined as a penalty for each offense an amount equaling their annual taxes. The councils of war can impose no other punishment than the death penalty. Their judgments will be executed immediately."

Hall, Int. Law, pp. 472-475, note, which gives the practice of Napoleon also. Walk. Int. Law, pp. 345-347.

* Hall, Int. Law, 472; Calvo, Int. Law, §§ 2159, 2160; Bluntschli, § 600, and notes.

PRACTICE IN REGARD TO ADMINISTRATIVE MATTERS, ETC.

173. The occupation of territory authorizes taking and exercising complete control of the administration, but the practice is to permit such native officials as may be deemed desirable to perform their duties under supervision of the military authorities, or officers appointed by the occupant.

174. The civil officers thus retained can be required to take an oath of obedience or fidelity to the new rulers during the occupation, and for refusing to do so may be expelled.

The employment of the native officials for minor officers is useful, because of their knowledge of the laws, and their familiarity with the existing methods renders the maintenance of order more easy for the new rulers. The oath required of them should not imply allegiance to the new sovereign, but that they will obey his orders, and perform no acts which are prejudicial to his interests during the occupation.⁷

DUTIES OF AN OCCUPANT.

175. The invader should, at as early a date as practicable, inform the inhabitants of the extent of the occupied district, and the extent of the powers he exercises, should take measures to secure public order and tranquillity, should nullify or alter existing laws as little as practicable, should not commit wanton damage, and should protect certain classes of public buildings, works of art, etc.

The obligations of the occupant arise from the fact that he has suspended or replaced the ordinary system of rules by his own will, and he owes it to society to establish order and define the limits

⁷ Am. Inst. art. 26 (Append. p. 343), authorizes the commanding generals to cause the magistrates or civil officers to take the oath of temporary allegiance, or an oath of fidelity to their own victorious government or rulers, and authorizes expulsion of any one who declines to take it. For form and general discussion of the nature of this oath, vide Hall, Int. Law, p. 476, note; Bluntschli, § 551; Calvo, Int. Law. § 2186.

of his will without unnecessary delay. His government being necessarily temporary, nothing of special benefit can accrue by the complete change of the established order of government. He owes it to humanity to inflict no unnecessary injury upon persons, or to destroy unnecessarily property that will not tend to assist him to bring to a close more speedily the issues of the war. No special obligations are imposed upon the inhabitants of the occupied district by the fact of occupation.*

WHEN OCCUPATION CEASES.

176. Occupation ceases when the occupying army is dispossessed, either by the operations of the national or allied army, or by local insurrection, and the public exercise of the legitimate sovereign authority is re-established, and, finally, when the invading army is withdrawn, so as to be unable to exercise actual control.

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The difference between the two theories has been discussed, and it is to be hoped that practice will in future conform to the principle that occupation must be effective in order to be recognized. But this does not imply that certain places may not be occupied without having an army actually present, for, as suggested by Mr. Hall, "it must be admitted that the country which is covered by the front of an army, although much of it may not be strongly held, and though it may in part be occupied only by the presence of a few officials, is, as a rule, far more effectually under command than territory beyond those limits, even when held by considerable detachments."*

* Code Inst. arts. 42-60; Append. p. 382; Hall, Int. Law, § 160; Am. Inst. arts. 4-6, 31-34; Append. pp. 340, 345.

* Hall, Int. Law, pp. 481-485.

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CHAPTER XVI.

MEANS OF CARRYING ON HOSTILITIES.

- 177. Instruments of War.
- 178. Limitation upon Instruments Used—Use of Instruments Rendering Death Inevitable.
- 179. Devastation.
- 180. Attack of Forts, Fortified and Other Places.
- 181. Employment of Deceit.
- 182. Spies.
- 183. Employment of Balloons.

INSTRUMENTS OF WAR.

177. Upon the general right to employ all and every violence upon the enemy and his property that may be necessary to reduce him to terms, certain restrictions have been placed, as follows:

SAME—INSTRUMENTS RENDERING DEATH INEVITABLE.

178. The use of weapons which render death inevitable, or inflict suffering distinctly disproportionate to the crippling effect upon the enemy, is prohibited.

The implements of war that may be used in war against an enemy are not limited to such as are generally used for the purpose of killing, such as swords, firearms, cannon, etc., but also secret and concealed means of destruction, such as pits, mines, etc., may be used. The amount of destruction or suffering is not material, provided the result obtained is proportionate thereto. The test of the proper instruments of war is not in their capacity for inflicting death, but rather in their capacity for causing aggravated or unnecessary suffering. A copper or other bullet which inflicted a poisonous wound, so also a barbed bayonet, a detachable lance head, or a small, explosive bullet, of seven-eighths of a pound or less, are considered illegal.¹

¹ Bluntschli, §§ 557, 558, bis.; Wools. Int. Law, § 133; Code Inst. Int. Law, §§ 8, 9; Append. p. 377; Hall, Int. Law, § 185.

SAME—DEVASTATION.

179. Devastation is now regarded as permissible only when it is a necessary incident to ordinary military action, or when necessary to the preservation of the force committing it from destruction or surrender. In the latter case, if the result is far-reaching and lasting in effect, the necessity must be very patent and extreme.

As an instance of devastation in connection with ordinary military operations may be mentioned the removal of houses or trees to enable a better or more effective attack or defense of a place, or when a village is burned to cover the retreat of an army. The destruction of Newark in 1813, and of the public buildings at Washington in 1814, are familiar examples of devastation in an enemy's country that have no justification. Another example of a somewhat different nature was the laying waste of a large tract of country and destruction of their capital by the Russians in 1812, as a result of which Napoleon's army was compelled to retreat from the country, but this was accomplished by complete loss of their homes by more than 200,000 people. This example is not likely to be repeated, and, if such destruction occurred in an enemy country, would command and deserve the disapprobation of the entire world.²

ATTACK OF FORTS, FORTIFIED AND OTHER PLACES.

180. A distinction is made between forts or fortified places and undefended towns, it being permissible to employ practically any means for assailing the former that may prove successful, while it is now considered unlawful to bombard an open or undefended town.

It is believed that the practice in regard to the attack of unfortified places which is recognized as conforming to modern usage, and is incorporated into the Oxford Code of the Institute, affords a protection to the unfortified towns upon the seacoast of the United

² 2 Halleck, *Int. Law*, pp. 117-119; *Vatt. Int. Law*, bk. 3, c. 7, § 142; Hall, *Int. Law*, pp. 531-535.

States. The excesses which were formerly permitted in the occupation of towns have now passed away, certainly as to pillage, rape, and murder. In the fortified places of to-day are to be found many non-combatants, but the practice is to place the fortifications outside of the town far enough to be without the reach of siege guns, whenever practicable. It is also customary to notify the inhabitants of a place which is to be attacked. This is not compulsory, and in the Franco-German war no such notice was given. This omission was the cause of remonstrance on the part of the foreign diplomatic officers, who were informed by Bismarck that no necessity existed for giving any such notice. Another practice which was resorted to by the Germans in this same war consisted in the bombardment of the houses of the town itself, in order to bring a stronger pressure upon the commanding officer, and induce him to make an earlier surrender, thereby preventing the suffering of non-combatant inhabitants. It is true that this method of attack is sanctioned by usage, but it should be resorted to only in extreme cases, as it is a measure of extreme cruelty, and the results accomplished are not proportionate to the suffering imposed. The defense of such places has caused much discussion, especially in regard to the duties of the commanders of such besieged places to surrender. It seems now to be settled that the question of holding out in such defense is left to the discretion of the commandant, who is to be the sole judge, and cannot be punished for the exercise of his discretion. In former times an officer who held out as long as possible in defense of such places was liable to be punished with death, but at the present time he can maintain the defense so long as he deems that such course will be of material benefit to his own government. But when no such consideration exists, and all hope of success has departed, it is his duty, on the grounds of humanity, to surrender, and thus spare further sacrifice of life, or, should he prefer, he may cut his way through the enemy's lines, if possible; but in all cases of surrender he is entitled to have himself and command considered and treated as prisoners of war.³

³ Bluntschli, §§ 552-554, *ter.*; Declaration of Brussels, art. 17; Hall, *Int. Law*, p. 535; Code *Inst. Int. Law*, arts. 31-34; *Append.* p. 380; *Vatt. Int. Law*, bk. 3, c. 8, §§ 142, 143; Davis, *Int. Law*, pp. 219-222; Calvo, *Int. Law*, § 2067 *et seq.* Bluntschli, *supra*, says: "The defender of a threatened place must call the in-

EMPLOYMENT OF DECEIT.

181. Deceit can, as a rule, be employed against an enemy, but it must be of such a nature as to involve no perfidy or breach of good faith, and must not contravene treaty stipulations.

The use of deception is permitted because so much employed for the purpose of avoiding actual conflict, as, for example, to render an attack unnecessary by inducing the enemy to surrender or come to terms, or evacuate a place in his control, and again it is used for the purpose of gaining an advantage before attack. It is not permissible to deceive by the use of acts or signs that have a recognized meaning in the necessary intercourse between belligerents by the usages of war; for instance, information cannot be obtained by using a flag of truce, nor can a building be properly protected by marking it with a hospital flag, unless it be in reality used as such, nor can persons not covered by the provisions of the Geneva convention make use of the prescribed cross for protection. Deception is permitted to the extent of using the enemy's uniform or flags or colors, but, before commencing actual hostilities, troops and

habitants, attention to the dangers they run in remaining, and must make no opposition to their leaving, unless military operations specially require it. When the defender of a stronghold expels the inhabitants (non-combatants) in order to be able longer to defend the place against the enemy, this measure is excusable if it is demanded by military necessity. But the besiegers can, without violating the laws of war, refuse to permit the expelled inhabitants to leave, and in this case the commander is bound to permit them to re-enter the place. The usage is that besiegers announce, when possible, their intention of bombarding the place, in order that the non-combatants, and specially the women and children, can depart or contrive means for their safety. It may, however, be necessary to surprise the enemy in order to carry the position, and in such case the non-announcement of the bombardment will not constitute a violation of the laws of war. Open towns, which oppose no resistance, can be occupied; but it is forbidden to bombard them without necessity. When a town is attached to fortified works, the bombardment, when necessary for military reasons, must particularly be directed upon its defenses (including the doors of the inclosing walls) and in their immediate vicinity. The interior of the town and parts inhabited by the civil population must, on the contrary, be spared as much as possible."

vessels must put on their proper uniform, or hoist their proper colors. There seems to be a difference of opinion as to the rule in regard to the use of such deception on the part of vessels. Some authorities state that the affirming gun can be fired only under the national flag, while others maintain that, such gun not being an act of hostility, no good reason exists for not firing it under false colors; and Mr. Hall goes further, in saying that no good reason exists for denouncing the use of the ruse even during actual hostilities, since the disguise is at that time useless for further serving the purpose for which it was employed, but he admits the desirability of enforcing the rule in regard to conflicts on land.⁴

SPIES.

182. A spy is a person who penetrates ~~secretly~~, or in disguise, or under false pretenses, within the lines of an enemy, for the purpose of obtaining information for the army employing him.

Obtaining information through the employment of spies is considered as perfectly legitimate, although the spy, if caught by the enemy, and found guilty by court-martial, is punishable with death by hanging. The infliction of so severe a punishment for this offense, except in the more dangerous cases, is now criticised as being out of all proportion to the offense committed. It is necessary that the element of disguise or concealment should enter, in order to constitute the offense; so that a person entering the enemy's lines in his proper uniform must be treated as a prisoner of war, if captured. It is the duty of the enemy to maintain a suitable line of outposts, to prevent individuals from passing them. The position of a spy is peculiar, in that the duty is not compulsory, and, if undertaken by an individual of the army, it is with a full understanding of the consequences if caught, and the fact of authorization by the government that employs him does not authorize retaliation for his punishment by the enemy. In case an individual who

⁴ Hall, Int. Law, pp. 535-537; Bluntschli, § 565; 2 Halleck, Int. Law, pp. 24-30; Am. Inst. art. 101; Append. p. 356; Wools. Int. Law, § 133; Davis, Int. Law, p. 241.

has acted as a spy succeeds in returning to his command, and is afterwards captured, he cannot be punished for an offense as a spy previous to his return.⁵

EMPLOYMENT OF BALLOONS.

183. Persons in balloons passing over territory occupied by the enemy, possessing neither secrecy, disguise, nor pretense, are not rated as spies.

The rule as stated by Mr. Bluntschli, is that: "Inasmuch as the army of occupation can exercise an effective power over the atmosphere extending over the occupied territory to the distance of cannon range, it has authority to prevent information through the use of balloons. But the space above its cannon range is not subject to the rules and penalties prescribed by the enemy. If, on the other hand, the enemy's army should capture a balloon, it is authorized to use every measure of safety that is recognized as necessary, whether it consists in seizing letters and dispatches, or in temporarily detaining the aeronauts and passengers, although they have committed no offense against the laws of war." The German army, in their war with France, maintained that all persons who attempted to pass the Prussian outposts without permission, whether by land or by water or by air, were legally transported to Prussia under suspicion of being French spies.⁶

⁵ Hall, Int. Law, § 188; Bluntschli, §§ 628-636; Am. Inst. § 5; Append. p. 340; Halleck, Int. Law, pp. 30-34; Vatt. Int. Law, bk. 3, c. 10, § 179; Code Inst. Int. Law, arts. 22-25; Append. p. 379.

⁶ Bluntschli, § 632 bis.; Hall, Int. Law, 538, 539.

CHAPTER XVII.**ENEMY CHARACTER.**

184. To Whom Attributed.
185. Domicile.
186. Change of Domicile.
187. House of Trade.
188. Enemy Character as to Property.
189. Transfer of Property in War, or in Anticipation of War.
190. Merchandise.
191. Vessels.
192. Transfers in Transitu.
193. Goods Consigned from Belligerent Ports by Belligerents to Neutrals, and Vice Versa.
194. Effect of Occupation by the Enemy of Territory of other Belligerent.

TO WHOM ATTRIBUTED.

184. Enemy character is attributed, under certain circumstances, to others than citizens of the enemy state.

In certain cases a neutral may become an enemy by rendering active and intentional assistance to the enemy. This may be done directly by taking service in the enemy country, or, indirectly, by establishing himself in that country without taking active service. By contributing to the support of the enemy he renders himself liable to be treated, either as to his person or property, or both, as an enemy. Thus, the subject of a belligerent, by establishing himself in the enemy country in this manner, even without loss of his nationality, may render service to the enemy country in which he lives by contributing in the way of taxes to its support. His property is thus a source of strength to the enemy, and it may certainly be treated as hostile. Should the subject of an enemy country establish himself in a neutral country, he naturally becomes more thoroughly identified with this latter country than with his own, and would be regarded more as a neutral than an enemy. From the foregoing it is apparent that the bare fact of nationality will not, in all cases, be controlling in determining enemy character. The

test upon which most reliance is placed, in order to determine the character of persons and property, is that of domicile.¹

DOMICILE.

185. Domicile is defined as a residence at a particular place, accompanied with positive or presumptive proof of intention to remain there for an unlimited time.

The domicile of a person is one of the controlling tests of his nationality, and so important is it that, upon the question of domicile alone, the Supreme Court of the United States condemned property during the civil war.² The conditions under which the domicile of individuals is to be determined are so various that it is difficult to state any certain one that is conclusive. The intention of the party is the one thing to be determined, but such intention must be coupled with overt acts, since, taken alone, it is not conclusive even when overtly expressed, and particularly in case this open declaration is not followed by some act in pursuance thereof.³ The two most important elements in determining what will create a reasonable presumption that a person intends to acquire domicile at a particular place are *object* and *time*, the latter being by far the more conclusive. If a person goes to a country with the purpose of establishing a fixed business, he acquires a domicile in that place

¹ Pitt-Cobbett, *Cas. Int. Law*, pp. 183, 184; Hall, *Int. Law*, pp. 491-493.

² *Prize Cases*, 2 Black, 635: "It was decided: First, that, if a place was in the firm possession and under the control of the rebel enemies, it was for the time, and in the technical sense of the prize law, enemy's territory; second, that the property of an enemy domiciled in that place at the time of capture was liable to condemnation as enemy's property, in the sense of the prize courts; and, lastly, that although the owner was a citizen of the United States, and had always resided in that place, which was held to be of right a part of the United States, and of right a proper place of residence to constitute citizenship of the United States, yet the property of such a person was to be condemned without inquiring whether he was or was not, in his intentions or acts, loyal or disloyal. No offer was made in these cases to prove an attempt to change domicile, and to remove beyond the reach of the enemy's control, before the capture." Wheat. *Int. Law*, D, note 160.

³ 1 Halleck, *Int. Law*, p. 363; *The Frances*, 8 Cranch, 335; *The President*, 5 C. Rob. Adm. 277.

as soon as he establishes himself, because the element of permanence goes with such intention. If on the other hand his business is of a temporary nature, an extended stay, beyond the time of the accomplishment of his purpose, does not necessarily establish a domicile, and will not do so unless his length of stay is sufficiently extended to rebut the original presumption of a temporary stay. In determining the effect of an extended residence, coupled with an original purpose of temporary stay, the existence of war would cause a close scrutiny of the attendant circumstances, and if the person had remained during a large portion of the war, and contributed to the expenses thereof by payment of taxes or other means, his domicile would probably be held to be that of his residence, in spite of his original special purpose. As stated, time is one of the controlling elements in determining domicile, but it is impossible to state just what length of time will be determined to be sufficient to fix domicile. Should a merchant come into a country just before war is declared for a purpose which clearly showed that his stay was to be temporary, time should be permitted him in which to close up his affairs before an acquired nationality is attached to him. The presumption of law in regard to residence in a foreign country is that the party is there *animo manendi*, and this presumption is to be rebutted by evidence to the contrary. This may be done in numerous ways, as by showing that his family resides, and his own residence is with them, in some other country, and that his stay was to be but temporary in the belligerent country, and that his business was not of such a nature as to identify him with this country sufficiently to cause him to acquire its nationality.⁴

⁴ Upon the subject of domicile, vide Hall, *Int. Law*, pp. 493-501; Pitt-Cobbett, *Cas. Int. Law*, p. 183. "This [domicile] may be a permanent domicile accompanied by naturalization, or it may be a domicile involving merely a civil status, the national character or political status of the party remaining unaffected." 1 Halleck, *Int. Law*, pp. 360-367; Wheat. *Int. Law*, D, pp. 403, 419; 3 Phillim. pp. 128, 603, et seq.; Bluntschli, § 367; Wools. *Int. Law*, §§ 71-76, 183; *The Harmony*, 2 C. Rob. Adm. 322; Vatt. *Int. Law*, bk. 1, c. 19, § 218; Levl. *Int. Law*, 253, 254; Walker, *Int. Law*, 251 et seq.; Calvo, *Int. Law*, § 1936 et seq.; *The Venus*, 8 Cranch, 253; *The Phoenix*, 5 C. Rob. Adm. 20. Davis, *Int. Law*, p. 116 et seq., draws a distinction between domicile, a domiciled stranger, and a citizen, as follows: "Domicile may be defined as the place which an individual has freely chosen as the center of his domestic

CHANGE OF DOMICILE.

186. Domicile may be changed, even during the existence of war, by actual removal to another country, or by taking steps, bona fide, to quit a country sine animo revertendi.

It is one of the rules of domicile that it must be freely chosen, so that, being acquired for private purposes of business or pleasure, the individual should be permitted to change it at will. The change after the commencement of hostilities will be scrutinized more carefully to determine the good faith of the change of residence, but if this is not impugned, all of the consequences of changed condition follow, and the party is entitled to have his character changed from that of a belligerent to that of a neutral or friend.⁵ In the case of *The Venus*, the facts showed that this vessel was owned by citizens of the United States who had become domiciled or had resided in Great Britain for some time, and were engaged in commerce there, that this vessel sailed from Great Britain before the outbreak of hostilities between the two countries in 1812, and before the owners had knowledge of the war, but was captured after the outbreak of hostilities. The goods were condemned, although the principle, that the right to change residence to the former domicile by election was admitted, but, until that election be made, the goods were subject to capture by the vessels of the country of domicile.⁶

and jural relations, and a domiciled stranger is an alien who, for purposes of residence or business, has selected a certain place as his durable abode, with no present intention of removing therefrom. The citizen is a creature of the municipal law of a state, with which other states ordinarily have no concern. * * * Domicile is a fact, and, when the domicile of an individual is drawn in question, is proved, like other facts, by evidence as to residence or intention. Citizenship results from birth, or the operation of law, and is acquired by undergoing a legal process, the various steps of which are regulated by the municipal law of the state. It is, moreover, a matter of legal record; and, when the citizenship of an individual is questioned, it is established by a duly authenticated certificate of origin or naturalization."

⁵ Hall, Int. Law, 501.

⁶ *The Venus*, 8 Cranch, 253; Hall, Int. Law, pp. 500, 501; Field, Int. Law, p. 152 et seq.; Walker, Int. Law, p. 253; Whart. Dig. § 352.

HOUSE OF TRADE.

187. A house of trade takes the national character of the country in which it is situated, but this rule does not apply to a house of trade in a neutral country of which the owners, or part of them, are domiciled in an enemy country.

Mr. Wheaton, after stating the rule substantially as above, in commenting upon the rule of imputing enemy character to a house of trade in a neutral country which is owned by a merchant resident in a belligerent country, said that it showed a want of reciprocity and strong marks of partiality towards the interests of captors, but, as was clearly shown by Mr. Dana, there is no chance for reciprocity in such cases, since reciprocity implies two parties, who make some equitable exchange or offset of rights or benefits yielded or enjoyed. The cases stated in the text are rather those of two positions of a third party, each having an element of hostile connection, presented conversely. "The question in each case is, whether the element of hostile connection or control which it presents, is sufficient to warrant a belligerent in taking the property *jure belli*."⁷ The above rule, in so far as it is applicable to persons who had been in the habit of trading during peace in one of the belligerent countries while residing in a neutral country, would not be enforced at once, or until a sufficient time had been permitted such persons to withdraw from such commerce, but, in case they continue to transact business in such countries after the outbreak of hostilities, the rule would in time be enforced. In the case of a person engaged in business in two countries, one of which is neutral and the other belligerent, he would be considered, in regard to a given transaction, as either neutral or belligerent, according to the origin of this transaction. When a business is conducted in a belligerent country through an agent, the owner being resident in a neutral country, and carrying on an ordinary neutral trade, the character of this trade is determined by the circumstances of each case. The fact of having an agent in the belligerent country is not sufficient in itself to establish enemy character. Should special concessions

⁷ Wheat. Int. Law, D, § 335, and note 161.

be made to the trade or business, as, for instance, the creation of a monopoly, then enemy character would attach, notwithstanding the non-residence of the owner. The rule of law in regard to consuls who are conducting a mercantile business is not, by this fact, changed either in the United States or England, but is otherwise in France.⁸

ENEMY CHARACTER AS TO PROPERTY.

188. Property, in addition to its assuming enemy character by being attendant upon its owner, may assume such character by virtue of its origin, or by the use to which it is applied.

Property is considered as hostile by its origin when it consists of the produce of lands situated in a belligerent state, even though the owner does not have his residence in this state. In the case of *Benson v. Boyle* the United States Supreme Court held that "wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offense to the course of human opinion, to say that the proprietor, so far as respects his interest in this land, partakes of this character: and that the produce, while the owner remains unchanged, is subject to the same disabilities."⁹ Property which is not belligerent, either by origin or by the national character of its owner, can become such by being employed or used by a belligerent. Thus a vessel owned by a neutral but manned by a belligerent, employed in a belligerent trade, or that accepted a belligerent license, or was found flying under belligerent colors, would be regarded as belligerent.¹⁰

⁸ Wheat. Int. Law, D, §§ 334, 335; Hall, Int. Law, pp. 501, 502; Calvo, Int. Law, § 1965; *The Anna Catharina*, 4 C. Rob. Adm. 119; *The Jonge Klasina*, 5 C. Rob. Adm. 302; *The Friendschaft*, 4 Wheat. 105. For rule as to consuls, vide *The Indian Chief*, 3 C. Rob. Adm. 12.

⁹ *Bentzon v. Boyle*, 9 Cranch, 191; *The Phoenix*, 5 C. Rob. Adm. 20; Wheat. Int. Law, §§ 336-339, Dana's note, 162; Hall, Int. Law, pp. 502, 503.

¹⁰ *The Vigilantia*, 1 C. Rob. Adm. 13.

**TRANSFER OF PROPERTY IN WAR, OR IN ANTICIPATION
OF WAR.**

189. Transfers of property during war, made with fraudulent intent by a belligerent to a neutral, need not be recognized by the other belligerent.

It may be said that a neutral has the general right to carry on trade with a belligerent during war, but this general right of trade is subject to the right of the other belligerent to prevent such trade as may be of direct benefit to his enemy in the prosecution of the struggle, and the above rule may be said to be particularly applicable to such property as may be liable to capture at sea, as this is the class of property with the transfer of which fraud is most likely to be connected. The rules of war permit a belligerent to seize the property of his enemy, so that if the transfer of property by a belligerent enemy to a neutral is attended with fraud, the other belligerent is authorized to refuse recognition of it.¹¹

SAME—MERCHANDISE.

190. Merchandise acquired by a neutral from a belligerent, if purchased in good faith can be exported from the belligerent country.

SAME—VESSELS.

191. According to the English and American practice, sales of vessels follow the same rule, but according to the rule of France and some other states such sales are forbidden on the ground of fraud, unless made before knowledge of the commencement of war can be imputed to the purchaser.

In the two countries named the right to transfer vessels is admitted in principle, because of the right of neutrals to carry on trade with belligerents, vessels being considered as legitimate ob-

¹¹ Hall, Int. Law, pp. 504, 505.

jects of trade. The nature of such a transfer, when made in time of war, is such that a belligerent can with good reason make a most searching examination of all the circumstances connected therewith. The temptation and opportunities for committing fraud in such transfers being very great, they are not considered as valid unless the title and interest of the vendor has passed absolutely. In case there is any covenant, condition, or understanding of any kind that the vendor retains an interest in the vessel or profits, or any control over it or a right of restitution at some future period, or a power of revocation, the transfer would be invalidated.¹²

TRANSFERS IN TRANSITU.

192. Transfers of property in transitu, during war or in contemplation of war, are prima facie fraudulent and void, but especially in case the transferee has not taken actual possession.

The above is the rule adopted by the English and American courts, and while admitting that transfers of property can during peace be made at any time or place, yet the rule is that enemy cargo, from the time that it is shipped, remains susceptible of capture and confiscation until it arrives at its destination. This rule that goods shipped are not permitted to change their character during transit is applied even if made during peace, if it is clear that the transfer was made in contemplation of war, but in the latter case evidence of intention is required, while in the former the mere fact of transfer is considered as conclusive proof of intended fraud. A change in the national character of the owner, during the voyage, is not permitted to change the hostile character of property in transitu, so that if he was an enemy at the commencement of the voyage, though

¹² 2 Halleck, Int. Law, pp. 138-143; Hall, Int. Law, pp. 506, 507; Calvo, Int. Law, §§ 2327, 2328; 3 Phillim. Int. Law, c. 86; The Soglasie, 2 Spinks, 101; The Bernon, 1 C. Rob. Adm. 102; The Sechs Geschwister, 4 C. Rob. Adm. 100; Whart. Dig. § 393; Moodie v. The Alfred, 3 Dall. 307. It is not contrary to the neutrality laws of the United States to sell to a foreigner a vessel built in this country, though suited to be a privateer, and having some equipments calculated for war, but frequently used by merchant ships. 7 Op. Attys. Gen. p. 538 (Cushing).

he become a subject of the capturing country during transit, the property is considered good prize; the principle being that, as the property was hostile, either actually or constructively, at the time of seizure, it remained so notwithstanding the change in the national character of the owner. The rights of the captor, having vested at the time of seizure, are not changed by subsequent events.¹³

GOODS CONSIGNED BY BELLIGERENTS FROM BELLIGERENT PORTS TO NEUTRALS, AND VICE VERSA.

193. Goods shipped during war, or in contemplation of war, under contract, are delivered to the master of the ship as the agent of, and from the time of such delivery the property in them is vested in, the consignee.

This rule may be departed from in time of peace, but the opening for fraud caused the English and American courts to adhere to the rule as above stated. "All such agreements (for changing rule of shipment) are held to be constructively fraudulent, and if they could operate, they would cover all belligerent property, while passing between a belligerent and a neutral country, since the risk of capture would be laid alternately on the consignor or the consignee, as the neutral factor would happen to stand in the one or the other relation. The great principles of national law are held to require that, in war, enemy's property should not change its hostile character *in transitu*; that no secret liens, no future elections, no private contracts looking to future events, shall be able to cover private property while sailing on the ocean. Captors disregard all equitable liens on enemy's property, and lay their hands on the gross tangible property, and rely on the simple title in the name and possession of the enemy. If they were to open the door to equitable claims, there would be no end to discussion and imposition, and the simplicity and celerity of proceedings in prize courts would be lost." When the consignor is an enemy the natural tendency is to

¹³ Hall, Int. Law, pp. 505, 506; Pitt-Cobbett, Cas. Int. Law, pp. 91-93; The Vrow Margaretha, 1 C. Rob. Adm. 336; The Jan Frederick, 5 C. Rob. Adm. 128; The Ann Green, 1 Gall. 274, Fed. Cas. No. 414; The Frances, 1 Gall. 445, Fed. Cas. No. 5,032; Id., 8 Cranch, 354, and cases cited. Contra, vide Calvo, Int. Law, § 2321 et seq.

hide the true nature of the contract so that evidence is required to show that the consignee is in reality the owner, and this latter must accept the goods unconditionally. According to the French rule the consignor is permitted to assume the risk by agreement.¹⁴

¹⁴ This rule is exemplified in the case of the Danish vessel *Les Trois Frères*, which was loaded with 535 barrels of oil, and billed to Ostende and Amsterdam (which in June, 1793, were enemies of France), was captured on the 3d of June, 1793, by the privateer *Le Passe Partout*, of Bordeaux, and, on the 6th of July following, was brought to Bayonne. The 18th of Brumaire, year 2, a verdict of the tribunal of commerce of that city, upon the demurrer of the Genoese merchants, Messrs. Straforello & Co., who had claimed a part of the cargo, annulled the capture, and compelled the captors to pay the price of the goods, as valued in Ostende and Amsterdam, by application of the right of presumption decreed by the law of the 9th of May, 1793, although the captors had not asked the use of this privilege, which had become very onerous, in consequence of the maximum price recently established for all goods. This verdict once given, the documents relating to the capture of the vessel (*Les Trois Frères*) were sent to the executive council, according to the law of the 18th Brumaire, year 2; and the committee of public safety, which substituted itself for this executive council, rendered in this case the following decision: "Upon the report made to the committee of public safety, by the commission of the navy and colonies, that on the 3d of June, 1793, the privateer *Le Passe Partout*, of Bordeaux, seized and carried to Bayonne the Danish vessel *Les Trois Frères*; that, the tribunal of commerce at Bayonne having acted upon the validity of taking the vessel, and having declared it to be neutral, the captain received his freight and the indemnity adjudged by the same tribunal; that, the cargo being no longer in question, the examination of the documents which concern it and the proceedings show that a part of it had been loaded by Genoese, friends of the French republic, and on their own account and risk, that it is the property of the Genoese citizens, that consequently its seizure was illegal and void, and that restitution of it must be made to its owners; that, the ownership of these goods loaded by the Genoese for account of unknown parties, these goods are of right presumed to be enemy, from the moment that no contrary proofs can be found to properly destroy this presumption; and that, as such, they are rightfully seized and become subject to confiscation,—the committee of public safety, pronouncing in accordance with its decree of the 4th Floreal, holds: (1) The judgment of the tribunal of commerce of the 30th of August, 1793, rendered in favor of the Danish captain of the vessel *Les Trois Frères*, and by which this vessel has been declared neutral property and released with payment of its freight and an indemnity, is confirmed. (2) The goods freighted on board of the vessel *Les Trois Frères* on the account and risk of the citizens Straforello and others are declared Genoese and neutral. (3)

EFFECT OF OCCUPATION OF THE TERRITORY OF A BELLIGERENT BY HIS ENEMY.

194. Places belonging to a belligerent which are occupied by the enemy are under practically the same restrictions as to trade as if in reality enemy country, and the property of these places, or of domiciled persons there, is confiscable to the same extent as enemy property.

This rule is considered necessary in order to exercise the requisite restraint upon the enemy, and losses through occupied territory have the same general effect upon the enemy as if they occurred in connection with his own territory, since this occupied territory is under his control. It is true that such territory is not looked upon as a permanent acquisition by the enemy, but, so long as he occupies and controls it, for all commercial and belligerent purposes it is considered as part of the domain of the conqueror.¹⁵

The goods belonging to Straforello and others shall be restored to them in the quantities marked and qualities designated in the bills of lading; and, in the case of the sale of these goods, the owners of the privateer *Le Passe Partout* will reimburse their value in accordance with their market price at the place of their destination at the time of seizure, with interest upon the value of the articles returned, said interest in lieu of all indemnity for undue detention. (4) Are declared enemy property, and as such adjudged by confiscation to the owners and crew of the privateer *Le Passe Partout*, all the remainder of the cargo of the *Les Trois Frères*, and which had been loaded for the account of those to whom it belongs. (5) The goods of this cargo, if they still exist in fact, that could be deemed as useful to the service of the republic, will be bought on its account, and the value will be paid as soon as delivered, to those to whom they belong, according to the terms of this decree." *Snow*, Cas. pp. 348, 349; *Pistoye v. Duverdy*, 1, 357.

For subject of shipment of goods during war, vide 1 *Kent*, Comm. p. 87; *Calvo*, Int. Law, §§ 2315-2320; *Hall*, Int. Law, pp. 506, 507; 2 *Halleck*, Int. Law, p. 128 et seq.; *The Packet De Bilbao*, 2 C. Rob. Adm. 133; *The San Jose Indiano*, 2 Gall. 268, Fed. Cas. No. 12,322; *The Sally*, 3 C. Rob. Adm. 179.

¹⁵ *Wheat*, Int. Law, D, note 162; *U. S. v. Rice*, 4 *Wheat*. 246; *Fleming v. Page*, 9 *How*. 603; *Cross v. Harrison*, 16 *How*. 164; *Hall*, Int. Law, pp. 507-509.

CHAPTER XVIII.**NON-HOSTILE RELATIONS.**

- 195. *Commercia Belli*.
- 196. Flags of Truce.
- 197-198. Passports and Safe-Conducts.
- 199-200. Suspensions of Arms, Truces, and Armistices.
- 201. Commencement of a Truce or Armistice.
- 202. Conclusion of Truce or Armistice.
- 203. Cartels.
- 204. Cartel Ship.
- 205. Capitulations.
- 206. Safeguards.
- 207. Licenses to Trade.

COMMERCIA BELLII.

195. Under the technical term, "*commercia belli*," is included all those pacific or non-hostile relations that are entered into by belligerents during the progress of a war.

All relations between belligerent countries during the war are suspended by the general rule, but it is necessary that certain relations be established for the purpose of rendering the termination of the war possible without total extinction of the contestants. These relations may refer to the cessation of hostilities, to individuals, to the whole or a part of the armed forces, or to the abandonment of the rights of hostility in certain particulars. These relations, looking to the cessation of hostilities, are not only entered into with certain formalities, but are based upon the one understanding of good faith. All of the authorities state that good faith must be observed between enemies, and in entering into arrangements imposing obligations, it is understood that, while each of the belligerents is to receive the full benefit of the rights conferred, neither party will take any undue advantage of the relation established to improve his own position in a manner not contemplated.¹

¹For enumeration and discussion of the *commercia belli*, vide Hall, Int. Law, pp. 540-556; 2 Halleck, Int. Law, c. 20; Calvo, Int. Law, §§ 2411-2452;

FLAGS OF TRUCE.

196. Flags of truce are white flags, used as signals to indicate that a belligerent wishes to communicate with the enemy.

The persons bearing a flag of truce are considered as inviolate, and must not be fired upon or injured or taken prisoners. A belligerent is not under obligation to enter into negotiation with the enemy, and consequently is not compelled to receive a flag of truce. They are usually employed during a cessation of active operations, but may be sent during the progress of an engagement, at which time a belligerent is not compelled to cease firing, so that, if the bearer of the flag of truce is accidentally killed at this time, the belligerent cannot be held responsible. The bearer of a flag of truce has no right to penetrate the enemy's lines, but can be stopped at the outposts, and his communication sent from that point. Other conditions can be imposed upon his reception, such as being blindfolded, or any other precautions deemed necessary to prevent him from acquiring knowledge of service to his own army, including his detention temporarily, and his abstention from communication with any other person than those designated. His reception implies suspension of hostilities with respect to him so long as he remains, and also a safe return within his own lines. On the other hand, he cannot make use of a flag of truce to obtain information from the enemy, and while the bearer of such flag is under no obligation to keep from his chief any information that he properly obtains during his stay within the enemy lines, the obtaining information surreptitiously renders him liable to punishment as a spy. The flag of truce will not protect him, under such circumstances, from seizure and execution.²

Bluntschli, §§ 674-699; Wools. Int. Law, §§ 154-157; Lawrence, Handbook, pp. 106-108; Davis, Int. Law, pp. 237-240; Wheat. Int. Law, D, §§ 399-410; Vattel, Int. Law, bk. 3, cc. 16, 17; Am. Inst. arts. 5, 6, 8; Append. p. 340; Creasy, Int. Law, 468; 3 Phillim. c. 8; Grotius, De Jure Belli, bk. 3, c. 21.

² 2 Halleck, Int. Law, pp. 361-363, note, gives instructions of United States navy department for government of United States navy in regard to use of flags of truce. Am. Inst. arts. 112-118; Append. p. 357; Code Inst. arts. 20-30. Append. p. 343.

PASSPORTS AND SAFE-CONDUCTS.

197. Passports are permissions to travel, without special restrictions, in territory belonging to a belligerent or under his control, issued by the government to subjects of the enemy.

198. Safe-conducts are similar permissions by which persons to whom they are granted may come to a particular place for a definite purpose. These may be given by officers within the districts under their command.

The essential difference between passports and safe-conducts lies in the fact that the former can only be given by the government of the belligerent, while the latter may be given either by the government or the officer in command within the district. Both may be revoked at the pleasure of the grantor, or, in case of safe-conducts, if given by the officer in command, may be revoked by a superior. If the authority granted be exceeded in regard to time, place, or route, unless from illness or some unavoidable cause, the holder is liable to have his privileges withdrawn, and if he has employed his privileges for improper objects, he can be severely punished, according to the nature of his offense. Neither passports nor safe-conducts are transferable.*

SUSPENSIONS OF ARMS, TRUCES, AND ARMISTICES.

199. The cessation of hostilities for a short period of time at a particular place for a temporary purpose is called a suspension of arms.

200. When the agreement to suspend hostilities is for an extended period, or for a general purpose, extending to the

* 1 Kent, Comm. p. 163; Vattel, Int. Law, bk. 3, §§ 263-277; 3 Phillim. Int. Law, §§ 99-102; 2 Halleck, Int. Law, 351; 1 Stat. 118; Hall, Int. Law, p. 542; Bluntschli, §§ 675-678. In the statute above cited, the penalty for violation of a passport or safe-conduct is imprisonment for three years, and soldiers are to be tried by courts martial.

whole or a considerable portion of the forces of the belligerents, or has a political object, it is called a truce or an armistice.

The agreement for a cessation of hostilities, which would be known as a suspension of arms, can be entered into by the immediate commanders, and would be binding upon the forces under their commands, and are usually made for a temporary purpose for a short period, such as for the purpose of removing the wounded or burying the dead after a battle. Truces or armistices, on the other hand, are either partial or general; the former being applied to particular localities or particular forces, such as the suspension of hostilities between two hostile armies, or between a besieged place and the troops surrounding it, while a general truce implies that it extends to all of the hostile operations of the opposing forces.* The effect of a truce is to suspend all hostile operations of an active nature, with the implied understanding that everything within the space affected shall remain as it was at the commencement of the truce, and all acts tending to strengthen a belligerent during the truce, which his enemy would be in a position to prevent were it not for the truce, are prohibited. Under such a rule, a besieged army or place cannot properly repair damages to the works that have been destroyed by the enemy, nor construct new works, if they are within reach or control of the guns of the enemy, nor can the besieging army construct new batteries or continue his approaches. But the besieged may construct new works in places hidden from the enemy, or receive reinforcements, if through an avenue not controlled by the invader, and the invader may also receive reinforcements or material of war. In the case of a truce between armies, neither party can take advantage of the suspension of hostilities to improve his position from a strategical standpoint, nor withdraw his forces from striking distance or assume a more advanced position. All acts that do not take effect in the immediate theater of the war are not denied to either party under a truce, and especially if these operations could have been carried on ir-

*2 Halleck, Int. Law, pp. 342-344; Hall, Int. Law, p. 543; Bluntschli, §§ 687-689; Vattel, Int. Law, bk. 3, § 233; Calvo, Int. Law, §§ 2433-2435.

respective of the truce.⁵ The right of revictualing a besieged place during a truce is one of much difficulty to determine. In case the besieging army is in a position to prevent the introduction of supplies into the besieged place in the absence of the truce, the general opinion seems to be that, in the absence of a stipulation to the contrary, the introduction of such provisions is forbidden. This would unquestionably be the construction of the law by a besieging army under such circumstances. On the other hand, as famine is one of the recognized means of reduction of a besieged place, and as a truce implies the suspension of all active operations, and the end of the truce is understood to find the belligerents in practically the same position that they found themselves at its commencement, no good reason is apparent why the introduction of supplies to the extent of the consumption during the length of the truce should not equitably be authorized, especially if introduced under the supervision of the besieging army.⁶

⁵ Halleck, *Int. Law*, p. 345: "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 building or repairing 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 his vessels of war; and in the theater 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 have safely done if hostilities had continued." Vide, also, Bluntschli, §§ 691, 692; Calvo, *Int. Law*, § 2438; *Am. Inst. art.* 143; *Append.* p. 361; Hall, *Int. Law*, pp. 543, 544; Walk, *Int. Law*, p. 370; Creasy, *Int. Law*, pp. 470-472; Vattel, *Int. Law*, bk. 3, §§ 245-255.

⁶ Calvo, *Int. Law*, §§ 2440-2446; Walk, *Int. Law*, p. 371. The practice of Bismarck in the Franco-German war was to refuse the introduction of supplies even in limited quantities. Vide Calvo, *Int. Law*, §§ 2444, 2445, for statement of cases.

COMMENCEMENT OF A TRUCE OR ARMISTICE.

201. The time of commencement of a truce or armistice dates from the receipt of information of its existence at the particular place.

When the truce or armistice is general, and extends over the whole area, or a considerable portion of it, the custom is to fix different dates for the different localities, so as to permit time for receipt of the news at these places. A belligerent performing acts of hostility in violation of a truce, or armistice, of the existence of which he was ignorant, is not responsible, but he may have to restore prisoners or property taken after the truce or armistice became effective. One belligerent is not bound to take notice of information in regard to a truce or armistice communicated to him by his enemy until such information is confirmed by advices from his own higher authorities officially.⁷

CONCLUSION OF TRUCE OR ARMISTICE.

202. A truce or armistice is terminated either by notice, or by expiration of the time agreed upon in its terms, or by breach of its terms by one belligerent authorizing the other party to further disregard it.

If a truce or armistice is made for an indefinite time, it is terminated by notice given by one party to the other. In case the time is fixed, and no provision is made for service of notice, the truce expires upon expiration of the term. The violation of the terms of a truce by one party, such as will release the other party from further regarding or observing it, must consist of an act of the offending state, or an act of its agent which is not disavowed. A similar act on the part of individuals simply authorizes the punishment of the offenders.⁸

⁷ Halleck, Int. Law, p. 344; Hall, Int. Law, pp. 546-548; Vattel, Int. Law, bk. 3, c. 17, § 239; Calvo, Int. Law, § 2446; Bluntschli, § 690; Am. Inst. art. 139; Append. 361.

⁸ Calvo, Int. Law, §§ 2447-2449; Vattel, Int. Law, bk. 3, § 244; Bluntschli, §§ 694-696; Halleck, Int. Law, p. 347.

CARTELS.

203. Cartels are conventions made between belligerents for the purpose of regulating permitted intercourse, either at the commencement of or during the progress of the war.

Under such an agreement is regulated the postal and telegraphic communications, the exchange of prisoners, the method of reception of flags of truce, the treatment of the wounded and prisoners of war, and all similar subjects. Such agreements are not regarded as treaties, in contemplation of the constitution of the United States, but cartels are of such force that the sovereign power cannot annul them, and paroles of prisoners of war are regarded as sacred obligations which the national faith is pledged to fulfill. Both belligerents are bound faithfully to observe such contracts.*

CARTEL SHIP.

204. A cartel ship is a vessel employed or commissioned for the purpose of carrying by sea exchanged prisoners of war.

These vessels are subject to certain rules, and are entitled to the protection of both belligerents, in so far as relates to the particular service in which they are employed. Such a ship usually sails under a safe-conduct from a commissary of prisoners situated in the enemy country, being protected from capture or molestation while she has prisoners on board, while returning from the transportation of such prisoners, and on her voyage for the purpose, although she is not protected while passing from one port to another of her own country for the purpose of being so employed. Such vessel must not depart from the strict line of her employment by taking on board merchandise, nor can she be prepared for carrying on hostilities. Her armament may consist of one gun, for the purpose of salutes.¹⁰

* Wheat. Int. Law, D, §§ 254, 344; 2 Halleck, Int. Law, pp. 354, 355; Hall, Int. Law, p. 548; The Carolina, 6 C. Rob. Adm. 336; U. S. v. Wright, 2 Pitts. R. 440.

¹⁰ Bluntschli, § 630; Calvo, Int. Law, §§ 2419-2421; 2 Halleck, Int. Law,

CAPITULATIONS.

205. A capitulation is an agreement under which a body of troops or a naval force surrenders upon conditions.

These compacts are varied, not only by the terms of the agreements themselves, but also by the effects produced. In case the compact is of a strictly military nature, the commanding officer present is authorized to enter into it, but if the effect is political in its nature, or contemplates the independence of the country, it must have the consent of the sovereign power, in the absence of special powers conferred upon the officer entering into the negotiations. In case the commanding officer present entering into the compact is unauthorized to complete or give effect to the agreement in all its terms, it is his duty to notify the enemy of this fact, so that it may be understood that there must be a ratification by the proper authority.¹¹

pp. 355, 356; Hall, *Int. Law*, pp. 549, 550; *The Daifjie*, 3 C. Rob. Adm. 141; *The Venus*, 4 C. Rob. Adm. 355; *La Gloire*, 5 C. Rob. Adm. 192.

¹¹ Hall, *Int. Law*, pp. 550-553. Brussels' Conference of 1874, art. 46: "The conditions for capitulations shall be discussed by the contracting parties. These conditions should not be contrary to military honor. When once settled by convention, they should be scrupulously observed by both sides." 2 Halleck, *Int. Law*, pp. 348, 349, note: "General Grant wrote to General Lee that he proposed to receive the surrender of the Army of Northern Virginia on the following terms, viz.: (1) That rolls of all officers and men were to be made in duplicate, one copy to be given to an officer of the selection of the former, the other to be retained by whomsoever the latter might appoint. (2) That the officers give their individual paroles not to take arms against the government of the United States until properly exchanged, and each commander of a company or regiment to sign a like parole for his men. The arms, artillery, and public property to be parked and stacked, and turned over to the officers appointed by the former to receive them. That this do not include the side-arms of the officers, nor their private horses or baggage. (3) That, this being done, each officer and man shall be allowed to return to his home, and shall not be disturbed by the United States authority so long as they observe their paroles and the laws in force where they reside. These terms were accepted by General Lee on the same day and the other armies were surrendered upon substantially the same terms."

SAFEGUARDS.

206. A safeguard is a protection granted either to persons or property within the limits of the command, and consists either in a written order or a guard of soldiers.

These are sometimes given to the persons whose property or persons are to be protected, or they may be posted upon the property, which usually consists of such as museums, libraries, public offices, and properties of neutrals or friends. These are usually given as a protection from the soldiers of the army of the person furnishing the safeguard, and violations of such instruments are punished with the greatest severity. The guards furnished are authorized to resort to the severest measures to punish any violation of the safety of their trust.¹²

LICENSES TO TRADE.

207. Licenses to trade are written permissions, granted to subjects of either belligerent, to carry on trade with a particular place or in specified articles.

Such licenses are usually granted by the executive power of the state,—by the Crown in England, and by the President of the United States,—and are either general or special; the former being a permission to all of the subjects of the enemy to carry on a particular trade, or to trade in a designated locality, and the latter being a permission granted to individuals authorizing them to carry on the commerce designated in the license. The question of granting such licenses is one of policy, and this is to be determined by the grantor. It is an implied condition of all such licenses that, when applied for, there must be no misrepresentation or concealment of material facts, and this is true in some cases where no fraudulent intent accompanies the actions of the applicant. These licenses are granted by the belligerent government, or by a commanding general in the field with the sanction of his government. A license granted by the latter, if in excess of his powers, would not be good except as

¹² 2 Halleck, Int. Law, pp. 353, 354; 11 Stat. 366; Calvo, Int. Law, §§ 2417, 2418; Hall, Int. Law, p. 553.

to the forces under his command. In the case of *The Sea Lion* the United States Supreme Court held that the act of congress of July 13, 1861, authorizing the President to license certain commercial intercourse with the states in rebellion, did not contemplate the exercise of that authority by subordinate officers of the executive department without the express order of the President. This was a case in which a certain firm in New Orleans obtained a special permit from an agent of the treasury department in New Orleans, indorsed "Approved" by Admiral Farragut, in command of the blockading force on that coast, to ship some cotton, which they proceeded to do. The cotton was shipped from the port of Mobile and was captured by the blockading squadron off the coast of Mobile, taken to Key West, and there libeled as prize. The lower court condemned the property, and this action was affirmed by the Supreme Court.¹³

In construing a license to trade a reasonable construction is to be placed upon it in view of all the circumstances attending a particular case, and the general conditions upon which licenses were granted. One of the elements to be considered will be the persons to whom the license is granted. The persons who use it must show that it was granted in their behalf, or else that they are acting in behalf of and as the agent of the grantee, or, in case the license is by its terms made negotiable, the transferee will be protected, although the general rule is that a license is not transferable. If a license is granted to a particular person by name, he cannot, by acting as agent for another, convert his personal privilege into a subject of transfer or sale. The character of the ship in which the goods are to be transported will also be considered, and if a ship of a particular nation is to be employed, as, for instance, of some neutral state, then the employment of a ship of the state granting the license would authorize condemnation; but in case the license covered one ship, and the goods were shipped in two vessels, with no material variation in the goods themselves, this fact alone would not effect the condemnation of the goods or vessels; nor, again, if the vessel of a particular neutral nation be specified, would the employment of a vessel of another nation, also neutral. Another thing for consideration would be the nature and quantity of the

¹³ *The Sea Lion*, 5 Wall. 630; *Coppell v. Hall*, 7 Wall. 542.

goods authorized to be shipped, and a material variation in either the quality or quantity would authorize condemnation, but an immaterial variation, even in the kind of goods, would not entail condemnation, especially if the goods were innocuous in their nature.

Again, the course and route to be followed is to be considered, and if there is a departure—as to the port of shipment or delivery, or as to the general course to be pursued, or in stopping at a port not designated, or in failure to stop at a designated port—from the terms of the license, the neglect or omission to comply with its terms will invalidate it. A deviation from the prescribed course will not invalidate the license, if caused by stress of weather or unavoidable accident. To touch at a port which is not interdicted for orders is permissible, even though lying out of the direct course.

The time specified in the license will also be considered, and in this element a distinction seems to be made between a designated time for departure, as where a license authorizes the exportation of certain goods on or before a certain day, and where the license authorizes the importation of goods within a designated time. In the former case, a delay after the date named renders the license absolutely void. On the other hand, ^{where the license authorizes importation} the delays caused by the enemy, stress of weather, and similar causes will be taken into consideration, and the vessel condemned only in case of delay which is the fault of the owner.¹⁴

¹⁴ As to general subject, vide Hall, Int. Law, pp. 553-556; 2 Halleck, Int. Law, c. 30; Calvo, Int. Law, §§ 1969-2000; Wools. Int. Law, § 155; Pitt-Cobbett, Cas. Int. Law, pp. 173-180; Usparicha v. Noble, 13 East, 332.

As to persons entitled to make use of license, vide Klingender v. Bond, 14 East, 484; The Jonge Klassina, 5 C. Rob. Adm. 297; 6 Op. Attys. Gen. p. 630; Warin v. Scott, 4 Taunt. 605; Robinson v. Morris, 5 Taunt. 725; Fenton v. Pearson, 15 East, 419; Attorney General v. Wilson, 3 Price, 431.

As to the character of the vessel, vide 2 Halleck, Int. Law, p. 371; Kensington v. Inglis, 8 East, 273; The Hoffnung, 2 C. Rob. Adm. 162.

As to character of goods and vessels, vide 2 Halleck, Int. Law, pp. 371, 372; The Bourse, 1 Edw. Adm. 370; Grigg v. Scott, 4 Camp. 339; The Vrow Cornelia, 1 Edw. Adm. 350; Keir v. Andrade, 6 Taunt. 498.

As to the route to be pursued, vide The Europa, 1 Edw. Adm. 342; The Minerva, Id. 375.

As to the time limited, vide Hall, Int. Law, p. 556; 2 Halleck, Int. Law, pp. 378, 379; The Sarah Maria, 1 Edw. Adm. 361; Effurth v. Smith, 5 Taunt. 329; Williams v. Marshall, 6 Taunt. 390.

CHAPTER XIX.**TERMINATION OF WAR.**

- 208. Methods of Termination.
- 209. Under Treaty of Peace.
- 210. By a Simple Cessation of Hostilities.
- 211. Effect of a Proclamation of the Executive in a Civil War.
- 212. The General Effect of a Treaty of Peace.
- 213. The Principle of Uti Possidetis.
- 214-216. The Effect of a Treaty of Peace upon Acts Done Before the Commencement of War.
- 217. Effect of a Treaty of Peace upon Acts Done During the War.
- 218. Effect of a Treaty of Peace upon Acts Done After the War.
- 219. Conquest.
- 220. Effects of Conquest.

METHODS OF TERMINATION.

208. War may be terminated¹ in the following ways:
- (a) By the conclusion of a treaty of peace.
 - (b) By a simple cessation of hostilities and resumption of pacific relations by the belligerents.
 - (c) In case of a civil war, by proclamation of the supreme authority.
 - (d) By conquest.

UNDER A TREATY OF PEACE.

209. The rule in regard to treaties between states becoming binding only upon ratification is so far departed from, in regard to treaties of peace, that from the date of signature, or from the date fixed in the treaty itself, they are binding, and hostilities cease from that date.

The necessity for such a rule as the above is done away with, in practice, by the fact that the general custom is to conclude an

¹ As to whole subject of termination of war, vide Hall, Int. Law, pt. 3, c. 9; Calvo, Int. Law, § 3153 et seq.; Whart. Dig. §§ 356, 357; Walker,

armistice preliminary to signing a treaty of peace. The reason for varying the rule in regard to treaties in the particular case of a treaty of peace seems to be that no good reason exists for causing further bloodshed or suffering by the inhabitants in the theater of war. In case of fixing the date for the cessation of hostilities at some future date, or at different dates in different localities, these dates have usually some reference to the time it requires, in the ordinary course, for information to be communicated to such places. In case the information of the conclusion of the treaty of peace reaches a given point before the time designated for the same to become effective at that place, the question arises as to whether the commanding officer is bound to regard the same before the time named, or must he act at once upon the official information received, from the time of receipt of the same. The latter rule seems to be the more satisfactory, and most universally accepted, but, if the information is not received officially from his own superiors, the commander is not bound to accept it as authentic. This was much discussed in the French courts of prize in the case of *The Swineherd*, which was an English ship captured by a French privateer in 1801, after receipt of information of the cessation of hostilities, but before the time fixed for their cessation, in the Indian Seas, the date fixed being five months from the time of concluding the treaty of peace. *The Swineherd* was captured under circumstances which clearly indicated that it was acting in good faith in supposing that the treaty of peace had become effective, since it offered no resistance, and had only enough powder on board to use for purposes of signaling. The vessel, however, was libeled and condemned, which action was affirmed on appeal to the council of prizes, upon the ground that the information received by the French vessel was not sufficient, in so much that it was not duly attested by French authority. Chancellor Kent says that "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 pro-

Int. Law, pp. 371, 372; Wools. Int. Law, §§ 158-162; Vatt. Int. Law, bk. 4. cc. 1-4; Phillim. Int. Law, pt. 12, c. 1; Wheat. Int. Law, D, §§ 537-550; Bluntschli, §§ 700-726; 1 Kent, Comm. pp. 165-173; 1 Halleck, Int. Law, c. 9.

duce that effect.”² Admitting the desirability of having a fixed rule for the guidance of officers conducting hostilities, and the danger of acting upon information received which is not duly attested, and the facts in the foregoing case of the condemnation of the Swineherd, it would seem to be equitable for the government to reimburse the loss to the owners.³

BY A SIMPLE CESSATION OF HOSTILITIES.

210. The time of return to the normal or peace relations cannot be determined with accuracy when there is a simple cessation of hostilities by the belligerents.

From the nature of such relations as are established from a simple cessation of hostilities by two belligerents, it is apparent that not only the subjects of the states affected, but also all neutral states, are in doubt as to the extent of their rights and their status. An instance of this mode of terminating a war occurred in 1716, when Sweden and Poland were engaged in war, and simply ceased hostilities. Another somewhat similar case was the wars that were waged by Spain with her South American colonies, which hostilities ceased some time before the independence of the different states was acknowledged; and, in the case of Chili, her independence was not recognized for about 25 years after the cessation of active hostilities. There must come a time, in such cases, when the normal relation is restored, and the same relations established as in the case of the cessation of hostilities by a treaty of peace. In regard to the question which caused the war, it may be said that it remains unsettled, and could be made a cause of war by either party at a subsequent time. Not only is the uncertainty as to the settlement of the dispute between the belligerents unfortunate, but the relations of neutrals are thereby permitted to remain in an unwarranted condition, causing confusion as to what acts are lawful or unlawful.⁴

² Kent, Comm. p. 172.

³ Hall, Int. Law, p. 560; Pitt-Cobbett, Cas. Int. Law, p. 224; Halleck, Int. Law, p. 261; U. S. v. Reynes, 9 How. 127; Hylton v. Brown, 1 Wash. C. C. 312, Fed. Cas. No. 6,981; Wheat. Int. Law, D, § 547, note 252.

⁴ Hall, Int. Law, pp. 564, 565; 3 Phillim. Int. Law, § 511.

PROCLAMATION OF THE EXECUTIVE IN A CIVIL WAR.

211. In the case of a civil war, the termination thereof is determined by some act of the political department.

This was held by the supreme court of the United States in the case of *The Protector*, in which case it was necessary to determine the exact time of the commencement and termination of the Civil War, in order to ascertain whether the case was barred by the statute of limitations, which did not run during the continuance of the war; and in this decision it was held that the war did not commence or terminate in all of the states at the same time, but that the time of commencement and termination in each state was determined by the proclamations affecting it.⁵

THE GENERAL EFFECT OF A TREATY OF PEACE.

212. The general effect of a treaty of peace is to restore the belligerents to their normal relations with regard to each other, so that all acts which are permitted only during the war must cease.

The establishment of a state of peace implies that the belligerents will resume all the rights and obligations which pertain to that status. The treaty of peace itself may confer upon one of the belligerents authority to perform certain acts for a limited time, such as the occupation of certain districts, or the levying of contributions and requisitions for the support of troops in such districts, under certain conditions and restrictions. In regard to prisoners of war, all of whom are supposed to be released at once upon the conclusion of peace, this strict rule may be and is departed from by imposing certain regulations for the purpose of guarding against misconduct on their part. A state may incorporate certain other agreements in the treaty of peace, by which a number of acts on the part of its belligerents will be authorized, without changing the above rule.

⁵ *The Protector*, 12 Wall. 700; *Brown v. Hiatts*, 15 Wall. 177.

THE PRINCIPLE OF UTI POSSIDETIS.

213. By the "principle of uti possidetis" is understood that the absolute property, in territory and things attached to it, which is under the control of either belligerent, and, in the case of movables, those that are in actual legal possession of such belligerent, vests in such belligerent upon the conclusion of peace, in the absence of express stipulations concerning the same, or in so far as express stipulations do not extend.

If nothing be said about the conquered territory in the treaty of peace, it remains with the conqueror, whose title cannot afterwards be questioned. So that the title thus acquired to this territory and things attached to it is just as binding as if transferred by the treaty expressly. In regard to movables which have not been confiscated by the conqueror, the principle of postliminy operates to transfer them to the original owner. Strictly speaking, the *jus postliminii* does not operate except during the continuance of war, but the term is used to show that property returns by a similar principle. Should the treaty of peace contain the stipulation that, except in so far as otherwise expressly provided therein, all things shall return to the same state as existed previous to the commencement of the war, it would be construed to mean that all property which had been appropriated or destroyed or damaged in accordance with the rules of war would not be included in the operation of such a clause, unless special and specific provision be made for such effect; and such general stipulation would refer only to such immovable property as had been occupied by the enemy, which would be returned in the condition in which it is found after the war, as a result of legitimate acts of war during occupation.^o

^o Hall, Int. Law, pp. 538, 559; Wheat. Int. Law, D, § 545; 1 Halleck, Int. Law, p. 260; 3 Phillim. § 511; Walk. Int. Law, p. 372; The Foltina, 1 Dod. 452.

THE EFFECT OF A TREATY OF PEACE UPON ACTS DONE BEFORE COMMENCEMENT OF WAR.

214. A treaty of peace puts an end to all quarrels which resulted in the war that has just been waged, whether expressly mentioned or not.

215. It renders operative and binding certain treaties or international agreements, the operation of which has been suspended by the war.

216. Private rights, the right of prosecution of which is suspended by the war, are revived by the peace, even though nothing be said upon the subject in the treaty.

The above statement as to the causes of complaint being buried in oblivion, as a result of the peace, and that war cannot be renewed upon the same grounds, means that the belligerents have made a new start, and established a new order of things, and that the original acts complained of are to be considered as settled, but new acts of the same kind as those complained of originally might be a cause of war.⁷

EFFECT OF A TREATY OF PEACE UPON ACTS DONE DURING THE WAR.

217. The effect of a treaty of peace is—

- (a) To settle finally all claims for acts committed by either belligerent during the progress of the war, in carrying on hostilities, irrespective of the rights of war,—whether these claims arise on behalf of the state or its subjects.
- (b) To grant an amnesty to all individuals for acts performed during the existence of hostilities by them.

⁷ Wools. Int. Law, § 161; Hall, Int. Law, pp. 561, 562; 3 Phillim. Int. Law, § 524 et seq.; Calvo, Int. Law, §§ 3155-3159.

112.12
 This grant of amnesty may be incorporated in the treaty itself, in which case the provision inserted will show what acts have been considered as being covered; but, irrespective of such provision, the immunity extends to a large number of acts committed during the war which have been done without authority of any kind, or without sufficient authority, and protects the individual from civil or criminal process to which he would otherwise be exposed. This amnesty does not extend to civil actions arising out of private contracts, nor to criminal prosecutions for acts which are recognized as crimes by the country to which the perpetrator belongs, and particularly if the criminal acts complained of have no direct connection with the war. Nor, unless specially incorporated in the treaty, would treason against the state be included in a general amnesty, as a result of peace.*

EFFECT OF A TREATY UPON ACTS DONE AFTER THE WAR.

218. Acts of hostility committed after the conclusion of peace are null.

This is true also in regard to acts of hostility committed after the time fixed for the cessation of hostilities, and even though done in ignorance of the conclusion of the peace, and in good faith. In regard to those acts which cannot be undone, the injury inflicted should be met by giving compensation therefor. In the case of *The Mentor*, the high court of admiralty held that: "Hostile acts committed after the conclusion of peace are illegal, and the injured party may sustain an action for damages against the wrongdoer. But, if such officer commits such act in ignorance of the ending of the war, his own government should protect him." °

* Bluntschli, §§ 710-714; Hall, Int. Law, pp. 562, 563; 1 Halleck, Int. Law, pp. 258, 259; *The Molly*, 1 Dod. 396.

° Hall, Int. Law, pp. 563, 564; Bluntschli, § 709; Calvo, Int. Law, § 3155; *The Mentor*, 1 C. Rob. Adm. 183.

CONQUEST.

219. Conquest consists in the appropriation of the property in, and sovereignty over, the territory of a state. This condition is complete when the conquering power has become the permanent sovereign of the country. This condition may be accomplished either—

- (a) By cession from the former sovereign.
- (b) By the practical acquiescence of the sovereign or the people of the territory in its subjection to the conquering state.
- (c) By the entire extinction of the political existence of the conquered state.

In regard to when the completed conquest has been effected, no question can arise when the country has been ceded, or when, at the conclusion of a peace, the principle of *uti possidetis* is allowed to operate, as the acts in each case are sufficient proof of the fact of the complete conquest. Where the conquest has not such positive proof of being effected, the fact must be established in some other manner that is equally as certain. This is accomplished by the fact of actual possession, recognition by other states, and by the lapse of time; no one of which is in itself sufficient, but if the possession is practically undisputed for a considerable time, or is of such a nature as to manifest on the part of the conqueror an ability to hold, it is enough. The question of recognition by other states is not conclusive, but when the number of states so recognizing is large, and their acts of recognition are unqualified in their nature, a strong confirmatory proof is afforded. The principal case illustrating the question of conquest was that of the Elector of Hesse Cassel, whose territory was conquered by the first Napoleon in 1806, and remained for about a year under his immediate control, after which time it was annexed to the new kingdom of Westphalia, and formed a part of that kingdom till after the battle of Leipzig, in 1813. The question was whether the debts owing to the elector were validly discharged by a payment to Napoleon, and receiving from him a quittance in full. The intention of Napoleon

was to effect a conquest. He treated the country as having been conquered, and the conquest was acknowledged by a number of states as being definite. During the year the country was under his direct control he confiscated the property of the elector, who was at the time in the Prussian army, the seizure of which was based upon the ground that the owner was at the time in arms against the legitimate sovereign of the state. One of the debtors of the elector was a certain Count Hahn Hahn, who had borrowed money from him on a mortgage, before his expulsion, and had obtained a release from Napoleon by paying a portion of the debt. The Elector contested the validity of the discharge. The matter was finally referred to one of the universities, and the confiscation was confirmed. The real question was held to be whether Napoleon had or had not become the true creditor of the Hesse Cassel funds; that since, in this case, Napoleon's rights and title were those of the conqueror, which had been ratified by the public act of the state, or, in other words, that he had effected a conquest, and had a right to confiscate the property of an active enemy of the state, the fact that the funds in this case were the private property of the Elector, and not the public funds of the state, became of no importance. They held that, even according to the letter of the Roman law, the restored owner must take the property as he found it, and was entitled to no compensation for damage which it might have suffered in the interval; that it was impossible to consider the return of the Prince as a continuation of his former government, since he had not been constantly in arms against Napoleon, and at last successful, by force of arms, in recovering his domains. He had been treated by the peaces of Tilsit and Schœnbrunn as politically extinct, and the King of Westphalia had been recognized by the continental powers as Regent of Hesse Cassel. They remarked that the Elector's own tribunals of Hesse Cassel had pronounced that those subjects of the King of Westphalia who had paid to him or his exchequer their debts, and received due discharges, could not be legally called upon to pay a second time; and they thought the principles of the decision, as well as the authorities which they had referred to, led them to the judicial conclusion that all the debts, whether the whole sum had been paid or not, for which discharges in full had been

given by Napoleon, were validly and effectually paid, and they therefore so far reversed the former sentences.¹⁰

THE EFFECT OF CONQUEST.

220. When the conquest is completed the following results follow:

- (a) The retroactive effect of rendering valid acts of the conqueror from the date of military occupation of the territory.
- (b) The conquering state acquires property in the conquered territory, and assumes the obligations attendant upon the absorption of such territory.
- (c) The conquering state acquires sovereignty over the conquered territory, and the inhabitants of such territory at the time the conquest becomes definite become subjects of, and owe allegiance to, the new sovereignty.

22.10.

The question of the effect of acts of the conqueror during occupation was considered in the case of the Elector of Hesse Cassel, in so far as the alienation of the property was concerned. In the case of Count Platen Hallemund, who was tried by the courts of Prussia for treason, and sentenced to fifteen years' penal servitude, the facts were that in 1866 the Hanoverian army capitulated, and the Count was at the time the Prime Minister of Hanover, and continued in attendance upon his Prince, taking up his abode in Vienna. He was arraigned upon the charge of high treason committed after he ceased to reside in Hanover. The Prussian courts have jurisdiction to try subjects for high treason committed abroad. Objection was raised to the jurisdiction of the court in this case, and the matter was submitted to two German jurists, who gave it as their opinion that the mere forcible conquest of a country did not, of itself, create the relation of sovereign and subject between the conqueror and the conquered; that in order to create such a relation there must be an express or tacit submission to the new government, which was a

¹⁰ Hall, *Int. Law*, pp. 565-569; Snow, *Cas.* p. 381.

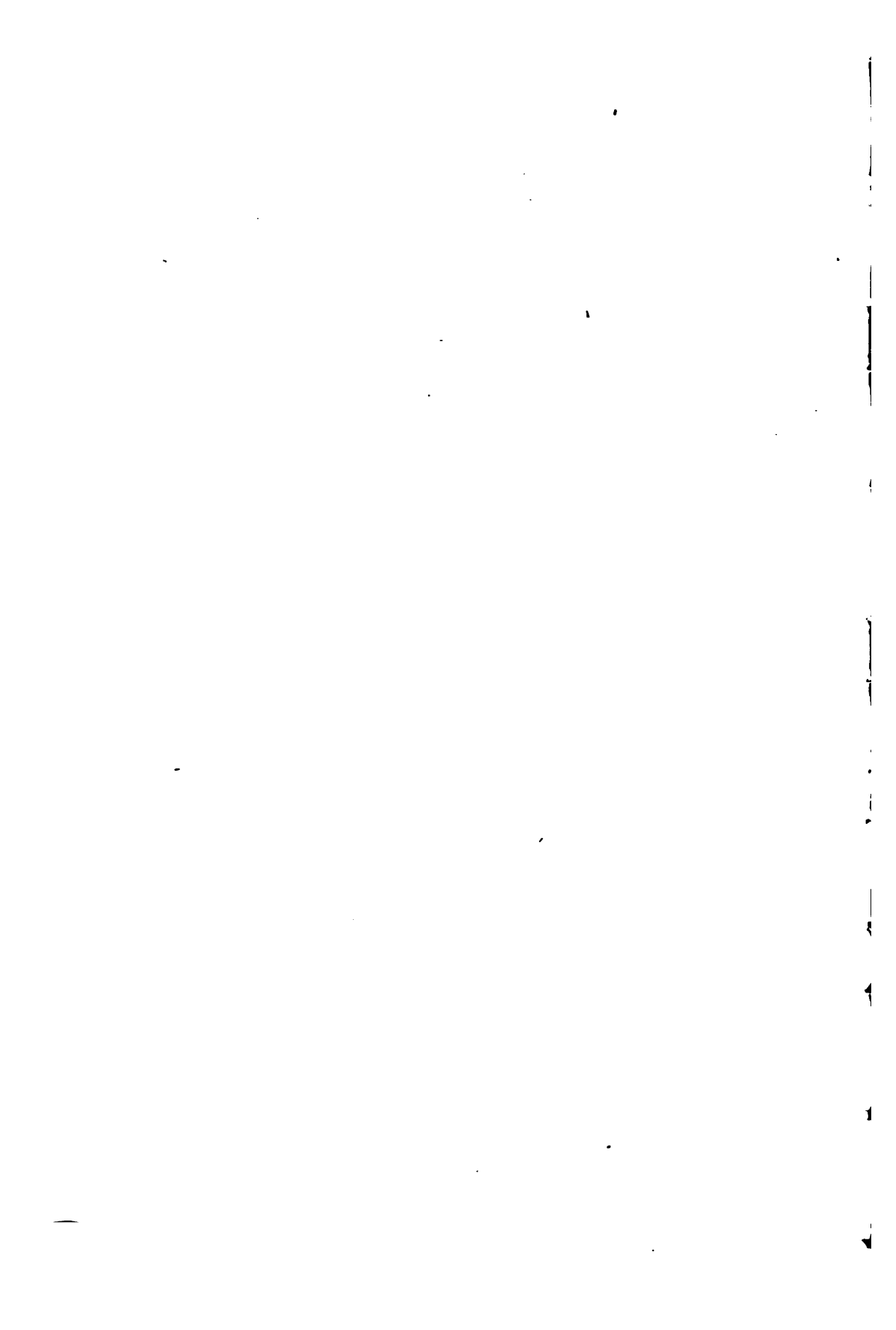
question for the inhabitants themselves, to whom the liberty of leaving if they chose should be accorded. In case they did not depart, but remained in the conquered territory, after the conquest, this fact would constitute them subjects of the new sovereignty. In the United States it has been determined that, when a conqueror has obtained possession of the enemy's country, he has the right to forbid the departure therefrom of the subjects or citizens of this territory, and to exercise sovereignty over them. The rule seems to be that persons who are residents of the territory acquired by the conquest, and remain there, should be considered as becoming subjects of the new sovereignty, and persons who are natives of this territory, and are residents of another part of the state, from which the conquered territory is taken, should be considered as owing allegiance to the sovereignty in which they reside.¹¹

¹¹ Vide Hall, *Int. Law*, pp. 570, 571; Pitt-Cobbett, *Cas. Int. Law*, pp. 227-232; Dana's note to Wheaton, No. 169; 2 Halleck, *Int. Law*, p. 484 et seq.; Calvo, *Int. Law*, § 2457 et seq.; *U. S. v. Repentigny*, 5 Wall. 260; *Johnson v. McIntosh*, 8 Wheat. 588; *U. S. v. Moreno*, 1 Wall. 400; *Campbell v. Hall*, 1 Cowp. 208; *American Ins. Co. v. Carter*, 1 Pet. 542; Grotius, *Int. Law*, bk. 3, c. 8; Vattel, *Int. Law*, bk. 3, c. 13.

PART III.
NEUTRALITY.

INTERNAT. LAW

(365)*



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CHAPTER XX.

IN GENERAL OF NEUTRALITY.

- 221. Neutrality Defined—Sketch of the Subject.
- 222. Permanent Neutrality.
- 223. Armed Neutrality.
- 224. Division of Subject.

NEUTRALITY DEFINED—SKETCH OF THE SUBJECT.

221. Neutrality consists in the non-participation by one state in a war that is being carried on between two or more other states.¹

Some authorities make certain distinctions, in defining neutrality, or divide the subject into two or more species, which are described by the qualifying terms, "natural," "perfect," "strict," etc., to denote the neutrality as above defined, using the terms "imperfect," "quali-

¹ The definition of Calvo from which the above is taken is: "Dans l'acceptation la plus large du mot, la neutralité est la non-participation à une lutte engagée entre deux ou plusieurs autres nations." Calvo, *Int. Law*, § 2493.

A neutral state is one which sustains relations of amity to both the belligerent parties, or negatively is a *non hostis*. Woolf, *Int. Law*, p. 268.

Neutrality consists in not participating in a war being carried on between third parties, and in maintaining peace upon one's own territory. Neutral states are those that are not belligerent parties, and that take part in the military operations neither in favor of one of the belligerents, nor to the detriment of the other. "La neutralité consiste à ne point participer à la guerre engagée entre des tiers, et à maintenir la paix sur son propre territoire. Les états neutres sont ceux qui ne sont pas parties belligérantes et qui ne prennent part aux opérations militaires, ni en faveur de l'un des belligérants, ni au détriment de l'autre." Bluntschli, § 742.

Halleck and Wheaton translate the definition of Vattel. 2 Halleck, *Int. Law*, p. 173, c. 24; Wheat. *Int. Law*, D, c. 3, pt. 4. For other definitions, vide 5 Calvo, *Int. Law*, pp. 408-411.

The relation of neutrality will be found to consist in two principal circumstances: (1) Entire abstinence from any participation in the war; (2) impartiality of conduct towards both belligerents. Kluber says, tersely and happily: "A neutral state is neither judge nor party." 3 Phillim. c. 9, § 130.

fied," "conventional," etc., to explain the relations of a state that departs from its duty as a neutral by furnishing assistance to both belligerents of the same nature and degree, such as authorizing each to transport troops through its territory, or furnishing each with a designated number of troops, or other similar acts that are of questionable authority; the term "conventional" being quite generally employed to define the relation of a state not a party to the war, but which is under some obligation by an engagement made previous to the outbreak of hostilities, by which it has agreed to furnish one of the belligerents with a certain number of troops or vessels. In all such cases the other belligerent is authorized to decide for itself in what manner it will regard the questionable acts, and is authorized to treat the state performing them as a neutral or enemy, as it may deem best.²

Derivation of the Term "Neutrality"—Opinions of Earlier Publicists.³

The fact that neither the Greek nor Latin languages have any words which clearly express the meaning of the words "neutral" and "neutrality" has been commented upon by most of the modern writers on international law. This fact, together with the history of the practice of nations up to the beginning of the eighteenth century, shows that the law upon this subject is of decidedly modern growth. The Romans made use of the words, "amici," "medii," "pacati," "socii," to convey what we understand in English by "neutrals"; and Grotius made use of the expression, "De his qui in bello sunt medii," as a title for his chapter upon the subject of their rights, in which he said: "It is the duty of those who stand apart from a war to do nothing which may strengthen the side whose cause is

² "One makes a distinction between absolute and partial or restrained neutrality. A state can enter into a treaty to furnish advantages to one of the belligerents, and execute the treaty without on that account taking part in the war." Bluntschli, § 746. Vide, also, 2 Halleck, Int. Law, pp. 173-175; Wheat. Int. Law, D, §§ 412-427. Section 413: "There are two species of neutrality recognized by international law. These are (1) natural or perfect neutrality; and (2) imperfect, qualified, or conventional neutrality."

³ For more extended sketch of subject of neutrality, vide Hall, Int. Law, pp. 576-594; 2 Halleck, Int. Law, p. 173 et seq., c. 24; Creasy, Int. Law, pp. 470-482; Wools. Int. Law, § 163 et seq.; Calvo, Int. Law, § 2494 et seq.; Wheat. Int. Law, D, §§ 412-425; Walk. Int. Law, pp. 374-388; Gallaudet, Int. Law, p. 260, c. 5.

unjust, or which may hinder the movements of him who is carrying on a just war, and, in a doubtful case, to act alike to both sides, in permitting transit, in supplying provisions to the respective armies, and in not assisting persons besieged.”⁴

Bynkershoek, in the eighteenth century, said: “I call those ‘non-enemies’ who are of neither party in a war, and who owe nothing, by virtue of alliance, to one side or the other. If they are under any such obligations, they are not simply friends, but allies. * * *

If I am neutral, I cannot advantage one party, lest I injure the other.

* * * The enemies of our friends may be looked at in two lights, —either as our friends, or as the enemies of our friends. If they are regarded as our friends, we are right in helping them with our counsel, our resources, our arms, and everything which is of avail in war. But, in so far as they are the enemies of our friends, we are barred from such conduct, because by it we should give a preference to one party, over the other, inconsistent with that equality in friendship which is above all things to be studied. It is more essential to remain in amity with both than to favor the hostilities of one at the cost of a tacit renunciation of the friendship of the other.”⁵

Following him, we find that Vattel defines “neutrals” as “those who, in time of war, do not take any part in the contest, but remain common friends to both parties, without favoring the arms of the one to the prejudice of the other.” In explanation, he says that the impartiality which a neutral nation ought to observe relates solely to war, and includes two articles, namely: “(1) To give no assistance where there is no obligation to give it, nor voluntarily to furnish troops, arms, ammunition, or anything in direct use in war. I do not say to give ‘assistance equally,’ but ‘to give no assistance’; for it would be absurd that a state should at one and the same time assist two nations at war with each other, and, besides, it would be impossible to do it with equality. The same things, the like number of troops, the like quantity of arms, of stores, etc., furnished under different circumstances, are no longer equivalent succors. (2) In whatever does not relate to war, a neutral and impartial nation must not refuse to one of the parties, on account of his present

⁴ Grotius, De Jure Belli, bk. 3, c. 17.

⁵ Bynkershoek, Int. Law, p. 66, c. 9.

quarrel, what she grants to the other. This does not deprive her of the liberty to make the advantage of the state still serve as her rule of conduct in her negotiations, her friendly connections, and her commerce. When this reason induces her to give preferences in things which are ever at the free disposal of the possessor, she only makes use of her right, and is not chargeable with partiality. But to refuse any of those things to one of the parties purely because he is at war with the other, and because she wishes to favor the latter, would be departing from the line of strict neutrality.”⁶

Practice Down to the Eighteenth Century.

Down to the beginning of the seventeenth century, the idea and practice among nations was to regard, during war, every other nation either as an ally or enemy. It is to be observed, also, that during the seventeenth century the authorities, in speaking of the obligations of neutrals, refer only to acts of the state itself towards the belligerents, and are silent upon the subject of the obligations of a neutral to watch over the acts of its subjects. During the eighteenth century it was the constant practice of supposedly neutral states to furnish bodies of troops to one or the other of the belligerents. In some instances—notably, during the war of the Austrian succession—the United Provinces sent 20,000 men to the assistance of Maria Theresa, and afterwards furnished their entire force. It was not until the latter part of the eighteenth century that this furnishing of troops by neutral states to a belligerent gave rise to any protest, which action was first taken by Sweden, who claimed that the furnishing of limited assistance by Denmark under a treaty with Russia, in view of the relations of amity existing between herself and Denmark, was not permissible, under the law of nations. In regard to the levy of troops by belligerents on their own account within neutral territory, it may be said that up to the latter part of the eighteenth century it was constantly practiced, and until that time was not abandoned. The same is true in regard to the equipment of cruisers under letters of marque in a neutral country, to be employed in the service of a belligerent.⁷

⁶ Vattel, Int. Law, bk. 3, c. 7, § 104.

⁷ Hall, Int. Law, pp. 586-589; Wools. Int. Law, p. 268.

Practice in America during the War of Independence.

During the War of Independence of the American colonies, objection on the part of England to fitting out cruisers for employment in aid of the American armies by France was based upon the treaty stipulations between England and France, rather than upon such acts being contrary to the principles of international law. On June 5, 1793, Mr. Jefferson, in a note to Mr. Genet, stated, "The granting of military commissions within the United States by any other authority than their own is an infringement on their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe their own country." This was addressed to this newly appointed French minister, who, on landing at Charleston, granted commissions to American citizens, fitted out privateers, and manned them with Americans to cruise against English commerce. In a subsequent communication to Mr. Morris, the American minister at Paris, under date of August 16, 1793, Mr. Jefferson used the following language: "Mr. Genet assumes his right of arming in our ports, and of enlisting our citizens, and that we have no right to restrain him or punish them. Examining this question under the law of nations, founded on the general sense and usage of mankind, we have produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in all things relating to the war, observe an exact impartiality towards the parties; that favors to one to the prejudice of the other would import a fraudulent neutrality, of which no nation would be the dupe; that no succor should be given to either unless stipulated by treaty, in men, arms, or anything else directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent, and he who does may be rightfully and severely punished; that, if the United States have the right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments. To these principles of the law of nations, Mr. Genet answers by calling them 'diplomatic subtleties,' and 'aphorisms of Vattel and others.' But something more than this is necessary to disprove

them; and, till they are disproved, we hold it certain that the law of nations and the rules of neutrality forbid our permitting either party to arm in our ports." This correspondence, and the situation of the United States, resulted in the passage of a statute by the congress of the United States for the purpose of carrying out the principles announced, as constituting their policy at that time. No better statement of this policy, and its relation to the usages of nations on the subject of neutrality, can be found than in the words of Mr. Hall. He says that: "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinion as to what those obligations were, and in some points it even went further than authoritative international custom has, up to the present time, advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations." *

PERMANENT NEUTRALITY.

222. A permanent neutrality arises from an agreement establishing the perpetual neutrality of a state with respect to a certain number of other states.

A state so situated has been stripped of its sovereignty, to the extent that it is prohibited from waging war with the other states, except for a breach of its neutrality. The geographical location of certain countries renders such a condition not only desirable, but at the same time of very great importance to the state itself, as well as to the other states affected. The examples of this class of neutrality of most prominence are Belgium and Switzerland, whose territories are located between some of the more important European powers, and the establishment of their permanent neutrality plays a most important part in the maintenance of what is known as the "balance of power" in Europe.⁹

* Whart. Dig. § 395; Hall, Int. Law, p. 494; Creasy, Int. Law, pp. 572-574; 1 Stat. p. 381.

⁹ Wools. Int. Law, pp. 268, 269; Wheat. Int. Law, D, §§ 416-422, and Dana's note, 202.

ARMED NEUTRALITY.

223. By armed neutrality is understood the armed resistance to infringement of neutral rights by belligerents.

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This term is not a happy one to express the relation of the powers that proclaimed the principles that pertained to neutrals, and which they proposed to defend with force of arms. An armed neutrality is in fact an alliance of two or more powers for the avowed object of protection of certain rights of neutrality, which are announced by proclamation and agreed to by members of the alliance. The first armed neutrality, which occurred in 1870, was for the purpose of protecting neutral property from the severe methods of Great Britain. The principles were announced by Russia, and concurred in by Denmark, Sweden, the Dutch provinces, Prussia, Austria, Portugal, Naples, France, and Spain, the two last named being belligerents at the time; but England, the other belligerent, declined, stating that she stood by the law of nations and her treaties. The principles contended for were that enemy property, not contraband of war, on neutral ships, should be free; that unjust usage of neutral ships should entail, not only reparation for the loss, but satisfaction should be made to the neutral sovereign; that a port is blockaded only when there is evident danger attendant upon an attempt to run into it. The members of the league agreed to act in concert, and equip a fleet for carrying into effect the principles enunciated. The second armed neutrality occurred in 1800, between Russia, Sweden, Denmark, and Prussia, the principal stipulation of which was to the effect that the declaration of the officer in charge of a convoy that no contraband goods were on board the ships under his charge was sufficient to prevent search.¹⁰

¹⁰ Calvo, Int. Law, § 2504; Wools. Int. Law, §§ 163, 189, 209.

DIVISION OF SUBJECT.

224. Relations existing between neutrals and belligerents at the present time are divided into and treated under two headings, as follows:

- (a) The first comprising all those rights and duties and obligations existing between the belligerents and neutral states, as such.
- (b) The relations existing between the belligerent states and neutral individuals.

The Relations between Belligerent and Neutral States.

The questions that arise under this head affect these sovereign states themselves as parties. Both of them have the same general duties as in the normal or peace relations. The obligation imposed upon the belligerent is to respect the sovereignty of the neutral, whose territory is, of right, to remain inviolate during hostilities, and whose municipal laws for the preservation of neutrality must be respected by the belligerents. The obligation of the neutral is to aid neither directly nor indirectly either belligerent, and, to a certain recognized extent, to prevent persons under its control from performing acts of the same nature upon its territory. A breach of the above mentioned obligations is a wrong which gives rise to a corresponding remedy, which is international.

Relations between Belligerent States and Neutral Individuals.

In the case of belligerent states and neutral individuals, there exist no mutual obligations between the parties, since the neutral individual owes no duty to any sovereignty other than his own; and, on the other hand, the belligerent owes no duty to the neutral individual, except in so far as international usage has prescribed the treatment of him for the commission of acts forbidden by the belligerent, and which he is empowered to repress. These repressive measures are inflicted by the courts of the belligerent only. The acts of individuals which the belligerent represses are, in the main, of a commercial nature, and are not proceeded against upon the theory that a wrong has been committed, but on the theory that it is inconvenient to the belligerent to permit them. The object of the individual is not injury to the belligerent, but rather for the

purpose of making gain, and his trade is one that, of strict right, a neutral individual is privileged to carry on. Interference with this neutral trade of the individual is permitted to the belligerent, upon the theory that he is authorized to prevent acts which tend to assist his enemy, and thereby diminish the effect of his stress upon him. There is a class of acts of individuals which involve the neutral state with duties to the belligerent. The more important of this class involving state obligations is that it is bound to prevent within its territory the illegal enlistment, or participation by its subjects in hostile acts towards either belligerent; it must prevent the issuing of commissions, the preparation of hostile expeditions, the construction or outfitting of vessels of war, and prevent its territory from being used as a base of operations.¹¹

¹¹ For present neutrality policy of the United States, see Whart. Dig. § 405.

CHAPTER XXI.**THE LAW OF NEUTRALITY BETWEEN BELLIGERENT AND NEUTRAL STATES.**

- 225. Furnishing Troops to a Belligerent under Treaty.
- 226. Loans to Belligerents—By a Neutral State.
- 227. By Neutral Individuals.
- 228. Sales of Munitions of War, etc., by a Neutral State.
- 229. Levies of Troops within Neutral Territory by a Belligerent.
- 230. Use of Neutral Territory for Transit of Troops.
- 231. Commission of Hostilities in Neutral Territory.
- 232. Use of Neutral Territory as a Base of Operations.
- 233. Fitting Out Hostile Expeditions in Neutral Territory.
- 234. Equipment of Vessels of War in Neutral Territory.
- 235. Effect of Neutral Territory upon Persons—Prisoners of War.
- 236. Right of Asylum to Belligerent Troops.
- 237. Right of Asylum to Naval Forces.
- 238. Effect of Neutral Territory upon Property of Belligerent.
- 239. Duty of Neutral State in Regard to Injuries to Belligerents Committed upon Its Territory.
- 240. Property Captured in Violation of Neutrality.
- 241. Captured Vessel Converted into Public Vessel of Belligerent.

FURNISHING TROOPS TO A BELLIGERENT UNDER A TREATY.

225. No nation can, without violation of her strict neutrality obligation, furnish military assistance to an ally.

Mr. Bluntschli says: "When a state has bound itself by anterior treaties, and when it could not foresee the outbreak of war, to furnish troops to a state which has become one of the belligerents, the presence of these troops upon the territory of the enemy, and their participation in the war would not be considered as contrary to the neutrality of the state which has furnished them, provided this power manifests in an evident manner its intention of remaining neutral, and that it observes strictly the conditions of the treaties concluded by it. The troops furnished to one of the belligerents by virtue of treaties will be regarded as enemy troops; but the state

which has furnished them, before the war could be foreseen, does not become an enemy by the single fact of the rupture of peace.”¹ This view is supported by Wheaton, Kent, Manning, and in part by Dr. Woolsey. The latter says that “if the assistance to be rendered is to be trifling, and has no reference to a particular case, or a war with a particular nation, it will probably be overlooked; otherwise it will expose the nation furnishing the assistance to the hostility of the other.”² It is difficult, however, to understand how the amount of assistance in this regard can operate to change the nature of the act itself. Again, it is admitted that the furnishing of military assistance, apart from a treaty agreement to do so, would be a breach of neutrality. If this is true, then by what process can a contract to do an unlawful act convert the act itself into a lawful one? How can such a prior agreement change the effect of this act upon the other belligerent, who has not consented to it? In addition it may be said that no such treaties have been made during the present century. The last precedent for furnishing such assistance occurred in 1788, when Denmark, as already related, furnished troops to Russia.³

LOANS TO BELLIGERENTS—BY NEUTRAL STATE.

226. Loans of money made or guarantied by a neutral state to a belligerent constitute a violation of neutrality.

The reason for this is apparent, and the law upon this point is well established by all the authorities. No distinction can be drawn between the furnishing of money and the furnishing of troops or other material assistance to a belligerent.

¹ Bluntschli, § 759; 1 Kent, Comm. pp. 49, 116, 117; Wheat. Int. Law, D, § 425. But Dana's note 203 says: “The progress of modern times has been towards insisting on entire and impartial neutrality. It is difficult to conceive now of a state being permitted to continue a condition of limited and partial neutrality. A belligerent would be justified in treating any state as an enemy throughout which rendered any aid to its enemy, whether in pursuance of treaty obligations or not, or which gave or withheld belligerent privileges unequally.”

² Wools. Int. Law, p. 268.

³ Hall, Int. Law, § 215; Calvo, Int. Law, § 2631; 3 Phillim. 138.

SAME—BY NEUTRAL INDIVIDUAL.

227. On the other hand, loans of money by individuals of a neutral state to a belligerent or its citizens are not unlawful.

Money, being an article of commerce, should stand upon the same footing as other articles of a similar nature. If captured by the enemy of the belligerent for whom it is destined, it can be condemned as contraband of war, and certainly it is no more noxious than munitions of war. Again, its nature is such that it would be impossible for a neutral state to enforce a statute forbidding its being loaned or sent to a belligerent, and for this reason it would be impracticable to hold the neutral state responsible for the acts of its subjects in regard to it. Unless the neutral state can regulate or prevent, by reasonable diligence, the loaning of money, then there should be no international responsibility. The practice of nations is in accord with the above views. During the Franco-German war of 1870-71, the French Morgan loan, and part of the North German Confederation loan, were issued in England. In this same war large sums of money were raised in the United States and sent to both Germany and France, for the relief of sufferers in the hospitals, without eliciting any protests as to violations of neutrality. And in 1860 a revolt took place in Naples, which was, if not instigated, at least materially aided, by the king of Sardinia. The liberal English press took an active part in encouraging the insurgents. They also received from England important material aid. Mr. Webster, in 1841-42, said that "as to advances and loans made by individuals to the government of Texas or its citizens, the Mexican government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States, and that these are things which no government undertakes to restrain." ⁴

⁴ Kennett v. Chambers, 14 How. 38: "A suit cannot be maintained on a loan made expressly to effect a belligerent object." In *De Wutz v. Hendricks*, 9 Moore, 586, 2 Bing. 314, it was held that British courts of justice will not take notice of or afford any assistance to persons who in Great Britain make or undertake to make loans to a belligerent at war with

SALES OF MUNITIONS OF WAR, ETC., BY A NEUTRAL STATE.

228. In general, a neutral state cannot, without violation of neutrality, furnish one of the belligerents with articles which he makes use of for carrying on hostilities.

Except in rare cases, as, for instance, when it desires to dispose of vessels or munitions of war which it does not need, a state does not engage in commerce, so that it will be difficult to justify the furnishing of a belligerent with such articles. This was illustrated in 1825, when Sweden desired to reduce her navy, and offered to sell six vessels to Spain which offer was refused. Three of these vessels were afterwards sold to an English mercantile firm, who, it appears, was acting as agent for Mexico, then at war with Spain. When this fact was brought to the attention of Sweden by the Spanish minister, the sale was revoked, although the sale was made by her in good faith, and without knowledge of the ultimate destination of the vessels, and the revocation resulted in some loss to her. In 1871 the United States sold some ordnance stores under an act of congress of 1868 authorizing the sale of such "muskets and other military stores" as were unsuitable for use. Under this provision large sales were made without preference, except in regard to persons who were suspected of being agents of France. Upon complaint being made of these sales, the matter was made the subject of investigation by a committee of the senate, whose report is as follows: "Your committee, without hesitation, report that the sales of arms and military stores during the fiscal year ending June 30, 1871, were not made under such circumstances as to violate the obligations of our government as a neutral power; and this, to recapitulate, for three reasons: (1) The Remingtons (the purchasers) were not, in fact, agents of France during the time when sales were made to them; (2) if they were such agents, such fact was neither known nor suspected by our government at the time the

a nation at peace with Great Britain. Vide, also, Hall, Int. Law, § 216; Whart. Dig. § 390; Calvo, Int. Law, §§ 2628, 2629. Contra, vide Bluntschli, § 768; 3 Phillim. 151; Pitt-Cobbett, Cas. Int. Law, pp. 246-250; Walk. Int. Law, pp. 391, 448.

sales were made; and (3) if they had been such agents, and if that fact had been known to our government, or if, instead of sending agents, Louis Napoleon or Frederick William had personally appeared at the war department to purchase arms, it would have been lawful for us to sell to either of them, in view of a national policy adopted by us prior to the commencement of hostilities." The first two reasons above are more accurate statements of the law than the third, in regard to which it can be said that it is doubtful if the act of congress of 1868 would in itself be sufficient to establish good faith, or the fact that the government was acting *animo commercandi*, and not *animo adjuvandi*.⁵

LEVIES OF TROOPS WITHIN NEUTRAL TERRITORY BY A BELLIGERENT.

229. A neutral state is bound to restrain the enlistment of bodies of men within its territory by belligerents.

The enlistment of troops in the United States by a foreign government is strictly forbidden, not only by our laws, but by international law as well. It was at one time the cause of vigorous correspondence between this country and Great Britain, and has caused the recall of ministers of foreign countries who have connived at such acts. The attorney general of the United States (Mr. Cushing) stated that "the attempt by one government to enlist troops in the territory of another without the latter's consent is just cause of war."⁶ It certainly constitutes a breach of sovereignty of the neutral nation. While it is unquestionably the duty of a neutral nation to prevent the enlistment of bodies of troops in its territory by a belligerent, yet a state is not expected to take precautions against microscopic errors, and certainly individuals of the neutral nation may abandon their own country, and take service with a foreign nation, without rendering their state liable for violation of neutral obligations. "Nor is it a crime, under the neutrality law, to leave this country [United States] with intent to enlist in foreign

⁵ Whart. Dig. § 391; Rep. Senate Com. May 11, 1872; Hall, Int. Law, pp. 599, 600; Pitt-Cobbett, Cas. Int. Law, pp. 243-245.

⁶ 7 Op. Attys. Gen. p. 367.

military service, nor to transport persons out of the country, with their own consent, who have an intention of so enlisting."† The issuing of letters of marque is now very generally prohibited, and the individuals engaged in such enterprises do not stand upon the same footing as individuals who enlist in a foreign army, for the reason that they do not, by so doing, separate themselves from their own state. The enlistment, by an armed vessel of a belligerent, of men in a neutral port, is equally forbidden; but this prohibition would scarcely apply to the case of a vessel of the belligerent whose crew was reduced below the point which would be safe for her navigation, provided only enough men were enlisted to enable her to reach a port of her own country, and did not extend to enlistment of enough men to render her capable of use as an engine of war.‡

USE OF NEUTRAL TERRITORY FOR TRANSIT OF TROOPS.

230. Passage through neutral territory should be denied to troops of a belligerent.

The statement of the law upon this subject by Manning, who quotes the opinions of Grotius, Vattel, and De Martens, is that "the spirit of treaties agrees with the dictates of reason, in the principle that the passage of troops cannot be 'claimed,' unless under special treaty, and cannot be 'granted' by a neutral, where there is no antecedent treaty, unless an equality of privilege be allowed to both belligerents." The contrary opinion is held by the more modern writers, who maintain that the granting of passage of troops for the sole purpose of war is positively forbidden, since it is distinctly an interference in the war, and the excuse offered, that it is affording an equal privilege to each belligerent, is not sufficient justification for the act. The practice for the past century has accorded with the views of the modern authorities. In the Franco-German war of 1870, the German government endeavored to induce the Belgian government to permit the passage through Belgian territory of wounded Prussians and French. This was referred to the French government, who replied that it would consider such act

† U. S. v. Kazinski, 2 Spr. 7, Fed. Cas. No. 15,508.

‡ Whart. Dig. 392; Bluntschli, §§ 760-762; Calvo, Int. Law, §§ 2619-2621.

as a violation of neutrality. The permission was refused, and the Belgian government disarmed, and detained as prisoners, all soldiers of either army that were driven into their territory. The latest precedent for the passage of hostile troops through neutral territory occurred in 1815, when the allied armies passed through the territory of Switzerland; but this was accorded practically under duress, and the same government refused a similar permission in 1870 to certain Alsatians.

The granting of permission in time of war for the passage of troops for a specific purpose is different from granting the same privilege during peace. This privilege may very properly be granted under certain circumstances such as to enable the grantee to reach certain possessions more easily or promptly, if this is in itself harmless. If such passage were provided for by treaty, and taken advantage of customarily during peace, and a war should subsequently break out, the passage of troops through this neutral territory during the war might not be construed as a violation of neutrality. In such cases, each would be judged by its own circumstances. If the injury to the other belligerent was apparent, resulting from the grant of passage to an unusually large number of troops, the act would certainly be a breach of neutrality.*

* Grotius, *De Jure*, lib. 3, c. 7, § 3; Vatt. *Law Nat.* liv. 3, c. 7, § 2; DeMartens, liv. 8, c. 7, § 310; Kent, *Comm. lect.* 4; 3 Phillim. *Int. Law*, § 153. Wheat. *Int. Law*, D, § 427, says: "It [passage of troops] may be granted or withheld, at the discretion of the neutral state; but its being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to him, unless there be sufficient reasons for withholding it." Dana's note 205 says: "A special license in a particular case to one belligerent would not be justified by an offer to grant a special license in a like case to the other; for the exigency, the means of using the license, and the advantages to be gained by it are too varying to insure equality; and it can hardly be supposed that a neutral will grant a general license of passage to both parties, at their option."

In support of text, vide, also, Hall, *Int. Law*, pp. 602-604; Bluntschli, § 770; Heffter, § 147; Calvo, *Int. Law*, §§ 2646-2648. Both Calvo and Bluntschli think that, under certain circumstances,—as when a neutral state is bound by a treaty previously made to grant such privilege to one of the belligerents,—the granting of such passage should not be regarded as a breach of neutrality or granting of assistance to the other belligerent.

COMMISSION OF HOSTILITIES IN NEUTRAL TERRITORY.

231. The commission of hostilities in neutral territory without the permission of the neutral sovereign is forbidden.

This subject was among the first to be regulated, and the law upon the subject is well settled. The judicial determinations of this question have arisen, in the main, in regard to captures made by belligerents in neutral waters. The capture of the ship of an enemy in neutral waters is illegal, and the ship will be restored by the prize court of the captor. This is the doctrine of the English, American, and French courts; but, in order to have the benefit of the rule, the captured vessel must not violate neutral territory by resistance, instead of asking the protection of the neutral. This is certainly true if the captured ship first commences hostilities. Such captures in mutual waters are regarded as valid, as between enemies, and the neutral sovereign alone can call their validity into question.¹⁰

USE OF NEUTRAL TERRITORY AS A BASE OF OPERATIONS.

232. A neutral state cannot permit the use of its territory by a belligerent as a base of operations.

The acts that properly fall under this heading are all such as endanger the peaceful relations that exist between the neutral state and the injured belligerent. A neutral territory cannot be made use of for the purpose of drawing supplies and reinforcements for the army or navy of the belligerent. In regard to vessels of war of the belligerent, certainly a neutral state should not permit them to enter its ports, rivers, canals, etc., for anything but a peaceful object, such as to make necessary repairs, procure provisions, coal, etc., and should never permit them to enter for the purpose of procuring provisions of war or reinforcements. The question of taking supplies of coal has been regulated by both England and Amer-

¹⁰ The Anna, 5 C. Rob. Adm. 373; The General Armstrong, 2 Whart. Dig. 604; The Anne, 3 Wheat. 435; The Lilla, 2 Sprague, 177, Fed. Cas. No. 8,348; The Estrella, 4 Wheat. 298.

ica, the restrictions consisting in the prohibition of taking more coal than was absolutely necessary to take the vessel to the nearest port of its own country, and not to be furnished with a second supply for three months, or until such vessel had put into a port of its own country.¹¹ The principle which lies at the bottom of this regulation is that a vessel should not be permitted to take in more supplies than is absolutely necessary. If supplied beyond this point, an injury is done to the other belligerent, in that it enables the vessel to carry on hostilities otherwise impossible.¹²

FITTING OUT HOSTILE EXPEDITIONS IN NEUTRAL TERRITORY.

233. A neutral cannot permit the use of its territory for the fitting out or issuing of armed expeditions by a belligerent.

In some cases it is difficult to determine what is an expedition, the fitting out of which is unlawful. The men who compose an expedition, although not armed, yet if militarily organized, and sent out, as such organization, to some other point, where the arms have been sent to meet them, would constitute an expedition, the sending out of which would be in violation of neutrality. In 1870 a large number of Frenchmen embarked from the port of New York in two French ships, the Lafayette and the Ville de Paris, for the purpose of joining the armies of their nation at home. These vessels were also laden with a large number of rifles and a large number of cartridges, but the men were not officered, or in any way organized. Mr. Fish was of the opinion that the men not being in an efficient state, and the arms and ammunition being in themselves subjects of legitimate commerce, there was no violation of neutrality. The men and arms were not susceptible, under the circumstances, while aboard ship, or immediately after their arrival in France, of being so combined as to be capable of performing offensive operations. An interesting phase in regard to fitting out an expedition is presented when two or more independent acts are performed in neutral territory, each of which is in itself innocent,

¹¹ Hall, *Int. Law*, p. 607; Whart. *Dig.* § 398.

¹² Bluntschli, § 773; Calvo, *Int. Law*, § 2749.

but is intended by the person doing them to be combined and used for offensive operations, the combination to take place outside of the neutral state. Mr. Dana says: "No cases have arisen as to the combination of material which, separated, cannot do acts of hostility, but, united, constitute a hostile instrumentality; for the intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials for these acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise." Mr. Hall, on the other hand, says that "these acts can only, by their nature, be proved when the persons guilty of them are no longer within neutral jurisdiction. They cannot, therefore, be prevented by the responsible state; and, if this doctrine were a legal consequence of the accepted principles of international law, it might be a question whether it would not be wise to refuse operation to it, on the ground of undue oppressiveness to the neutral. * * * The true theory is that the neutral sovereign has only to do with such overt acts as are performed within his own territory, and to them he can only apply the test of their immediate quality. If these are such, in themselves, as to violate neutrality, or to raise a violent presumption of fraud, he steps in to prevent their consequences; but, if they are presumably innocent, he is not justified in interfering with them. If a vessel in other respects perfectly ready for immediate warfare is about to sail with a crew insufficient for fighting purposes, the neutral sovereign may reasonably believe that it is intended secretly to fill up the complement just outside his waters. Any such completion involves a fraudulent use of his territory, and expectation that it is intended, gives him the right of taking precautions to prevent it. But no fraudulent use takes place when a belligerent, in effect, says: "I will not compromise your neutrality, I will make a voyage of a hundred miles in a helpless state, I will take my chance of meeting my enemy during that time, and I will organize my expedition when I am so far off that the use of your territory is no longer the condition of its being." ¹³

¹³ Wheat. Int. Law, D, note 215; Hall, Int. Law, p. 611; 3 Whart. Dig. § 395a; U. S. v. Lumsden, 1 Bond, 5, Fed. Cas. No. 15,641. A mere prepara-

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EQUIPMENT OF VESSELS OF WAR IN NEUTRAL TERRITORY.

234. To construct and completely equip a vessel of war in neutral territory, for the purpose of carrying on hostilities against a particular power, is forbidden; but neutral citizens may construct and arm a vessel and send such armed vessel to a belligerent port for sale, provided it be done as a bona fide commercial transaction. B.C.P. 214

The terms "construction" and "complete equipment" are intended to convey the idea of a vessel complete in every respect for carrying on hostilities. As stated by Mr. Walker: "Let a vessel in every way suitable for warlike use be built, fitted, and armed in a neutral dock yard. Let her be supplied with provisions in a neutral port, and let her emerge therefrom manned by a fighting crew, who clearly set out their intention to carry on hostilities against a particular power. As to the denomination of such proceeding, no reasonable man can entertain a moment's doubt." It is difficult to state the number of elements which go to make up a forbidden expedition that must be combined in order to create a violation of neutrality. The mere construction, and fitting out in such a manner as to be capable of being used by a belligerent for warlike purposes, of a vessel of war, should be accompanied ordinarily by some further act, in order to render it a violation of neutrality. Such a vessel, standing alone, under these conditions, can be regarded only as contraband of war, and subject to seizure under proper conditions. It is a proper object of commerce, and, until it receives a crew and is commissioned, is properly so regarded.¹⁴ Mr. Justice

tion or plan of violation of neutrality, without overt acts, does not make the party amenable under the neutrality act of 1818 (3 Stat. 447). If the means provided were procured to be used on the occurrence of a future contingent event, no liability is incurred under the statute. If, also, the intention is that the means provided shall only be used at a time and under circumstances when they could be used without a violation of law, no criminality attaches to the act.

¹⁴ In the case of *The Meteor*, 1 Am. Law Rev. 401, Fed. Cas. No. 9,498, the vessel was built in the United States in 1865, during the war then pending between Chili and Spain, and sold to the Chilian government with-

Storey says: "There is nothing in our laws, or in the law of nations, that forbid our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." In fact, the practice of the United States, and the decisions of her courts, conform to the rule that an American merchant may build and arm and furnish a vessel with supplies, and offer her for sale in her own market, provided he is not acting as the agent of a belligerent, or in pursuance of some arrangements or understanding with a belligerent that she will be employed for hostile purposes. Further, such merchant may send out such a vessel for market in a

out armament, and then, it was alleged, commissioned, when in the United States, as a Chilian privateer. She was libeled in New York, and seized January 23, 1866; and on the hearing before Judge Betts, it was maintained by the claimant to "be no offense (under the act of 1818) to issue a commission within the United States for a vessel fitted out and equipped to cruise or commit hostilities, and intended to cruise and commit hostilities, so long as such vessel was not armed at the time, and was not intended to be armed within the United States, although it could be shown that a clear intent existed, on the part of the person issuing or delivering the commission, that the vessel should receive her armament the moment she should be beyond the jurisdiction of the United States." Judge Betts decided adversely, and condemned the vessel upon the grounds that this vessel was essentially a vessel of war, and not a merchant vessel; that (relying on Dana's note to Wheat. Int. Law, p. 215) the intent to employ such vessel in hostile operations in favor of Chili and against Spain was manifest, and only lacking an armament to be supplied just outside of United States territorial waters. The case was not one of a bona fide commercial nature. This decision was reversed in the circuit court, upon the ground that, the negotiations between the owners and Chili having fallen through, an end was put to that ground of complaint, which implied knowledge that the vessel was to be used for active hostilities by Chili against Spain; that the supplying the vessel with coal for a voyage to Panama was not in pursuance of an agreement or understanding with the agents of the Chilian government; and that the evidence (coming from agents employed to negotiate a sale with Chili), being influenced by their disappointment and chagrin at the failure of receiving a commission on the proposed sale to Chili, was not sufficient to make out a case of the violation of our neutrality laws. Vide discussion of this case in North Am. Rev. Oct. 1866; also, 3 Whart. Dig. pp. 563, 564; U. S. v. Quincy, 6 Pet. 445; The Gran Para, 7 Wheat. 471.

belligerent port, provided she sails under the flag and papers of her own country, with a crew sufficient only for navigating purposes, with no right to resist search or seizure. The statute for preventing acts contrary to our neutrality was first passed in 1794, and was modified in 1818, upon request of Portugal, and upon complaints also from Spain, by the addition of measures looking to the more certain execution of its provisions.¹⁵ The construction of these statutes by the courts has been to the effect that they were directed against the *animus belligerandi*, rather than against the *animus vendendi*. The practice of the United States has been in accord with her municipal laws upon this subject, and it is understood to be the law of nations in regard to this subject of vessels of war being fitted out in her territory. Great Britain has also what is termed her "Foreign Enlistment Act," which was first passed in 1819, and which was amended in 1870, as a direct result of experience in the Civil War of this country in 1861-65.¹⁶ It seems that France, Italy, Austria, Spain, Portugal, Denmark, and the Netherlands have provided means, either through their penal codes or otherwise, to prevent the equipment of vessels of war. France, by means of her penal code, and after the proclamation of neutrality in 1861, actually arrested some vessels that were being constructed in her ports. The practice of the United States, as stated, is to look at the intent of the party constructing and equipping the vessel of war, and if this intent is to fit out a vessel to be sent to the belligerent port as contraband of

¹⁵ *La Santissima Trinidad*, 7 Wheat. 340; *The Gran Para*, 7 Wheat. 471; *U. S. v. Quincy*, 6 Pet. 445.

¹⁶ 1 Stat. 381; Rev. St. § 5289.

Section 3: "If any person shall within any of the ports, harbors, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state (or of any colony, district or people), to cruise or commit hostilities upon the subjects, citizens, or property of another foreign prince or state (or of any colony, district or people), with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, shall be adjudged guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had. * * * " (The remainder

war, and subject to capture, then it is the duty of the belligerent to prevent it. If, on the other hand, it is the intent of the party to fit out a vessel to cruise, immediately or ultimately, upon friendly commerce, then it is the duty of our government to prevent it. Mr. Hall, on the other hand, seems to think that, instead of planting the doctrine upon the intent of the neutral trader or the belligerent agent in the neutral country, that it should be made to rest upon the nature of the vessel itself, and says that "jurists appear hardly to have realized how unimportant is the advantage which is given to the injured belligerent, in comparison with the grave evils of an indefinite increase in the number of international controversies." It is true that experts can distinguish readily vessels that are intended

of the section designates the amount of fine, term of imprisonment, and forfeiture of the vessel and contents.)

Section 7 authorizes the President to employ the land and naval forces or militia to execute the law.

Section 10 provides for the giving of a bond in double the value of the vessel and contents that she shall not be employed for hostile purposes.

Section 11 authorizes the collector of customs to detain vessels manifestly built for warlike purposes.

British foreign enlistment acts of 1819 and 1870 (59 Geo. III. c. 69; 33 & 34 Vict. c. 90):

Section 7: "If any person, within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and license of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavor to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people; or if any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store-ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country, with whom His Majesty shall not then be at war or shall, within the United Kingdom, or any of His Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to His Majesty, issue or deliver any commission for a ship

primarily for warlike use, and a nation can easily prevent the departure of such vessels from its ports. It is also true that the intent of the parties is difficult to ascertain, but it is not clear why the same difficulty would not arise in regard to prescribing just what vessels a belligerent should not permit to be constructed and fitted out. It is believed that the difficulties that arise in prevention of the equipment of vessels on the part of members of a neutral state who are anxious for gain would not be lessened.

This question arose most prominently after the Civil War in this country, between England and the United States, in regard to certain vessels that were fitted out in British ports for the Confederate States, and gave rise to what are generally known as the "Alabama

or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the court in which such offender shall be convicted. * * * (The remainder of the section applies to the forfeiture of the vessel, authorizes proper officers to make the seizures, etc.)

The act of 1870 was passed in pursuance of the report of a royal commission appointed for that purpose.

Section 1 defines and punishes by fine and imprisonment illegal enlistment.

Section 2 refers to military or naval expeditions.

Section 3 prohibits the augmentation without license of the warlike force of any ship, etc.

Section 5: "Any person, who, within Her Majesty's dominions, and without the license of Her Majesty, (1) builds, agrees to build or causes to be built, (2) issues or delivers a commission to, (3) equips, or (4) dispatches, or causes or allows to be dispatched, any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any state with which Her Majesty is at peace, is declared thereby to offend against the law of Great Britain." (An exception is made in the case of a person who builds or equips a vessel in pursuance of a contract made before the outbreak of war provided he complies with certain conditions prescribed in the act.)

Section 23 empowers the secretary of state to seize and search and detain a suspected ship until condemned or released by process of law.

Section 24 makes it the duty of the local authority to detain a suspected ship, and communicate at once the fact of such detention to the proper authority.

For provisions of other states, vide Pitt-Cobbett, *Cas. Int. Law*, pp. 288-291.

Claims." By the treaty of Washington it was agreed between and by the two powers named that these claims, together with some others should be submitted to arbitration; the method of selection of the board of arbitrators, together with the other details for their sittings, etc., being fully set forth in the treaty. Article 6 provided that, in deciding the matters submitted to the arbitrators, they should be governed by three rules, which were agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith, as the arbitrators should determine to be applicable to the case. These rules were as follows:

"A neutral government is bound:

11. 13.
"First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above; such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

"Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in article 1 arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of these claims, the arbitrators shall assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules. And the High contracting parties

agree to observe these rules, as between themselves, in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them.”

Article 7 provided that the tribunal should first determine, as to each vessel separately, as to whether Great Britain has, by any act or omission, failed to fulfill any of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules, and shall certify such fact as to each of said vessels. Provision was then made for awarding by the tribunal of a sum in gross, to be paid in coin by Great Britain to the United States. And for the appointment of a commission to award the sums to be so paid in gross in case the tribunal failed to make such award.

The first thing that the arbitrators found necessary to be done, after meeting, was to determine what construction should be placed upon the three rules agreed upon for their guidance, and also upon certain international law points involved in their decision. The decision was as follows:

“(1) Due diligence ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part.

“(2) The effects of a violation of neutrality, committed by means of the construction, equipment, and armament of a vessel, are not done away with by any commission which the government of the belligerent power benefited by the violation of neutrality may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence.

“(3) The principle of extritoriality has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality.”

The award of the tribunal was against Great Britain in regard to three of the vessels. In the case of *The Alabama*, the award was unanimous; in the case of *The Florida*, the vote stood four to one;

and, in regard to The Shenandoah, the vote was three to two. In regard to the last named, the responsibility was for acts done after her departure from Melbourne, on February 18, 1865. The amount of the award was fixed in gross at \$15,500,000, to be paid in gold by Great Britain to the United States.

In regard to the treaty of Washington, and the principles announced by the two contracting parties, it is to be noted that as they did not agree upon the interpretation to be placed upon the rules for the guidance of the tribunal, as neither party has carried out the last clause in regard to calling the attention of other maritime powers to the rules agreed upon, or asked their adoption of them, and in view of the attitude of England in regard to these rules not being in accord with the recognized principles of international law, it is questionable whether this treaty or the action of the board of arbitrators will be considered as introducing any change into international law. On the other hand, there is no question but that England did not exercise due diligence in regard to the performance of her neutral obligations, whether due diligence be properly defined by the tribunal, or not, either as to the enforcement of her foreign enlistment acts, or in regard to the hospitality or asylum offered to the cruisers of the Confederate States. The passage of the amendments to her foreign enlistment acts in 1870 certainly shows that there was a realized necessity for more vigorous enforcement of her neutrality obligations.¹⁷

EFFECT OF NEUTRAL TERRITORY UPON PERSONS — PRISONERS OF WAR.

235. Prisoners of war are released upon touching neutral territory.

This release, however, does not extend to prisoners of war upon board of a belligerent vessel of war within neutral waters; but

¹⁷ Vide Hall, Int. Law, pp. 612-620; 2 Halleck, Int. Law, pp. 185-195; Walker, Int. Law, pp. 458-502; Davis, Int. Law, pp. 319-335; Dana's note to Wheat. Int. Law, No. 215; Whart. Dig. §§ 156a, 396; Creasy, Int. Law, pp. 176-191; Gallaudet, Int. Law, 268-273; Pitt-Cobbett, Cas. Int. Law, pp. 280-288; Calvo, Int. Law, §§ 2561-2582; Bluntschli, §§ 763, 779 bis.; La Amistad de Rues, 5 Wheat. 385.

this is due to the fact of the peculiar doctrine which is held in regard to such vessels, and is not in reality an exception to the rule. The same is true in regard to prisoners on board of privateers, and also is, by some authorities, maintained as applicable to prizes, to the extent that prisoners on board of them may be retained. The principle upon which the rule rests is that a neutral becomes identified with the act of confinement, and thus commits an act of hostility by permitting their continued confinement upon his territory.¹⁸

SAME—RIGHT OF ASYLUM TO BELLIGERENT TROOPS.

236. A neutral state has the right to permit troops of a belligerent to take refuge upon his territory, either as a body or as individuals, but must not permit them to again depart from his territory for the purpose of committing hostilities.

The practice in such cases is for the neutral to disarm such members of a belligerent force as may take refuge within his territory, and to intern them until the conclusion of the war. The most satisfactory method of dealing with such troops would be to release such fugitives under a convention between the neutral and belligerent state by which the latter would agree not to again employ them during the continuance of the war.¹⁹

SAME—RIGHT OF ASYLUM TO NAVAL FORCES.

237. The privilege of entrance by a belligerent vessel of war into neutral waters does not depend upon stress by the enemy, or stress of weather, but is generally accorded. Taking refuge after a defeat does not cause such a vessel to be disarmed, but she is subject to certain regulations imposed by the neutral.

¹⁸ Hall, Int. Law, pp. 620, 621; Bluntschli, § 85; Vatt. Int. Law, bk. 3, c. 7, § 132; The Twee Gebroeders, 3 C. Rob. Adm. 165; L'Invincible, 1 Wheat. 252.

¹⁹ Bluntschli, § 774.

The rule that has been adopted by most nations at the present time is that vessels of war are to remain in neutral ports only for twenty-four hours, unless a longer time is requisite to enable her to have necessary repairs made, or to take on authorized supplies, in which case she is to depart as soon after accomplishing the same as practicable. Another rule in regard to such ships, when in neutral ports at the same time with vessels of war of the other belligerent, is that an interval of twenty-four hours must elapse after the departure of one before the departure of the other. This twenty-four-hour rule was first adopted in regard to privateers,—a public vessel of war being subject to a promise on the part of its commander not to engage in hostilities against another vessel issuing from a neutral port shortly before him,—the distinction being made because the commanders of privateers were regarded as less responsible than the commanders of the other class of vessels. The practice in regard to privateers was afterwards extended to public vessels of war. The right of entrance to privateers would now be very generally denied.²⁰

EFFECT OF NEUTRAL SOVEREIGNTY UPON PROPERTY.

238. The usual practice of neutral nations is to prevent belligerents from bringing prizes into their ports.

This rule has practically done away with much of the inconvenience resulting from the former practice of permitting prizes to be brought into neutral ports by belligerents. The right of a neutral state to permit or forbid a belligerent to bring property within its territorial waters is undoubted. In the absence of an express prohibition, on the other hand, a belligerent has the privilege of bringing his prizes within neutral waters or harbors, and of keeping them there during the time of the proceedings for their condemnation by the proper court. The neutral state also has a right to require evidence that the belligerent bringing property into its waters has acquired definite rights of property in the same.²¹

²⁰ Whart. Dig. § 394; Hall, Int. Law, pp. 629-633; Bluntschli, §§ 774-776, 845; Calvo, Int. Law, § 2608; Creasy, Int. Law, p. 584.

²¹ 7 Op. Attys. Gen. p. 122; Vatt. Int. Law, bk. 3, c. 7, § 132; Hall, Int. Law, pp. 621, 622.

**DUTY OF A NEUTRAL STATE IN REGARD TO INJURIES TO
A BELLIGERENT COMMITTED IN ITS TERRITORY.**

239. Acts of a belligerent resulting in injury to his enemy, which are committed within neutral jurisdiction, should be taken cognizance of by the neutral, and reparation be demanded, in the interest of the injured belligerent, especially when such acts are in violation of the sovereignty of the neutral.

This duty is incumbent upon the state, because, should it fail so to act, there will be a violation of its duty of impartiality as a neutral. The extent to which this duty of the neutral state, under such circumstances, should be performed, is, in general, the same as in the case of a violation of its own sovereignty resulting in injury to itself. Generally speaking, it is the duty of the neutral state, under such circumstances, to see that the original conditions are restored, if possible; but, in case of inability to do this, such other reparation as the circumstances admit of should be demanded. A case illustrating this occurred in 1864, when the United States war steamer *Wachusett*, in pursuance of a plan matured by the United States consul, towed the Confederate cruiser *Florida* from her moorings in the harbor of Bahia into the open sea. Upon protest being made by the Brazilian government, the United States disavowed and apologized for the action of her officials, dismissed the consul, and tried the commander of the United States vessel by court-martial; it being impossible to restore the vessel, which had in the meantime been sunk. The United States further surrendered the crew of the captured cruiser, and caused the flag of the Brazilian empire to be saluted at the point where the offense was committed.²² Should a neutral state fail to prevent the acts in violation of its neutrality, and resulting in injury to a belligerent, or fail to demand reparation, the injured belligerent may properly demand satisfaction for this failure, upon the ground that the neglect of the neutral has converted him into an active offender.²³

²² Mr. Seward, secretary of state, Dec. 23, 1864.

²³ Whart. Dig. §§ 399, 400; *La Amistad de Rues*, 5 Wheat. 390; *The Marianna Flora*, 11 Wheat. 42; Dana's note to Wheat. Int. Law, No. 207.

PROPERTY CAPTURED IN VIOLATION OF NEUTRALITY.

240. Property captured in violation of neutrality will be seized, and restored to its original owner, if it enter the neutral's jurisdiction.

Property which has been once carried *infra praesidia* of the captor's country, and there regularly condemned in a competent court of prize, presents a question, in regard to its seizure and restitution, upon which the authorities are not agreed. Upon the principle that "the sentence of a court of admiralty or of appeal, in questions of prize, binds all the world, as to everything contained in it, because all the world are parties to it," a seizure by a neutral after such a condemnation would be invalidated by such previous decision of the court, and restitution impracticable. On the other hand, the sovereign rights of a neutral nation should not be shut out by the decision of a foreign tribunal.²⁴

This doctrine, it seems, is the one generally adopted,

SAME—CAPTURED VESSEL CONVERTED INTO PUBLIC VESSEL OF BELLIGERENT.

241. A vessel which, after capture, and before return to the neutral port, has been regularly commissioned, enjoys the same immunity as other public vessels of war of the belligerent country.

The extent to which the neutral nation may proceed in such case is to ascertain whether such vessel is in fact commissioned as a public vessel, and when this fact is established further proceedings must cease.²⁵

²⁴ *La Estrella*, 4 Wheat. 298; *Talbot v. Janson*, 3 Dall. 157. As to duty of neutral sovereign to prosecute in such cases, vide *La Santissima Trinidad*, 7 Wheat. 341; *The Twee Gebroeders*, 3 C. Rob. Adm. 162; *The Anne*, 3 Wheat. 447; *Bluntschli*, § 786.

²⁵ *L'Invincible*, 1 Wheat. 254.

CHAPTER XXII.

CONTRABAND.

- 242. Contraband Defined.
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- 244. Articles for Manufacture of Same, and Equipments.
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- 253. Carriage of Same in Ordinary Course of Business.

CONTRABAND DEFINED.

242. Contraband of war may be said to consist of those commodities which, on account of their immediate use in the prosecution of hostilities, a neutral cannot transport to either belligerent without risk of confiscation.¹

¹ Other definitions:

Les marchandises, here refer to the state or an individual

"The privilege has never been denied to a belligerent of intercepting the access to his enemy of such commodities as are capable of being immediately used in the prosecution of hostilities against himself." Hall, Int. Law, § 236.

"Contraband of war perhaps denoted at first that of which a belligerent publicly prohibited the exportation into his enemy's country, and now those kinds of goods which by the law of nations a neutral cannot send into either of the countries at war without wrong to the other, or which by conventional law the states making a treaty agree to put under this rubric." Wools. Int. Law, p. 319.

"Contraband at first signified those articles the importation of which into a country was publicly prohibited. It now denotes those articles which a neutral cannot carry into the country of a belligerent without incurring the risk of confiscation." Pitt-Cobbett, Cas. Int. Law, p. 311.

"Sont considérés comme contrebande de guerre, les objets transportés à l'un des belligérants dans le but de faciliter les opérations militaires, et dont il pourra se servir pour faire la guerre." Bluntschli, § 802.

"On désigne en général sous la dénomination de contrebande de guerre les choses qui sont d'un usage particulier pour la guerre, pouvant servir directement à l'attaque ou à la défense, et dont, par conséquent, le transport à

Two theories as to the derivation of this term, "contraband," are advanced, one of which is that it comes from the word "*contrabannum*," dating from the middle ages, when the church ban was laid upon those who furnished arms to infidels.² Mr. Woolsey rejects this idea of its origin, and says "*contrabannum*," in mediaeval Latin, is '*merces banno interdictae*.' '*Bannus*,' or '*bannum*,' represented by our '*ban*,' and the Italian '*bando*,' denoted originally an edict, a proclamation, then an interdict. The sovereign of the country made goods contraband by an edict prohibiting their importation or exportation. Such prohibitions are found in Roman law."³ The authorities and usage leave uncertain what is contraband, and the articles of contraband are varied with the situation of the nations whose interests are affected by their position as a maritime power. The classification of articles made by Grotius is still resorted to, in the main, and certainly by Great Britain and the United States. He says: "We must make a distinction as to the things supplied. For there are some articles of supply which are useful in war only, as arms; others which are of no use in war, but are only luxuries; others which are useful both in war and out of war, as money, provisions, ships, and their furniture. In matters of the first kind, that is true which Amalasuintha said to Justinian,—that they are of the party of the enemy who supply him with what is necessary in war. The second class of objects is not a matter of complaint. In the third class, objects of ambiguous use (*ancipitis usus*), the state of the war is to be considered."⁴

l'un des belligérants par les neutres est considéré comme un acte illicite."
Calvo, Int. Law, § 2708.

² Bluntschli, § 801, note 1.

³ Woolf, Int. Law, § 193. Vide, also, Calvo, Int. Law, § 2708.

⁴ Grotius, bk. 3, c. 1, § 5; The Peterhoff, 5 Wall. 58. The court observes that the classification of contraband best supported by British and American decisions might be said to divide all merchandise into three classes: Of these, the first consisted of articles manufactured and primarily used for military purposes in time of war; the second, of articles which might be and were used for the purposes of peace and war, according to circumstances; and the third, of articles exclusively used for peaceful purposes. The first always contraband; those of the second class were contraband if actually destined to the military or naval use of the belligerent; articles of the third class not contraband at all, except subject to confiscation for violation of blockade.

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 The question of contraband relates to articles that are exported by a neutral to one of the belligerent countries. Articles that remain in the neutral country, whatever their nature, are not contraband; and no article becomes so until the act of exportation commences, at which time a violation of neutrality commences. The exporting of articles does not in itself make them contraband, provided they are bound for another neutral port, and are bona fide a commercial transaction with the neutral. The general view taken of this subject is that, so long as the neutral remains passive, he is at liberty to furnish either belligerent with any and all articles that he may wish in his own market. The criticism of this doctrine is that, if it is wrong for a neutral to export contraband to a belligerent port, then it is wrong for him to supply such belligerent in his own market, since the furnishing of the articles is rendering assistance to an enemy, whatever the location of the market. In consequence, it is recommended that all articles that are free from taint be freely furnished to either belligerent, and all articles which become contraband under the present law should be absolutely prohibited by the neutral. This is a departure from the doctrine laid down by Judge Story in *The Santissima Trinidad*,⁵ and the imposition of such a duty upon a neutral disposed to carry out his obligations in good faith would make war more burdensome upon him than upon the belligerents themselves, since it would necessarily upset the business of a large portion of the population of the neutral state, which they carry on during the normal relations of states.

Again, there exists a confusion as to what articles are to be considered as contraband, which during peace are not so, and are only

⁵ *The Santissima Trinidad*, 7 Wheat. 340: "The question as to the original illegal armament and outfit of the *Independencia* may be dismissed in a few words. It is apparent that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemnable as good prize, for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

rendered so by virtue of the accidental relation of war. Certainly, as to this class, it would be impossible for a neutral state to forbid dealings on the part of its inhabitants. It may be that certain articles, which, from their nature, are specially noxious, might be placed upon the same footing as those which a neutral is bound to prohibit being supplied to a belligerent by his subjects. It must not be forgotten that the burden of the war should be borne by the belligerent, and should not be transferred to the neutral or his subjects. The latter should not be made to suffer in their trade on account of the differences of belligerents, further than taking the risks at present assumed under the international rights of seizure conferred upon a belligerent. The true principle seems to be that, to render a particular article contraband, it must possess the quality of being essential to the belligerent, for his warlike purposes. The neutral merchant has an unquestioned right to carry on his trade, and this right, in regard to contraband articles, comes into conflict with that of the belligerent to prevent his enemy from obtaining articles of immediate use in his operations of war. The former has not ordinarily an intent to do wrong, but merely the idea of obtaining the best market for his goods; the latter, the idea of putting stress upon his enemy. It is impossible to determine from treaty or international usage what articles are to be classed as contraband, because of the lack of uniformity in both. The same nation makes a certain article contraband in a treaty with one nation, and classes it as free in a treaty concluded with another nation about the same time. Text writers are equally at variance with regard to what articles are to be classed as contraband.*

* For general law of contraband, vide Hall, *Int. Law*, pt. 4, c. 5; 2 Halleck, p. 244 et seq.; Vatt. bk. 3, c. 7, § 112 et seq.; Wheat. *Int. Law*, D, § 476 et seq.; Whart. *Dig.* §§ 368-375; Walker, *Int. Law*, pp. 506-516; Davis, *Int. Law*, c. 12; Dahlgren, *Int. Law*, pp. 65-100; Lawrence, *Handbook*, pp. 130-133; Mann, *Int. Law*, c. 7; Twiss, *Law Nat.* c. 7; Bynk. *Int. Law*, cc. 10, 14; Galaudet, *Int. Law*, 283-292; Pitt-Cobbett, *Cas. Int. Law*, pp. 211-230; Creasy, *Int. Law*, 604-633; Phillim. *Int. Law*, pt. 10, c. 1; Wools. *Int. Law*, §§ 193-199; Calvo, *Int. Law*, § 2703 et seq.; Bluntschli, §§ 801-817.

ARMS AND MUNITIONS OF WAR.

243. Arms and munitions of war, of whatever description, being of immediate use in the prosecution of war, are, without question, regarded as contraband.

This comprises all those articles that cannot be used for anything else than military purposes, or that are generally made use of in that manner. It would include all ordnance, and arms of every description (cannon, mortars, firearms, pistols, bombs, grenades, etc.), balls, shells, shot, gunpowder of all kinds, gun carriages, ammunition wagons, belts, scabbards, and military equipments of all kinds, military clothing, vessels clearly intended for warlike use, with their armament, torpedoes, with the electric appliances connected with them, and all other articles, whether manufactured or not, that are almost exclusively used for military purposes, such as machinery for manufacture of arms and munitions.⁷

⁷ Ortolan gives the following as contraband: "(1) Arms and instruments of war, and munitions of every kind directly serving for the use of those arms, are the only objects generally and necessarily contraband. (2) Raw materials or merchandise of every kind fitted for peaceful use, even though equally capable of being employed in the manufacture or application of arms, instruments, and munitions of war, are not strictly comprised in this contraband. It is, at most, permitted to a belligerent power, in view of some special circumstances affecting its military operations, to treat such articles as contraband, but they ought only to be so assimilated as a rare exception, which should be limited to those cases in which they in fact form a disguised contraband; that is to say, in which they are tainted with fraud. (3) Provisions and all other objects of first necessity are incapable of being included in any case, or for any reason, among goods contraband of war." *Dip. De La Mer*, 2, 190; *Hall, Int. Law*, p. 657. *Bluntschli*, §§ 803-806, says: "As a general rule, unless special conventions exist between the two parties, are contraband: (a) Guns, muskets, swords, cannon, balls, bullets, powder, and other material of war; (b) saltpeter and sulphur serving to manufacture powder; (c) ships of war, dispatches relative to the war, and transported with the intention of favoring one of the belligerents. The arms and munitions that a neutral ship carries for its own needs are not contraband of war. The transporting of articles serving for individual needs of individuals, clothing, money, horses, timber for naval construction, sail cloth, iron plates, steam engines, coal and merchant vessels, etc., are as a rule authorized. These articles can be exceptionally regarded as contraband if specially mentioned in treaties, or

ARTICLES FOR MANUFACTURE, EQUIPMENT, ETC.

244. Materials for naval construction, for ammunition and equipment, and machinery for the manufacture of arms and munitions of war, are, in general, regarded as contraband.

This is not the accepted usage of all nations, but it is certainly the general practice of England and of the United States. England has always treated as contraband all manufactured articles that, in their natural state, are fitted for military use, or for building or equipping ships of war, and would include, not only all articles that were formerly used in the construction of ships, but also all articles which go to make the modern steam vessel of war, with its armament, armor, engines, etc.³

Salt peter and sulphur are generally placed upon the list of contraband, because of their use in the manufacture of explosives of all kinds, and they are very generally included in all treaties upon the subject of contraband. Their use is extending under the modern inventor.

Whether horses are contraband or not has been much discussed. The general rule seems to be that they are. Russia seems to be the only country which has not included them in her treaties, as contraband, at some time or other. The general rule formerly was to regard all beasts of burden, except the horse, as free, but at the present time asses, mules, and horses are regarded as contraband. Sometimes a distinction based upon the use to which the animal is adapted, as for artillery or transport, or for cavalry, is attempted to be drawn, but there is no means of determining this. The safer rule is to assume that they are intended for military use, when exported to a belligerent, instead of for agricultural purposes.

if in the same manner it can be shown that they are specially destined for warlike purposes, and transported with the intention of aiding one of the belligerents." Vide 2 Halleck, Int. Law, pp. 257-263.

³ For list of articles usually regarded as contraband, vide Whart. Dig. § 368. Page 413 shows the list given in a draft convention between the United States and England in 1804.

In considering whether or not coal is contraband, it must be borne in mind that during the early part of this century was the period when the introduction of the use of this article into vessels of war so extensively first gave rise to the tendency to extend the right of a belligerent to place it upon the list of articles which he could deny the transportation of to his enemy. It is an article very extensively used in nearly all peaceful pursuits,—so much so as to render it vitally necessary. It is essential for commercial navigation, and is not exclusively, or even principally, used in war. The transportation of this article to a belligerent port cannot, from the nature of the article itself, create the presumption that it is for belligerent use. On the other hand, it may be transported or furnished under circumstances such as to clearly render it *res hostilis*. If it is sent direct to a belligerent fleet, or to a place used as a base of operations by the navy of one of the belligerents, it may very properly be regarded as contraband. Again, if it is supplied to one of the belligerents, as in the case of The Shenandoah, during the Civil War in this country, it becomes a violation of neutrality. “When I see the Florida and the Shenandoah choose for their field of action, the one the stretch of sea between the Bahama Archipelago and Bermuda, to cruise there at its ease, and the other Melbourne and Hobson’s Bay, for the purpose, immediately carried out, of going to the Arctic seas, there to attack the whaling vessels, I cannot but regard the supplies of coal in quantities sufficient for such services infraction of the second rule of article VI.” The circumstances, therefore, of each case, will determine the nature of the transaction. It would certainly be no breach of neutrality to sell coal for use on a belligerent steamer visiting the port of sale on account of stress of weather, but a plain breach of neutrality to establish a coaling station to supply all vessels of a particular belligerent.*

Articles of food are now very generally regarded as belonging to the free list. This has been the contention of the United States since Mr. Jefferson was Secretary of State. During his term of office, England maintained that under certain conditions provisions

* Count Sclopis, in the Geneva award. Whart. Dig. § 369; Hall, Int. Law, pp. 664, 665; Bluntschli, § 805.

were contraband, and carried the doctrine so far as to seize all vessels laden with provisions which were bound for a French port, on the ground that there was a prospect of reducing her enemy by famine. As a result of the controversy that arose at this time, it was agreed that when provisions become contraband by the law of nations, and are captured, they shall be paid for, with a reasonable profit. In the case of *The Commercen*, Mr. Justice Story said: "By the modern law of nations, provisions are not, in general, deemed contraband, but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."¹⁰ The American courts have been in accord with those of England, while the doctrine of the French courts has been that provisions are always free. In the year 1885 the French government declared that rice destined for any port north of Canton would be regarded as contraband. This caused a vigorous protest from Great Britain, but no authoritative decision was had upon the subject by a French tribunal, as the war was brought to a close very soon after, and before any seizures were made. The attitude of England at that time placed her unequivocally in favor of provisions being free. Lord Granville, speaking for Great Britain, said that she would not consider herself bound by the decision of any prize court which should give effect to the doctrine put forward by France. "If supplies are consigned directly to an enemy's fleet, or if they are sent to a port where the fleet is lying, they being in the latter case such as would be required by ships, and not ordinary articles of import into the port of consignment, their capture produces an analogous effect to that of commissariat trains in the rear of an army."¹¹

Money may, like provisions, under certain circumstances, become contraband of war, but is certainly not so if sent to a belligerent

¹⁰ *The Commercen*, 1 Wheat. 382; *Maisonnaire v. Keating*, 2 Gall. 325, Fed. Cas. No. 8,978.

¹¹ Parl. Papers, France, No. 1, 1885; Hall, Int. Law, p. 667; Whart. Dig. § 370.

It is only where the money is used for the purchase of arms & military equipment.

In order to make anything contraband it must of course be shipped by a neutral.

country for the payment of debts or the purchase of goods. Should it be sent for the purpose of assisting belligerent operations, the holding it contraband is authorized. Money, silver plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, being contraband of war, the general in command at New Orleans was authorized to order them to be removed from a foreign vessel outward bound, and her clearance withheld until the order was complied with.¹²

Under the head of "merchandise" may be considered articles not previously mentioned separately, and in regard to them it can be said that those which have produced the greatest amount of discussion, and which at the same time have received most attention from the courts, are those used in the construction of vessels of war. This list, as previously stated, has been very much increased by the change in the nature of such vessels. The English and American courts have uniformly regarded such articles as contraband, the practice of the French courts being the reverse. Cotton, during the Civil War in the United States, was regarded as contraband by the Federal Government, because it was used as collateral for loans secured abroad, was sold for cash to meet current expenses, was used to purchase arms and munitions of war, and its use for such purposes was publicly proclaimed by the Confederate Government. Under the circumstances there was no doubt as to the right of the United States authorities to regard it as confiscable, as contraband. It has been held that blankets, boots, and other articles of clothing, were contraband when the circumstances clearly indicated that they were intended for the use of the enemy.¹³

¹² Mann. Int. Law, p. 358; U. S. v. Diekelman, 92 U. S. 520.

¹³ Mr. Bayard, Secretary of State, Spain, June 28, 1836; Whart. Dig. § 373. The following list is from Mr. Godfrey Lushington's Manual of Naval Prize Law: "*Goods absolutely contraband*: Arms of all kinds, and machinery for manufacturing of arms; ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, chloride of potassium, chlorate of potash, and nitrate of soda; gunpowder and its materials,—saltpeter and brimstone; also gun cotton; military equipments and clothing; military stores; naval stores, such as masts (The Charlotte, 5 C. Rob. Adm. 305), spars, rudders, and ship timber (The Twende Brodre, 4 C. Rob. Adm. 33), hemp (The Apollo, 4 C. Rob. Adm. 158) and cordage, sail cloth (The Neptunus, 3 C. Rob. Adm. 108), pitch and tar (The Jonge Tobias, 1 C. Rob. Adm. 329), copper fit

PENALTY FOR CARRYING CONTRABAND.

245. Articles which are clearly contraband, if more in quantity than the needs of the vessel, are subject to confiscation upon being captured, with loss of freight to the carrier.

246. The modern rule is that the vessel carrying contraband articles, with the goods on board not contraband, go free, except in the following cases in which the vessel is condemned:

- (a) Where the vessel and cargo belong to the same owner.
- (b) Where the owner of the vessel has been privy to the carriage of the contraband.
- (c) Where false papers have been used.
- (d) Vessels have sometimes been confiscated—
 - (1) When the contraband goods make up three-fourths of the cargo.
 - (2) When the owner of the vessel is bound, by special treaties of his government with that of the captor, to refrain from carrying the contraband articles.

for sheathing vessels (The Charlotte, 5 C. Rob. Adm. 275); marine engines, and the component parts thereof, including screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, and fire bars, marine cement, and materials used in the manufacture thereof, as blue lias and Portland cement; iron, in any of the following forms: Anchors, rivet iron, angle iron, round bars of from three-quarters to five-eighths of an inch in diameter, rivets, strips of iron, sheet-plate iron exceeding one-fourth of an inch, and low moor and bowling plates. *Goods conditionally contraband:* Provisions and liquors fit for the consumption of an army or navy (The Haabet, 2 C. Rob. Adm. 182); money; telegraph materials, such as wire, porous cups, platina, sulphuric acid, and zinc (Parl. Papers, North America, No. 14, 1863); materials for the construction of a railway, as iron bars, sleepers, etc.; coals; hay (Hosæk, 45); horses; rosin (The Nostra Signora De Begona, 5 C. Rob. Adm. 98); tallow (The Neptunus, 3 C. Rob. Adm. 108); timber (The Twende Brodre, 4 C. Rob. Adm. 37)." 2 Halleck, Int. Law, pp 200, 261, note.

Three ships make free goods.

Some authorities maintain that a vessel has the right to abandon the contraband articles on board to the belligerent captor, unless in too large quantity for the captor to receive them, and purchase the free continuance of her voyage. This is not in accord with the common practice, which is to take the vessel into port, where the articles of contraband are duly condemned, and the vessel, with her free goods on board, is permitted to go free, with loss of time, freight, and expenses.¹⁴

PRE-EMPTION.

247. The doctrine of pre-emption arises from the rule adopted by the English prize courts, by which articles occasionally contraband, which are intercepted by a belligerent, are to be paid for by such belligerent government, with a fair profit on the commodity.

The general English practice was to pay a fair mercantile value for the merchandise, with a profit of ten per cent. This has been modified by treaty stipulations by which the price to be paid is regulated, and also the indemnification to be paid for the loss of freight and detention. The principle has been extended to articles, native products of the exporting country, even, in some instances, when tainted with contraband.¹⁵

TIME WHEN PENALTY ATTACHES.

248. The penalty attaches, and is complete, from the time of quitting port, for an enemy's port, with contraband goods.

The destination is assumed to be belligerent, if clearly not friendly, as this must not be left open to question. In order to authorize

¹⁴ Wools. Int. Law, § 198; Wheat. Int. Law, D, note No. 230; Hall, Int. Law, 669-672; 1 Kent, Comm. p. 142; Whart. Dig. § 375; The Bermuda, 3 Wall. 514; The Springbok, 5 Wall. 1; The Peterhoff, Id. 28; Seton v. Low, 1 Johns. Cas. 1; The Neutralitet, 3 C. Rob. Adm. 295.

¹⁵ Wools. Int. Law, § 197; Hall, Int. Law, p. 669, and note; 2 Halleck, Int. Law, p. 263; Walker, Int. Law, pp. 510, 511; Mann. Int. Law, bk. 5, c. 8; Pitt-Cobbett, Cas. Int. Law, p. 318; Calvo, Int. Law, §§ 2790-2795.

Contraband shipped from a Belligerent to a neutral, or from a neutral to a neutral, is not subject to capture & confiscation. - but note below.

condemnation, both the contraband character of the goods, and their destination for a hostile port, must be shown. If, however, a neutral destination be the ostensible one, and it be clearly shown that the ultimate destination is hostile, the former being used to screen the goods so far on their voyage, even if the rest of the voyage be overland, they may be confiscated. The general rule seems to be that the liability to penalty ceases as soon as the voyage is complete, and the goods have been deposited in the enemy port, so that neither the vessel, nor the proceeds of the sales of her cargo, can be confiscated on her return voyage.¹⁶

CARRIAGE OF DESPATCHES.

249. The carriage of hostile despatches of the belligerent by a neutral is forbidden.

250. Despatches are communications passing between persons in the military or civil service of a state, in their official capacity. Those addressed to or received from a regular diplomatic or consular agent are not presumed to be hostile in their nature. Those addressed to persons in the military service, and those addressed to unaccredited agents in a neutral state, are presumed hostile.

It has been stated that the carriage of despatches is prohibited because they are contraband. The more correct reason authorizing a belligerent to prevent their carriage seems to be that a neutral carrying them is thereby rendering aid directly to his enemy. International law recognizes the right of a belligerent to prevent his enemy from receiving despatches which are hostile in their nature, and in doing this he not only intercepts the despatches themselves but in certain appropriate cases punishes the carrier in a similar manner to that adopted for preventing the carriage of contraband of war. It is in regard to this method of punishment that the carriage of despatches is analogous to contraband, more than in the nature of the articles themselves. This has been prohibited by proclamations of different nations addressed to their subjects and is

¹⁶ The *Imina*, 3 C. Rob. Adm. 167; The *María*, 5 C. Rob. Adm. 365; The *Bermuda*, 3 Wall 531.

usually contained in the prohibition addressed to the subject of contraband articles. The carriage of such by neutrals is generally regarded as an unneutral act.¹⁷

CARRIAGE OF PERSONS.

251. The carriage of persons in the service of a belligerent by a neutral vessel is an unneutral act, provided:

- (a) The vessel so employed is under the control of the belligerent entirely, and has thus become a transport.**
- (b) The circumstances attending the carriage are such that a reasonable presumption exists of intention to render service to the belligerent. This may be manifested either from the number, rank, etc., of the persons transported, or from the reception of them.**

One of the cases illustrating this was that of *The Orozembo*, an American merchant vessel chartered by a merchant at Lisbon, ostensibly to proceed in ballast to Macao, and thence to take a cargo to America. Afterwards, this vessel was specially fitted up for the carriage of passengers, when three Dutch officers of rank, and two persons of the civil service in the government of Batavia, with some others, were received on board, and the vessel actually sailed for Batavia. The vessel was condemned by the English Courts upon the facts, because it was assumed that a contract had been entered into with the Dutch government before the vessel left Rotterdam. In the case of *The Friendship*, the vessel was condemned upon the ground that she was employed as a transport; the facts being that she was not allowed to take cargo, but shipped some eighty French sailors, who had been shipwrecked, and the passage was paid for by the French government, thus rendering them not ordinary passengers, but members of the French navy being transported from the United States to France.¹⁸

¹⁷ *The Madison*, 1 Edw. Adm. 226; Whart. Dig. § 374; Hall, Int. Law, pp. 676-678; Wools. Int. Law, § 199.

¹⁸ *The Orozembo*, 6 C. Rob. Adm. 430; *The Friendship*, Id. 420; *The Carolina*, 4 C. Rob. Adm. 256.

PENALTY FOR CARRYING HOSTILE PERSONS AND PAPERS.

252. The penalty for carrying hostile persons and despatches consists in the confiscation of the vessel, the seizure of the despatches, and making the captured persons prisoners of war.

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This differs from the ordinary carriage of contraband of war, and the confiscation of the ship results from the difference in the nature of the acts. In the case under consideration the vessel is employed in the service of the belligerent, and the loss of the despatches or persons would inflict, as a rule, no punishment upon the carrier, which his act certainly warrants. In the case of contraband goods, on the other hand, there is no presumption of intended aid to the enemy, and the loss of the goods confiscated—causing, as it does, a pecuniary loss—acts as a sufficient deterrent. Despatches are not necessarily noxious, and unless established to be such, either from the fact of their outward address or destination, or from the character of the despatch itself, the confiscation of the ship does not necessarily result from their carriage. The carrier is bound to exercise great diligence in the acceptance of despatches, and when they contain noxious matter, in order to avoid confiscation of the vessel, it must appear from all the circumstances that he was ignorant of the character of the persons or papers carried. To do this it is necessary to consider all the circumstances of the delivery, the nature of the ports of shipment and delivery, the source of the letter, and its character. The transporting of diplomatic despatches knowingly by a neutral does not entail a penalty, since it is not regarded as an unneutral act, and it is the policy of nations to maintain diplomatic relations undisturbed by wars.¹⁹ When a vessel, either in the carriage of persons or despatches, is in the service of the enemy, she becomes liable to confiscation. In this case it is not necessary to consider the number, rank, etc., of the persons she carries, or the nature of her cargo; nor is it necessary to determine upon the importance of the despatches, or the exact form of the em-

¹⁹ The Madison, 1 Edw. Adm. 224; Pitt-Cobbet, Cas. Int. Law, p. 327; Hall, Int. Law, p. 680; 2 Halleck, Int. Law, pp. 321-323, note; The Carolina, 6 C. Rob. Adm. 461; The Tulip, 3 Wash. C. C. 181, Fed. Cas. No. 14,234.

ployment. So long as the fact of temporary ownership is established, she becomes a transport of the enemy and is condemned as such. The English courts have held that a vessel is liable even where the employment was obtained by force of the belligerent, or through deception on the part of the latter.²⁰

CARRIAGE OF PERSONS AND DESPATCHES IN THE ORDINARY COURSE OF BUSINESS.

253. The carriage of persons and despatches in the ordinary course of business does not entail the penalty of forfeiture of the vessel.

The business of carrying the mails is now largely regulated by conventions between nations, and yet the practice in regard to the visit and search of such vessels has not become authoritative. That they are exempt from condemnation is acknowledged, but their mail bags, when visited, may, under certain circumstances, be seized, and despatches that are hostile taken from them. France enunciated in 1870 that, when the vessel visited by her officers was a packet boat engaged in postal service with a government agent of the state whose flag the vessel carried on board, the word of such agent as to the character of the letters and despatches was to be accepted. The tendency is to form some such practice, and that a very general immunity will in future be conceded to mails, under such circumstances, there is no doubt, the belligerent exercising his right of search only in case of reasonable suspicion.

The right of a belligerent to take noxious persons from an innocent neutral vessel was the real question that was presented in the celebrated case of *The Trent*. The facts in this case, briefly, are that in 1861 the Confederate Government appointed Mr. Mason to England, and Mr. Slidell to France, ostensibly as ministers, although not in reality such, because the Confederate Government had not at that time been recognized, further than as a belligerent, and had no authority to maintain diplomatic relations. The two gentlemen, with their secretaries, managed to run the blockade, and arrived

²⁰ Dana's notes to Wheat. Int. Law, pp. 228-230, and cases cited; 1 Kent, Comm. 146; 2 Phillim. Int. Law, 571.

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safely at Havana, where their destination, and the purpose of their mission, were well known. In short, it was to aid their government in every manner possible,—by granting commissions, securing military and naval aid, and to counteract the diplomacy of the Federal Government of the United States. They took passage in the Trent—a regular steamer (British) carrying the mails—from Havana to Nassau, en route to Europe. A short distance out from Havana this vessel was overhauled by a United States vessel of war (the San Jacinto; Capt. Wilkes), and, after search, Messrs. Mason, Slidell, and their secretaries were taken from aboard this vessel, and carried to the United States, while the Trent was permitted to pursue her course. The despatches of these gentlemen were concealed by them among the passengers, and were not discovered. There was nothing to connect the crew with the concealment of the despatches. It is well to state that the captain of the Trent was well aware of the destination and purpose of the gentlemen named. Immediately upon receipt of information of the action of Capt. Wilkes in England, demand was made for their release, and a suitable apology on the part of the United States. The men were released under an arrangement satisfactory to both governments. In regard to the legal points involved in this case, which has a great notoriety, from the political consequences threatened at the time, it has been said that only one principle was settled by it, “and that had substantially ceased to be a disputed question, viz. that a public ship, though of a nation at war, cannot take persons out of a neutral vessel at sea, whatever may be the claim of her government on those persons.” In the correspondence of Mr. Seward, it was maintained that these persons were contraband of war, and in arriving at this conclusion he cites Vattel as saying, “War allows us to cut off from our enemy all his resources, and to hinder him from sending ministers to solicit assistance.” He also cites Sir William Scott as saying: “You may stop the ambassador of your enemy on his passage.” “If it is of sufficient importance to the enemy that such persons should be sent out on the public service at the public expense, it should afford equal ground of forfeiture of the vessel that may be let out for a purpose so intimately connected with the hostile operations.” There was no doubt that the right of visit and search was authorized in this case, and that Capt. Wilkes, in pursuance of

this right, could have taken the Trent as prize, and brought her in for adjudication, but in such case the action of the court could have been directed only against the vessel, the status of the offending persons could not have been determined by it, being purely a question for diplomacy. His (Mr. Seward's) action in restoring the captured persons was based upon the fact, therefore, that the action of Capt. Wilkes should have been to have brought in the vessel; not having done this, he was unauthorized to take the persons from the vessel, which action was contrary to the settled policy of the United States since its organization. It was very clearly pointed out, however, that the position assumed by England at this time was diametrically opposed to her previous settled policy in the similar circumstances of taking seamen, etc., from the vessels of neutrals, as an exercise of ocean police, and that her action in this case committed her to a course of conduct in the future that the United States had repeatedly endeavored to accomplish by treaty stipulation previous to that time. Lord Russell maintained that these men were not contraband, because the nature and character of their service was not such as to render them such, and, even if they were admitted to be such, that the Trent, being in passage between two neutral ports, could not be held liable for carrying contraband. It is unfortunate that so celebrated a case should have settled so little international law, and yet cause so much discussion and speculation as to its legal aspect, aside from its political importance, which was due, as stated, to the complicated situation of the countries involved.²¹

²¹ For full discussion of this case, vide Dana's note to Wheat. No. 228; Hall, Int. Law, pp. 683-686; Pitt-Cobbett, Cas. Int. Law, 327-330; Wools. Int. Law, p. 338; and the authorities cited at beginning of this subject.

CHAPTER XXIII.**BLOCKADE.**

- 254. Blockade Defined.
- 255. Places That can be Blockaded.
- 256. Commercial Blockade.
- 257. Notification of Blockade.
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- 259. When a Blockade Ceases.
- 260-261. Effect of Blockade upon Vessels in the Blockaded Port.
- 262. What is a Breach of Blockade.
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- 264. When Penalty Attaches.
- 265. Blockade of a River Partly in Neutral Territory.
- 266. The Rule of the War of 1796.
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BLOCKADE DEFINED.

254. By blockade is understood the exercise of the recognized belligerent right of excluding trade or commerce from a place or port of the enemy, and is, in general, applied to the prevention of communication by water.¹

¹ Other definitions are:

Vattel, *Law Nat. bk. 2, c. 7, § 117*: "If I lay siege to a place, or even simply blockade it, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry anything to the besieged, without my leave; for he opposes my undertaking, and may contribute to the miscarriage of it, and thus involve me in all the misfortunes of an unsuccessful war."

Pitt-Cobbett, *Cas. Int. Law, p. 301*: "Blockade is the obstruction of a passage to or from a place by land or sea."

Wools, *Int. Law, § 202*: "The word 'blockade' properly denotes obstructing passage into or from a place on either element, but is more especially applied to naval forces preventing communication by water. Unlike siege, it implies no intention to get possession of the blockaded place. With blockades by land or ordinary sieges neutrals have usually little to do."

Davis, *Int. Law, p. 366*: "The interruption or suspension of neutral commerce which results from the forcible closing of a belligerent's ports or harbors is called a 'blockade.'"

A general definition of this term will render it applicable to interception of communication by land as well as by sea, but the former is usually discussed under the head of "sieges," and the rights of the belligerent are differently enforced. At the same time, these rights do not come into conflict with the equal rights of neutrals to trade with a blockaded port, so clearly and sharply. This right of blockade is a sovereign right, exercised as a measure of war, and has been subjected to certain rules, since a breach of a blockade carries with it penalties of such a severe nature upon neutrals and their commerce.²

PLACES THAT CAN BE BLOCKADED.

255. Blockade is not confined to a seaport, but may extend to any avenue of communication, such as a river, gulf, bay, etc., or a portion of the enemy coast.

This must be understood to refer to such places as are clearly within the territorial limits of the enemy state, and would not be extended to the case of a river on one bank of which was a neutral state, or if the neutral state were situated above the enemy state, on the same river, and it afforded communication for such neutral with the sea.

COMMERCIAL BLOCKADE.

256. By a commercial blockade is understood the extension of the prohibition to innocent trade with the enemy country beyond the area of purely military operations, to all coasts of the belligerent which can be guarded by the fleet of the belligerent.

The most extensive blockade that has ever been introduced was that of the entire coasts of the Confederate States by the federal

² For general discussion of subject of blockade, vide Hall, Int. Law, pp. 694-714; Bluntschli, §§ 827-840; Walk. Int. Law, pp. 516-526; Pitt-Cobbett, Cas. Int. Law, pp. 299-311; Dahlgren, Mar. Int. Law, pp. 25-61; Davis, Int. Law, pp. 366-374; Gallaudet, Int. Law, 292-301; Twiss, Law Nat. c. 6; Mann. Int. Law, c. 9; Wools. Int. Law, §§ 202-207; Wheat. Int. Law, D, § 511 et seq.; Calvo, Int. Law, § 2827 et seq.; 2 Halleck, Int. Law, c. 25; Whart. Dig. §§ 359-365.

government during the Civil War, which eventually proved to be a most material aid to the cessation of hostilities. The usual understanding of a blockade is that it must have some connection with the actual military operations that are being carried on by the land forces, but in the case of a commercial blockade there is not necessarily any direct connection with the two, and one of the best illustrations of this class of blockade would be the institution of a blockade of the entire Pacific coast of the United States by a power at war with them, when the only military operations on land were being conducted on the Atlantic coast. This right has been very much questioned, and was not generally supported until the Civil War, but it may be said to be an undisputed right at the present time.^a

NOTIFICATION OF BLOCKADE.

257. In order to incur liability for its breach, a neutral must be notified of the existence of a blockade. This knowledge is communicated either:

- (a) By proclamation announcing the date upon which the designated place will be blockaded.
- (b) By warning vessels, when they approach, of the existence of the blockade.
- (c) By combining the two previous methods.

The first and second are both employed in the practice of the United States, England, Prussia, and Denmark, as follows: If a blockade is proclaimed after a neutral vessel has departed for the blockaded place, warning is given to such vessel upon arrival at the entrance of the place, which warning is indorsed upon the ship's papers by the blockading squadron, and after which time an attempt to enter the place will entail all of the penalties for breach of blockade upon such vessel. The proclamation is resorted to because it is a convenient method of notifying neutrals, and it is considered to be the duty of the neutral state receiving such notice to warn its subjects of its contents. This proclamation is not considered as essential in case it is established clearly that the offending vessel has actual knowledge of the existence of the blockade, as, for instance,

^a Hall, Int. Law, § 233; The *Franciska*, 10 Moore, P. C. 50.

in case of a vessel sailing for a place, the blockade of which is so notorious as to render ignorance of its existence impossible. In case of a *de facto* blockade, knowledge of its existence could not be presumed, and in such case warning would be necessary.⁴

According to what is known as the "French rule," a neutral trader is not affected by information gained previous to arrival at the blockaded place,—not even by information received through his own government,—but can, on the contrary, proceed to the entrance of the place, and there ascertain personally of the existence of blockade at the moment of arrival. The practice of France, and nations who have adopted this rule, is to issue a proclamation of the existence of a blockade; but this is regarded simply as an act of courtesy, as the inhabitants of the neutral country are not affected by such notice. This is adopted by a number of text writers upon this subject, who claim that it is the right of a neutral trader to sail for a blockaded place, in hopes that he can succeed in finding it open, either on account of abandonment, or by stress of weather, etc.

A VALID BLOCKADE.

258. By the declaration of Paris, it was decided that a "blockade, to be binding, must be effective."

The blockade of a port is effective when ingress or egress is liable to be intercepted either by ships of war stationed before the port, or by batteries upon the shore. No exact number of vessels of war or of cannon is requisite, but it is necessary that the belligerent have enough vessels or cannon to render vessels who attempt to break the blockade dangerously liable to capture. An isolated capture would not be sufficient, nor, on the other hand, is it requisite that all vessels should be captured which attempt to pass. The amount of danger required has not been determined, and this will be dependent upon the circumstances of the case under consideration. In the Civil War of the United States, a large number

⁴ Wools. Int. Law, § 203; Hall, Int. Law, pp. 699-702; 2 Halleck, Int. Law, p. 225; The Prize Cases, 2 Black, 635; The Admiral, 3 Wall. 603; The Columbia, 1 C. Rob. Adm. 156; The Adelaide Rose, 2 C. Rob. Adm. 111, note; The Nerelde, 9 Cranch, 440; The Circassian, 2 Wall. 151; Bluntschli, § 832.

of vessels succeeded in running the blockade established at Charleston without the cessation of the same. Again, the exact distance of the blockading squadron from the port has not been fixed, but must have some relation to the place to be blockaded. In the case of the blockade of Riga during the Russian war in 1854, which was accomplished by one vessel in the Lyser Ort, a channel only three miles wide, which forms the only navigable entrance to the gulf, although this vessel was one hundred and twenty miles from the place blockaded, yet the blockade so established was considered legal because effective. From the foregoing, which is the English and American rule, the continental authorities differ, and maintain that a blockade, to be effective, must be supported by such a force as to render access practically impossible, or express their requirements in such language as to imply the same conditions.⁵ Their contention is based upon the language of the treaty of Paris, which the American and English authorities interpret to mean that the force contemplated by that declaration was not such as to absolutely prevent access to the port blockaded, but such as would practically accomplish the same result; and further contend that the intention of the declaration was to do away with "paper blockades," and those attempted to be enforced with manifestly inadequate force.⁶

WHEN A BLOCKADE CEASES.

259. A blockade ceases under the following circumstances:

- (a) When the vessels enforcing it are withdrawn.
- (b) When these vessels are driven away by the enemy, however short the time of absence. But a temporary absence on account of stress of weather would not cause it to cease.
- (c) In case the blockading squadron pursues a prize so far that a neutral ship, finding it absent, may reasonably suppose that abandonment has taken place.

⁵ Hall, Int. Law, p. 706, note 1, contains the authorities.

⁶ Wools. Int. Law, pp. 343, 344; The Francisca, Spinks, Prize Cas. 115; Bluntschli, § 829; 1 Kent, Comm. p. 144 et seq.

In the first and second cases there would be a complete cessation of the blockade, which would require the same formalities for its renewal as are required in the original establishment thereof. In the third case a neutral vessel entering the port would be exempt from seizure for violation of the blockade. In regard to this subject, also, some continental writers are not in accord with the doctrine of the text, and maintain, on the contrary, that whenever there is a temporary absence of the blockading squadron, for whatever cause, a neutral vessel is authorized to enter. It is not recognized as necessary when a blockade ceases, even when it is raised by the belligerent, that it shall be noticed to neutrals, although such is, without doubt, the duty of such belligerent; and this notice, especially when the blockade is established by proclamation, should be as formal as practicable, and given as promptly as practicable. The actual cessation may take place before notice is given, in which case vessels are not liable for entering between the date of actual cessation and date of receipt of notice. It will be necessary, for a vessel to escape the penalty, in such case, to show that the blockade did not actually exist at the time of entrance.⁷

EFFECT OF BLOCKADE UPON VESSELS IN THE BLOCKADED PORT.

260. The neutral vessels lying in the blockaded port are, by general usage, permitted to come out within a designated time.

261. Vessels in blockaded ports are permitted to come out, also, in case—

- (a) **The entrance into the port arose from necessity, such as stress of weather, immediate need of provisions, etc.**⁸

⁷ Hall, Int. Law, pp. 705-709; *The Columbia*, 1 C. Rob. Adm. 154; *The Frederick Molke*, Id. 86; *Radcliff v. Insurance Co.*, 7 Johns. 53. That a blockade is not suspended by occasional absence of blockading squadron on account of weather. *The Hoffnung*, 6 C. Rob. Adm. 116. For presumption in regard to the continuance of a regularly notified blockade continuing until displaced by evidence, *vide The Neptunus*, 1 C. Rob. Adm. 171; *The Circassian*, 2 Wall. 150; *The Balgorry*, Id. 480.

⁸ *The Charlotta*, Edw. 252; *The Hustige Hane*, 2 C. Rob. Adm. 127. *Blunt-*

- (b) Where the entrance was by license, or the vessel, coming to the blockaded port in ignorance of the blockade, is permitted to pass, authority to return is inferred.⁹
- (c) In the case of a vessel employed exclusively by a minister of a neutral state for transportation home of distressed marines of his own state.
- (d) A neutral vessel which has legally entered is permitted to return with a cargo found unsalable.
- (e) Vessels of war of a neutral state are, as a courtesy, usually permitted to go into and out of a blockaded port.

The time for neutral vessels lying in a blockaded port to come out after the institution of a blockade which has been generally designated is fifteen days but for various reasons this time has been extended for as much as three times this number of days. The blockaded place is usually notified of the existence of the blockade and the time in which neutral vessels must leave is then designated. In certain cases vessels would not be confiscated for attempting to come out after the designated time. This time was extended by the commander of the fleet in the blockade of New Orleans in favor of vessels of deep draught on account of the low water in the Mississippi.¹⁰

schli, § 838: "One cannot refuse to neutral ships in distress the privilege of refuge in blockaded ports; but they must respect the regulations prescribed by the maritime power that gives them the authority to pass notwithstanding the blockade."

⁹ The *Juffrow Maria Schroeder*, 3 C. Rob. Adm. 160.

¹⁰ The limit of time named in the text has been authorized in most of the wars during this century, including the Civil War in this country and the Franco-German War of 1870. Vide Hall, *Int. Law*, pp. 709-712; Bluntschli, § 837; The *Franciska*, Spinks, *Prize Cas.* 122; The *Vrouw Judith*, 1 C. Rob. Adm. 152.

WHAT IS BREACH OF BLOCKADE.

262. A breach of a blockade consists in some positive act of entering or quitting a blockaded place, or by showing an evident and speedy intention of doing so.

According to the rulings of the United States and English courts, it appears that when the intention to enter a blockaded place is manifest at the outset from a neutral port, the ship is liable for breach of blockade. This has been extended by the courts of the former country to the case in which a vessel bound, although ostensibly for a neutral port, yet, when it was manifest that the ultimate intention was to try a blockaded port, the ship upon seizure was subject to confiscation. The doctrine of the French courts is different, in so much that they hold that an actual attempt to pass into or out of the blockaded place is necessary, in order to create a breach of blockade. This difference in the practice of France arises from the difference in the conception of the notice required by this country. Should a vessel receive information from a belligerent cruiser of the blockading country of the existence of the blockade, and continue her journey to the blockaded place, the French rule permits in such case an inference of intention to commit a breach of blockade. It is manifest that the breach takes place, under the rules of England and the United States, as soon as the vessel leaves the neutral port, and, if captured en route, she is liable to the penalty for breach. It is not necessary that the vessel herself cross the line of blockade, provided she receive her cargo from the blockaded port by vessels or lighters.¹¹

¹¹ Pitt-Cobbett, Cas. Int. Law, p. 301: "The essentials of liability for breach of blockade are (1) the existence of an actual blockade; (2) knowledge of the party; and (3) some act of violation by entering or attempting to enter, after the blockade has been established, or by coming out after time." *The Irene*, 5 C. Rob. Adm. 80; *The Cheshire*, 3 Wall. 235; *The Maria*, 6 C. Rob. Adm. 201; Hall, Int. Law, pp. 712, 713.

PENALTY FOR BREACH OF BLOCKADE.

263. The penalty for breach of blockade is forfeiture of vessel and cargo, if captured, or the forfeiture of the vessel only, in certain cases.

It has been held that a breach of blockade is not an offense against the laws of the country of the neutral owner or master, the only penalty being the liability to capture and condemnation by the belligerent. The cargo and vessel are both condemned when they both belong to the same owner, but should the cargo belong to one who has no interest in the vessel, and at the time of shipment he is ignorant of the blockade, or in case the vessel deviates to a blockaded place, thus departing from her legitimate course, then the vessel only will be condemned, and the cargo restored.¹²

WHEN PENALTY ATTACHES.

264. The penalty attaches upon valid capture after breach of blockade has been committed.

In order that there shall be a valid capture for breach of blockade, the following essentials must exist: The blockade must be effective. Notification must have been given, and the intention to commit the breach must appear. The penalty for breach of blockade is held to continue until the completion of the voyage, unless the blockade ceases before that time. A vessel committing a breach of blockade by egress would therefore be liable until the end of her return voyage.¹³ The raising of the blockade carries with it the suspension of liability to the penalty for its breach, since the offense is due to and dependent upon the existence of the same state of things.¹⁴

¹² The Alexander, 4 C. Rob. Adm. 93; The Adonis, 5 C. Rob. Adm. 258; The Marianna Flora, 11 Wheat. 57.

¹³ Dana's notes to Wheat. Int. Law, Nos. 236 and 237. Vide, also, Bluntschli, § 836.

¹⁴ The Lisette, 6 C. Rob. Adm. 387; Wools. pp. 350-357; The Helen, L. R. 1 Adm. & Ecc. 1.

BLOCKADE OF A RIVER PARTLY IN NEUTRAL TERRITORY.

265. The blockade of enemy territory cannot affect the territory of a neutral state, whose territory is contiguous.

This question arises in case of the blockade of rivers forming the boundary between the enemy territory and that of a neutral, or, again, in case of the blockade of a river upon the upper part of the navigable portion of which is situated a neutral state. A blockade of Holland was held not to be broken by a destination to Antwerp.¹⁵ In the Civil War in the United States the blockade of the Southern ports was held not to affect trade with Matamoras, on the Mexican shore of the Rio Grande river. But vessels were required to keep upon the south side of the line dividing Texas from Mexico, and for violation of this requirement no allowance was made for costs and expenses.¹⁶

THE RULE OF THE WAR OF 1756.

266. The rule of 1756 is that a neutral cannot lawfully engage in trade with the enemy, during a war, from which he had been shut out during peace.

This question first arose in the year named, and was brought about by the fact that France (then at war with England) opened up the trade between the mother country and the colonies to the Dutch. Previous to that time it had been the practice of nations to deny such trade to other nations. Some Dutch vessels were captured by the English, and condemned upon the ground that they had in effect been incorporated into the French navy. This practice gave rise to a protest by the first armed neutrality, in so far as coasting trade was concerned, and has been made the subject of regulation by treaty.¹⁷ This rule was extended and enforced by England in 1793 beyond what has been considered legitimate limits by some

¹⁵ The Frau Ilisabe, 4 C. Rob. Adm. 64.

¹⁶ The Peterhoff, 5 Wall. 54; The Dashing Wave, Id. 170; The Volant, Id. 179; The Science, Id. 178.

¹⁷ Hall, Int. Law, pp. 639, 640; Wools. Int. Law, § 200.

authorities. It appears that France threw open to all neutrals her colonial and coasting trade, but England at once forbade the carrying of French goods from the mother country to her colonies by neutrals, and also their engaging in the coasting trade.¹⁸ The English courts based their condemnation of vessels upon the ground that since the belligerent would not depart from a recognized right of such importance to his commercial interests as the retention in his own hands the colonial and coasting trade, unless he felt unable to carry it on, that in consequence the neutral must be aware that by indulging in such trade he is rendering aid to one of the belligerents, of such an effective nature as to be unwarranted.¹⁹ The exercise of this prohibition in regard to trade with the colonies was based upon the further fact that they were, in all probability, peculiarly in need of the supplies, and, in case the mother country could not furnish them, they fell naturally to the belligerent. The belligerent can with more propriety prevent the trade between the mother country and the colony, especially if thrown open only during war, than prevent all intercourse with the colonies, as between neutral ports and such colonies.²⁰

¹⁸ The Emanuel, 1 C. Rob. Adm. 296.

¹⁹ The Immanuel, 2 C. Rob. Adm. 186. 1 Kent, Comm. pp. 82-86: "It is very possible that if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate, and which shall prove sufficient to render it expedient for her maritime enemy (if any such enemy shall ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have heretofore done the weight of the argument of the foreign jurists in favor of the policy and equity of the rule."

²⁰ Wools. Int. Law, p. 241, and authorities cited; Halleck, Int. Law, pp. 330-339; 3 Phillim. Int. Law, §§ 212-221; Calvo, Int. Law, pp. 49, 60, 61; Wheat. Int. Law, D, § 508; Walker, Int. Law, 259-262, 399-402. Bluntschli, § 799: "The principle of the liberty of neutral commerce ought to be maintained in case where one of the belligerents authorized during war a special branch of commerce that it denied before the war, and that it will restrain perhaps when the war is terminated." Section 800: "When, in time of peace, trade between different ports of the same state [coasting trade] is exclusively reserved to the national marine, and when one of the belligerent parties gives, during the war, to neutrals, authority to carry on this trade, neutral ships that profit by this permission do not violate the laws of war, and cannot be captured upon the pretext that they are engaging in a forbidden trade."

CONTINUOUS VOYAGES.

267. By the doctrine of continuous voyage is meant the carrying of goods to a hostile destination, but touching at a neutral port, unloading and reloading before sailing for the forbidden port. This principle of continuous voyage was applied by the United States to contraband and blockade, so that a vessel whose goods were evidently contraband, and destined for belligerent use, or where the ultimate destination was for a blockaded port, the vessel was liable to capture before touching the neutral port.

The doctrine of continuous voyage arose from the rule of 1756, and was enunciated to prevent neutral traders from touching at a neutral port for the purpose of concealing the fraudulent intent in original shipment. The extension of the rule by the United States has been much censured by jurists and international authorities outside of the United States. In *The Commercen*, the principle was announced that, so long as the goods shipped were destined for military use of the enemy, the destination to a neutral port could not change the effect of the rule applicable to the transaction in that case. In the case of *The Bermuda* it was held that "it makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo. * * * A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transshipments intervene." This vessel was claimed to be en route between two neutral ports at the time of capture. This question was again presented to the United States Supreme Court in the case of *The Springbok*, in which it was held that, where a neutral vessel carries goods destined for a belligerent port between two neutral ports, it is not subject to condemnation, but is subject to seizure in order to effect a confiscation of the goods. And where the cargo was originally shipped with intent to violate the blockade, to be transhipped at a neutral port, the liability to condemnation,

if captured during any part of that voyage, attached to the cargo at the time of sailing. It is this extension of the rule of liability to capture when on a voyage between neutral ports that has caused so much adverse criticism.²¹

²¹ *The Commercen*, 1 Wheat. 382. For the English decisions, vide *The William*, 5 C. Rob. Adm. 385; *The Maria*, Id. 365. For the American decisions, vide *The Bermuda*, 3 Wall. 514; *The Springbok*, 5 Wall. 1. Vide, also, Dana's note to *Wheat*. Int. Law, No. 231; *Wools*. Int. Law, § 207; *Hall*, Int. Law, pp. 672, 673; *Walk*. Int. Law, pp. 512, 514, 515; *Calvo*, Int. Law, §§ 2762-2766; *Bluntschli*, § 835, note; *Pitt-Cobbett*, *Cas. Int. Law*, 333-340; *Whart. Dig.* §§ 362, 388.

CHAPTER XXIV.

VISIT AND SEARCH, AND RIGHT OF ANGARY.

- 268. The Right Defined.
- 269. Who can Visit.
- 270. Who Liable to Exercise of the Right.
- 271-272. Convoy Defined—Exemption from Visit and Search.
- 273. Formalities in Exercising the Right of Search.
- 274. When a Vessel may be Captured.
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- 277. Duties of the Captor.
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THE RIGHT DEFINED.

268. The right of visit or search is a belligerent right which authorizes both belligerents to stop neutral vessels on the open seas, to go on board of them, and to examine their papers, and, in certain cases, their cargo.

This right is exercised by a belligerent for the purpose of ascertaining whether a vessel carrying a neutral flag is in reality what she claims to be, whether she has on board any contraband of war, whether she is guilty of a breach of blockade, or, in short, whether she has been guilty of any breach of law. This right cannot be exercised in neutral waters.¹

¹ For discussion of the general subject of visit, search, and capture, vide Wheat. Int. Law, D, §§ 525-538; Hall, Int. Law, pp. 724-741; Wools. Int. Law, §§ 208-215; Mann. Int. Law, cc. 11, 12; Calvo, Int. Law, §§ 2939-3003; Whart. Dig. §§ 325-331; 2 Halleck, Int. Law, pp. 267-304, c. 27; 1 Kent, Comm. pp. 153-157; 3 Phillim. pp. 417-503; Bluntschli, §§ 344-346, 819-826; Dahlgren, Mar. Int. Law, pp. 100-115; Vatt. Int. Law, bk. 3, c. 7, §§ 114-116; Davis, Int. Law, c. 14; Creasy, Int. Law, 668.

WHO CAN VISIT.

269. From the nature of this right, only a regularly commissioned vessel of the belligerent state can visit a neutral vessel.

This being a belligerent right, which comes into existence at the commencement of war, and ends with peace, it must be exercised in accordance with recognized usage or treaty obligations, a violation of which is to be remedied through the neutral government.

WHO LIABLE TO EXERCISE OF THE RIGHT.

270. All private vessels of neutrals are subject to the exercise of this right by either belligerent in the open seas or waters of either belligerent.

It is the duty of neutral vessels to be provided with the necessary papers to establish their neutrality, and that they are not engaged in unlawful carriage, which a belligerent has a right to interfere with, which papers, it is conceded, must be produced, upon demand made by a duly authorized agent of the belligerent, for his inspection. It is further considered to be the duty of a neutral vessel not to resist the exercise of the right of belligerent search, since such resistance entails the appropriate penalty of confiscation of the vessel, and in certain cases the cargo also. Vessels of war of the neutral state are not liable to visit, because, from their nature, they are not fitted to carry on a business that a belligerent can prohibit.

CONVOY—EXEMPTION FROM VISIT AND SEARCH.

271. By the term "convoy" is understood the protection of merchant vessels during a voyage by a public vessel of war. The term is applied both to the protecting and protected vessels.

272. The right of convoy, by which is understood the exemption of such vessels from search by belligerents, was never conceded by England, and is not very generally claimed by other nations, when the presence of contraband is suspected.

This question of exemption of vessels under convoy was first raised in the middle of the seventeenth century by the Dutch. It was again raised in the middle of the next century, and the discussion has continued from that date. Towards the latter part of that century, instructions were given by the Dutch that their vessels of war acting as convoys should resist the search of the merchant vessels under their escort. In 1798, however, when a Swedish vessel of war, acting as convoy, resisted a search of vessels under her charge, the whole fleet that was captured was condemned.² Shortly after this the second armed neutrality maintained that search of vessels under convoy should be prevented by a declaration of the officer in charge of the convoy that the vessels under his charge contained no contraband. This extreme right maintained by the parties to that agreement was waived the following year, when, by convention between the powers concerned, it was agreed that goods on neutral vessels, except contraband of war and enemy's property, should be free, and that the right of visit should be confined to public vessels of war, and never committed to privateers, and in other ways regulated the exercise of the right, which right, however, was distinctly recognized.³ The policy of the political department of the United States has been to recognize the

² *The Maria*, 1 C. Rob. Adm. 340.

³ By the convention referred to, it was provided: (1) That the right of search should only be exercised by war ships, and should not be extended to privateers. (2) That the owners of merchantmen should produce their passports and certificates to the commander of the convoy before being allowed to sail under convoy. (3) That the convoy and merchant ships should keep out of cannon shot if possible, and that, for the purpose of making a search, a boat should be sent by the belligerent to the convoy. (4) That no search should be made if the papers were in form, and there was no good motive for suspicion. In the contrary case the commander of the convoy was to detain the merchantman for sufficient time to allow of search, which was to be made in the presence of officers selected by the commanders of both the belligerent and the convoying vessels. (5) If there appeared sufficient reason for making further search, notification of the intention to do so was to be made to the commander of the convoy, the latter having the right to appoint an officer to remain on board and assist at the examination. The merchantman in such case was to be taken as soon as possible to the nearest and most convenient port of the belligerent, and the search was to be made with all possible dispatch. (6) If a merchantman under convoy should be detained with-

right of convoy, and a number of treaties have been entered into with other nations which recognize it; but the judicial department has followed the rulings of the English courts, and held that no such principle is recognized by the law of nations. In support of the right of convoy, it is maintained that the commander of the convoying vessel distinctly represents the state, so that, when he asserts that none of the vessels under his charge have any contraband goods on board, it is practically a guaranty from the neutral state. From the nature and extent of commercial shipments, it will be very difficult for any neutral government to be able to affirm that none of the vessels under convoy are engaged in acts which the belligerent has the right to prevent, either in carrying contraband goods, despatches, military persons, etc., or that such vessels have no intention to commit a breach of blockade, etc. This is placing upon the neutral government the duty of standing between individuals and the belligerent, under conditions that are practically impossible to expect. The changed conditions under which vessels of all kinds now navigate has rendered the exercise of this right so difficult that it has not the importance in the community of states that it once had.⁴

FORMALITIES IN EXERCISING THE RIGHT OF SEARCH.

273. In the exercise of the right of search, only such acts as may be necessary to ascertain the character of the vessel, cargo, and destination are authorized.

All acts in excess of this are illegal, and will render the persons guilty of them liable in damages. In the exercise of the principal

out sufficient cause, the commander of the ship should not only be bound to make compensation, but should suffer further punishment for every act of violence committed. On the other hand, a convoying ship should not be allowed to resist by force the detention of a merchantman.

⁴ Vide Hall, *Int. Law*, pp. 725-732; Pitt-Cobbett, *Cas. Int. Law*, 342-344. Wools, *Int. Law*, § 192, questions the right of a neutral to employ armed vessels of a belligerent to convey his goods, it being essentially a resistance to search. *The Nereide*, 9 Cranch, 440; 1 Kent, *Comm. p.* 156; *The Marianna Flora*, 11 Wheat. 42. Bluntschli, §§ 824, 825, practically denies the right of search of vessels under convoy, following the above convention.

right, all the means essential for this purpose are recognized as pertaining to it. The usual method pursued is for the visiting ship, when at a reasonable distance, to hoist its colors and fire a cannon, called the "semonce," "coup d'assurance," or "affirming gun," although this is not obligatory, since any other method will be considered as equally effective if actually communicated to and understood by the neutral ship. The formalities are set forth with great precision in some conventions, and specify the distance at which the belligerent vessel must bring to, the party who is to make the visit, together with the persons to accompany him, etc. It is customary for one officer only to make the visit, who examines first the papers which establish the character of the vessel, the nature of the cargo, and the points of departure and destination.⁵

WHEN VESSEL MAY BE CAPTURED.

274. A vessel may be captured:

- (a) If resistance is made to visit and search.
- (b) If it has false papers or double papers. Concealment of papers of the vessel is regarded as sufficient to justify capturing a neutral vessel and bringing her in for adjudication, though it does not follow that there will be a condemnation.

Upon the Ground of Resistance.

Deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequences of capture and confiscation. The English and American

⁵ Dahlgren, Mar. Int. Law, p. 103: "The rule of search is nearly alike in all cases: (1) The examiner is to remain out of cannon shot. (2) Send boats; but only two or three men must go on board. (3) The master shall show his passport or sea letter and certificates, showing name and character of vessel, port left, where bound, particulars of cargo, so as to show if contraband be on board. No other papers are to be required, and the master is not required to leave the ship. (4) Hatches are not to be opened, nor the packages of the cargo, unless in landing, and then in the presence of competent officers. If any papers are retained by captor, a receipt is to be given."

For papers carried by vessels of different nationalities, vide Append. p. 365.

courts agree that in case of such resistance by a neutral master both the vessel and cargo are confiscated. In the case of neutral goods in a merchantman of the belligerent, the English courts hold that they are not liable to confiscation in case of capture after resistance by the master, since such master has a right to protect the belligerent goods of his cargo, and the neutral shipper is not presumed to know that resistance will occur when he makes the shipment.⁶ If, on the other hand, the neutral places his goods on board of a belligerent ship of force, he is presumed to know that the intention is to resist visit and search, and relies on force for the protection of his goods.⁷ The doctrine of immunity is carried further by the American courts, who maintain that the shipment by a neutral in a belligerent ship of force does not authorize the confiscation of the goods. In the leading case upon this question, Mr. Justice Story wrote a strong dissenting opinion, maintaining the rule of the English courts and the later authorities seem to hold that this view is the better one.⁸ It was in regard to the employment of an English man-of-war as a convoy for American vessels that a dispute arose between the United States and Denmark in the early part of this century. It seems that certain merchant vessels were in the habit of receiving cargoes of naval stores in Russian ports, and assembling on the coasts of Sweden, from which point they were escorted by a British man-of-war. The Danish government issued an ordinance forbidding it, and declaring such vessels good prize. Some American vessels were actually captured, without resistance, and were condemned. This controversy was settled by treaty between the two countries, by which Denmark agreed to pay an indemnity, but without its action being construed as a precedent.⁹

⁶ The Catharina Elizabeth, 5 C. Rob. Adm. 232.

⁷ The Fanny, 1 Dod. 448.

⁸ The Nereide, 9 Cranch, 441.

⁹ Hall, Int. Law, pp. 735-737; Wheat Int. Law, D, §§ 531-537. Vide, also, Dana's note No. 245, who gives the authorities, and says: "There seems little doubt that in condemning these vessels, as the practice in respect to convoys then stood, and in the relations of Denmark with France, the Danish court did not violate any established rule of international law." Mann. Int. Law, p. 369.

Possession of False Documents.

In the case of false or fraudulent papers, some countries hold that it is always good ground for condemnation, but in England and the United States it is held that the possession of such papers does not necessarily entail condemnation, since the falsity is only noxious when the circumstances indicate clearly intention to deceive, or there is a reasonable presumption that they were prepared with the express intention of deceiving the belligerent that makes the capture, or would act as a fraud on the rights of the captors, and these fraudulent papers must relate to the voyage in which the capture is made.¹⁰

SPOLIATION OF PAPERS.

275. Spoliation of papers of a vessel subject to visit and search, although regarded as a more aggravated offense than concealment, does not necessarily entail condemnation.

The courts of the United States and England hold that, while this is a circumstance of a most serious nature, yet it is subject to explanation, and if the same be open and frank the vessel will not be condemned for this offense alone. If, on the other hand, they are destroyed under circumstances that indicate with reasonable certainty that the act was to cover up their real nature, condemnation would follow.¹¹

THE RIGHT OF SEARCH IN TIME OF PEACE.

276. The right of search during peace may be exercised under the following conditions:

- (a) For the execution of revenue laws, which is confined to the territorial waters of the state.
- (b) Any and all public vessels are authorized to visit and search vessels suspected of being piratical,

¹⁰ 2 Halleck, Int. Law, p. 299; *The St. Nicholas*, 1 Wheat. 417; *Phoenix Ins. Co. v. Pratt*, 2 Bin. 308; *The Mars*, 6 C. Rob. Adm. 86; *The Eliza and Katy*, Id. 192.

¹¹ *The Rising Sun*, 2 C. Rob. Adm. 106; *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274; *The Pizarro*, 2 Wheat. 241.

provided it is done in good faith, and on the open sea, or the territorial waters of the state to which the visiting vessel belongs.

(c) In a proper case of self-defense.

In the execution of revenue laws, or in case of suspected engagement in unlawful commerce, the action of the visiting government is really an exercise of sovereignty; and some authors extend the right to visit during peace, in certain cases, to the open sea, as in case of criminals escaping from territorial waters, when it is maintained that a right exists to pursue the vessel into the high seas, and there make the search. This is questionable, since the exercise of the right of visit and search is a belligerent right only, and contemplates the existence of the relation of war. A nation is authorized, on the ground of self-defense, to visit and capture a vessel on the high seas, or in its own waters, when there is reasonable ground to believe it to be engaged in a hostile expedition against the territory of such nation.¹²

DUTIES OF THE CAPTOR.

277. The captor, in addition to the duties incidentally discussed herein, is under the following obligations:

- (a) In case persons are detained by him as witnesses, they cannot be regarded as prisoners of war, and, if maltreated, the courts will decree damages.
- (b) The captured property must be brought in for adjudication with all possible dispatch.
- (c) He is liable for negligence in the preservation of the vessel or goods.

In the discussion of the formalities of visit, the duties of the captor were sufficiently discussed in regard to the persons and property on board. It is the duty of the prize master, immediately upon arrival in port, to institute proceedings in the proper court for the adjudication of his prize. He should deliver over to the court the proper papers, and furnish the proper evidence for the examination of the court. For any improper delay demurrage will be

¹² 2 Halleck, Int. Law, 268-282; Wools. Int. Law, § 212 et seq.

granted, and for any loss of the property captured the prize master is regarded in the light of a bailee, and held to a strict accountability.¹⁸

CAPTURE OF ENEMY'S GOODS IN NEUTRAL VESSELS.

278. By the declaration of Paris, a neutral vessel containing goods of the enemy is invested with power to protect them from capture. By the same declaration, the goods of neutrals in enemy vessels were also declared to be free.

In regard to the question of belligerent goods in enemy vessels, two theories were for a long time, previous to 1856, held in regard to them. The one theory was that, being enemy goods, they were liable to seizure wherever found outside of the jurisdiction of a third state, and therefore liable to capture. The other theory conformed with the statement in the text. The Dutch were the strongest advocates of the latter theory, because for a long time the great carriers of commerce. In regard to the question of neutral goods on board of enemy vessels, two theories were held upon the subject,—the one, as stated in the black-letter text; and the other, that such goods, by contact with property subject to confiscation, became so irredeemably tainted that they shared the fate of such property. This question has been practically settled, but, since the United States has never become a party to the treaty of Paris, this country is not bound by the declarations contained therein. In the absence of treaty, and according to the international common law, it

¹⁸ Vide 2 Halleck, Int. Law, c. 31; Hall, Int. Law, pp. 739-741; 3 Phillim. Int. Law, § 361 et seq.

In illustration of duties towards persons on board of the prize, vide *The Savior*, 4 Phila. 409; Fed. Cas. No. 12,272; *The Anna Maria*, 2 Wheat. 327; *The Vrow Johanna*, 4 C. Rob. Adm. 351; *The St. Juan Baptista*, 5 C. Rob. Adm. 33.

In illustration of duty as to bringing in for adjudication, vide *The Zee Star*, 4 C. Rob. Adm. 71; *The Felicity*, 2 Dod. 383; *Wilcocks v. Union Ins. Co.*, 2 Bin. 574; *Willis v. Commissioners*, 5 East, 22; *Penhallow v. Doane*, 3 Dall. 54.

In the case of negligence, vide *The Der Mohr*, 4 C. Rob. Adm. 314; *The Felicity*, 2 Dod. 383; *The Leucade*, Spinks, Prize Cas. 221.

has been decided in this country that the goods of neutrals, in enemy's vessels, are free.¹⁴

THE RIGHT OF ANGARY.

279. By the right of angary is understood the right possessed by a belligerent to use or destroy, if necessary, the property of neutral subjects within the territory of the belligerent.

Mr. Phillimore says: "There is yet another measure, partaking also of a belligerent character, though exercised, strictly speaking, in time of peace, called by the French 'le droit d'angarie.' It is an act of the state, by which foreign as well as private domestic vessels, which happen to be within the jurisdiction of the state, are seized upon, and compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties, against

¹⁴ The *Atalanta*, 3 Wheat. 415. For more extended discussion of this subject, vide Hall, Int. Law, pp. 687-695, 717-723.

"In 1872 the French prize court gave judgment in a case, arising out of the war of 1870-71, in which the neutral owners of property on board two German ships, the *Ludwig* and the *Vorwarts*, which had been destroyed instead of being brought into port, claimed restitution in value. It was decided that though, under the terms of the Declaration of Paris, neutral goods on board an enemy's vessel cannot be seized, it only follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or, in case of sale, to payment of the sum for which it may have been sold, and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship, or by acts of war which may have accompanied or followed the capture. In the particular case, the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ships, because, from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war, the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity. It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris." Hall, Int. Law, p. 722.

APPENDIX.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.

GENERAL ORDERS, }

No. 100.

WAR DEPARTMENT,

ADJUTANT-GENERAL'S OFFICE,

WASHINGTON, APRIL 24, 1863.

The following "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, LL. D., and revised by a Board of Officers, of which Major-General E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.

BY ORDER OF THE SECRETARY OF WAR:

E. D. TOWNSEND,

Assistant Adjutant-General.

SECTION I

Martial Law—Military Jurisdiction—Military Necessity—Retaliation.

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its Martial Law.

2. Martial Law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief; or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. **Martial Law** in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4. **Martial Law** is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not **Martial Law**; it is the abuse of the power which that law confers. As **Martial Law** is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5. **Martial Law** should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed—even in the commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under **Martial Law**, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under **Martial Law**, or continue only with the sanction, or if deemed necessary, the participation of the occupier or invader.

7. **Martial Law** extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to **Martial Law** in cases of urgent necessity only: their

property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of Ambassadors, Ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10. Martial Law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety, and the safety of its operations.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offences to the contrary shall be severely punished, and especially so if committed by officers.

12. Whenever feasible, Martial Law is carried out in case of individual offenders by Military Courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13. Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the "Rules and

Articles of War," or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God.

16. Military necessity does not admit of cruelty, that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18. When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their

intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary alle-

giance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of a regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and co-existence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.

Public and private Property of the Enemy—Protection of persons, and especially women; of religion, the arts and sciences—Punishment of crimes against the inhabitants of hostile countries.

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32. A victorious army, by the martial powers inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own, and make it a portion of its own country.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hos-

pitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offences to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the army of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war—such as judges, administrative or police officers, officers of city or communal governments—are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41. All municipal law of the ground on which the armies stand,

or of the countries to which they belong, is silent and of no effect between armies in the field.

42. Slavery, complicating and confounding the ideas of property, (that is of a *thing*,) and of personality, (that is of *humanity*,) exists according to municipal law or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of post-liminy, no belligerent lien or claim of service.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offences to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offence may require; if by soldiers, they shall be punished according to the nature of the offence.

47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

SECTION III.

Deserters—Prisoners of War—Hostages—Booty on the Battle-Field.

48. Deserters from the American army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American army; and if a deserter from the enemy, having taken service in the army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50. Moreover, citizens who accompany an army for whatever pur-

pose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe conduct granted by the captor's government, prisoners of war.

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and if captured, are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are no individual crimes or offences. No belligerent has a right to declare that enemies of a certain class,

color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, neverthe-

less, be ordered to suffer death if, within three days after the battle it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States, or is an enemy captured after having committed his misdeed.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they had been placed in the private luggage of the prisoners.

73. All officers, when captured, must surrender their side-arms

to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

74. A prisoner of war being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The government alone releases captives, according to rules prescribed by itself.

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76. Prisoners of war shall be fed upon plain and wholesome food whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77. A prisoner of war who escapes may be shot, or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

78. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners, in order to extort the desired information, or to punish them for having given false information.

SECTION IV.

Partisans—Armed enemies not belonging to the hostile army—Scouts—Armed prowlers—War-rebels.

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the

authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they, if discovered and secured before their conspiracy has matured to an actual rising, or to armed violence.

SECTION V.

Safe-conduct—Spies—War-traitors—Captured messengers —Abuse of the flag of truce.

86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority.

Contraventions of this rule are highly punishable.

87. Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe conduct is declined. Such passes are usually given by the supreme authority of the state, and not by subordinate officers.

88. A spy is a person who secretly, in disguise or under false pretence, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeeded in obtaining the information or in conveying it to the enemy.

89. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war-traitor is always severely punished. If his offence consists in betraying to the enemy anything concerning the condition, safety, operations or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offence.

93. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99. A messenger carrying written dispatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected

with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offences, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103. Spies, war-traitors, and war-rebels, are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.

Exchange of prisoners—Flags of truce—Flags of protection.

105. Exchanges of prisoners take place—number for number—rank for rank—wounded for wounded—with added condition for added condition—such, for instance, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the government, or of the commander of the army in the field.

107. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange; nor a higher rank, for the purpose of obtaining better treatment.

Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases of provision, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable so soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

111. The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such a flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and 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.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offence,

great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115. 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 engagement.

116. Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII

The Parole.

119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120. The term *parole* designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121. The pledge of the parole is always an individual but not a private act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125. When paroles are given and received, there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individual giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battle-field, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

129. In capitulations for the surrender of strong places or fortified camps, the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131. If the government does not approve of the parole, the

paroled officer must return into captivity; and should the enemy refuse to receive him, he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army; and upon their failure to give it, he may arrest, confine, or detain them.

SECTION VIII.

Armistice—Capitulation.

135. An armistice is the cessation of active hostilities for a period agreed upon between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared, without conditions, it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137. An armistice may be general, and valid for all points and lines of the belligerents; or special—that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary

to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, do in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends; but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

142. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works, as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of defence within the place during an armistice, this point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition, in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145. When an armistice is clearly broken by one of the parties, the other party is released from all obligations to observe it.

146. Prisoners, taken in the act of breaking an armistice, must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice: in the latter case, the war is carried on without any abatement.

SECTION IX.

Assassination.

148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism.

SECTION X.

Insurrection—Civil war—Rebellion.

149. Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

151. The term *rebellion* is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same who seek to throw off their allegiance to it, and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife, and settles the future relations between the contending parties.

154. Treating, in the field, the rebellious enemy according to the law and usages of war, has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155. All enemies in regular war are divided into two general classes; that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize

with the rebellion, without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy, without being bodily forced thereto.

156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war, as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him, that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law, and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops, is levying war against the United States, and is therefore treason.

PAPERS CARRIED BY VESSELS IN EVIDENCE OF THEIR
NATIONALITY, AND OTHER PAPERS WHICH
OUGHT TO BE FOUND ON BOARD.

Austria.

Papers evidencing nationality:

Patente sovrana (royal license).

Sccontrino ministeriale (certificate of registry).

Other papers carried:

Giornale di navigazione (official log book).

Scartafaccio, giornale di navigazione quotidiano (ship's log book).

Ruolo del equipaggio (muster roll).

Manifest of cargo and bills of lading.

Charter party, if the vessel is chartered.

Belgium.

Lettre de mer (sea letter).

Rôle d'équipages.

Registre de certificat de jaugeage (certificate of registry).

Log book.

Manifest of cargo.

Les connaissements (bills of lading).

Acte de propriété.

Charter party.

Brazil.

Papers evidencing nationality:

Carta de registro (certificate of registry).

Passé especial (special pass), issued to Brazilians out of the empire by the minister or consul in foreign country, and constituting provisional proof of nationality.

Other papers carried:

Passport.

Muster roll.

Manifest of cargo.

Bills of lading.

Denmark.**Evidence of nationality:**

Registering certifikat (certificate of registry and nationality).

Provisional certificate of registry issued by governors of possessions abroad, or by consuls.

The letters "D. E." (Dansk Eiendom) must be burnt into the main beam in the after part of the main hatchway.

Papers carried, other than those above mentioned:

Royal passport, in Latin, with translation, available only for the voyage for which it is issued, unless renewed by attestation.

Certificate of ownership.

Build-brief (certificate of build).

Admeasurement brief,

Burgher-brief (certificate that the master has burgher rights in some town of the kingdom).

Muster roll,

Charter party, if the vessel is chartered.

France.**Papers evidencing nationality:**

L'acte de francisation (certificate of nationality).

Acte de francisation provisoire.

Other papers which must be carried under the provisions of the Code de Commerce:

Congé (sailing license).

Le rôle d'équipage.

L'acte de propriété de navire.

Les connaissements et charte-parties.

Les procès-verbaux de visite.

Les acquits de paiement ou à caution.

Manifest of cargo and inventory of ship's fitting and stores.

Germany.**Papers evidencing nationality:**

Schiffs-Certifikat (certificate of nationality).

Flaggen-Attest (provisional certificate of nationality).

Germany—Continued.**Other papers carried:**

Messbrief (certificate of measurement).

Beilbrief (builder's certificate).

See-Pass (sailing license).

Journal (ship's log book).

Musterrolle (muster roll).

Charter party, if the vessel is chartered.

Great Britain.**Paper evidencing nationality:**

Certificate of registry, or provisional certificate granted by a consul resident in a foreign country to a vessel brought there. The provisional certificate is good for six months from the date of issue. A pass granted to a vessel before registration, enabling her to go from one port to another within the British dominions, has also the force of a certificate.

Other papers carried:

Official log book.

Ship's log book.

Shipping articles,

Muster roll.

Manifest of cargo.

Bills of lading.

Charter party, if the vessel is chartered.

Greece.**Paper evidencing nationality:**

Certificate of nationality.

Other papers carried:

Congé or passport.

Inventory of ship's fittings.

Certificate of tonnage,

Muster roll,

Description of visits to which the ship has been subjected.

Log book.

Bill of health.

Italy.**Paper evidencing nationality:**

Alto di nazionalita (certificate of nationality).

Other papers carried:

Giornale di navigazione (official log book).

Scartafaccio, giornale di navigazione quotidiano (ship's log book).

Ruolo dell' equipaggio (muster roll).

Manifest of cargo and bills of lading.

Charter party, if the vessel is chartered.

Netherlands.

Zeebrief (sailing license).

Voorloopige Zeebrief (provisional sailing license).

Buitengevone Zeebrief (extraordinary sailing license).

Bijlbrief (certificate of ownership).

Meetbrief (certificate of tonnage).

Journal (ship's log book).

Monster-roll (muster roll).

Manifest of cargo and bills of lading.

Charter party, if the vessel is chartered.

Norway.**Papers evidencing nationality:**

Nationalitetsbreviis (certificate of nationality).

Provisional certificate granted by a consul.

Other papers carried:

Bulbrev (certificate of build).

Maalebrev (certificate of measurement).

N. B. The bulbrev and the maalebrev need not be carried by vessels for two years after purchase.

Mandskabliste (muster roll).

Journale (ship's log book).

Manifest of cargo and bills of lading.

Charter party, if the vessel is chartered.

Russia.**Evidence of nationality:**

Patent authorizing the use of the Russian flag.

The fact that the master and half the crew are Russian.

N. B. The patent is not conclusive evidence in itself, because it can be granted, though it is not commonly granted, to foreign ships.

Papers which must be carried by Russian ships:

The patent above mentioned.

Beilbrief (builder's certificate).

Customhouse passport.

Other papers carried:

Ship's log book,

Muster roll.

Charter party, if the vessel is chartered.

Spain.**Paper evidencing nationality;**

La patente o pasaporte de navegacion.

Other papers carried;

El rol del equipage y lista de pasajeros.

Testimonio de la escritura de propiedad de la nave.

Contrato de fletamento.

Conocimientos, facturas y guias de la carga.

Sweden.

A passport from a chief magistrate or commissioner of customs.

Bilbrief (builder's certificate).

Matebref (certificate of measurement).

Fribref (certificate of registry).

Journalen (ship's log book),

Folkpass or sjomansrubla (muster roll).

Charter party, if the vessel is chartered.

United States.**Papers evidencing nationality;**

Certificate of registry.

Provisional certificate of registry issued by a consul.

United States—Continued.**Other papers carried:**

- Sea letter, or certificate of ownership.
- Ship's log book,
- Shipping articles.
- Muster roll.
- Bill of health.
- Charter party, if the vessel is chartered.

THE DECLARATION OF PARIS.

Declaration Respecting Maritime Law, Signed by the Plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey Assembled in Congress at Paris, April 16, 1856.

The Plenipotentiaries who signed the Treaty of Paris on the 30th of March, 1856, assembled in conference, considering:

That Maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law, and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their governments are animated than by seeking to introduce into international relations fixed principles in this respect:

The above-mentioned Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn declaration:

1. Privateering is, and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
4. 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.

The governments of the undersigned Plenipotentiaries engage to bring the present Declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their governments to obtain the general adoption thereof will be crowned with full success.

The present declaration is not and shall not be binding, except between those powers who have acceded, or shall accede to it.

Done at Paris, April 16, 1856.

THE DECLARATION OF ST. PETERSBURG.

“Considering that the progress of civilization should have the effect of alleviating, as much as possible, the calamities of war;

“That the only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy;

“That for this purpose, it is sufficient to disable the greatest possible number of men;

“That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

“That the employment of such arms would, therefore, be contrary to the laws of humanity;

“The contracting parties engage, mutually, to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances.

“They agree to invite all the states which have not taken part in the deliberations of the International Military Commission, assembled at St. Petersburg, by sending delegates thereto, to accede to the present engagement.

“This engagement is obligatory only upon the contracting or acceding parties thereto, in case of war between two or more of themselves; it is not applicable with regard to non-contracting powers, or powers that shall not have acceded to it.

“It will also cease to be obligatory from the moment when, in a war between contracting or acceding parties, a non-contracting party, or a non-acceding party, shall join one of the belligerents.

“The contracting or acceding parties reserve to themselves the right to come to an understanding, hereafter, whenever a precise proposition shall be drawn up, in view of future improvements which may be effected in the armament of troops, in order to maintain the principles which they have established, and to reconcile the necessities of war with the laws of humanity.”

THE GENEVA CONVENTION FOR THE AMELIORATION OF
THE CONDITION OF THE SICK AND WOUNDED
OF ARMIES IN THE FIELD.

Article I. Ambulances and military hospitals shall be acknowledged to be neuter, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein. Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

Art. II. Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality, while so employed, and so long as there remain any wounded to bring in or to succor.

Art. III. The persons designated in the preceding articles may, even after occupation by the enemy, continue to fulfill their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong.

Under such circumstances, when these persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

Art. IV. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property.

Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

Art. V. Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free. The generals of the belligerent powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and the neutrality which will be the consequence of it.

Any wounded man entertained or taken care of in a house shall be considered a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the

quartering of troops, as well as from a part of the contributions of war which may be imposed.

Art. VI. Wounded or sick soldiers shall be entertained or taken care of, to whatever nation they may belong.

Commanders-in-chief shall have the power to deliver immediately, to the outposts of the enemy, soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties.

Those who are recognized, after their wounds are healed, as incapable of serving, shall be sent back to their own country.

The others may also be sent back, on condition of not bearing arms during the continuance of the war.

Evacuations, together with the persons under whose direction they shall take place, shall be protected by an absolute neutrality.

Art. VII. A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations. It must on every occasion be accompanied by the national flag. An arm badge (brassard) shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority.

The flag and arm badge shall bear a red cross on a white ground.

Art. VIII. The details of execution of the present convention shall be regulated by the commanders-in-chief of belligerent armies, according to the instructions of their respective governments, and in conformity with the general principles laid down in this convention.

Art. IX. The high contracting powers have agreed to communicate the present convention to those governments which have not found it convenient to send plenipotentiaries to the International Convention at Geneva, with an invitation to accede thereto; the protocol is for that purpose left open.

Art. X. The present convention shall be ratified, and the ratifications exchanged at Berne, in four months, or sooner if possible.

THE LAWS OF WAR ON LAND.

Recommended for Adoption by the Institute of International Law
at Its Session in Oxford, September 9, 1880.

PART FIRST.

General Principles.

1. The state of war does not admit of acts of violence, save between the armed forces of belligerent states. Individuals who form no part of a belligerent armed force should abstain from such acts.

This rule implies a distinction between the individuals who compose the armed force of a state and its other citizens or subjects. A precise definition of the term "armed force" is therefore necessary.

2. The armed force of a state includes:

(1) The army proper, or permanent military establishment, including the militia and reserve forces.

(2) The national guard, landsturm, free corps, and other bodies which fulfill the three following conditions; i. e.:

(a) They must be under the direction of responsible chiefs.

(b) They must have a uniform, or distinguishing mark, or badge, recognizable at a distance, and worn by individuals composing such corps.

(c) They must carry arms openly.

(3) The crews of public armed ships, and other vessels used for warlike purposes.

(4) The inhabitants of non-occupied territory, who, at the approach of the enemy, take arms openly and spontaneously to resist an invader, even if they have not had time to organize.

3. Every belligerent armed force must carry on its military operations in accordance with the laws of war.

The only legitimate end that a state may have in war is to weaken the military strength of the enemy.

4. The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain

from all needless severity, as well as from all perfidious, unjust, or tyrannical acts.

5. Agreements made between belligerents during the continuance of war, such as armistices, capitulations, and the like, are to be scrupulously observed and respected.

6. No invaded territory is to be regarded as conquered until the end of the war. Until that time the invader exercises, in such territory, only a *de facto* power, essentially provisional in character.

PART SECOND.

Application of General Principles.

I. HOSTILITIES.

A. RULES OF CONDUCT WITH REGARD TO INDIVIDUALS.

(a) *Inoffensive Populations.*

The Contest Being Carried on by "Armed Forces" Only.

7. It is forbidden to deal harshly with inoffensive populations.

(b) *Means of Injuring the Enemy.*

8. It is forbidden,

(a) To make use of poison, in any form whatever.

(b) To make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay, or by feigning to surrender.

(c) To attack an enemy by concealing the distinctive signs of an armed force.

(d) To use improperly the national flag, uniform, or other distinctive signs of the enemy; the flag of truce, or the distinctive signs of the Geneva Convention.

9. It is forbidden,

(a) To employ arms, projectiles, or materials of any kind, calculated to cause needless suffering, or to aggravate wounds—notably projectiles of less weight than four hundred grammes (fourteen ounces avoirdupois), which are explosive, or are charged with fulminating or explosive substances.

(b) To kill or injure an enemy who has surrendered, or who is disabled; or to declare in advance that quarter will not be given, even by those who do not ask it themselves.

(c) The Sick and Wounded, and the Sanitary Service.

The following provisions, extracted from the Geneva Convention, exempt the sick and wounded, and the personnel of the sanitary service, from many of the needless hardships to which they were formerly exposed:

10. Wounded or sick soldiers shall be collected together and cared for, to whatever nation they may belong.

11. Commanders-in-chief shall have power to deliver, immediately, to the outposts of the enemy, soldiers who have been wounded in an engagement, when circumstances are such as to permit this to be done, and with the consent of both parties. Those who are recognized after their wounds are healed, as incapable of serving, shall be sent back to their own country. The others may also be sent back, on condition of not again bearing arms during the continuance of the war. Evacuations, together with the persons under whose direction they take place, shall be protected by an absolute neutrality.

12. Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, and the duly accredited agents of relief associations, who are authorized to assist the regular sanitary staff, shall participate in the benefit of neutrality while so employed, and so long as there remain any wounded to bring in or to succor.

13. The persons designated in the preceding article should, even after occupation by the enemy, continue to attend, according to their needs, the sick and wounded in the hospital, or ambulance, to which they are attached.

14. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall only be allowed to delay, for a short time, in case of military necessity.

15. Suitable arrangements should be made to assure to neutralized persons, who have fallen into the hands of the enemy, the enjoyment of suitable salaries.

16. An arm-badge (brassard) shall be worn by neutralized individuals, but the delivery thereof shall be regulated by military authority.

17. The commanding generals of the belligerent powers should ap-

peal to the humanity of the inhabitants, and should endeavor to induce them to assist the wounded, by pointing out to them the advantages that will result from so doing. They should regard as inviolable those who respond to this appeal.

(d) *The Dead.*

18. It is forbidden to rob, or mutilate, the bodies of the dead lying on the field of battle.

19. The bodies of the dead should not be buried until they have been carefully examined, and all articles which may serve to fix their identity, such as names, medals, numbers, pocket-books, etc., shall have been secured. The articles thus collected, from the bodies of the enemy's dead, should be transmitted to their army or government.

(e) *Who may be Made Prisoners of War.*

20. Individuals who form a part of the belligerent armed force of a state, if they fall into the hands of the enemy, are to be treated as prisoners of war, in conformity with articles 61-78 of these instructions. The same rule is observed in the case of messengers who carry official despatches openly; and towards aeronauts charged with observing the operations of an enemy, or with the maintenance of communications between the various parts of an army, or theatre of military operations.

21. Individuals who accompany an army, but who are not a part of the regular armed force of the state, such as correspondents, traders, sutlers, etc., and who fall into the hands of the enemy, may be detained for such length of time only as is warranted by strict military necessity.

(f) *Spies.*

22. Spies, captured in the act, cannot demand to be treated as prisoners of war.

23. An individual may not be regarded as a spy, however, who, belonging to the armed force of either belligerent, penetrates, without disguise, into the zone of military operations of the enemy. Nor does the term apply to aeronauts, or to couriers, or messengers,

who carry openly, and without concealment, the official dispatches of the enemy.

24. No person, charged with being a spy, shall be punished for that offense, until the fact of his guilt shall have been established before a competent military tribunal.

25. A spy who succeeds in quitting the territory occupied by an enemy, incurs no penalty for his previous offense, should he at any future time fall into the hands of that enemy.

(g) *Flags of Truce.*

26. The bearer of a flag of truce, who, with proper authority from one belligerent, presents himself to the other, for the purpose of communicating with him, is entitled to complete inviolability of person.

27. He may be accompanied by a drummer or trumpeter, by a color-bearer, and, if need be, by a guide and interpreter, all of whom shall be entitled to a similar inviolability of person.

28. The commander to whom a flag is sent, is not obliged to receive the flag under all circumstances.

29. The commander who receives a flag has a right to take such precautionary measures as will prevent his cause from being injured by the presence of an enemy within his lines.

30. If the bearer of a flag of truce abuse the trust reposed in him, he may be temporarily detained, and, if it be proven that he has taken advantage of his position to abet a treasonable act, he forfeits his character of inviolability.

B. RULES OF CONDUCT WITH REGARD TO THINGS.

(a) *Means of Injuring the Enemy—Bombardments.*

Certain precautions are made necessary, by the rule that a belligerent must abstain from useless severity. In accordance with this principle,

31. It is forbidden

(a) To pillage, even places taken by assault.

(b) To destroy public or private property, unless such destruction be commanded by urgent military necessity.

(c) To attack, or bombard, open or undefended towns.

32. The commander of an attacking force, save in cases of open assault shall, before undertaking a bombardment, make due effort to give notice of his intention to the local authorities.

33. In cases of bombardments all needful measures shall be taken to spare, if it be possible to do so, buildings devoted to religion and charity, to the arts and sciences, hospitals, and depots of sick and wounded. This on condition, however, that such places be not made use of, directly or indirectly, for purposes of defence.

34. It is the duty of the besieged to designate such buildings by suitable marks or signs, indicated, in advance, to the besieger.

(b) *Sanitary Establishments.*

The arrangements for the relief of the wounded, which are made the subject of article 10 et seq. of the Geneva Convention, would be inadequate to their purpose, were not sanitary establishments granted equal protection. Hence, in accordance with the rules of the Geneva Convention,

35. Ambulances and military hospitals are recognized as neutral, and, as such, are to be protected by belligerents, so long as any sick or wounded remain therein.

36. The same rule applies to buildings, or parts of buildings, in which the sick or wounded are gathered together or cared for.

37. The neutrality of hospitals and ambulances ceases if they are guarded by a military force. This does not preclude the presence of an adequate police force.

38. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away articles but such as are their private property. Under the same circumstances, an ambulance shall, on the contrary, retain its equipment.

39. Under the circumstances foreseen in the above paragraphs, the term "ambulance" is applied to field hospitals, and other temporary establishments, which follow the troops on the field of battle to receive the sick and wounded.

40. A distinctive and uniform flag is adopted for ambulances, hospitals, and evacuations. It bears a red cross on a white ground. It must, on all occasions, be accompanied by the national flag.

II. OCCUPIED TERRITORY.

A. DEFINITION.

41. Territory is regarded as occupied when, as the consequence of its invasion by the enemy's forces, the state from which it has been taken has ceased, in fact, to exercise there its regular authority, and the invading state, alone, finds itself able to maintain order therein. The limits within which this state of affairs exists determine the extent and duration of the occupation.

B. RULES OF CONDUCT WITH RESPECT TO PERSONS.

42. It is the duty of the occupying military authority to inform the inhabitants, at the earliest practicable moment, of the powers that he exercises, as well as to define the limits of the occupied territory.

43. The occupying authority should take all due and needful measures to assure order and public tranquillity.

44. To that end the invader should maintain the laws in force in the territory in time of peace, and should not modify, suspend, or replace them, unless it becomes absolutely necessary to do so.

45. The administrative officials and civil employees, of every grade, who consent to continue in the performance of their duties, should be supported and protected by the occupying authority. Their appointments are always revocable, and they have the right to resign their places at any time. They should be subjected to penalties only when they fail to perform the duties freely accepted by them, and should be given over to justice only when they have betrayed them.

46. In case of urgency, the invader may demand the co-operation of the inhabitants, to enable him to provide for the necessities of local administration.

47. The population of an invaded district cannot be compelled to swear allegiance to the hostile power; but individuals who commit acts of hostility against the occupying authority are punishable.

48. The inhabitants of an occupied territory, who do not submit to the orders of the occupying authority, may be compelled to do

so. The invader, however, cannot compel the inhabitants to assist him in his works of attack or defence, or to take part in military operations against their own country.

49. Family honor and rights, the lives of individuals, as well as their religious convictions, and the right of religious worship should be respected.

C. RULES OF CONDUCT WITH REGARD TO PROPERTY.

(a) *Public Property.*

Although the authority of the invader replaces that of the government of the occupied territory, his power is not absolute. So long as the fate of the territory remains in suspense—that is, until the peace—the invader is not free to dispose of property which still belongs to the enemy, and which is not of direct use to him in his military operations. From these principles the following rules are deduced:

50. The occupying authority may seize only the cash, public funds, and bills due or transferable, belonging to the state in its own right, depots of arms and supplies, and, in general, the movable property of the state, of such character as to be useful in military operations.

51. Means of transportation (railways, boats, etc.), as well as telegraph lines and landing cables, can only be appropriated to the use of the invader. Their destruction is forbidden, unless it be commanded by military necessity. They are to be restored, at the peace, in the condition in which they are at that time.

52. The invader can only act in the capacity of a provisional administrator in respect to real property; such as buildings, forests, agricultural establishments, etc., belonging to the enemy's state. He should protect these properties and see to their maintenance.

53. The property of communes, and that of establishments devoted to religious worship, and to the arts and sciences, cannot be seized. All destruction, or intentional defacement of such establishments, of historic monuments or archives, or of works of science or art, is formally prohibited, save when commanded by urgent military necessity.

(b) *Private Property.*

If the powers of the invader are limited with respect to the public property of the enemy's state, with greater reason are they limited with respect to the private property of individuals.

54. Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only under the limitations contained in the following articles:

55. Means of transportation (railways, boats, etc.), telegraphs, factories of arms and munitions of war, although belonging to private individuals or corporations, may be seized by an invader, but must be restored at peace; if possible, with suitable indemnities.

56. Impositions in kind (requisitions), levied upon communes, or the residents of invaded districts, should bear direct relation to the generally recognized necessities of war, and should be in proportion to the resources of the district. Requisitions can only be made, or levied, with the authority of the commanding officer of the occupied district.

57. The invader may levy, in the way of dues and imposts, only such as are already established for the benefit of the state revenues. He employs them to defray the expenses of administration of the occupied territory, contributing in the same proportion in which the legal government was bound.

58. The invader cannot levy extraordinary contributions of money, save as an equivalent for fines, or imposts not paid, or for payments not made in kind. Contributions in money can only be imposed by the order, and upon the responsibility, of the general-in-chief, or that of the superior civil authority established in the occupied territory; and then, as nearly as possible, in accordance with the rule of apportionment and assessment of existing imposts.

59. In the apportionment of burdens relating to the quartering of troops, and in the levying of requisitions and contributions of war, account is to be made of the charitable zeal displayed by the inhabitants in behalf of the wounded.

60. Impositions in kind, when they are not paid for in cash, and contributions of war, are authenticated by receipts. Measures should be taken to assure the regularity and bona fide character of these receipts.

III. PRISONERS OF WAR.

The confinement of prisoners of war is not in the nature of a penalty for crime; neither is it an act of vengeance. It is a temporary detention only, entirely without character. In the following provisions, therefore, regard has been had to the consideration due them as prisoners, and to the necessity of their secure detention.

61. Prisoners of war are the prisoners of the captor's government, and not of the individuals or corps who captured them.

62. They are subject to the laws and regulations in force in the army of the enemy.

63. They must be treated with humanity.

64. All articles in their personal possessions, arms excepted, remain their private property.

65. Every prisoner of war is obliged to disclose, when duly interrogated upon the subject, his true name and grade. Should he fail to do so, he may be deprived of all, or a part, of the privileges accorded to prisoners of his rank and station.

66. Prisoners of war may be confined in towns, fortresses, camps, or other places, with an obligation not to go beyond certain specific limits; but they may only be imprisoned as an indispensable measure of security.

67. Every act of insubordination, on the part of a prisoner of war, authorizes the resort to suitable measures of severity on the part of the government in whose hands he is.

68. Prisoners of war attempting to escape may, after having been summoned to halt or surrender, be fired upon. If an escaped prisoner be recaptured, before being able to rejoin his own army or to quit the territory of his captor, he is only liable to disciplinary penalties; or he may be subjected to a more rigorous confinement. If, after having successfully effected his escape, he is again made a prisoner, he incurs no penalty for his previous escape. If, however, the prisoner so recaptured, or retaken, has given his parole not to attempt to escape, he may be deprived of his rights as a prisoner of war.

69. The government, having prisoners of war in its hands, is obliged to support them. If there be no agreement between the belligerents upon this point, prisoners of war are placed, in all matters

regarding food and clothing, upon the peace footing of the troops of the state which holds them in captivity.

70. Prisoners cannot be compelled to take any part whatsoever in operations of war. Neither can they be compelled to give information concerning their army or country.

71. They may be employed upon public works that have no direct connection with the captor's military operations; provided, however, that such labor is not detrimental to health, nor humiliating to their military rank, if they belong to the army; or to their official or social position, if they are civilians, not connected with any branch of the military service.

72. In the event of their being authorized to engage in private industries, their pay for such services may be collected by the authority in charge of them. The sums so received may be employed in bettering their condition, or may be paid to them, at their release, subject to deduction, if that course is deemed expedient, of the expense of their maintenance.

IV. TERMINATION OF CAPTIVITY.

The right of detaining individuals in captivity exists only during the continuance of hostilities. Hence:

73. The captivity of prisoners of war ceases, as a matter of right, at the conclusion of peace; but their liberation is then regulated by agreement between the belligerents.

74. Captivity also ceases, in so far as sick or wounded prisoners are concerned, so soon as they are found to be unfit for military service. It is the duty of the captor, under such circumstances, to send them back to their country.

75. During the continuance of hostilities, prisoners of war may be released in accordance with cartels of exchange, agreed upon by the belligerents.

76. Without formal exchange, prisoners may be liberated on parole, provided they are not forbidden, by their own government, to give paroles. In such a case they are obliged, as a matter of military honor, to perform, with scrupulous exactness, the engagements which they have freely undertaken, and which should be clearly specified. On its part, their own government should not

demand, or accept from them, any service contrary to, or inconsistent with, their plighted word.

77. A prisoner of war cannot be constrained to accept a release on parole. For a similar reason, the enemy's government is not obliged to accede to the demand of a prisoner of war to be released on parole.

78. Every prisoner of war, liberated on parole, who is recaptured in arms against the government to which he has given such parole, may be deprived of his rights and privileges as a prisoner of war; unless, since his liberation, he has been included in an unconditional exchange of prisoners.

V. TROOPS INTERNED IN NEUTRAL TERRITORY.

It is universally admitted that a neutral state cannot, without compromising its neutrality, lend aid to either belligerent, or permit them to make use of its territory. On the other hand, considerations of humanity dictate that asylum should not be refused to individuals who take refuge in neutral territory to escape death or captivity. From these principles the following provisions are deduced. They are calculated to reconcile, to some extent, the opposing interests involved.

79. It is the duty of a neutral state, within whose territory commands, or individuals, have taken refuge, to intern them at points as far removed as possible from the theater of war. It should pursue a similar course towards those who make use of its territory for warlike operations, or to render military aid to either belligerent.

80. Interned troops may be guarded in camps, or fortified places. The neutral state decides whether officers are to be released, on parole, by taking an engagement not to quit neutral territory without authority.

81. In the event of there being no agreement with the belligerents concerning the maintenance of interned troops, the neutral state shall supply them with food and clothing, and the immediate aid demanded by humanity. It also takes such steps as it deems necessary to care for the arms and other public property brought into its territory by the interned troops. When peace has been concluded, or sooner, if possible, the expenses occasioned by the internment are reimbursed to the neutral state, by the belligerent state to whom the interned troops belong.

82. The provisions of the Geneva Convention of August 22, 1864 (articles 10-18, 35-40, 59 & 74 above given), are applicable to the sanitary staff, as well as to the sick and wounded, who take refuge in, or are conveyed to, neutral territory.

83. Evacuations of sick and wounded, not prisoners of war, may pass through neutral territory, provided the *personnel* and material accompanying them are exclusively sanitary. It is the duty of the neutral state, through whose territory the evacuation is made, to take such measures of safety and necessary control as it may deem necessary to the rigorous performance of its neutral duty.

PART THIRD.

Penal Sanction.

If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are.

84. Offenders against the laws of war are liable to the punishments specified in the penal or criminal law.

This mode of repression, however, is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless, and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other resource remains than a resort to reprisals. Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rules of war, without reciprocity on the part of the enemy. This necessary rigor, however, is modified, to some extent, by the following restrictions:

85. Reprisals are formally prohibited in all cases in which the injury complained of has been repaired.

86. In all cases of serious importance, in which reprisals appear to be absolutely necessary, they shall not exceed, in kind or degree, nor in their mode of application, the exact violation of the law of war committed by the enemy. They can only be resorted to with the express authority of the general-in-chief. They must conform, in all cases, to the laws of humanity and morality.

ACTES DE LA CONFÉRENCE

DE

BRUXELLES, 1874.

No. III.

PROJET

présenté dans la séance du 31 Juillet, par M. le premier Délégué de Belgique, concernant les prisonniers de guerre, les non-combattants et les blessés, les belligérants internés et les blessés soignés chez les neutres. (Voir Prot. No. II.)

CHAPITRE Ier.

Des prisonniers de guerre.

ARTICLE PREMIER.

Les prisonniers de guerre ne sont pas des criminels, mais des ennemis légaux et désarmés. Ils sont au pouvoir du Gouvernement ennemi, mais non des individus ou des corps qui les ont capturés. Ils ne doivent être l'objet d'aucune violence ou mauvais traitement.

ART. 2.

Les prisonniers de guerre sont assujettis à l'internement dans une ville, forteresse, camp ou localité quelconque, avec obligation de ne pas s'en éloigner au delà de certaines limites déterminées.

ART. 3.

Les prisonniers de guerre peuvent être employés à certains travaux publics qui ne soient pas exténuants ou humiliants pour leur grade et la position sociale qu'ils occupent dans leur pays et qui, en même temps, n'aient pas un rapport direct avec les opérations de guerre entreprises contre leur patrie ou contre ses alliés. Leur sa-

laire servira à améliorer leur position, ou leur sera compté au moment de leur libération.

Ils pourront également, en se conformant aux dispositions réglementaires, et fixer par l'autorité militaire, prendre part aux travaux de l'industrie privée.

ART. 4.

Les prisonniers de guerre ne peuvent pas être astreints à prendre une part quelconque à la poursuite des opérations de guerre.

ART. 5.

Le Gouvernement au pouvoir duquel se trouvent les prisonniers de guerre est chargé de leur entretien. Les conditions de l'entretien des prisonniers de guerre sont, autant que possible, établies par une entente mutuelle entre les belligérants.

ART. 6.

Un prisonnier de guerre qui prend la fuite peut être tué pendant la poursuite, mais s'il est repris ou de nouveau fait prisonnier, il n'est passible d'aucune punition pour sa fuite; la surveillance dont il est l'objet seulement peut être renforcée.

ART. 7.

Les prisonniers de guerre ayant commis, durant leur captivité, des délits quelconques, peuvent être déférés aux tribunaux.

ART. 8.

Tout complot des prisonniers de guerre, en vue d'une fuite générale, ou bien contre les autorités établies au lieu de leur internement, est puni d'après les lois militaires.

ART. 9.

Chaque prisonnier de guerre est tenu par l'honneur de déclarer son véritable grade et, dans le cas où il enfreindrait cette règle, il encourrait une restriction de la jouissance des droits reconnus aux prisonniers de guerre.

ART. 10.

L'échange des prisonniers de guerre dépend entièrement des convenances des parties belligérantes et toutes les conditions de cet échange sont fixés par une entente mutuelle.

ART. 11.

Les prisonniers de guerre peuvent être mis en liberté sur parole, si le Gouvernement de leur pays les y autorise et, en pareil cas, ils sont obligés, sous la garantie de leur honneur personnel, de remplir scrupuleusement, tant vis-à-vis de leur propre Gouvernement que vis-à-vis de celui qui les a faits prisonniers, les engagements qu'ils auraient contractés.

ART. 12.

Un prisonnier de guerre ne peut pas être contraint à accepter sa liberté sur parole, de même que le Gouvernement ennemi n'est pas obligé d'accéder à la demande du prisonnier réclamant sa mise en liberté sur parole.

ART. 13.

Tout prisonnier de guerre, libéré sur parole et repris portant les armes contre le Gouvernement envers lequel il s'était engagé d'honneur, n'a plus qualité pour réclamer le traitement des prisonniers de guerre.

CHAPITRE II.

Des non-combattants et des blessés.

ART. 14.

Les malades et les blessés tombés entre les mains de l'ennemi sont considérés comme prisonniers de guerre et traités conformément à la Convention de Genève et aux articles additionnels suivants:

ART. 15.

Le fait que les hôpitaux et les ambulances sont protégés par un piquet ou des sentinelles, ne les prive pas de la neutralité; le piquet ou les sentinelles, s'ils sont capturés, sont seuls considérés comme prisonniers de guerre.

ART. 16.

Les personnes jouissant du droit de neutralité et mises dans la nécessité de recourir aux armes pour leur défense personnelle ne perdent point, par ce fait, leur droit à la neutralité.

ART. 17.

Les parties belligérantes sont tenues de prêter leur assistance aux personnes neutralisées afin de leur obtenir la jouissance de l'entretien qui leur est assigné par leur Gouvernement et, en cas de nécessité, de leur délivrer des secours comme avance sur cet entretien.

ART. 18.

Les non-combattants jouissant du droit de neutralité doivent porter un signe distinctif délivré par leur Gouvernement et, en outre, un certificat d'identité.

CHAPITRE III.

Des belligérants internés et des blessés soignés chez les neutres.

ART. 19.

Les officiers peuvent être laissés libres s'ils prennent l'engagement écrit de ne pas quitter le territoire neutre sans autorisation.

Les sous-officiers et les soldats doivent être internés, autant que possible, loin du théâtre de la guerre. Ils peuvent être gardés dans les camps et même renfermés dans les forteresses ou dans les lieux appropriés à cet effet, si l'on a des motifs sérieux de craindre qu'ils ne s'évadent.

ART. 20.

L'État neutre a le droit de mettre en liberté les prisonniers amenés par des troupes qui pénètrent sur son territoire.

ART. 21.

L'État neutre fournit aux internés des vivres et tous les secours commandés par l'humanité.

ART. 22.

L'État neutre ne procède à un échange d'internés, que de commun accord avec les États belligérants. Il en est de même de la levée de l'internement avant la conclusion de la paix définitive.

ART. 23.

Dès que le traité de paix est ratifié, les internés sont rendus à l'État auquel ils appartiennent, lequel est tenu de rembourser les dépenses qu'ils ont occasionnées.

L'État neutre restituera, en même temps, et sous la même condition, à l'État qui en est resté propriétaire, le matériel, les armes, munitions, effets d'équipement et autres objets amenés ou apportés, par les internés ou le prix de perte, s'il en a été disposé par suite d'une utilité évidente ou d'une commune entente.

ART. 24.

L'État neutre peut autoriser le passage par son territoire des blessés ou malades appartenant aux armées en guerre.

ART. 25.

L'État neutre a le droit d'accueillir chez lui des blessés ou malades à condition de les garder jusqu'à la conclusion de la paix. Ceux qui seraient estropiés au point d'être devenus impropres au service ou dès la convalescence seraient renvoyés dans leur pays dès que leur état le permettrait.

No. XVII.

PROJET D'UNE DÉCLARATION INTERNATIONALE CONCERNANT
LES LOIS ET COUTUMES DE LA GUERRE.

(Texte modifié par la Commission.)

De l'autorité militaire sur le territoire de l'État ennemi.

ARTICLE PREMIER.

Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie.

L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.

ART. 2.

L'autorité de pouvoir légal étant suspendue et ayant passée de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures

qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publique.

ART. 3.

(See article 3, page 400.)

ART. 4.

(See article 4, page 400.)

ART. 5.

L'armée d'occupation ne préleva que les impôts, redevances, droits et péages déjà établis au profit de l'État, ou leur équivalent, s'il est possible de les encaisser, et, autant que possible, dans la forme et suivant les usages existants. Elle les emploiera à pourvoir aux frais de l'administration dans la mesure où le Gouvernement légal du pays y était obligé.

ART. 6.

L'armée qui occupe un territoire ne pourra saisir que le numéraire, les fonds et les valeurs exigibles appartenant en propre à l'État, les dépôts d'armes, moyens de transport, magasins et approvisionnements et, en général, toute propriété mobilière de l'État de nature à servir au but de la guerre.

Le matériel des chemins de fer, les télégraphes de terre, les bateaux à vapeur et autres navires en dehors des cas régis par la loi maritime, de même que les dépôts d'armes et en général toute espèce de munitions de guerre, quoique appartenant à des Sociétés ou à des personnes privées, sont également des moyens de nature à servir au but de la guerre et qui peuvent ne pas être laissés par l'armée d'occupation à la disposition de l'ennemi. Le matériel des chemins de fer, les télégraphes de terre, de même que les bateaux à vapeur et autres navires susmentionnés, seront restitués et les indemnités réglées à la paix.

ART. 7.

(See article 7, page 401.)

ART. 8.

Les biens des communes, ceux des établissements consacrés aux cultes, à la charité et à l'instruction, aux arts et aux sciences, même appartenant à l'État, seront traités comme la propriété privée.

Toute saisie, destruction ou dégradation intentionnelle de semblables établissements, de monuments historiques, des oeuvres d'art ou de science, doit être poursuivie par les autorités compétentes.

Qui doit être reconnu comme partie belligérante; des combattants et des non-combattants.

ART. 9.

(See article 9, page 402.)

ART. 10.

(See article 10, page 402.)

ART. 11.

((See article 11, page 402.)

ART. 12.

(See article 12, page 402.)

ART. 13.

D'après ce principe sont notamment *interdits*:

- a. L'emploi du poison ou d'armes empoisonnées;
- b. Le meurtre par trahison d'individus appartenant à l'armée ennemie;
- c. Le meurtre d'un ennemi qui, ayant mis bas les armes ou n'ayant plus les moyens de se défendre, s'est rendu à merci;
- d. La déclaration qu'il ne sera pas fait de quartier;
- e. L'emploi d'armes, de projectiles ou de matières propres à causer des maux superflus, ainsi que l'usage des projectiles prohibés par la déclaration de St. Pétersbourg de 1868;
- f. L'abus du pavillon parlementaire, du pavillon national ou des insignes militaires et de l'uniforme de l'ennemi, ainsi que les signes distinctifs de la Convention de Genève;
- g. Toute destruction ou saisie de propriétés ennemies qui ne serait pas impérieusement commandée par la nécessité de la guerre.

ART. 14.

Les ruses de guerre et l'emploi des moyens nécessaires pour se procurer des renseignements sur l'ennemi et sur le terrain (sauf les dispositions de l'art. 36) sont considérés comme des moyens licites.

Des sièges et bombardements.**ART. 15.**

(See article 15, page 403.)

ART. 16.

(See article 16, page 403.)

ART. 17.

En pareil cas, toutes les mesures nécessaires doivent être prises pour épargner, autant qu'il est possible, les édifices consacrés aux cultes, aux arts, aux sciences et à la bienfaisance, les hôpitaux et les lieux de rassemblement de malades et de blessés à condition qu'ils ne soient pas employés en même temps à un but militaire.

Le devoir des assiégés est de désigner ces édifices par des signes visibles spéciaux et indiquer d'avance par l'assiégé.

ART. 18.

(See article 18, page 403.)

ART. 19.

(See article 19, page 404.)

ART. 20.

(See article 20, page 404.)

ART. 21.

(See article 21, page 404.)

ART. 22.

Les militaires qui ont pénétré dans la zone d'opérations de l'armée ennemie à l'effet de recueillir des informations, ne sont pas considérés comme espions, s'il a été possible de reconnaître leur qualité de militaires.

De même, ne doivent pas être considérés comme espions, s'ils sont capturés par l'ennemi: les militaires (et aussi les non-militaires accomplissant ouvertement leur mission) chargés de transmettre des dépêches destinées soit à leur propre armée, soit à l'armée ennemie.

A cette catégorie appartiennent également, s'ils sont capturés, les individus envoyés en ballon pour transmettre les dépêches, et, en

général, pour entretenir les communications entre les diverses parties d'une armée ou d'un territoire.

Des prisonniers de guerre.

ART. 23.

Les prisonniers sont les ennemis légaux et désarmés.

Ils sont au pouvoir du Gouvernement ennemi, mais non des individus ou des corps qui les ont capturés.

Ils doivent être traités avec humanité.

Tout acte d'insubordination autorise à leur égard les mesures de rigueur nécessaires.

Tout ce qui leur appartient personnellement, les armes exceptées, reste leur propriété.

ART. 24.

(See article 24, page 405.)

ART. 25.

(See article 25, page 405.)

ART. 26.

(See article 26, page 405.)

ART. 27.

Le Gouvernement au pouvoir duquel se trouvent les prisonniers de guerre se charge de leur entretien.

Les conditions de l'entretien des prisonniers de guerre peuvent être établies par une entente mutuelle entre les parties belligérantes.

À défaut de cette entente, et comme principe général, les prisonniers de guerre seront traités pour la nourriture et l'habillement sur le même pied que les troupes du Gouvernement qui les aura capturés.

ART. 28.

(See article 28, page 405.)

ART. 29.

Chaque prisonnier de guerre est tenu de déclarer, s'il est interrogé à ce sujet, ses véritables noms et grade et, dans le cas où il enfreindrait cette règle, il encourrait une restriction des avantages accordés aux prisonniers de guerre de sa catégorie.

APPENDIX.

ART. 30.

(See article 30, page 406.)

ART. 31.

(See article 31, page 406.)

ART. 32.

(See article 32, page 406.)

ART. 33.

(See article 33, page 406.)

ART. 34.

(See article 34, page 406.)

ART. 35.

(See article 35, page 407.)

ART. 36.

(See article 36, page 407.)

ART. 37.

La population de territoires occupés ne peut être contrainte de prêter serment à la puissance ennemie.

ART. 38.

(See article 38, page 407.)

ART. 39.

(See article 39, page 407.)

ART. 40.

(See article 40, page 407.)

ART. 41.

(See article 41, page 408.)

ART. 42.

(See article 42, page 408.)

ART. 43.

(See article 43, page 408.)

ART. 44.

(See article 44, page 408.)

ART. 45.

(See article 45, page 409.)

ART. 46.

(See article 46, page 409.)

ART. 47.

(See article 47, page 409.)

ART. 48.

(See article 48, page 409.)

ART. 49.

(See article 49, page 409.)

ART. 50.

(See article 50, page 409.)

ART. 51.

(See article 51, page 410.)

ART. 52.

La violation des clauses de l'armistice par des particuliers, sur leur initiative personnelle, donne droit seulement à réclamer la punition des coupables et, s'il y a lieu, une indemnité pour les pertes éprouvées.

Des belligérants internés et des blessés soignés chez les neutres.

ART. 53.

(See article 53, page 410.)

ART. 54.

À défaut de convention spéciale, l'État neutre qui reçoit des troupes belligérantes fournira aux internés les vivres, les habillements et les secours commandés par l'humanité.

Bonification sera faite à la paix des frais occasionnés par l'internement.

ART. 55.

(See article 55, page 410.)

ART. 56.

(See article 56, page 410.)

No. XXIII.

PROJET D'UNE DÉCLARATION INTERNATIONALE CONCERNANT
LES LOIS ET COUTUMES DE LA GUERRE.

(Texte modifié par la Conférence. Voir protocole des séances plénières No. IV.)

De l'autorité militaire sur le territoire de l'État ennemi.

ARTICLE PREMIER.

Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie. L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.

ART. 2.

L'autorité du pouvoir légal étant suspendue et ayant passée de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publique.

ART. 3.

A cet effet, il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifiera, ne les suspendra ou ne les remplacera que s'il y a nécessité.

ART. 4.

Les fonctionnaires et les employés de tout ordre qui consentiraient, sur son invitation, à continuer leurs fonctions, jouiront de sa protection. Ils ne seront révoqués ou punis disciplinairement que s'ils manquent aux obligations acceptées par eux et livrés à la justice que s'ils les trahissent.

ART. 5.

L'armée d'occupation ne préleva que les impôts, redevances, droits et péages déjà établis au profits de l'État, ou leur équivalent, s'il est impossible de les encaisser, et, autant que possible dans la forme et suivant les usages existants. Elle les emploiera à pourvoir aux frais de l'administration du pays dans la mesure ou le Gouvernement légal y était obligé.

ART. 6.

L'armée qui occupe un territoire ne pourra saisir que le numéraire, les fonds et les valeurs exigibles appartenant en propre à l'État, les dépôts d'armes, moyens de transport, magasins et approvisionnements et, en général, toute propriété mobilière de l'État de nature à servir aux opérations de la guerre.

Le matériel des chemins de fer, les télégraphes de terre, les bateaux à vapeur et autres navires en dehors des cas régis par la loi maritime, de même que les dépôts d'armes et en général toute espèce de munitions de guerre, quoique appartenant à des Sociétés ou à des personnes privées, sont également des moyens de nature à servir aux opérations de la guerre et qui peuvent ne pas être laissés par l'armée d'occupation à la disposition de l'ennemi. Le matériel des chemins de fer, les télégraphes de terre, de même que les bateaux à vapeur et autres navires susmentionnés, seront restitués et les indemnités réglées à la paix.

ART. 7.

L'État occupant ne se considérera que comme administrateur et usufruitier des édifices publics, immeubles, forêts et exploitations agricoles appartenant à l'État ennemi et se trouvant dans le pays occupé. Il devra sauvegarder le fond de ces propriétés et les administrer conformément aux règles de l'usufruit.

ART. 8.

Les biens des communes, ceux des établissements consacrés aux cultes, à la charité et à l'instruction, aux arts et aux sciences, même appartenant à l'État, seront traités comme la propriété privée.

Toute saisie, destruction ou dégradation intentionnelle de sembla-

bles établissements, de monuments historiques, d'oeuvres d'art ou de sciences, doit être poursuivi par les autorités compétentes.

ART. 9.

Les lois, les droits et les devoirs de la guerre ne s'appliquent pas seulement à l'armée, mais encore aux milices et aux corps de volontaires réunissant les conditions suivantes :

- (1) D'avoir à leur tête une personne responsable pour ses subordonnés;
- (2) D'avoir un signe distinctif fixe et reconnaissable à distance;
- (3) De porter les armes ouvertement, et
- (4) De se conformer dans leur opérations aux lois et coutumes de la guerre.

Dans les pays où les milices constituent l'armée ou en font partie, elles sont comprises sous la dénomination d'armée.

ART. 10.

La population d'un territoire non occupé qui, à l'approche de l'ennemi, prend spontanément les armes pour combattre les troupes d'invasion sans avoir eu le temps de s'organiser conformément à l'article 9, sera considérée comme belligérante si elle respecte les lois et coutumes de guerre.

ART. 11.

Les forces armées des parties belligérantes peuvent se composer de combattants et de non-combattants. En cas de capture par l'ennemi, les uns et les autres jouiront des droits de prisonniers de guerre.

Des moyens de nuire à l'ennemi.

ART. 12.

Les lois de la guerre ne reconnaissent pas aux belligérants un pouvoir illimité quant aux choix des moyens de nuire à l'ennemi.

ART. 13.

D'après ce principe sont notamment interdits :

- a. L'emploi du poison ou d'armes empoisonnées;
- b. Le meurtre par trahison d'individus appartenant à la nation ou à l'armée ennemie;

c. Le meurtre d'un ennemi qui ayant mis bas les armes ou n'ayant plus les moyens de se défendre, s'est rendu à discrétion;

d. La déclaration qu'il ne sera pas fait de quartier;

e. L'emploi d'armes, de projectiles ou de matières propres à causer des maux superflus, ainsi que l'usage des projectiles prohibés par la déclaration de St. Pétersbourg de 1868;

f. L'abus du pavillon parlementaire, du pavillon nationale ou des insignes militaires et de l'uniforme de l'ennemi, ainsi que des signes distinctifs de la Convention de Genève;

g. Toute destruction ou saisie de propriétés ennemies qui ne serait pas impérieusement commandée par la nécessité de guerre.

ART. 14.

Les ruses de guerre et l'emploi des moyens nécessaires pour se procurer des renseignements sur l'ennemi et sur le terrain (sauf les dispositions de l'art. 56) sont considérés comme licites.

ART. 15.

Les places fortes peuvent seules être assiégées. Des villes, agglomérations d'habitations ou villages ouverts qui ne sont pas défendus ne peuvent être ni attaqués ni bombardés.

ART. 16.

Mais si une ville ou place de guerre, agglomération d'habitations ou village, est défendu, le commandant des troupes assaillantes, avant d'entreprendre le bombardement, et sauf l'attaque de vive force, devra faire tout ce qui dépend de lui pour en avertir les autorités.

ART. 17.

En pareil cas, toutes les mesures nécessaires doivent être prises pour épargner, autant qu'il est possible, les édifices consacrés aux cultes, aux arts, aux sciences et à la bienfaisance, les hôpitaux et les lieux de rassemblement de malades et de blessés à condition qu'ils ne soient pas employés en même temps à un but militaire.

Le devoir des assiégés est de désigner ces édifices par des signes visibles spéciaux et indiquer d'avance à l'assiégeant.

ART. 18.

Une ville prise d'assaut ne doit pas être livrée au pillage des troupes victorieuses.

Des espions.

ART. 19.

Ne peut être considéré comme espion que l'individu qui, agissant clandestinement ou sous de faux prétextes, recueille ou cherche à recueillir des informations dans les localités occupées par l'ennemi, avec l'intention de les communiquer à la partie adverse.

ART. 20.

L'espion pris sur le fait sera jugé et traité d'après les lois en vigueur dans l'armée qui l'a saisi.

ART. 21.

L'espion qui rejoint l'armée à laquelle il appartient et qui est capturé plus tard par l'ennemi est traité comme prisonnier de guerre et n'encourt aucune responsabilité pour ses actes antérieurs.

ART. 22.

Les militaires non déguisés qui ont pénétré dans la zone d'opérations de l'armée ennemie, à l'effet de recueillir des informations, ne sont pas considérés comme espions.

De même, ne doivent pas être considérés comme espions, s'ils sont capturés par l'ennemi: les militaires (et aussi les non-militaires accomplissant ouvertement leur mission) chargés de transmettre des dépêches destinées soit à leur propre armée, soit à l'armée ennemie.

A cette catégorie appartiennent également, s'ils sont capturés, les individus envoyés en ballon pour transmettre les dépêches, et, en général, pour entretenir les communications entre les diverses parties d'une armée ou d'un territoire.

Des prisonniers de guerre.

ART. 23.

Les prisonniers de guerre sont des ennemis légaux et désarmés. Ils sont au pouvoir du Gouvernement ennemi, mais non des individus ou des corps qui les ont capturés. Ils doivent être traités avec humanité.

Tout acte d'insubordination autorise à leur égard les mesures de rigueur nécessaires.

Tout ce qui les appartient personnellement, les armes exceptées, reste leur propriété.

ART. 24.

Les prisonniers de guerre peuvent être assujettis à l'internement dans une ville, forteresse, camp ou localité quelconque, avec obligation de ne pas s'en éloigner au delà de certaines limites déterminées; mais ils ne peuvent être enfermés que par mesure de sûreté indispensable.

ART. 25.

Les prisonniers de guerre peuvent être employés à certains travaux publics qui n'aient pas un rapport direct avec les opérations sur le théâtre de la guerre et qui ne soient pas exténuants ou humiliants pour leur grade militaire, s'ils appartiennent à l'armée, ou pour leur position officielle ou sociale, s'ils n'en font point partie.

Ils pourront également, en se conformant aux dispositions réglementaires et fixées par l'autorité militaire, prendre part aux travaux de l'industrie privée. Leur salaire servira à améliorer leur position ou leur sera compté au moment de leur libération. Dans ce cas, les frais d'entretien pourront être défalqués de ce salaire.

ART. 26.

Les prisonniers de guerre ne peuvent être astreints d'aucune manière à prendre une part quelconque à la poursuite des opérations de la guerre.

ART. 27.

Le Gouvernement au pouvoir duquel se trouvent les prisonniers de guerre se charge de leur entretien.

Les conditions de cet entretien peuvent être établies par une entente mutuelle entre les parties belligérantes.

À défaut de cette entente, et comme principe générale, les prisonniers de guerre seront traités pour la nourriture et l'habillement sur le même pied que les troupes du Gouvernement qui les aura capturés.

ART. 28.

Les prisonniers de guerre sont soumis aux lois et règlements en vigueur dans l'armée au pouvoir de laquelle ils se trouvent.

Contre un prisonnier de guerre en fuite il est permis, après sommation, de faire usage des armes. Repris, il est passible de peines disciplinaires ou soumis à une surveillance plus sévère.

Si, après avoir réussi à s'échapper, il est de nouveau fait prisonnier, il n'est passible d'aucune peine pour sa fuite antérieure.

ART. 29.

Chaque prisonnier de guerre est tenu de déclarer, s'il est interrogé à ce sujet, ses véritables noms et grade et, dans le cas où il enfreindrait cette règle, il s'exposerait à une restriction des avantages accordés aux prisonniers de guerre de sa catégorie.

ART. 30.

L'échange de prisonniers de guerre est réglé par une entente mutuelle entre les parties belligérantes.

ART. 31.

Les prisonniers de guerre peuvent être mis en liberté sur parole, si les lois de leur pays les y autorisent, et, en pareil cas, ils sont obligés, sous la garantie de leur honneur personnel, de remplir scrupuleusement, tant vis-à-vis de leur propre Gouvernement que vis-à-vis de celui qui les a fait prisonniers, les engagements qu'ils auraient contractés.

Dans le même cas leur propre Gouvernement ne doit ni exiger ni accepter d'eux aucun service contraire à la parole donnée.

ART. 32.

Un prisonnier de guerre ne peut pas être contraint d'accepter sa liberté sur parole; de même le Gouvernement ennemi n'est pas obligé d'accéder à la demande du prisonnier réclamant sa mise en liberté sur parole.

ART. 33.

Tout prisonnier de guerre, libéré sur parole et repris portant les armes contre le Gouvernement envers lequel il s'était engagé d'honneur, peut être privé des droits de prisonnier de guerre et traduit devant les tribunaux.

ART. 34.

Peuvent également être faits prisonniers les individus qui, se trouvant auprès des armées, n'en font pas directement partie, tels

que: les correspondants, les reporters de journaux, les vivandiers, les fournisseurs, etc., etc. Toutefois ils doivent être munis d'une autorisation émanant du pouvoir compétent et d'un certificat d'identité.

Des malades et des blessés.

ART. 35.

Les obligations des belligérants concernant le service des malades et des blessés sont régies par la Convention de Genève du 22 août, 1864; sauf les modifications dont celle-ci pourra être l'objet.

Du pouvoir militaire à l'égard des personnes privées.

ART. 36.

La population d'un territoire occupé ne peut être forcée de prendre part aux opérations militaires contre son propre pays.

ART. 37.

La population d'un territoire occupé ne peut être contrainte de prêter serment à la puissance ennemie.

ART. 38.

L'honneur et les droits de la famille, la vie et la propriété des individus, ainsi que leurs convictions religieuses et l'exercice de leur culte doivent être respectés. La propriété privée ne peut pas être confisquée.

ART. 39.

Le pillage est formellement interdit.

Des contributions et des réquisitions.

ART. 40.

La propriété privée devant être respectée, l'ennemi ne demandera aux communes ou aux habitants que des prestations et des services en rapport avec les nécessités de guerre généralement reconnues, en proportion avec les ressources du pays et qui n'impliquent pas pour les populations l'obligation de prendre part aux opérations de guerre contre leur patrie.

ART. 41.

L'ennemi prélevant des contributions soit comme équivalent pour des impôts (v. art. 5) ou pour des prestations qui devraient être faites en nature soit à titre d'amendes, n'y procédera, autant que possible, que d'après les règles de la répartition et de l'assiette des impôts en vigueur dans le territoire occupé.

Les autorités civiles du Gouvernement légal y prêteront leur assistance si elles sont restées en fonctions.

Les contributions ne pourront être imposées que sur l'ordre et sous la responsabilité du général en chef ou de l'autorité civile supérieure établie par l'ennemi dans le territoire occupé.

Pour toute contribution, un reçu sera donné au contribuable.

ART. 42.

Les réquisitions ne seront faites qu'avec l'autorisation du commandant dans la localité occupée.

Pour toute réquisition, il sera accordé une indemnité ou délivré un reçu.

Des parlementaires.

ART. 43.

Est considéré comme parlementaire l'individu autorisé par l'un des belligérants à entrer en pourparlers avec l'autre et se présentant avec le drapeau blanc, accompagné d'un trompette (clairon ou tambour) ou aussi d'un porte-drapeau. Il aura droit à l'inviolabilité ainsi que le trompette (clairon ou tambour) et le porte-drapeau qui l'accompagnent.

ART. 44.

Le chef auquel un parlementaire est expédié n'est pas obligé de le recevoir en toutes circonstances et dans toutes conditions.

Il lui est loisible de prendre toutes les mesures nécessaires pour empêcher le parlementaire de profiter de son séjour dans le rayon des positions de l'ennemi au préjudice de ce dernier, et si le parlementaire s'est rendu coupable de cet abus de confiance, il a le droit de le retenir temporairement.

Il peut également déclarer d'avance qu'il ne recevra pas de parlementaires pendant un temps déterminé. Les parlementaires qui

viendraient à se présenter après une pareille notification, du côté de la partie qu'il aurait reçue, perdraient le droit à l'inviolabilité.

ART. 45.

Le parlementaire perd ses droits d'inviolabilité, s'il est prouvé d'une manière positive et irrécusable qu'il a profité de sa position privilégiée pour provoquer ou commettre un acte de trahison.

Des capitulations.

ART. 46.

Les conditions des capitulations sont débattues entre les parties contractantes.

Elles ne doivent pas être contraires à l'honneur militaire.

Une fois fixées par une convention, elles doivent être scrupuleusement observées par les deux parties.

De l'armistice.

ART. 47.

L'armistice suspend les opérations de guerre par un accord mutuel des parties belligérantes.

Si la durée n'est pas déterminée, les parties belligérantes peuvent reprendre en tout temps les opérations, pourvu, toutefois, que l'ennemi soit averti en temps convenu, conformément aux conditions de l'armistice.

ART. 48.

L'armistice peut être général ou local. Le premier suspend partout les opérations de guerre des États belligérants; le second seulement entre certaines fractions des armées belligérantes et dans un rayon déterminé.

ART. 49.

L'armistice doit être officiellement et sans retard notifié aux autorités compétentes et aux troupes. Les hostilités sont suspendus immédiatement après la notification.

ART. 50.

Il dépend des parties contractantes de fixer dans les clauses de l'armistice les rapports qui pourront avoir lieu entre les populations.

ART. 51.

La violation de l'armistice, par l'une des parties, donne à l'autre le droit de le dénoncer.

ART. 52.

La violation des clauses de l'armistice par des particuliers, agissant de leur propre initiative, donne droit seulement à réclamer la punition des coupables et, s'il y a lieu, une indemnité pour les pertes éprouvées.

ART. 53.

L'État neutre qui reçoit sur son territoire des troupes appartenant aux armées belligérantes, les internera autant que possible loin du théâtre de la guerre.

Il pourra les garder dans des camps et même les enfermer dans des forteresses ou dans des lieux appropriés à cet effet.

Il décidera si les officiers peuvent être laissés libres en prenant l'engagement sur parole de ne pas quitter le territoire neutre sans autorisation.

ART. 54.

À défaut de convention spéciale, l'État neutre fournira aux internés les vivres, les habillements et les secours commandés par l'humanité.

Bonification sera faite à la paix des frais occasionnés par l'internement.

ART. 55.

L'État neutre pourra autoriser le passage par son territoire des blessés ou malades, appartenant aux armées belligérantes, sous la réserve que les trains qui les amèneront ne transporteront ni personnel ni matériel de guerre.

En pareil cas, l'État neutre est tenu de prendre les mesures de sûreté et de contrôle nécessaires à cet effet.

ART. 56.

La Convention de Genève s'applique aux malades et aux blessés internés sur territoire neutre.

No. XIX.

PROTOCOLE FINAL.

La Conférence réunie à Bruxelles sur l'invitation du Gouvernement de S. M. L'Empereur de Russie pour délibérer sur un Projet de règlement international des lois et coutumes de la guerre, à examiné le Projet déferé à ses discussions dans un esprit conforme à la haute pensée qui avait présidé à sa convocation et que tous les Gouvernements qui y sont représentés ont accueilli avec sympathie.

Cette pensée avait déjà trouvé son expression dans la déclaration échangée en 1868 entre tous les Gouvernements relativement à l'exclusion des balles exploisibles. Il avait été unanimement constaté que les progrès de la civilization doivent avoir pour effet d'atténuer, autant que possible, les calamités de la guerre, et que le seul but légitime que les États doivent se proposer durant la guerre est d'affaiblir l'ennemie, sans lui infliger des souffrances inutiles.

Ces principes ont recontré alors un assentiment universel.

Aujourd'hui, la Conférence, se maintenant dans la même voie, s'associe à la conviction exprimée par le Gouvernement de S. M. l'Empereur de Russie, qu'il y a un pas de plus à faire en revisant les lois et coutumes générales de la guerre, soit dans le but de les définir avec plus de précision, soit afin d'y tracer d'un commun accord certaines limites destinées à en restreindre, autant que possible, les rigueurs.

La guerre étant ainsi regularisée entraînerait de moindres calamités, serait moins sujetti aux aggravations qu'y appartienne, l'incertitude, l'imprévu et les passions excitées par la lutte; elle conduirait plus efficacement à ce qui doit être son but final, c'est-à-dire, le rétablissement de bonnes relations et d'une paix plus solide et plus durable entre les États belligérants.

La Conférence n'a pas cru pouvoir mieux répondre à ces idées d'humanité qu'en s'en inspirant également dans l'examen du Projet sur lequel devaient porter ses délibérations. Les modifications qui y ont été introduites, les commentaires réservés, et avis séparés, que les Délégués ont cru devoir insérer dans les protocoles d'après les instructions et les points de vue particuliers de leurs Gouvernements ou leur opinions personnelles, forment l'ensemble de son travail. Elle croit pouvoir le déferer aux Gouvernements, respectifs dont elle

est mandataire, comme une enquête consciencieuse, de nature à servir de base à un échange d'idées ultérieur et à un développement des dispositions de la Convention de Genève de 1864 et de la déclaration de Saint-Pétersbourg de 1868. Il leur appartiendra d'apprécier ce qui, dans ce travail, pourra devenir l'objet d'une entente, et ce qui nécessiterait un plus mûr examen.

La Conférence exprime, en terminant, la conviction que ses débats auront en tout cas appelé la lumière sur ces importants questions dont le règlement, s'il résultait d'une entente générale, serait un progrès réel pour l'humanité.

Fait à Bruxelles, le 27 août 1874.

- (S) Le Conseiller privé Baron A. JOMINI.
- (S) Le Général-major H. LEER.
- (S) Le Conseiller de Cour D'MARTENS.
- (S) Général-major v. VOIGTS-RHETZ.
- (S) Général-major v. LEONROD.
- (S) Major Freiherr von WELCK.
- (S) Staatsrath Frh. v. SODEN.
- (S) Dr. BLUNTSCHLI.
- (S) B. CHOTEK.
- (S) Freiherr von SCHONFELD, général major.
- (S) Bon LAMBERMONT.
- (S) Ch. FAIDER.
- (S) MOCKEL.
- (S) P. VEDEL.
- (S) Le colonel H. BRUN.
- (S) El Duque de TETUAN.
- (S) Général SERVET.
- (S) Contr'almirante M. de la PEZUELA.
- (S) Bon BAUDE.
- (S) Général E. ARNAUDEAU.
- (S) A. HORSFORD, M. Genl.
- (S) N. MANOS.
- (S) ALBERT BLANC.
- (S) O. LANZA.
- (S) van LANSBERGE.
- (S) van der SCHRIECK.
- (S) M. d'ANTAS.
- (S) Gal A. PALMEIRIM.
- (S) F. M. STAAFF.
- (S) HAMMER Eldg. Oberst.
- (S) CARATHEODORY.
- (S) J. EDHEM.

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Author of a "Handbook of Criminal Law," and a
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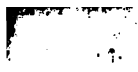
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