

**ELEMENTS**

OF

**INTERNATIONAL LAW:**

WITH

A SKETCH

OF THE



**HISTORY OF THE SCIENCE.**

BY

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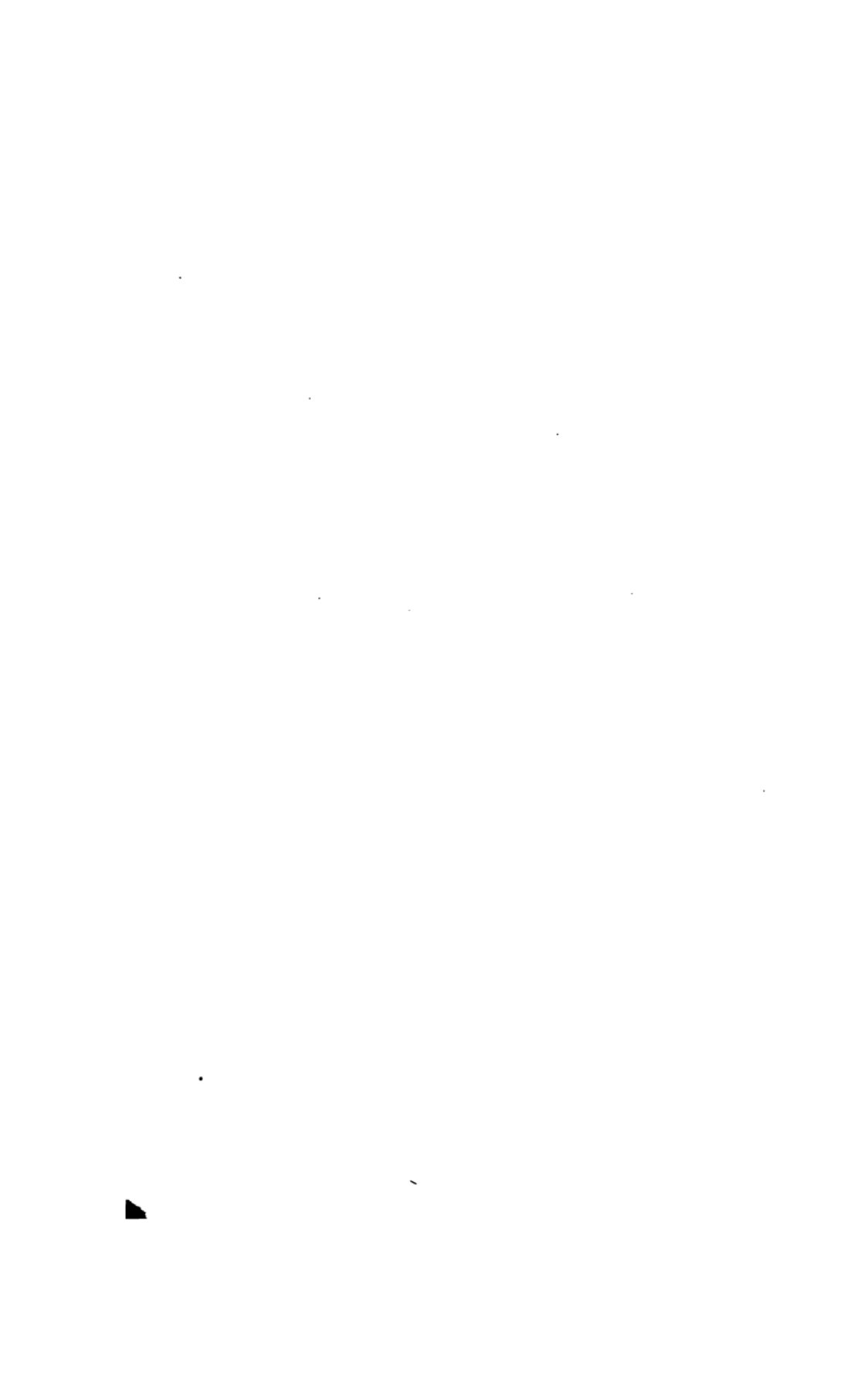
THE object of the Author in the following attempt to collect the rules and principles which govern, or are supposed to govern, the conduct of States in their mutual intercourse in peace and in war, and which have therefore received the name of International Law, has been to compile an elementary work for the use of persons engaged in diplomatic and other forms of public life, rather than for mere technical lawyers, although he ventures to hope that it may not be found wholly useless even to the latter. The great body of the rules and principles which compose this Law is commonly deduced from examples of what has occurred, or been decided in the practice

and intercourse of nations. These examples have been greatly multiplied in number and interest during the long period which has elapsed since the publication of Vattel's highly appreciated work: a portion of human history abounding in fearful transgressions of that Law of Nations which is supposed to be founded on the higher sanction of the Natural Law, (more properly called the Law of God,) and at the same time rich in instructive discussions in cabinets, courts of justice, and legislative assemblies, respecting the nature and extent of the obligations between the independent societies of men called States. The principal aim of the Author has been to glean from these sources the general principles which may fairly be considered to have received the assent of most civilized and christian nations, if not as invariable rules of conduct, at least as rules which they cannot disregard without general obloquy and the hazard of provoking the hostility of other communities who may be injured by their violation. Experience shows that these motives, even in the worst times, do really afford



a considerable security for the observance of justice between States, if they do not furnish the perfect sanction annexed by the lawgiver to the observance of the municipal code of any particular State. The knowledge of this science has, consequently, been justly regarded as of the highest importance to all who take an interest in political affairs. The Author cherishes the hope that the following attempt to illustrate it will be received with indulgence, if not with favour, by those who know the difficulties of the undertaking.

BERLIN,  
*Jan. 1, 1836.*



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## ERRATA.

- P. 10. Note 6, for *Esamischen* read *Esamischen*.  
 65. Note 5, for *Moderne* read *Moderne*.  
 115. Line 14, and in marginal note, for *Trappau* read *Troppau*.  
 125. Line 14, after *parties* insert *were*.  
 133. Note 4, for *Schultz* read *Schluss*.  
 134. Note 5, after *States* add *Art. 3*.  
 172. Line 11, for *it* read *in*.

At the end of note in p. 68, add, "Great Britain and France have protested  
 "against this measure of the Russian government, as an infraction of the  
 "treaties of Vienna."

**SKETCH**  
**OF THE**  
**HISTORY OF INTERNATIONAL LAW.**



# S K E T C H

OF THE

## HISTORY OF INTERNATIONAL LAW.

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THE classic nations of antiquity had very imperfect notions of international justice. With the Greeks and Romans, "foreigner" and "*barbarian*," or "enemy," were synonymous in language and in fact. By their rude theory of public law, the persons of aliens were doomed to slavery, and their property to confiscation, the moment they passed the bounds of one petty state and touched the confines of another. Nothing but some positive compact gave them any exemption from this unsocial principle. Piracy was unblushingly practised by the most civilized nations which then existed. The peaceful merchant was liable to be plundered both on sea and land, by men with whom he and his country had no quarrel; and even the philosopher,

who visited foreign countries to enrich his native land with the merchandize of science and art, was exposed to be captured and sold as a slave to some barbarian master. As to these barbarians themselves, the acutest of the Grecian philosophers gravely asserts that they were intended by nature to be the slaves of the Greeks, and that it was lawful to make them so by all possible means.<sup>1</sup> Thucydides has correctly stated the leading political maxim of his countrymen,—“that to a king or commonwealth, nothing is unjust which is useful.” The same idea is openly avowed by the Athenians, in their reply to the people of Melos. Aristides distinguished in this respect between public and private morality, holding

<sup>1</sup> Aristot. Polit. lib. i. c. 8. The Greeks termed those who were connected with them by compact *Ἐνσπονδοὶ*, literally those with whom they had poured out libations to the Gods. Those who were not entitled to claim the benefit of this sort of alliance, were called *Ἐκσπονδοὶ*, that is, what we should term outlaws. The able, but often too systematic and prejudiced historian of Greece, observes, that “it appears to have been very generally held among the Greeks of that age, that men were bound to no duties to each other without an express compact.” He furnishes, among other instances, a practical example of this rule in the cruel conduct of the Spartans to their prisoners taken upon the surrender of Plataea.—*Mitford's Hist. of Greece*, vol. i. c. 15, s. 7.

that the rules of justice were to be sacredly observed between individuals, but as to public and political affairs, a very different conduct was to be followed. He accordingly scrupled not to invoke upon his own head the guilt and punishment of a breach of faith, which he advised the people to commit in order to promote their national interests.<sup>2</sup>

If such were what may be called the *pacific* relations of the Grecian states with each other, and with the rest of mankind, we may easily imagine that the rights of *war* must have been exerted with extreme rigour. To reduce to slavery prisoners taken in war, was the universal practice of the ancient world. But the cold-blooded cruelty with which the Athenians could deliberately devote, by a public decree, to mutilation or death those whom they ought, even in compliance with their own national prejudices, to have regarded as brethren, is a striking proof how lamentably deficient was their theory and practice of international justice. The institutions of Lycurgus imparted a still more stern and unrelenting character to the savage people for whom he undertook to legislate. The Lacedæmonian government was the patron of the

<sup>2</sup> Theophrastus ap. Plutarch. in Aristide.

aristocratic faction throughout all Greece ; and as the popular interests in the different republics naturally looked up to the democracy of Athens for support, and there was no supreme federal authority adequate to check and control them, these rival powers kept every other state in continual commotion and furious disorders, which reduced them to misery, and thinned their population by proscriptions, banishments, and massacres <sup>3</sup>

<sup>3</sup> A learned modern writer has enumerated the following points, as constituting the rude outlines of public law observed among the Greek states :—1. The rites of sepulture were not to be denied to those slain in battle. 2. After a victory, no durable trophy was to be erected. 3. When a city was taken, those who took refuge in the temples could not lawfully be put to death. 4. Those guilty of sacrilege were to be left unburied. 5. All the Greeks were allowed to resort to the public games, and the temples, and to sacrifice there without molestation. These rules were enforced by the council of the Amphictyons, which was a religious rather than a political institution, and, as such, took cognizance of offences against the laws and customs which had been sanctioned by the national superstition.—Saint-Croix, Gouvernemens Fédératifs.

“ We find it difficult to comprehend and believe,” says Niebuhr, “ in the existence of the spirit with which the ancient oligarchies maintained the power they at all times abused : that spirit, however, is sufficiently manifested in the oath they exacted in some of the Greek states from their members, to bear malice towards the commonalty,



Cicero's theory of justice in the intercourse of states seems to have been more liberal than that of the Grecian statesmen and philosophers, though the practice of his countrymen varied as much from that theory as their religious notions differed from his sublime conceptions of the Divine attributes. But neither had any correct or adequate notion of a science of international law, as understood in modern times. The intercourse of the Romans with foreign nations was but too conformable with their domestic discipline. Their ill-adjusted constitution fluctuated in perpetual mutations, but always preserved the character impressed upon it by Rome's martial founder of a state, the very law of whose being was perpetual war, and whose unceasing occupation was the conquest and colonization of foreign countries. For more than seven centuries the Romans pursued a scheme of aggrandizement, conceived in deep policy, and prosecuted with inflexible pride and pertinacity, at the expense of all the useful pursuits and charities of private life. All solicitude for the fate of their fellow-citizens made captive

"and to devise all possible harm against it."—*Niebuhr, Römische Geschichte, 2 band.*

in war was disdained by their stern and crafty policy.

“ Hoc caverat mens provida Reguli  
 Dissidentis conditionibus  
 Fædis, et exemplo trahenti  
 Perniciem veniens in ævum,  
 Si non periret immiserabilis  
 Captiva pubes.”

The institution of the Feacial law, with a college of heralds to expound it, which they borrowed from the Etruscans, is the only symptom of a recognition by these *Barbarians*, as the Greeks called them, of an international code, distinct from their own municipal law. This mere formal institution strongly contrasts with their oppressive conduct towards their allies, and their unjust and cruel treatment of their vanquished enemies. “VICTORY,” in their expressive, metaphorical language, “made even the *sacred* things of the enemy *profane* ;” confiscated all his property, movable and immovable, public and private ; doomed him and his posterity to perpetual slavery ; and dragged his kings and generals at the chariot-wheels of the conqueror.<sup>4</sup>

<sup>4</sup> No professed treatise of international law has been left us by any ancient writer. Neither the work of Aristotle,

Though the Romans had a very imperfect knowledge of international law as a science, and little regard for it as a practical rule of justice between states, yet their municipal code has essentially contributed to construct the edifice of public law in modern Europe. The stern spirit of the Stoic philosophy was breathed into the Roman law, and contributed to form the character of the most highly gifted, virtuous, and accomplished aristocracy

upon the laws of war, nor the institutes of the Roman feacial law, have descended to modern times. "When the Romans called their feacial law the law of nations, we are not to understand from hence that it was a positive law, established by the consent of all nations. It was in itself only a civil law of their own: they called it a law of nations, because the design of it was to direct them how they should conduct themselves towards other nations in the hostile intercourse of war; and not because all nations were obliged to observe it." (*Rutherford, Nat. Law*, b. ii. c. 9, § 10.) And the incidental notices which may be collected from the writers on the Roman law, of what they call the *jus gentium*, concur in showing, that the idea associated with this term was not that of a positive rule governing the intercourse of states, but what has been since called natural law, or the rule of conduct that exists, or ought to exist, amongst mankind, independent of positive compact and institution. Hence it is always contrasted by these writers with the municipal law, *jus civile*, and even with the constitutional code, *jus publicum*, which regulated the government of the city.—Ompfeda, *Litteratur des Völkerrechts*, tom. i. pp. 142—161.

the world ever saw. There is a calm and placid dignity in the pictures drawn by the classic writers of the private manners of the Roman patricians, strongly contrasting with the harsher features of their public conduct, but which blended together to form a character admirably fitting them to perform the dignified office of consultation in the laws.

*“ Romæ dulce diu fuit et solemne, reclusa  
Mane domo vigilare, clienti promere jura.”*

Theirs was for a long time the exclusive prerogative of administering justice. The usage insensibly grew up of certain families devoting their peculiar attention to the study and practice of jurisprudence, and transmitting the knowledge thus gained, as a private inheritance and most valuable instrument of political power. These circumstances essentially contributed to the perfection of the science in a state, where any other liberal pursuit, except the study of philosophy, was for a long time thought unworthy of its ingenuous citizens. In performing the duty of interpreting the laws to their clients and fellow-citizens, they invented a sort of judicial legislation, which was improved from

age to age by the long line of juriconsults, following each other in regular and unbroken succession from the foundation of the republic to the fall of the empire. The consequence was, that civil law, which seems never to have grown up to be a science in any of the Grecian republics, became one very early at Rome, and was thence diffused over the civilized world.<sup>5</sup> The mighty fame and fortune of the Roman people, in this respect, cannot be contemplated without emotion. Its martial glory has long since departed, but the "Eternal City" still continues to rule the greatest part of the civilized and christian world, through the powerful influence of her civil codes. The acute research and unrivalled sagacity of an illustrious German civilian of the present day, have laboriously collected and happily combined the multiplied proofs, scattered in many a worm-eaten volume, that the Roman law, so far from having been buried in the ruins of the Roman empire, survived throughout the middle age, and continued to form an integral portion of European legislation long before the period of the pretended discovery of the


<sup>5</sup> Smith's Wealth of Nations, b. v. c. 1. Part III.

**Pandects of Justinian at Amalfi, in the beginning of the twelfth century. The vanquished Roman provincials were neither extirpated nor deprived of their personal freedom, nor was their entire property confiscated, by the Gothic invaders, as we are commonly taught to believe. The conquered people were not only permitted to retain a large portion of their lands, and the personal laws by which they had been previously governed; but the municipal constitutions of the Roman cities were preserved, so that the study and practice of the Roman law could never have been entirely abandoned, even during what has been called the midnight darkness of the middle age.<sup>6</sup> Accordingly, we find that in every civilized country of Europe, the Scandinavian nations and England excepted, the Roman civil law either formed the original basis of the municipal jurisprudence, or constitutes a suppletory code of "written reason," appealed to where the local legislation is silent, or imperfect, or requires the aid of interpretation to explain its ambiguities.**

The foundation of the modern science of international law may be traced to a period

<sup>6</sup> *Geschichte des Römischen Rechts in Mittelalter*, von Dr. C. von Savigny, 4 tom. Heidelberg, 1814—1826.

nearly coincident to that memorable epoch in the history of mankind—the revival of letters, the discovery of the new world, and the reformation of religion. The Roman law infused its spirit into the ecclesiastical code of the Romish Church; and it may be considered a favourable circumstance for the revival of civilization in Europe, that the interests of the priesthood, in whom all the moral power and knowledge of the age were concentrated, induced them to cherish a certain respect for the immutable rules of justice. The spiritual monarchy of the Roman pontiffs was founded upon the want of some moral power to temper the rude disorders of society during the middle age. The influence of the papal authority was then felt as a blessing to mankind: it rescued Europe from total barbarism; it afforded the only shelter from feudal oppression. The compilation of the canon law, under the patronage of Pope Gregory IX., contributed to diffuse a knowledge of the rules of justice among the Catholic clergy; whilst the art of casuistry, invented by them to aid in performing the duties of auricular confession, opened a wide field for speculation, and brought them in view of the true science of ethics. The universities of Italy and Spain produced, in the



sixteenth century, a succession of labourers in this new field. Among these was Francis de Victoria, who flourished as a professor at Salamanca about 1546, and Dominic Soto, who was the pupil and successor of Victoria at the same seat of learning, (which Johnson said he loved for its noble decision upon the Spanish conquests in America,) and published, in 1560, an elaborate treatise "Of Justice and Law," the subject-matter of his lectures delivered there, which he dedicated to the unfortunately celebrated Don Carlos. Both Victoria and Soto condemned, with honest boldness and independence, the cruel wars of avarice carried on by their countrymen in the new world, under the pretext of propagating what was called Christianity in that age. Soto was the arbiter appointed by the emperor Charles V. to decide between Sepulveda, the advocate of the Spanish-American colonists, and Las Casas, the champion of the unhappy natives, as to the lawfulness of enslaving the latter. The edict of reform of 1543 was founded upon his decision in their favour. It is said that Soto did not stop here, but condemned in the most unmeasured terms the African slave-trade, then beginning to be carried on by the Portuguese. But



I do not understand that Soto reprobated slavery in general, or even the slave-trade itself, so long as it was confined to that unfortunate portion of the inhabitants of Africa who had been doomed to servitude from time immemorial, or had been enslaved by conquest in war, in that age universally regarded as giving a legitimate title to property in human beings *jure gentium*; but only that he condemned that system of kidnapping, by which the Portuguese traders seduced the natives to the coast, under fraudulent pretences, and forced them by violence on board their slave-ships.<sup>7</sup>

<sup>7</sup> "If the report," says Soto, "which has lately prevailed, be true, that Portuguese traders entice the wretched natives of Africa to the coast by amusements and presents, and every species of seduction and fraud, and compel them to embark in their ships as slaves,—neither those who have taken them, nor those who buy them from the takers, nor those who possess, can have safe conscience, until they manumit these slaves, however unable they may be to pay ransom."—*Soto, de Justitia et Jure*, lib. iv. quæst. ii. art. 2.

To the above names may be added that of Francisco Suarez, another casuist, who flourished in the same century, and of whom Grotius says that he had hardly an equal, in point of acuteness, among philosophers and theologians. Some parts of his theory of private morals are justly reprobated by Pascal in the *Lettres Provinciales*; but this Spanish Jesuit has the merit of having clearly conceived

Long before the appearance of these labourers in the new field of natural jurisprudence, the genius of commerce, ever favourable to the improvement and happiness of mankind, had reduced to a written text the long-established customs and usages of the maritime nations bordering on the shores of the Mediterranean Sea. Spain and Italy mutually contest with each other the honour of compiling the *Consolato del Mare*. This code embraces a great mass of civil commercial

and expressed, even at that early day, in his treatise *De Legibus ac Deo Legislatore*, the distinction between what is called the law of nature and the conventional rules of intercourse observed among nations. "He first saw that international law was composed, not only of the simple principles of justice applied to the intercourse between states, but of those usages long observed in that intercourse by the European race, which have since been more exactly distinguished as the consuetudinary law acknowledged by the christian nations of Europe and America." (*Mackintosh, Progress of Ethical Philosophy*, sect. 3, p. 51.) A number of practical treatises on the laws of war were also written about this period by Spanish and Italian authors, several of whom are cited by Grotius; and it is remarked by Sir J. Mackintosh, that Spain, under Charles V. and Philip II., having become the first military and political power in Europe, maintaining large armies and carrying on long wars, was likely to be the first that felt the want of that more practical part of the law of nations which reduces war to some regularity.

regulations, with a few chapters on the subject of maritime captures in war, which show that the leading principles of prize-law, as since practised by the maritime states of Europe, had been settled and generally adopted at this early period. The first printed edition of this curious monument of commercial legislation is nearly coeval with the art of printing itself, and was published in the Catalonian dialect, at Barcelona, in 1494. There is no question that it was collected long previous to that period; but at what particular epoch, and by which of the numerous commercial republics with which the Mediterranean coasts were studded during the middle age, is matter of great uncertainty. The question of its origin has exercised the learning and ingenuity of various critics, whose zeal in exploring this dark recess of legal antiquities has been stimulated by national vanity and rivalry. Many of the provisions of this antique code have been incorporated into the more modern ordinances of the different European states, and especially into that beautiful model of legislation, the marine ordinance of Louis XIV. Its decisions are in general dictated by a spirit of justice and equity which recommends them to adoption, even at the

present day ; and they unquestionably attest the general sense of Christian Europe at the period when they were collected, respecting the commercial relations of its different states.<sup>8</sup>

Albericus Gentilis was the forerunner of Grotius in the science whose history we are reviewing. He was born in the March of Ancona, about the middle of the sixteenth century, of an ancient and illustrious family. His father, being one of the few Italians who openly embraced the doctrines of the Reformation, was compelled to fly with his family into Germany, whence he sent his son *Alberico* to England, where he found, not only freedom of conscience, but patronage and favour, and was elected to fill the chair of jurisprudence at Oxford. He did not confine his attention to the Roman law, the only system then thought worthy of being taught in a scientific

<sup>8</sup> A beautiful edition of the *Consolato* was published at Madrid, in 1791, by Don Antonio Capmany, in the Catalonian, with a Spanish translation. The commentary of Valin upon the marine ordinance of Louis XIV., of 1681, contains a most valuable body of maritime law, from which the English writers and judges, especially Lord Mansfield, have borrowed very freely. Valin also published a separate *Traité des Prises*, in 1763, which contains a collection of the French prize ordinances down to that period.

manner, (the municipal code being abandoned to the barbarous discipline of the inns of court, of which Sir Henry Spelman has left us so feeling an account;) but investigated the principles of natural jurisprudence, and of the consuetudinary law then governing the intercourse of christian nations. His attention was especially directed to this last, by the circumstance of his being retained as the advocate of Spanish claimants in the English courts of prize. The fruits of his professional labours were given to the world in the earliest eports of judicial decisions on maritime law published in Europe. His more scholastic and academical studies produced the first regular treatise upon the law of war, considered as a branch of international law, which appeared in modern times. This work served as a light to guide the path of the illustrious Grotius, when he entered upon and pursued the same track of investigation in the following century.<sup>9</sup>

<sup>9</sup> The title of *Alberico Gentili*, to be considered as the father of the modern science of natural and international law, is asserted by his countryman *Lampredi*. "He first explained the rules of war and peace, which probably suggested to Grotius the idea of writing his own work—worthy to be remembered, among other things, for having contributed to augment the glory of his native Italy,

Gentilis also wrote a treatise on embassies, which he dedicated to his friend and patron, the gallant and accomplished Sir Philip Sidney, whose "high thoughts were seated in a heart of courtesy," who was the generous protector of persecuted genius in that stormy and tumultuous age. In this work, Gentilis defends the moral tendency of Machiavelli's *Prince*, commonly supposed to have been intended as a manual of tyranny, but which he insists is a disguised satire upon the vices of princes, and a full and calm exposition of the arts of tyrants, for the admonition and instruction of the people; written by a man always actually engaged on the popular side in the factions of his own country, and almost a fanatical admirer of the ancient republicans and regicides. Whatever may be thought of this long-disputed question as to Machiavelli's motives in writing, his work certainly presents to us a gloomy picture of the state of public law and European society in the beginning of the sixteenth century:—one mass of dissimulation, crime, and corruption, which

"where he drew his knowledge of the Roman law, and  
"proved her to be the earliest teacher of natural juris-  
"prudence, as she had been the restorer and patroness of  
"all liberal arts and learning."

called loudly for a great teacher and reformer to arise, who should speak the unambiguous language of truth and justice to princes and people, and stay the ravages of this moral pestilence.

Such a teacher and reformer was Hugo Grotius, who was born in the latter part of the same century, and flourished in the beginning of the seventeenth. That age was peculiarly fruitful in great men, but produced no one more remarkable for genius, and for variety of talents and knowledge, or for the important influence his labours exercised upon the subsequent opinions and conduct of mankind. Almost equally distinguished as a scholar and man of business, he was at the same time an eloquent advocate, a scientific lawyer, classical historian, patriotic statesman, and learned theologian. His was one of those powerful minds which have paid the tribute of their assent to the truth of Christianity. His great abilities were devoted to the service of his country, and of mankind. He vindicated the freedom of the seas, as the common property of all nations, against the extravagant pretensions of Great Britain and Portugal.<sup>19</sup>

<sup>19</sup> The *Mare Liberum* of Grotius appeared in 1634; and

His ungrateful country rewarded his virtues and services with exile, and would have extended her injustice to perpetual imprisonment or death, but for the courageous contrivance and self-devotion of his wife. Involved in the persecution of the Pensionary Barnevelt and the other Arminians, he was shut up in the fortress of Louvestein, in the year 1619. He was, however, allowed the society of his books, and of his accomplished and heroic wife, who contrived to deceive his guards, and induce them to carry him out in a chest, while she remained thus voluntarily exposed to the vengeance of his enemies. Grotius escaped into France, and in his banishment returned good for evil by rendering the most important services to his countrymen; and even his persecutor, Prince Maurice of Nassau, is treated with perfect fairness and impartiality in his Belgic history. In an age peculiarly infected with party animosity, Grotius preserved himself pure from the taint of bigotry;

Archbishop Laud immediately engaged the learned Selden to answer it, in a treatise entitled *Mare Clausum*, in which he not only maintained the national claim of sovereignty over the British seas, but the obnoxious claim of ship-money, which it was at that time the object of Charles I. and his councillors to establish.



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and though actively engaged in the contention between the religious factions of the Gomarists and Arminians, his expansive toleration embraced every sect, whether Catholic or Protestant;—a degree of liberality almost unexampled in those times. When he could no longer be useful in active life, he laboured to win men to the love of peace and justice by the publication of his great work, which made a deep impression upon all the liberal-minded princes and ministers of that day, and contributed essentially to influence their public conduct. Alexander carried the Iliad of Homer in a golden casket, to inflame his love of conquest; whilst Gustavus Adolphus slept with the Treatise on the Laws of War and Peace under his pillow, in that heroic war which he waged in Germany for the liberties of Protestant Europe. It is difficult to decide which presents the most striking contrast—the poet of Greece and the philosopher of Holland, or the two heroes who imbibed such different and opposite sentiments from their pages.<sup>11</sup>

<sup>11</sup> The treatise *De Jure Belli ac Pacis* was composed during the author's exile in France, and published at Paris in 1625. A very interesting summary of the life of Grotius

Nor was this the only immediate practical effect of this publication. Its enlightened and benevolent doctrines so forcibly struck the mind of that liberal sovereign, the Elector Palatine, Charles Lewis, that he founded at Heidelberg the first professorship of the law of nature and nations instituted in Europe, and bestowed the chair upon the celebrated Puffendorf, who used the treatise of Grotius as his text-book.<sup>12</sup> Grotius thus became the creator of a new school of political philosophy, which laid the foundation for all those important improvements in the science of government, political economy, and legislation, which have marked the two last centuries as an æra in the progress of mankind. His work was illustrated by a crowd of commentators in the universities of Holland and Germany, and within forty

was published in 1826, by that venerable lawyer and excellent man, the late Charles Butler.

<sup>12</sup> Puffendorf's principal work, *De Jure Naturæ et Gentium*, was first published in 1672, and subsequently abridged by the author, in a smaller treatise, entitled *De Officio Hominis et Civis*. The reputation of Puffendorf seems to have been founded more upon the fact of his having no cotemporary competitor than upon his real merit either as an inventor or compiler. Leibnitz calls him, *Vir parum jurisconsultus, et minime philosophus*.

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years after his death obtained an honour which had been exclusively reserved, by the learned world, for the classical writers of antiquity: it was edited *cum commentariis variorum*. His Latin style is sometimes obscured by an imitation of the sententious brevity of Tacitus; and the work sins against the prevailing taste of the present age, in being adorned with a profusion of illustrations from the writers of sacred and heathen antiquity. Yet it should be remembered, that these are so many different witnesses summoned to attest the concurring sentiments and usages of mankind among all ages and nations, and that their testimony was much more revered by the cotemporaries of Grotius than the unsupported authority or reasonings of any individual writer of their own time.<sup>13</sup>

<sup>13</sup> "I have used," says Grotius, "in proof of this law, the testimony of philosophers, historians, poets, and, lastly, even of orators. Not that they are indiscriminately to be relied on as impartial authority, since they often bend to the prejudices of their sect, the nature of their argument, or the interest of their cause: but where many minds of different ages and countries concur in affirming the same sentiment, this general concurrence must be referred to some general cause; which, in the questions we have undertaken to examine, can be no other than a

The great treatise of Grotius on the *Law of Peace and War*, defective as it confessedly is in scientific arrangement and distinctiveness of aim, produced a wonderful impression on the public mind of christian Europe, and gradually wrought a most salutary change in the practical intercourse of nations in favour of humanity and justice. This new science of natural jurisprudence, developed by the disciples of Grotius, and applied in the first instance to ascertain those rules of justice which ought to regulate the conduct of individuals in the social state, was subsequently adopted to determine the like rules which govern, or ought to govern, the conduct of independent nations and states, considered as moral beings living in a social state, independent of positive human institution. This gave

“ right induction from the principles of natural justice, or  
“ some common consent. The former indicates the law of  
“ nature, the latter the law of nations: which difference is  
“ not to be understood from the terms alone which these  
“ authors use, (for they often confound the law of nature  
“ with that of nations,) but from the nature of the subject  
“ in question. For if a certain maxim, which cannot be  
“ inferred as a corollary from the principles of natural  
“ justice, is nevertheless found to be generally observed,  
“ we must attribute its origin to the general consent of  
“ nations.”—*Proleg.* § xli.

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rise to the mixed science of the law of nature and nations, which soon came to form an indispensable part of liberal education all over Europe. Whatever defects may have been justly imputed to the works of the more eminent publicists, considered as scientific, expository treatises, it would be difficult to name any writers who have contributed so much to promote the progress of civilization as “these illustrious authors—these friends  
“ of human nature—these kind instructors of  
“ human errors and frailties—these benevo-  
“ lent spirits, who held up the torch of science  
“ to a benighted world.” If the international intercourse of Europe, and the nations of European descent, has been since marked by superior humanity, justice, and liberality, in comparison with the usages of the other members of the human family, they are mainly indebted for this glorious superiority to these private teachers of justice, to whose moral authority sovereigns and states are often compelled to bow, and whom they acknowledge as the ultimate arbiters of their controversies in peace; whilst the same authority contributes to give laws even to war itself—mitigating its ferocity, and limiting the range of its operations within the narrowest possible

bounds, consistent with its purposes and objects.

Protestant Germany was the field where the science of natural and international jurisprudence was first cultivated with most assiduity and success. The scientific writers of that intellectual land had not yet learned to use freely their native Teutonic tongue. That rich, copious, and expressive dialect—for scientific purposes clearly and decidedly superior to any other, except Greek alone—was almost entirely neglected by her scholars and men of science. They wrote in the dead language of Rome, to instruct the living men of their own age and country. In Germany more than any other country, (and *then* even more than *now*,) scientific and active life stand detached from each other like two separate worlds. Their mutual intercourse, at this period, was kept up through the medium of the learned or fashionable language, common to both. Leibnitz wrote mostly in Latin or French, and Wolf, his disciple, almost exclusively in Latin. Leibnitz, so justly compared by Gibbon to those conquerors whose empire has been lost in the ambition of universal conquest, comprised both the philosophy of law and the details of practical jurisprudence

within the vast circle of his attainments. Wolf gleaned after Puffendorf in the field of natural jurisprudence; he entitled himself to the credit of first separating the law which prevails, or ought to prevail, between nations, from that part of the science which teaches the duties of individuals; and of reducing the law of nations to a full and systematic form, as derived from a suitable application of the rules of natural justice to the conduct of independent sovereigns and states. The slumber of his once celebrated work, in nine ponderous tomes, is probably not now often disturbed; especially as all that is really valuable in their contents has been incorporated into the treatise of Vattel—  
“ a diffuse, unscientific, and superficial, but  
“ clear and liberal writer, whose work still  
“ maintains its place as the most convenient  
“ abridgment of a part of knowledge which,”  
in the words of Mackintosh, “ calls for the  
“ skill of a new builder.”<sup>14</sup>

Previously to these writers, Bynkershoek had selected for discussion the particular

<sup>14</sup> Christiani Wolfii Jus Naturæ Methodo Scientifica Pertractatum, in 9 tomos distributum. *Francof.* 1740. Vattel, *Droit des Gens ou Principes de la Loi Naturelle. Neufchatel*, 1758.

questions deemed the most important, and of most frequent occurrence in the practical intercourse of nations, instead of undertaking, after the example of his predecessors in the school of Grotius, an entire system of natural and public law. In precision and practical utility, he excels all the other publicists. It should be observed, however, as detracting not a little from his merits, that his pages are stained with ferocious sentiments respecting the rights of war, unworthy of a writer who flourished in the commencement of the eighteenth century: holding every thing lawful against an enemy—that he may be destroyed, though unarmed and defenceless, and even by poison, or any kind of weapons. It might be supposed that an author who sets out with such notions as these would write a very compendious treatise upon the laws of war: yet Bynkershoek proceeds to unfold, in a very clear and vigorous, though somewhat dogmatic and arrogant style, the principles of this branch of the science; from which we learn that there are many modes of hostility which the mitigated usage of nations, operating with the force of law, has prohibited between enemies, and in which the respective rights of belligerents and neutrals are



expounded in a more critical and satisfactory manner than by any other elementary writer.<sup>15</sup>

<sup>15</sup> *Quæstiones Juris Publici. Lugd. Batav.* 1737. Bynkershoek had previously published his treatise *De Dominio Maris*, in 1702, and that *De Foro Legatorum*, in 1721. The latter was translated into French, and published with valuable notes by Barbeyrac at the Hague, 1724, Amsterd. 1730, 1741, 1746.



## PART FIRST.

### SOURCES AND SUBJECTS OF INTERNATIONAL LAW.

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#### CHAP. I.

##### SOURCES OF INTERNATIONAL LAW.

THE leading object of Grotius, and of his <sup>§ 1.</sup> immediate disciples and successors, in the <sup>Natural</sup> science of which he was the founder, seems <sup>Law de-</sup> to have been, *First*, to lay down those rules <sup>fined.</sup> of justice which would be binding on men living in a social state, independently of any positive laws of human institution; or, as is commonly expressed, living together in a *state of nature*: and,

*Secondly*, To apply those rules, under the name of Natural Law, to the mutual relations of separate communities living in a similar state with respect to each other.

With a view to the first of these objects, *Grotius* sets out with refuting the doctrine

of those ancient sophists who wholly denied the reality of moral distinctions, and that of some modern theologians, who asserted that these distinctions are created entirely by the arbitrary and revealed will of God, in the same manner as certain political writers (such as Hobbes) afterwards referred them to the positive institution of the civil magistrate. For this purpose, Grotius labours to show that there is a law audible in the voice of conscience, enjoining some actions, and forbidding others, according to their respective suitableness or repugnance to the reasonable and social nature of man. "Natural law," says he, "is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of nature. Actions which are the subject of this exertion of reason, are in themselves lawful or unlawful, and are, therefore, as such, necessarily commanded or prohibited by God."<sup>1</sup>

<sup>1</sup> De Jur. Bel. ac Pac. lib. i. cap. 1, § x.

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

§ 2.  
Natural  
Law identical with  
the law of  
God, or  
Divine  
Law.

As independent communities acknowledge no common superior, they may be considered as living in a state of nature with respect to each other: and the obvious inference drawn by the disciples and successors of Grotius was, that the disputes arising among these independent communities must be determined by what they called the Law of Nature. This gave rise to a new and separate branch of the science, called the Law of Nations, *jus gentium*.<sup>2</sup>

§ 3.  
Natural  
Law applied to the  
intercourse  
of States.

<sup>2</sup> This law was termed *Jus inter Gentes*, by Dr. Zouch, an English civilian, distinguished in the celebrated controversy during the reign of Charles II. between the

§ 4.  
Law of  
Nations  
distin-  
guished  
from Na-  
tural Law.

*Grotius* distinguished the law of nations from the natural law by the different nature of its origin and obligation, which he attributed to the general consent of nations. In the introduction to his great work, he says, "I have used in favour of this law, the testimony of philosophers, historians, poets, and even of orators: not that they are indiscriminately to be relied on as impartial authority; since they often bend to the

civilians and common lawyers, as to the extent of the Admiralty jurisdiction. He introduced this term as more appropriate to express the real scope and object of that rule of conduct which obtains between nations. An equivalent term in the French language was afterwards proposed by Chancellor D'Aguesseau, as better adapted to express the idea properly annexed to the system of jurisprudence, commonly called *Droit des Gens*, but which, according to him, ought rather to be termed *Droit entre les Gens*. (*Œuvres de d'Aguesseau*, tom. ii. p. 337, ed. 1773, 42mo.) The term *International Law* has since been proposed by Mr. Bentham as calculated to express in our language, in "a more significant manner, that branch of jurisprudence which commonly goes under the name of *Law of Nations*, a denomination so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal or municipal jurisprudence." (*Morals and Legislation*, vol. ii. ed. 1823.) The term *International Law* has now taken root in the English language, and is familiarly used in all discussions connected with the science.

“ prejudices of their respective sects, the  
“ nature of their argument, or the interest of  
“ their cause : but because where many minds  
“ of different ages and countries concur in  
“ the same sentiment, it must be referred to  
“ some general cause. In the subject now in  
“ question, this cause must be either a just  
“ deduction from the principles of natural  
“ justice, or universal consent. The first  
“ discovers to us the natural law, the second  
“ the law of nations. In order to distinguish  
“ these two branches of the same science, we  
“ must consider, not merely the terms which  
“ authors have used to define them, (for they  
“ often confound the terms natural law and  
“ law of nations,) but the nature of the  
“ subject in question. For if a certain maxim  
“ which cannot be fairly inferred from ad-  
“ mitted principles is, nevertheless, found to  
“ be every where observed, there is reason to  
“ conclude that it derives its origin from  
“ positive institution.” Again he says, “ As  
“ the laws of each particular state are de-  
“ signed to promote its advantage, the consent  
“ of all, or at least the greater number of  
“ states, may have produced certain laws  
“ between them. And, in fact, it appears  
“ that such laws have been established,

“ tending to promote the utility, not of any particular state, but of the great body of these communities. This is what is termed the Law of Nations, when it is distinguished from Natural Law.”<sup>3</sup>

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

*Hobbes*, who appeared after Grotius, and before Puffendorf, asserted that the general principles of natural law and the law of nations are one and the same, and that the distinction between them is merely verbal. Thus he says, “ The natural law may be divided into the natural law of men, and the natural law of states, commonly called the law of nations. The precepts of both are the same; but since states, when they are once instituted, assume the personal qualities of individual men, that law, which when speaking of individual men we call the Law of Nature, is called the Law of Nations when applied to whole states, nations, or people.”<sup>4</sup> To this opinion *Puffendorf* implicitly subscribes, declaring that there is no other voluntary or positive law of nations properly invested with a true and legal force, and binding as the command of

<sup>3</sup> Prolegom. §§ xlii. xviii.    <sup>4</sup> De Cive, cap. 14. § 4.



“ a superior power.” In conformity with this opinion, Puffendorf contents himself with laying down the general principles of natural law, leaving it to the reader to apply it as he might find it necessary to private individuals or to independent societies.<sup>5</sup>

Grotius, on the other hand, considers the law of nations as a positive institution, deriving its authority from the positive consent of all, or the greater part of nations, which he supposes to be united in a social compact for this purpose. But one of his commentators (Rutherford) infers that there can be no such positive law of nations, because there is no such social union among nations as that supposed by Grotius. He concludes that the same law which is called the law of nature when applied to separate and unconnected individuals, becomes the law of nations when it is applied to the collective bodies of civil societies, considered as moral agents, or to the several members of civil societies, considered not as distinct agents, but as parts of these collective bodies. At the same time, he admits that the natural law is not the only

§ 6.  
How far  
the Law of  
Nations is  
a positive  
law de-  
rived from  
the posi-  
tive con-  
sent of  
nations.

<sup>5</sup> De Jure Naturæ et Gentium, lib. ii. cap. 3. § 23.

measure of the obligations that nations may be under to one another. When considered as moral agents, they become capable, as individuals are, of binding themselves to each other by particular compacts to do or avoid what the law of nature has neither commanded nor forbidden. But these obligations neither arise from a positive law of nations, nor produce such a law. They arise from immediate and direct consent, and extend no further than to the nations, which by their own act of immediate and direct consent have made themselves parties to them. The only foundation then, according to this writer, of international law, so far as it differs from the law of nature, is the general consent of mankind to consider each separate civil society as a distinct moral being. He contends that no evidence of a positive international law can be collected from usage, because there is no immemorial, constant, uniform practice among nations from which such a law can be collected. But if the law of nations, instead of being merely positive, is only the law of nature applied in consequence of a positive agreement among mankind to the collective bodies of civil societies as moral agents,

and to the several members of such societies as parts of these bodies, the dictates of this law may be ascertained by the same means that we use in searching for the law of nature. The history of what has passed from time to time among the several nations of the world may likewise be of some use in this inquiry: not because any constant and uninterrupted practice in matters which are indifferent by the law of nature can be collected from thence; but because we shall there find what has been generally approved, and what has been generally condemned in the variable and contradictory practice of nations. "There are two ways," says Grotius, (lib. i. cap. 1, § xix.) of investigating the law of nature: we ascertain this law, either by arguing from the nature and circumstances of mankind, or by observing what has been generally approved by all nations, or at least by all civilized nations. The former is the more certain of the two: but the latter will lead us, if not with the same certainty, yet with a high degree of probability, to the knowledge of this law. For such an universal approbation must arise from some universal principle; and this principle can be nothing else but the

“ common sense or reason of mankind. “ Since, therefore, the general law of nature “ may be investigated in this manner, the “ same law as it is applied particularly to “ nations as moral agents, and hence called “ the law of nations, may be investigated in “ the same manner.” Hence his commen- tator infers, that if we understand what the law of nature is, when it is applied to indi- vidual persons in a state of natural equality, we shall seldom be at a loss to judge what it is, when applied to nations, considered as collective persons in a like state of equality.<sup>6</sup>

§ 7.  
Law of  
Nations  
derived  
from rea-  
son and  
usage.

*Bynkershoek*, (who wrote after Puffendorf, and before Wolf and Vattel,) derives the law of nations from reason and usage (ex ratione et usu), and founds usage on the evidence of treaties and ordinances (pacta et edicta), with the comparison of examples frequently recurring. In treating on the law of con- traband, he says, “ The law of nations on “ this subject is to be drawn from no other “ source than reason and usage. Reason “ commands me to be equally friendly to two “ of my friends who are enemies to each “ other, and hence it follows that I am not to

<sup>6</sup> Rutherford's Inst. of Natural Law, b. i. c. 9, §§ 1—6.

“ prefer either in war. Usage is shown by the  
 “ constant, and as it were, perpetual custom  
 “ which sovereigns have observed of making  
 “ treaties and ordinances upon this subject, for  
 “ they have often made such regulations by  
 “ treaties to be carried into effect in case of  
 “ war, and by laws enacted after the com-  
 “ mencement of hostilities. I have said *by, as*  
 “ *it were, a perpetual custom* ; because one, or  
 “ perhaps two treaties, which vary from the  
 “ general usage, do not alter the law of  
 “ nations.”<sup>7</sup>

In treating of the question as to the compe-  
 tent judicature in cases affecting ambas-  
 sadors, he says : “ The ancient jurisconsults  
 “ assert, that the law of nations is that  
 “ which is observed, in accordance with the  
 “ light of reason, between nations, if not  
 “ among all, at least certainly among the  
 “ greater part, and those the most civilized.  
 “ According to my opinion we may safely  
 “ follow this definition, which establishes  
 “ two distinct bases of this law ; namely,  
 “ reason and custom. But in whatever  
 “ manner we may define the law of nations,  
 “ and however we may argue upon it, we  
 “ must come at last to this conclusion,

<sup>7</sup> Quæstiones Jur. Pub. cap. 10.

“ that what reason dictates to nations, and  
 “ what nations observe between each other,  
 “ as a consequence of the collation of cases  
 “ frequently recurring, is the only law of those  
 “ who are not governed by any other—(uni-  
 “ cum jus sit eorum, qui alio jure non regun-  
 “ tur.) If all men are men, that is to say, if  
 “ they make use of their reason, it must  
 “ counsel and command them certain things  
 “ which they ought to observe as if by mutual  
 “ consent, and which being afterwards esta-  
 “ blished by usage, impose upon nations a  
 “ reciprocal obligation; without which law,  
 “ we can neither conceive of war, nor peace,  
 “ nor alliances, nor embassies, nor commerce.”<sup>8</sup>  
 Again, he says, treating the same question :  
 “ The Roman and pontifical law can hardly  
 “ furnish a light to guide our steps: the  
 “ entire question must be determined by  
 “ reason and the usage of nations. I have  
 “ alleged whatever reason can adduce for or  
 “ against the question: but we must now see  
 “ what usage has approved, for that must  
 “ prevail, since the law of nations is thence  
 “ derived.”<sup>9</sup> In a subsequent passage of the  
 same treatise, he says: “ It is nevertheless  
 “ most true, that the States General of Hol-

<sup>8</sup> De Foro Legatorum, cap. 3, § xii.    <sup>9</sup> Ibid. cap. 7, § viii.

“ land alleged in 1651, that according to the  
 “ law of nations, an ambassador cannot be  
 “ arrested, though guilty of a criminal  
 “ offence; and equity requires that we should  
 “ observe that rule unless we have previ-  
 “ ously renounced it. The law of nations is  
 “ only a presumption founded upon usage,  
 “ and every such presumption ceases the  
 “ moment the will of the party who is affected  
 “ by it is expressed to the contrary. Huberus  
 “ asserts that ambassadors cannot acquire or  
 “ preserve their rights by prescription; but  
 “ he confines this to the case of subjects who  
 “ seek an asylum in the house of a foreign  
 “ minister against the will of their own sove-  
 “ reign. I hold the rule to be general as to  
 “ every privilege of ambassadors, and that  
 “ there is no one they can pretend to enjoy  
 “ against the express declaration of the sove-  
 “ reign, because an express dissent excludes  
 “ the supposition of a tacit consent, and there  
 “ is no law of nations except between those  
 “ who voluntarily submit to it by tacit con-  
 “ vention.”<sup>10</sup>

Without refining too much upon this sub-  
 ject, it may be properly observed that inter-

§ 8.  
 The law of  
 nations is

<sup>10</sup> De Foro Legatorum, cap. 19, § vi.

not merely  
the law of  
nature ap-  
plied to  
sovereign  
states.

national law is something more and other than merely the natural law (the law of God) applied to the conduct of independent states considered as moral beings. In order to determine what is the rule to be observed among nations in any particular case, it is not sufficient to inquire what would be the natural law in a similar case, when applied to individual persons supposed to be living in a state of social union, independently of positive human institutions for their government. "The application of a rule," says *Vattel*, "cannot be reasonable and just, unless it is made in a manner suitable to the subject. We are not to believe that the law of nations is precisely and in every case the same as the law of nature, the subjects of them only excepted, so that we need only substitute nations for individuals. A civil society or state is a subject very different from an individual of the human race; whence, in many cases, there follow, in virtue of the law of nature itself, very different obligations and rights; for the same general rule, applied to two subjects, cannot produce exactly the same decisions when the subjects are different; since a particular rule, that is very just with respect to one



“ subject, may not be applicable to another.  
“ There are many cases, then, in which the  
“ law of nature does not determine between  
“ state and state as it would between man and  
“ man. We must therefore know how to  
“ accommodate the application of it to differ-  
“ ent subjects ; and it is the art of applying  
“ it with a justness founded on right reason,  
“ that renders the law of nations a distinct  
“ science.”<sup>11</sup>

<sup>11</sup> Vattel, *Droit des Gens*, Prelim. § 6. This modification of natural law, in its application to the mutual relations of states, is attributed by Vattel himself to Wolf. (See Pref. p. xx.) “ A great part of the law of nations,” says Lord Stowell, “ stands upon the usage and practice of nations. It is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent ; and if it stops there, you are not at liberty to go further, and say that mere general speculation would bear you out in a further progress. For instance, on mere general principles, it is lawful to destroy your enemy ; and mere general principles make no great difference as to the manner in which it is to be effected ; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction ; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.”—*Robinson's Adm. Rep.* vol. i. p. 140. The Flad Oyen.

If states are moral beings capable of contracting by direct and positive consent, and still more if their consent to consider each other as such moral beings may be implied from the general acquiescence of mankind, they are equally capable of binding themselves by that tacit convention which is fairly to be implied from the approved usage and practice of nations, and their general acquiescence in certain positive rules for the regulation of their mutual intercourse. But it has been asserted that such an approved usage and general acquiescence can only spring up among nations of the same class or family, united by the ties of similar origin, manners, and religion. *Grotius* states that the *jus gentium* acquires its obligatory force from the positive consent of all nations, or *at least of several*. "I say of several, for except the natural law, which is also called the *jus gentium*, there is no other law which is common to all nations. It often happens, too, that what is the law of nations in one part of the world is not so in another, as we shall show in the proper place in respect to prisoners of war and the *jus postliminii*."<sup>12</sup>

<sup>12</sup> De Jur. Bel. ac Pac. lib. i. cap. 1, § xiv. 4.

So also Bynkershoek, in the passage before cited, says that "the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, *at least certainly among the greater part, and those the most civilized.*" *Montesquieu* says, that "the law of nations is naturally founded upon the principle that all nations ought to do to each other in peace as much good, and in war as little injury, as possible, consistently with their true interests. The object of war is victory; that of victory is conquest; that of conquest is self-preservation. From this and the former principle ought to be derived those laws which form the law of nations." After thus stating the principles on which the law of nations *ought to be founded*, he proceeds to say, that "every nation has a law of nations—even the Iroquois, who eat their prisoners, have one. They send and receive ambassadors; they know the laws of war and peace; the evil is, that their law of nations is not founded upon true principles."<sup>13</sup>

<sup>13</sup> *Esprit des Lois*, liv. i. ch. 3. *Montesquieu* deduces the peculiar law of nations prevailing among different races from their peculiar moral and physical circumstances, in the

§ 9.  
There is  
no univer-  
sal law of  
nations.

There is then, according to these writers, no universal, immutable law of nations, binding upon the whole human race—which all mankind in all ages and countries, ancient and modern, savage and civilized, christian and pagan, have recognized in theory or in practice, have professed to obey, or have in fact obeyed ;—no law of nations similar to that law of right reason of which Cicero speaks, “ which “ is congenial to the feelings of nature, diffused “ among all men, uniform, eternal, command- “ ing us to our duty and prohibiting every “ violation of it ;—one eternal and immortal “ law, which can neither be repealed nor “ derogated from, addressing itself to all “ nations and all ages, deriving its authority “ from the common Sovereign of the universe, “ seeking no other lawgiver and interpreter, “ carrying home its sanctions to every breast “ by the inevitable punishment he inflicts on “ its transgressors.” If there be any such universal law acknowledged by all nations, it must be that of reciprocity, of amicable or vindictive retaliation, as the case may require the application of either. The ordinary *jus gentium* is only a particular law, applicable to same philosophical spirit with which he traces the origin and history of the civil laws of different nations.

a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions, among every class of nations. Hence the international law of the civilized, christian nations of Europe and America, is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, is another and a very different thing. The international law of Christendom began to be fixed about the time of Grotius, when the combined influence of religion, chivalry, the feudal system, and commercial and literary intercourse, had blended together the nations of Europe into one great family. This law does not merely consist of the principles of natural justice applied to the conduct of states considered as moral beings. It may, indeed, have a remote foundation of this sort; but the immediate visible basis on which the public law of Europe, and of the American nations which have sprung from the European stock, has been erected, are the customs, usages, and conventions observed by that portion of the human race in their mutual intercourse.<sup>14</sup>

<sup>14</sup> Ward's History of the Law of Nations in Europe, *passim*.

§ 10.  
International law  
between christian  
and Mohammedan  
nations.

Many examples of the practical application of this theory will be found in the intercourse actually subsisting between Turkey and the Barbary states on the one hand, and the christian nations of Europe and America on the other; in which the latter have been sometimes content to take the law from the Mohammedans, and in others to modify the christian code in its application to them. Instances of this are to be found in the cases of the ransom of prisoners, the rights of ambassadors, and many others which will readily occur to the intelligent reader. On some points the Mohammedans are considered entitled to a very relaxed application of the principles established by long usage between the states of Christendom holding an intimate and constant intercourse with each other. Thus a formal sentence of condemnation by a Court of Admiralty is not held necessary to transfer the property in a vessel captured by the Algerines, and subsequently sold to a christian purchaser *bonæ fidei*. It is deemed sufficient if the confiscation takes place by a public act of the competent authority, according to the established custom of that part of the world.<sup>15</sup> On the other hand, the merchants

<sup>15</sup> Robinson's Adm. Rep. vol. iv. p. 3. The Helena.

of the African states are not exempted from the observance of the law of blockade, though on some points they may be entitled to a more relaxed application of the European law of nations. "The law of nations," says the same enlightened civilian just quoted, "is a law  
" made up of a good deal of complex reasoning,  
" although derived from very simple rules, and  
" altogether composing a pretty artificial system, which is not familiar to their knowledge or their observance. But on a point  
" like this—the breach of a blockade, one of  
" the most universal and simple operations of  
" war in all ages and countries, excepting such  
" as are merely savage—no such indulgence  
" can be shown. It must not be understood by  
" them that if an European army or fleet is  
" blockading a town or port, they are at  
" liberty to trade with that port. If that  
" could be maintained, it would render the  
" obligation of a blockade perfectly nugatory.  
" They, in common with all other nations,  
" must be subject to this first and elementary  
" principle of blockade—that persons are not  
" to carry into the blockaded port supplies of  
" any kind. It is not a new operation of  
" war; it is almost as old and general as war  
" itself. The subjects of the Barbary states

“ could not be ignorant of the general rules  
 “ applying to a blockaded port, so far as  
 “ concerns the interests and duties of neu-  
 “ trals.”<sup>16</sup>

§ 11.  
 Definition  
 of interna-  
 tional law.

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

§ 12.  
 In what  
 sense the  
 rules of  
 conduct  
 between  
 states are  
 called  
*laws*.

A distinguished writer upon the science of law has questioned how far the rules which have been adopted for the conduct of independent societies of men, or sovereign states, in their mutual relations with each other, can with strict propriety be called *laws*.<sup>17</sup> And one of his disciples has observed, that “ *laws* (properly “ so called) are commands proceeding from “ a determinate rational being, or a determi-  
 “ nate body of rational beings, to which is

<sup>16</sup> Sir W. Scott (Lord Stowell) in Robinson’s Adm. Rep. vol. iii. p. 324. The *Hurtige Hane*.

<sup>17</sup> Bentham, *Morals and Legislation*, vol. ii. p. 256, ed. 1823.



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

“ moral sanctions : by fear on the part of  
 “ nations, or by fear on the part of sovereigns;  
 “ of provoking general hostility, and incurring  
 “ its probable evils, in case they should violate  
 “ maxims generally received and respected.”<sup>18</sup>

§ 13. International law is commonly divided into  
 Divisions of interna- two branches :—  
 tional law.

I. What is termed the Natural Law of Nations, consisting of the rules of justice applicable to the conduct of those independent societies of men called states.

II. The Positive Law of Nations, which is again subdivided into three branches :—

1. The Voluntary Law of Nations, derived from the presumed consent of nations arising out of their general usage and consent.

2. The Conventional Law of Nations, derived from the express consent of nations, as evidenced in treaties and other international compacts.

3. The Customary Law of Nations, derived from the tacit consent of particular nations establishing a peculiar usage between themselves.<sup>19</sup>

<sup>18</sup> Austin, *Province of Jurisprudence determined*, pp. 147-8, 207-8.

<sup>19</sup> Vattel, *Droit des Gens*, Prelim.

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

§ 14.  
Sources of  
international law.

1. The rules of conduct which ought to be observed between nations, as deduced by reason from the nature of the society existing among independent states.

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

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

In the present imperfect state of positive international law, which acknowledges no permanent authorized judicial expositor of its principles and rules, resort must necessarily be had to the precedents collected from the decisions of the boards of arbitration specially constituted to determine controversies between particular states, or of the courts of prize established in every country to judge of the validity of captures made in war. Greater weight is justly attributable to the judgments of the mixed tribunals, appointed by the joint consent of the two nations between whom they are to decide, than to those of admiralty courts esta-

blished by and dependent on the instructions of one nation only. It is said indeed to be the duty of these courts, though established in the belligerent country, to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is locally in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits there to determine the questions that arise exactly as he would determine the same questions if sitting in the neutral country whose rights are to be adjudicated upon.<sup>20</sup> Such is the theory of judicial duty, as expounded by one of the greatest of maritime judges. How far the practice of recent times, or of any times, has corresponded with this theory, will always be a matter of doubt with those whose rights and interests are affected by the adjudications of these *ex parte* tribunals. This will be more especially the case with respect to a great maritime country, depending on the encouragement of

<sup>20</sup> Sir W. Scott (Lord Stowell) in the case of the Swedish Convoy, Robinson's Adm. Rep. vol. i. p. 34.

its navy for its glory and safety, where the national bias is so strong in favour of the captor, that the judge must, unconsciously, feel its influence. On this account, it becomes the more necessary to investigate rigidly the principles on which these adjudications are founded, and the reasonings by which they are supported.<sup>21</sup> With this caution, the books of admiralty reports may become an instructive source of information respecting the practical administration of prize law.

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

5. The history of the wars, negotiations, treaties of peace, and other transactions relating to the public intercourse of nations.

6. Treaties of peace, alliance, and commerce, declaring, modifying, or defining the preexisting international law.

Though the binding force of express compacts between nations may not depend upon positive law, still these compacts constituting a rule between the contracting parties, are

<sup>21</sup> Mr. Chief Justice Marshall, in the case of the ship *Venus*, Cranch's Rep. vol. viii. p. 253.

familiarly called *laws* by analogy to the proper use of that term. The effect of treaties and conventions between nations is not necessarily restricted, as Rutherford has supposed, to those states who are direct parties to these compacts. They cannot, indeed, modify the original and preexisting international law to the disadvantage of those states who are not direct parties to the particular treaty in question. But if such a treaty relaxes the rigour of the primitive law of nations in their favour, or is merely declaratory of the preexisting law, or furnishes a more definite rule in cases where the practice of different states has given rise to conflicting pretensions, the conventional law thus introduced is not only obligatory as between the contracting parties, but constitutes a rule to be observed by them towards all the rest of the world.<sup>22</sup>

What has commonly been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties varying from the general usage and custom of nations cannot alter the interna-

<sup>22</sup> See "Substance of a Speech delivered by Lord Grenville in the House of Lords, Nov. 13, 1801," upon the maritime convention of June, 1801, between Great Britain and Russia.

tional law, yet an almost perpetual succession of treaties establishing a particular rule will go very far towards proving what that law is upon a disputed point. Some of the most important modifications and improvements in the modern law of nations have thus originated in treaties.<sup>23</sup>

<sup>23</sup> Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 10.*

## CHAP. II.

## SOVEREIGN STATES.

§ 1.  
Sovereign  
states de-  
fined.

THE subjects of international law are separate political societies of men living independently of each other, and especially those called Sovereign States.

A sovereign state is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers.<sup>1</sup>

§ 2.  
Limited  
sovereignty.

This definition, unless taken with great qualifications, cannot be admitted as entirely accurate. Some states are completely sovereign, and independent, acknowledging no superior but the supreme Ruler and Governor of the universe. The sovereignty of other states is limited and qualified in various degrees.

Equality of  
states.

All independent states are equal in the eye of international law, whatever may be their relative power. The coordinate sovereignty

<sup>1</sup> Vattel, *Droit des Gens*, liv. i. c. 1. § 4.



of a particular state is not impaired by its occasional obedience to the commands of other states, or even the habitual influence exercised by them over its councils. It is only when this obedience, or this influence, assumes the form of express compact, that the sovereignty of the state, inferior in power, is legally affected by its connexion with the other. Treaties of equal alliance, freely contracted between independent states, do not impair their sovereignty. Treaties of unequal alliance, guarantee, mediation, and protection, may have a different effect.

Still the sovereignty of the inferior ally or protected state remains, though limited and qualified by the stipulations of the treaties of alliance and protection.<sup>2</sup>

Thus the city of Cracow in Poland, with its <sup>City of Cracow.</sup> territory, was declared by the congress of Vienna to be a free, independent, and neutral state, under the protection of Russia, Austria, and Prussia.<sup>3</sup> This state may be occasionally obedient to the commands of these great powers, or its councils may be habitually influenced by them, but its sovereignty still

<sup>2</sup> Vattel, liv. i. c. 1. §§ 5, 6.

<sup>3</sup> Acte du Congrès de Vienne du 9 Juin, 1815, Art. 6, 9, 10.

remains, except so far as it is affected by the protectorate which may be lawfully asserted over it in pursuance of the treaties of Vienna.

§ 3.  
Tributary  
and vassal  
states.

So also tributary states, and states having a feudal relation to each other, are still considered as sovereign so far as their sovereignty is not affected by this relation. Thus it is evident that the tribute formerly paid by the principal maritime powers of Europe to the Barbary states, did not at all affect the sovereignty and independence of the former; whilst that paid by the principalities of Walachia and Moldavia to the Ottoman Porte under the mediation of Russia, can hardly be considered as leaving them any thing more than a shadow of sovereignty. So also the king of Naples has been a nominal vassal of the Papal see ever since the eleventh century: but this feudal dependance, now abolished, was never considered as impairing the sovereignty of the kingdom of Naples.<sup>4</sup>

§ 4.  
Single or  
united  
states.

Sovereign states may be either single, or may be united together under a common sovereign, or by a federal compact.

<sup>4</sup> Ward's Hist. of the Law of Nations, vol. ii. p. 69.

1. If this union under a common sovereign is not an incorporate union, that is to say, if it is only *personal* in the reigning sovereign, or even if it is *real*, yet if the different component parts are united with a perfect equality of rights, the sovereignty of each state remains unimpaired.<sup>5</sup>

§ 5.  
*Personal*  
union under the  
same sovereign.

Thus the kingdom of Hanover is held by the King of the United Kingdom of Great Britain and Ireland separately from his insular dominions. Hanover and the United Kingdom are subject to the same prince, without any dependence on each other, both kingdoms retaining their respective national rights of sovereignty.

The union of the different states composing the Austrian monarchy is a *real* union. The hereditary dominions of the house of Austria, the kingdoms of Hungary and Bohemia, the Lombardo-Venetian kingdom, and other states, are all indissolubly united under the same sceptre, but with distinct fundamental laws and other political institutions.

§ 6.  
*Real* union  
under the  
same sovereign.

It appears to be an intelligible distinction between the union of the Austrian states,

<sup>5</sup> Grotius, de Jur. Bel. ac Pac, lib. ii. cap. 9, §§ 8, 9. Kluber, Droit des Gens Modernes de l'Europe, pt. i. c. 1. § 27.

and all other unions which are not merely *personal* under the same crowned head, that though the separate sovereignty of each state may still subsist internally in respect to its co-ordinate states, and in respect to the imperial crown, yet the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign powers.

§ 7.  
Incorpo-  
rate union.

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

§ 8.  
Union  
between  
Russia and  
Poland.

3. The union established by the congress of Vienna, between the empire of Russia and the kingdom of Poland, is of a more anomalous character. By the Final Act of the congress, the duchy of Warsaw was reunited to the Russian empire, and it was stipulated that it should be irrevocably connected with that

empire by its constitution, to be possessed by His Majesty the emperor of all the Russias, his heirs and successors in perpetuity, with the title of King of Poland ; His Majesty reserving the right to give to this state, enjoying a distinct administration, such interior extension as he should judge proper : and that the Poles, subject respectively to Russia, Austria, and Prussia, should obtain a representation and national institutions, regulated according to that mode of political existence which each government to whom they belong should think useful and proper to grant.\*

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

“ Les Polonais, sujets respectifs de la Russie, de l’Au-  
 “ triche, et de la Prusse, obtiendront une représentation  
 “ et des institutions nationales, réglées d’après la mode  
 “ d’existence politique que chacun des Gouvernemens aux-  
 “ quelles ils appartiennent jugera utile et convenable de leurs  
 “ accorder.”—*Art. 1.*

In consequence of the revolution and reconquest of Poland by Russia, a manifesto was issued by the Emperor

§ 9.  
Federal  
union.

4. Sovereign states permanently united together by a federal compact, either form a *system of confederated states* (properly so called) or a *supreme federal government*, which has been sometimes called a *composite state*.

§ 10.  
Confederated  
states, each  
retaining  
its own  
sovereignty.

In the first case, the several states are connected together by a compact which does not essentially differ from an ordinary treaty of equal alliance. Consequently the sovereignty of each member of the union remains unimpaired; the resolutions of the federal body being enforced, not as laws directly binding on the private individual subjects, but through the agency of each separate government, adopting them, and giving them the force of law within its own jurisdiction.

§ 11.  
Supreme  
federal  
government  
or  
composite  
state.

In the second case, the federal government created by the act of union, is sovereign

Nicolas, on the 26th of February, 1832, by which the kingdom of Poland was declared to be perpetually united (*réuni*) to the Russian empire, and to form an integral part thereof; the coronation of the emperors of Russia and kings of Poland hereafter to take place at Moscow by one and the same act; Poland to be separately administered, and to preserve its civil and criminal code, subject to alteration and revision by the council of the Russian empire; and consultative provincial states to be established in the different Polish provinces.

and supreme within the sphere of the powers granted to it by that act, and the sovereignty of each several state is impaired both by the powers thus granted to the federal government, and the limitations thus imposed on the several states' governments.

1. Thus the sovereign princes and free cities of Germany, including the Emperor of Austria and the King of Prussia, in respect to their possessions which formerly belonged to the German empire, the King of Denmark for the duchy of Holstein, and the King of the Netherlands for the grand duchy of Luxembourg, are united in a perpetual league, under the name of the Germanic Confederation. § 12.  
Germanic  
confederation.

From the extremely complicated constitution of this league, it may at first sight appear doubtful to which of these two classes of federal compacts it properly belongs, and consequently how far the sovereignty of each member of the union is affected or impaired by its regulations.

The object of this union is declared to be the preservation of the external and internal security of Germany, the independence and inviolability of the confederated states. All the members of the confederation, as such, are

entitled to equal rights. New states may be admitted into the union, by the unanimous consent of the members.<sup>7</sup>

The affairs of the union are confided to a federative diet, which sits at Frankfort on the Main, in which the respective states are represented by their ministers, and are entitled to the following votes in what is called the *Ordinary Assembly* of the diet :—

	Votes.
Austria . . . . .	1
Prussia . . . . .	1
Bavaria . . . . .	1
Saxony . . . . .	1
Hanover . . . . .	1
Wurtemberg . . . . .	1
Baden . . . . .	1
Electoral Hesse . . . . .	1
The Grand Duchy of Hesse . . . . .	1
Denmark (for Holstein) . . . . .	1
The Netherlands (for Luxemburg) . . . . .	1
The Grand Ducal and Ducal Houses of Saxony	1
Brunswick and Nassau . . . . .	1
Mecklenburg-Schwerin and Strelitz . . . . .	1
Oldenburg, Anhalt, and Schwartzburg . . . . .	1

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Carried forward 15

<sup>7</sup> Acte Final du Congrès de Vienne, art. 53, 54, 55.  
Deutsche Bundes Acte, vom 8 Juni, 1815, art. 1. Wiener  
Schluss Acte, vom 15 Mai, 1820, art. 1, 6.



	Votes.
Brought forward	15
Hohenzollern, Lichtenstein, Reuss, Schaumburg, Lippe, Waldeck, and Hesse Homburg	1
The free cities of Lubek, Frankfort, Bremen, and Hamburg . . . . .	1
—	
Total	17

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

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

	Votes.
Austria . . . . .	4
Prussia . . . . .	4
Saxony . . . . .	4
Bavaria . . . . .	4
Hanover . . . . .	4
Wurtemberg . . . . .	4
Baden . . . . .	3
Electoral Hesse . . . . .	3
The Grand Duchy of Hesse . . . . .	3
Holstein . . . . .	3
Luxemburg . . . . .	3
Brunswick . . . . .	2
Mecklenburg-Schwerin . . . . .	2
—	
Carried forward	43

## SOVEREIGN STATES.

	Votes.
Brought forward	43
Naassau . . . . .	2
Saxe Weimar . . . . .	1
Gotha . . . . .	1
Coburg . . . . .	1
Meinengen . . . . .	1
Hilburghausen . . . . .	1
Mecklenburg-Strelitz . . . . .	1
Oldenburg . . . . .	1
Anhalt-Dessau . . . . .	1
Anhalt-Bernburg . . . . .	1
Anhalt-Coethen . . . . .	1
Schwartzburg-Sondershausen . . . . .	1
Schwartzburg-Rudolstadt . . . . .	1
Hohenzollern-Hechingen . . . . .	1
Lichtenstein . . . . .	1
Hohenzollern-Sigmaringen . . . . .	1
Waldeck . . . . .	1
Reuss (elder branch) . . . . .	1
Reuss (younger branch) . . . . .	1
Schaumburg-Lippe . . . . .	1
Lippe . . . . .	1
Hesse-Homburg . . . . .	1
The free city of Lubeck . . . . .	1
Frankfort . . . . .	1
Bremen . . . . .	1
Hamburg . . . . .	1

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Total 70

Every question to be submitted to the  
general assembly of the diet is first discussed

in the ordinary assembly, where it is decided by a majority of votes. But in the general assembly (*in pleno*) two-thirds of all the votes are necessary to a decision. The ordinary assembly determines what subjects are to be submitted to the general assembly. But all questions concerning the adoption or alteration of the fundamental laws of the confederation, or organic regulations establishing permanent institutions as means of carrying into effect the declared objects of the union, or the admission of new members, or concerning the affairs of religion, must be submitted to the general assembly; and in all these cases absolute unanimity is necessary to a final decision.<sup>8</sup>

The diet has power to establish fundamental laws for the confederation, and organic regulations as to its foreign, military, and internal relations.<sup>9</sup>

All the states guarantee to each other the possession of their respective dominions within the union, and engage to defend, not only entire Germany, but each individual state in case of attack. When war is declared by the

<sup>8</sup> Acte Final, art. 58. Wiener Schluss Acte, art. 12—15.

<sup>9</sup> Acte Final, art. 62.

confederation, no state can negotiate separately with the enemy, nor conclude peace or an armistice without the consent of the rest. Each member of the confederation may contract alliances with other foreign states, provided they are not directed against the security of the confederation, or the individual states of which it is composed. No state can make war upon another member of the union, but all the states are bound to submit their differences to the decision of the diet. This body is to endeavour to settle them by mediation; and if unsuccessful, and a juridical sentence becomes necessary, resort is to be had to an *Austrägal* proceeding, (*Austrägal-Instanz*), to which the litigating parties are bound to submit without appeal.<sup>10</sup>

Each country of the confederation is entitled to a local constitution of states.<sup>11</sup> The diet may guarantee the constitution established by any particular state upon its application, and thereby acquires the right of settling the differences which may arise respecting its interpretation or execution, either by mediation or judicial arbitration, unless such constitution

<sup>10</sup> Acte Final, art. 63.

<sup>11</sup> Bundes Acte, art. 13. In allen Bundestaaten wird eine landständische Verfassung Statt finden.

shall have provided other means of determining controversies of this nature.<sup>12</sup>

In case of rebellion or insurrection, or imminent danger thereof in several states of the confederation, the diet may interfere to suppress such insurrection or rebellion, as threatening the general safety of the confederation. And it may in like manner interfere on the application of any one state, or, if the local government is prevented by the insurgents from making such application, upon the notoriety of the fact of the existence of such insurrection, or imminent danger thereof, to suppress the same by the common force of the confederation.<sup>13</sup>

In case of the denial or unreasonable delay of justice by any state to its subjects, or others, the aggrieved party may invoke the mediation of the diet; and if the suit between private individuals involves a question respecting the conflicting rights and obligations of different members of the union, and it cannot be amicably arranged by compromise, the diet may submit the controversy to the decision of an Auströgal tribunal.<sup>14</sup>

<sup>12</sup> Wiener Schluss Acte, art. 60.

<sup>13</sup> Ibid. art. 25—28.

<sup>14</sup> Ibid. art. 29, 30.

The decrees of the diet are executed by the local governments of the particular states of the confederation, on application to them by the diet for that purpose, excepting in those cases where the diet interferes to suppress an insurrection or rebellion in one or more of the states; and even in these instances, the execution is to be enforced, so far as practicable, in concert with the local government against whose subjects it is directed.<sup>15</sup>

The subjects of each member of the union have the right of acquiring and holding real property in any other state of the confederation; of migrating from one state to another; of entering into the military or civil service of any one of the confederated states, subject to the paramount claim of their own native sovereign; and of exemption from every *droit de retraction*, or other similar tax on removing their effects from one state to another, unless where particular reciprocal compacts have stipulated to the contrary. The diet has power to establish uniform laws relating to the freedom of the press, and to secure to authors the copyright of their works throughout the confederation.<sup>16</sup>

<sup>15</sup> Wiener Schluss Acte, art. 32.

<sup>16</sup> Bundes Acte, art. 18.

The different christian sects throughout the confederation are entitled to an equality of civil and political rights; and the diet is empowered to take into consideration the means of ameliorating the civil condition of the Jews, and of securing to them in all the states of the confederation the full enjoyment of civil rights, upon condition that they submit themselves to all the obligations of other citizens. In the mean time, the privileges granted to them by any particular state are to be maintained.<sup>17</sup>

The diet has also power to regulate the commercial intercourse between the different states, and the free navigation of the rivers belonging to the confederation, as secured by the treaty of Vienna.<sup>18</sup>

Notwithstanding the great mass of powers thus given to the diet, and the numerous restraints imposed upon the exercise of sovereignty by the individual states of which the union is composed, it does not appear that the Germanic confederation can be distinguished from an ordinary equal alliance between independent sovereigns, except by its permanence, and the greater number and complication of

<sup>17</sup> Bundes Acte, art. 16.

<sup>18</sup> Ibid. art. 19. Acte Final, art. 108—117.

the objects it is intended to embrace. The several states of the confederation do not form by their union one composite state, nor are they subject to a common sovereign. Though what are called the fundamental *laws* of the confederation are framed by the diet, which has also power to make organic regulations respecting its external, internal, and military relations; these regulations are not, in general, enforced as laws directly binding on the private individual subjects, but only through the agency of each separate government adopting them, and giving them the force of laws within its own local jurisdiction. If there be cases where the diet may rightfully enforce its own resolutions directly against the individual subjects, or the body of subjects within any particular state of the confederation, without the agency of the local governments, (and there appear to be some such cases,) then these cases, when they occur, form an exception to the general character of the union, which then so far becomes a composite state, or supreme federal government. But the occasional obedience of the diet, and through it of the several states, to the commands of the two great preponderating members of the confederation, or even the habitual influence exercised



by them over its councils, and over the councils of its several states, does not, in legal contemplation, impair their sovereignty, or change the legal character of their union.

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

Art. 2. Since according to the spirit of the said 57th article of the Final Act, and its inductions as expressed in the 58th article, the chambers cannot refuse to any German sovereign the necessary means of fulfilling his federal obligations, and those imposed by the local

constitution, the cases in which the chambers endeavour to make their consent to the taxes necessary for these purposes depend upon the assent of the sovereign to their propositions upon any other subject, are to be classed among those cases to which are to be applied the 25th and 26th articles of the Final Act, relating to resistance of the subjects against the government.

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

Art. 4. In order to maintain the rights and dignity of the confederation, and of the assembly representing it, against usurpations of every kind, and at the same time to facilitate to the states which are members of the confederation the maintenance of the constitutional relations between the local governments and the legislative chambers, there shall be appointed by

the diet, in the first instance for the term of six years, a commission charged with the supervision of the deliberations of the chambers, and with directing their attention to the propositions and resolutions which may be found in opposition to the federal obligations, or to the rights of sovereignty, guaranteed by the compacts of the confederation. This commission is to report to the diet, which, if it finds the matter proper for further consideration, will put itself in relation with the local government concerned. After the lapse of six years a new arrangement is to be made for the prolongation of the commission.

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

and punish every attack against the confederation in the local chambers.

Art. 6. Since the diet is already authorized by the 17th article of the Final Act, for the maintenance of the true meaning of the original act of confederation, to give its provisions such an interpretation as may be consistent with its object, in case doubts should arise in this respect, it is understood that the confederation has the exclusive right of interpreting, so as to produce their legal effect, the original act of the confederation and the Final Act, which right it exercises by its constitutional organ, the diet.

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

By the 1st article of this last-mentioned act, it is provided, that in case of differences arising between the government of any state and the legislative chambers, either respecting the interpretation of the local constitution, or upon the limits of the co-operation allowed to the chambers in carrying into effect certain determinate rights of the sovereign, and especially

in case of the refusal of the necessary supplies for the support of government conformably to the constitution and the federal obligations of the state, after every legal and constitutional means of conciliation have been exhausted, the differences shall be decided by a federal tribunal of arbitrators appointed in the following manner.

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

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

either to name judges, they may be appointed by the diet.

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

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

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

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

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

to the diet, in order to be communicated to the government of the state interested.

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

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

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

11. The same tribunal shall decide upon the differences and disputes, which may arise, in the free towns of the confederation, between the senate and the authorities established by the burghers in virtue of their local constitutions. This provision is not to be construed to make any alteration in the 46th article of the act of the congress of Vienna of 1815, relating to the constitution of the free town of Frankfort.

12. The different members of the confederation may resort to the same tribunal of


arbitration to determine the controversies arising between them ; and whenever the consent of the states respectively interested is given for that purpose, the diet shall take the necessary measures to organize the tribunal according to the preceding articles.

§ 13.  
United  
States of  
America.

The constitution of the United States of America is of a very different nature from that of the Germanic confederation. It is not merely a league of sovereign states for their common defence against external and internal violence, but a supreme federal government, or composite state, acting not only upon the sovereign members of the union, but directly upon all its citizens in their individual and corporate capacities. It was established, as the constitutional act expressly declares, by “ the people of the United States, “ in order to form a more perfect union, establish justice, ensure domestic tranquillity, “ provide for the common defence, promote “ the general welfare, and secure the blessings “ of liberty to them and their posterity.” The legislative power of the union is vested in a congress, consisting of a senate, the members of which are chosen by the local legislatures of the several states, and a house of represen-



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



powers vested in the federal government by the constitution. To give effect to this mass of sovereign authorities, the executive power is vested in a President of the United States, chosen by electors appointed in each state in such manner as the legislature thereof may direct. The judicial power extends to all cases in law and equity arising under the constitution, laws, and treaties of the union, and is vested in a supreme court, and such inferior tribunals as congress may establish. The federal judiciary exercises under this grant of power the authority to examine the laws passed by the congress and the several state legislatures, and, in cases proper for judicial determination, to decide on the constitutional validity of such laws. The treaty-making power is vested exclusively in the president and senate, all treaties negotiated with foreign states being subject to their ratification. No state of the union can enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in the payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; grant any title of nobility; lay any duties on imports

or exports, except such as are necessary to execute its local inspection laws, the produce of which must be paid into the national treasury, and such laws are subject to the revision and control of the congress. Nor can any state, without the consent of congress, lay any tonnage duty; keep troops or ships of war in time of peace; enter into any agreement or compact with another state, or with a foreign power; or engage in war, unless actually invaded, or in such imminent danger as does not admit of delay. The union guarantees to every state a republican form of government, and engages to protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened,) against domestic violence.

The Swiss confederation, as remodelled by the federal pact of 1815, consists of a union between the twenty-two cantons of Switzerland, the object of which is declared to be the preservation of their freedom, independence, and security against foreign attack, and of domestic order and tranquillity. The several cantons guarantee to each other their respective constitutions and territorial possessions. The confederation has a common army and treasury,

§ 14.  
Swiss con-  
federation.



supported by levies of men and contributions of money in certain fixed proportions among the different cantons. In addition to these contributions, the military expenses of the confederation are defrayed by duties on the importation of foreign merchandize, collected by the frontier cantons, according to the tariff established by the diet, and paid into the common treasury. The diet consists of one deputy from every canton, each having one vote, and assembles every year, alternately at Berne, Zurich, and Lucern, which are called the directing cantons (*vororte*). The diet has the exclusive power of declaring war, and concluding treaties of peace, alliance, and commerce, with foreign states. A majority of three-fourths of the votes is essential to the validity of these acts; for all other purposes, a majority is sufficient. Each canton may conclude separate military capitulations and treaties relating to economical matters and objects of police with foreign powers, provided they do not contravene the federal pact nor the constitutional rights of the other cantons. The diet provides for the internal and external security of the confederation; directs the operations and appoints the commanders of the federal army; and names the ministers deputed

to other foreign states. Beside the powers exercised by the directing canton, or *vorort*, previous to the year 1798, the diet may delegate to the same special full powers, under extraordinary circumstances, to be exercised when the diet is not in session ; adding, when it thinks fit, federal representatives to assist the *vorort* in the direction of the affairs of the confederation. In case of internal or external danger, each canton has a right to require the aid of the other cantons ; in which case notice is to be immediately given to the *vorort*, in order that the diet may be assembled to provide the necessary measures of security.<sup>19</sup>

Sovereignty is acquired by a state either at the origin of the civil society of which it consists, or when it separates itself lawfully from the community of which it previously formed a part, and on which it was dependent.<sup>20</sup>

§ 15.  
Sovereignty, when  
acquired.

The identity of a state consists in its

§ 16.  
Identity of  
a state.

<sup>19</sup> Bundesvertrag zwischen den zwey und zwanzig Cantonen der Schweiz, Martens, nouveau Recueil, tom. viii. p. 173.

<sup>20</sup> Kluber, Droit des Gens Modernes de l'Europe, pt. i. ch. i. § 23.

having the same origin or commencement of existence; and its difference from all other states consists in its having a different origin or commencement of existence. A state, as to the individual members of which it is composed, is a fluctuating body; but in respect to the society, it is one and the same body, of which the existence is perpetually kept up by a constant succession of new members. This existence continues until it is interrupted by some change affecting the being of the state.<sup>21</sup>

How  
affected by  
internal  
revolution.

If this change be an internal revolution, merely altering the municipal constitution and form of government, the state remains the same; it neither loses any of its rights, nor is discharged from any of its obligations.<sup>22</sup>

Conduct of  
foreign  
states  
towards  
another  
nation in-  
volved in  
civil war.

Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other states may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against its enemy; or may espouse the cause of the party

<sup>21</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 9, § iii. Rutherford's Inst. b. ii. c. 10, §§ 12, 13.

<sup>22</sup> Grotius, § viii. Rutherford, § 14. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1—3.

which they believe to have justice on its side. In the first case, the foreign state fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening state becomes entitled to all the rights of war against the opposite party.<sup>23</sup>

If the foreign state professes neutrality, it is bound to allow impartially to both belligerent parties the free exercise of those rights which war gives to public enemies against each other; such as the right of blockade, and of capturing contraband and enemy's property. But the exercise of those rights, on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation of treaties previously existing between that country and foreign states.<sup>24</sup>

<sup>23</sup> Vattel, *Droit des Gens*, liv. ii. ch. 4, § 56. Martens, *Précis du Droit des Gens*, liv. iii. ch. 2, §§ 79—82.

<sup>24</sup> See Part IV. ch. 3, § 3.

§ 17.  
Identity of  
a state,  
how affect-  
ed by ex-  
ternal  
violence.

If, on the other hand, the change be effected by external violence, as by conquest, confirmed by treaties of peace, its effects upon the being of the state are to be determined by the stipulations of those treaties. The conquered and ceded country may be a portion only, or the whole of the vanquished state. If the former, the original state still continues; if the latter, it ceases to exist. In either case, the conquered territory may be incorporated into the conquering state as a province, or it may be united to it as a co-ordinate state with equal sovereign rights.

§ 18.  
By the  
Joint effect  
of internal  
and external  
violence con-  
firmed by  
treaty.

Such a change in the being of a state may also be produced by the conjoint effect of internal revolution and foreign conquest, subsequently confirmed, or modified and adjusted by international compacts. Thus the House of Orange was expelled from the Seven United Provinces of the Netherlands, in 1797, in consequence of the French Revolution and the progress of the arms of France, and a democratic republic substituted in the place of the ancient Dutch constitution. At the same time the Belgic provinces, which had long been united to the Austrian monarchy as a co-ordinate state, were conquered by France,




and annexed to the French republic by the treaties of Campo Formio and Luneville. On the restoration of the Prince of Orange, in 1813, he assumed the title of Sovereign Prince, and afterwards King, of the Netherlands; and by the treaties of Vienna, the former Seven United Provinces were united with the Austrian Low Countries into one state, under his sovereignty.<sup>25</sup>

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

In consequence of the revolution which took place in Belgium in 1830, this country was again severed from Holland, and its independence as a separate kingdom acknowledged and guaranteed by the five great powers—Austria, France, Great Britain, Prussia, and Russia. Prince Leopold of Saxe-Cobourg having been subsequently elected king of the Belgians by the national congress, the terms

<sup>25</sup> Acte Final du Congrès de Vienne, art. 65, 72, 73.



and conditions of the separation were stipulated by the treaty concluded on the 15th of November, 1831, between those powers and Belgium, which was declared by the conference of London to constitute the invariable basis of the separation, independence, neutrality, and state of territorial possession of Belgium, subject to such modifications as might be the result of direct negotiation between that kingdom and the Netherlands.

§ 19.  
Province  
or colony  
asserting  
its inde-  
pendence,  
how con-  
sidered  
by other  
foreign  
states.

If the revolution in a state be effected by a province or colony shaking off its sovereignty, so long as the independence of the new state is not acknowledged by other powers, it may seem doubtful, in an international point of view, whether its sovereignty can be considered as complete, however it may be regarded by its own government and citizens. It has already been stated, that whilst the contest for the sovereignty continues, and the civil war rages, other nations may either remain passive, allowing to both contending parties all the rights which war gives to public enemies, or may acknowledge the independence of the new state, forming with it treaties of amity and commerce; or may join in alliance with one party against

the other. In the first case, neither party has any right to complain so long as other nations maintain an impartial neutrality, and abide the event of the contest. The two last cases involve questions which seem to belong rather to the field of politics than of law; but the practice of nations, if it does not furnish an invariable rule for the solution of these questions, will at least shed some light upon them. The memorable examples of the Swiss cantons and of the Seven United Provinces of the Netherlands, which so long levied war, concluded peace, contracted alliances, and performed every other act of sovereignty, before their independence was finally acknowledged,—that of the first by the German empire, and that of the latter by Spain,—go far to show the general sense of mankind on this subject.

The acknowledgment of the independence of the United States of America by France, coupled with the assistance secretly rendered by the French court to the revolted colonies, was considered by Great Britain as an unjustifiable aggression, and, under the circumstances, it probably was so.<sup>27</sup> But had the

<sup>27</sup> See *Memoire Justificatif pour servir de Réponse à l'Exposé des Motifs de la Conduite du Roi de France relative à l'Angleterre*. Gibbon's *Miscell. Works*, vol. iv. p. 246.

French court conducted itself with good faith, and maintained an impartial neutrality between the two belligerent parties, it may be doubted whether the treaty of commerce, or even the eventual alliance between France and the United States, could have furnished any just ground for a declaration of war against the former by the British government. The more recent example of the acknowledgment of the independence of the Spanish American provinces by the United States, Great Britain, and other powers, whilst the parent country still continues to withhold her assent, also concurs to illustrate the general understanding of nations, that where a revolted province or colony has declared, and shewn its ability to maintain, its independence, the recognition of its sovereignty by other foreign states is a question of policy and prudence only.

Recogni-  
tion of its  
independ-  
ence by  
other fo-  
reign  
states.

This question must be determined by the sovereign legislative or executive power of these other states, and not by any subordinate authority, or by the private judgment of their individual subjects. Until the independence of the new state has been acknowledged, either by the foreign state where its sovereignty is drawn in question, or by the government of the country of which it was before a province,

courts of justice and private individuals are bound to consider the ancient state of things as remaining unaltered.<sup>28</sup>

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

§ 20.  
Inter-  
national  
effects of  
a change  
in the per-  
son of the  
sovereign  
or in the  
internal  
constitu-  
tion of the  
state.

I. As to its treaties of alliance and com-  
merce.

II. Its public debts.

III. Its public domain and private rights  
of property.

I. Treaties are divided by the text writers Treaties. into *personal* and *real*. The former relate exclusively to the persons of the contracting parties, such as family alliances and treaties guaranteeing the throne to a particular sovereign and his family. They expire, of course, on the death of the king or the extinction of his family. The latter relate solely to the subject matters of the convention, independently of the persons of the contracting parties.

<sup>28</sup> Vesey's Ch. Rep. vol. ix. p. 347. The City of Berne v. the Bank of England. Edwards's Adm. Rep. vol. i. p. 1. The Manila, Appendix IV. Note D. Wheaton's Rep. vol. iii. p. 324. Hoyt v. Gelston, p. 634. The United States v. Palmer.

They continue to bind the state, whatever intervening changes may take place in its internal constitution, or in the persons of its rulers. The state continues the same, notwithstanding such change, and consequently the treaty relating to national objects remains in force so long as the nation exists as an independent state. The only exception to this general rule, as to *real* treaties, is where the convention relates to the form of government itself, and is intended to prevent any such change in the internal constitution of the state.<sup>29</sup>

Public  
debts.


II. As to public debts—whether due to or from the revolutionized state—a mere change in the form of government, or in the person of the ruler, does not affect their obligation. The essential form of the state, that which constitutes it an independent community, remains the same; its accidental form only is changed. The debts being contracted in the name of the state, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution.<sup>30</sup>

<sup>29</sup> Vattel, *Droit des Gens*, liv. ii. ch. 12, §§ 183—197.

<sup>30</sup> Grotius, *de Jur. Bel. ac Pac.* lib. ii. cap. 9, § viii. 1—3.  
Puffendorf, *de Jur. Nat. et Gent.* lib. viii. cap. 12, §§ 1, 2, 3.

III. As to the public domain and private Public do-  
main and  
private  
rights of  
property. rights of property. If the revolution be successful, and the internal change in the constitution of the state is finally confirmed by the event of the contest, the public domain passes to the new government; and this mutation is not necessarily attended with any alteration whatever in private rights of property. But it may be attended by such a change: it is competent for the national authority to work a transmutation, total or partial, of the property belonging to the vanquished party; and if actually confiscated, the fact must be taken for right. But to work such a transfer of proprietary rights, some positive and unequivocal act of confiscation is essential.

If, on the other hand, the revolution in the government of the state is followed by a restoration of the ancient order of things, both public and private property, not actually confiscated, revert to the original proprietor on the restoration of the legitimate government, as in the case of conquest they revert to the former owners on the evacuation of the territory occupied by the public enemy. The national domain, not actually alienated by any intermediate act of the state, returns to the sovereignty along with the sovereignty. Private



property, temporarily sequestrated, returns to the former owner, as in the case of such property recaptured from an enemy in war on the principle of the *jus postliminii*.

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

Even the lawful sovereign of a country may, or may not, by the particular municipal constitution of the state, have the power of alienating the public domain. The general presumption, in mere internal transactions with his own subjects, is, that he is not so authorised.<sup>31</sup> But in the case of international transactions, where foreigners and foreign governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the state: So also where foreign governments and their subjects treat with the actual head of the state, or the government *de facto*, recognised by the acquiescence of the nation, for the acquisition of any portion of the public

<sup>31</sup> Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12. §§ 1—3.



domain or of private confiscated property, the acts of such government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were the acts of him who is considered by the restored sovereign as an usurper.<sup>32</sup> On the other hand, it seems that such alienations of public or private property, to the subjects of the state, may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his councils, reserving the legal rights of *bonæ fidei* purchasers under such alienation to be indemnified for ameliorations.<sup>33</sup>

Where the price or equivalent of the property sold or exchanged has accrued to the actual use and profit of the state, the transfer may be confirmed, and the original proprietors indemnified out of the public treasury, as was done in respect to the lands of the emigrant French nobility, confiscated and sold during the revolution. So also the sales of the national domains situate in the German and Belgian provinces, united to France during the revolution, and again detached from the French territory by the treaties of Paris and

<sup>32</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 14. § 16.

<sup>33</sup> Kluber, Droit des Gens, sec. ii. ch. 1, § 258.

Vienna in 1814 and 1815, or in the countries composing the Rhenish confederation, in the kingdom of Italy, and the Papal States, were, in general, confirmed by these treaties, by the Germanic diet, or by the acts of the respective restored sovereigns. But a long and intricate litigation ensued before the Germanic diet in respect to the alienation of the domains in the countries composing the kingdom of Westphalia. The elector of Hesse Cassel and the duke of Brunswick refused to confirm these alienations in respect to their territory, whilst Prussia, which power had acknowledged the king of Westphalia, also acknowledged the validity of his acts in the countries annexed to the Prussian dominions by the treaties of Vienna.<sup>34</sup>

<sup>34</sup> See the German Conversations Lexikon, art. *Domainenverkauf*.

**PART SECOND.**

**ABSOLUTE INTERNATIONAL RIGHTS OF  
STATES.**



## PART SECOND.

### ABSOLUTE INTERNATIONAL RIGHTS OF STATES.

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#### CHAP. I.

##### RIGHT OF SELF-PRESERVATION.

EVERY state has certain sovereign rights, to which it is entitled as an independent moral being; in other words, because it is a state. These rights may be called the *absolute* international rights of states.

§ 1.  
Absolute  
international  
rights.

The rights to which sovereign states are entitled, under particular circumstances, in their relations with others, may be termed their *conditional* international rights. These may arise from international relations existing either in peace or in war.

§ 2.  
Condi-  
tional in-  
ternational  
rights.

§ 3.  
Right of  
self-pre-  
servation.

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

Right of  
self-de-  
fence mo-  
dified by  
the equal  
rights of  
other  
states, or  
by treaty.

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

Thus the absolute right to erect fortifications within the territory of the state has sometimes been modified by treaties, where the erection of such fortifications has been deemed to threaten the safety of other communities, or where such a concession has been

extorted in the pride of victory by a power strong enough to dictate the conditions of peace to its enemy. Thus by the treaty of Utrecht between Great Britain and France, confirmed by that of Aix-la-Chapelle in 1748, and of Paris in 1763, the French government engaged to demolish the fortifications of Dunkirk. This stipulation, so humiliating to France, was effaced in the treaty of peace concluded between the two countries in 1783, after the war of the American revolution. By the treaty signed at Paris in 1815, between the allied powers and France, it was stipulated that the fortifications of Huningen, within the French territory, which had been constantly a subject of uneasiness to the city of Basle in the Helvetic confederation, should be demolished, and should never be renewed or replaced by other fortifications at a distance of less than three leagues from the city of Basle.<sup>1</sup>

The right of every independent state to increase its national dominions, wealth, population, and power, by all innocent and lawful means, such as the pacific acquisition of new


§ 4.  
Right of  
intervention.

<sup>1</sup> Martens, Recueil des Traités, tom. ii. p. 469.

territory, the discovery and settlement of new countries, the extension of its navigation and fisheries, the improvement of its revenues, arts, agriculture, and commerce, the increase of its military and naval force, is an incontrovertible right of sovereignty, generally recognized by the usage and opinion of nations. It can be limited in its exercise only by the equal correspondent rights of other states growing out of the same primeval right of self-preservation. Where the exercise of this right by any of these means directly affects the security of others, as where it immediately interferes with the actual exercise of the sovereign rights of other states, there is no difficulty in assigning its precise limits. But where it merely involves a supposed contingent danger to the safety of others, arising out of the undue aggrandizement of a particular state, or the disturbance of what has been called the balance of power, questions of the greatest difficulty arise, which belong rather to the science of politics than of public law. Each member of the great society of nations being entirely independent of every other, and living in what has been called a state of nature in respect to others, acknowledging no common sovereign, arbiter, or judge; the law which



prevails between nations being deficient in those external sanctions by which the laws of civil society are enforced among individuals; and the performance of the duties of international law being compelled by moral sanctions only, by fear on the part of nations of provoking general hostility, and incurring its probable evils in case they should violate this law; an apprehension of the possible consequences of the undue aggrandizement of any one nation upon the independence and safety of others has induced the states of modern Europe to observe, with systematic vigilance, every material disturbance in the equilibrium of their respective forces. This preventive policy has been the pretext of the most bloody and destructive wars waged in modern times, some of which have certainly originated in well-founded apprehensions of peril to the independence of weaker states, but the greater part have been founded upon insufficient reasons, disguising the real motives by which princes and cabinets have been influenced. Wherever the spirit of encroachment has really threatened the general security, it has commonly broken out in such overt acts as not only plainly indicated the ambitious purpose, but also furnished substantive grounds



Wars of  
the Refor-  
mation.

in themselves sufficient to justify a resort to arms by other nations. Such were the grounds of confederacies created, and the wars undertaken to check the aggrandizement of Spain and the house of Austria, under Charles V. and his successors ;—an object finally accomplished by the treaty of Westphalia, which so long constituted the written public law of Europe. The long and violent struggle between the religious parties engendered by the Reformation in Germany spread throughout Europe, and became closely connected with political interests and ambition. The great Catholic and Protestant powers mutually protected the adherents of their own faith in the bosom of rival states. The repeated interference of Austria and Spain in favour of the Catholic faction in France, Germany, and England, and of the Protestant powers to protect their persecuted brethren in Germany, France, and the Netherlands, gave a peculiar colouring to the political transactions of the age. This was still more heightened by the conduct of Catholic France under the ministry of Cardinal Richelieu, in sustaining, by a singular refinement of policy, the Protestant princes and people of Germany against the house of Austria, whilst she was persecuting with

unrelenting severity her own subjects of the reformed faith. The balance of power adjusted by the peace of Westphalia was once more disturbed by the ambition of Louis XIV., which compelled the protestant states of Europe to unite with the house of Austria against the encroachments of France herself, and induced the allies to patronize the English revolution of 1688, whilst the French monarch interfered to support the pretensions of the Stuarts. These great transactions furnish numerous examples of intervention by the European states in the affairs of each other, where the interests and security of the intervening powers were supposed to be seriously affected by the domestic transactions of other nations, which can hardly be referred to any fixed and definite principle of international law, or furnish a general rule fit to be observed in other apparently analogous cases.

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

§ 5.  
Wars of  
the French  
Revolution.

Alliance of  
the five  
great Eu-  
ropean  
powers.

peculiarly liable to abuse in its practical application. The successive coalitions formed by the great European monarchies against France, subsequent to her first revolution of 1789, were avowedly designed to check the progress of her revolutionary principles and the extension of her military power. The efforts of these coalitions ultimately resulted in the formation of an alliance, intended to be permanent, between the four great powers of Russia, Austria, Prussia, and Great Britain, to which France subsequently acceded, at the congress of Aix la Chapelle, in 1818, constituting a sort of superintending authority in these powers over the international affairs of Europe, the precise extent and objects of which were never very accurately defined. As interpreted by those of the contracting powers who were also the original parties to the compact called the Holy Alliance, this union was intended to form a perpetual system of intervention among the European states, adapted to prevent any such change in the internal forms of their respective governments as might endanger the existence of the monarchical institutions which had been re-established under the legitimate dynasties of their respective reigning houses. This general right of interference was some-

times defined so as to be applicable to every case of popular revolution, where the change in the form of government did not proceed from the voluntary concession of the reigning sovereign, or was not confirmed by his sanction, given under such circumstances as to remove all doubt of his having freely consented. At others, it was extended to every revolutionary movement pronounced by these powers to endanger, in its consequences, immediate or remote, the social order of Europe, or the particular safety of neighbouring states.

The measures adopted by Austria, Russia, and Prussia, at the congress of Trappau and of Laybach, in respect to the Neapolitan revolution of 1820, were founded upon principles adapted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different states. The British government expressly dissented from these principles, not only upon the ground of their being, if reciprocally acted on, contrary to the fundamental laws of Great Britain, but such as could not safely be admitted as part of a system of international law. In the circular despatch addressed on this occasion to all its diplomatic agents, it

§ 6.  
Congress  
of Trappau  
and of  
Laybach.

was stated, that though no government could be more prepared than the British government was, to uphold the right of any state or states to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another state, it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby; and did not admit that it could receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular state or states, or that it could be made prospectively the basis of an alliance. The British government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered, that exceptions of this description never can, without the utmost danger, be so far reduced to rule as to be incorporated into the ordinary diplomacy of states, or into the institutes of the law of nations.<sup>2</sup>

<sup>2</sup> Lord Castlereagh's Circular Despatch, Jan. 19, 1821. Annual Register, vol. lxii. pt. ii. p. 737.

The British government also declined being a party to the proceedings of the congress held at Verona in 1822, which ultimately led to an armed interference by France, under the sanction of Austria, Russia, and Prussia, in the internal affairs of Spain, and the overthrow of the Spanish constitution of the Cortes. The British government disclaimed for itself, and denied to other powers, the right of requiring any changes in the internal institutions of independent states, with the menace of hostile attack in case of refusal. It did not consider the Spanish revolution as affording a case of that direct and imminent danger to the safety and interests of other states, which might justify a forcible interference. The original alliance between Great Britain and the other principal European powers, was specifically designed for the reconquest and liberation of the European continent from the military dominion of France ; and, having subverted that dominion, it took the state of possession, as established by the peace, under the joint protection of the alliance. It never was, however, intended as an union for the government of the world, or for the superintendence of the internal affairs of other states. No proof had been produced to the British government

§ 7.  
Congress  
of Verona.

of any design on the part of Spain to invade the territory of France; of any attempt to introduce disaffection among her soldiery; or of any project to undermine her political institutions; and so long as the struggles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British government to afford any plea for foreign interference. If the end of the last, and the beginning of the present century, saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation; but because she attempted to propagate, first, her principles, and afterwards her dominion, by the sword.<sup>3</sup>

§ 8.  
War between  
Spain and  
her American colonies.

Both Great Britain and the United States, on the same occasion, protested against the right of the allied powers to interfere by forcible means in the contest between Spain and her revolted American colonies. The British

<sup>3</sup> Confidential Minute of Lord Castlereagh on the Affairs of Spain, communicated to the Allied Courts in May, 1823. Annual Register, vol. lxxv.; *Public Documents*, p. 93. Mr. Secretary Canning's Letter to Sir C. Stuart, 28 Jan. 1823, p. 114. Same to the Same, 31 March, 1823, p. 141.



government declared its determination to remain strictly neutral should the war be unhappily prolonged; but that the junction of any foreign power, in an enterprise of Spain against the colonies, would be viewed by it as constituting an entirely new question, and one upon which it must take such decision as the interests of Great Britain might require. That it could not enter into any stipulation binding itself either to refuse or delay its recognition of the independence of the colonies, nor wait indefinitely for an accommodation between Spain and the colonies; and that it would consider any foreign interference by force or by menace, in the dispute between them, as a motive for recognizing the latter without delay.<sup>4</sup>

The United States government declared that it should consider any attempt on the part of the allied European powers, to extend their peculiar political system to the American continent, as dangerous to the peace and safety of the United States. With the existing colonies or dependencies of any European power, they had not interfered, and should not inter-

<sup>4</sup> Memorandum of Conference between Mr. Secretary Canning and Prince Polignac, 9 Oct. 1823. Annual Register, vol. lxvi. p. 99. *Public Documents.*

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

The policy of the American government

in regard to Europe, adopted at an early stage of the war which had so long agitated that quarter of the globe, nevertheless remained the same. This policy was not to interfere in the internal concerns of any of the European powers; to consider the government, *de facto*, as the legitimate government for them; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting in all instances the just claims of every power—submitting to injuries from none. But with regard to the American continents, circumstances were widely different. It was impossible that the allied powers should extend their political system to any portion of these continents, without endangering the peace and happiness of the United States. It was therefore impossible that the latter should behold such interposition in any form with indifference.<sup>5</sup>


Great Britain had limited herself to protesting against the interference of the French government in the internal affairs of Spain, and had refrained from interposing by force to prevent the invasion of the peninsula by

§ 9.  
British interference  
in the  
affairs of  
Portugal  
in 1826.

<sup>5</sup> President's Message to Congress, 2 Dec. 1823. Annual Register, vol. lxx. *Public Documents*, p. 193.

France. The constitution of the Cortes was overturned, and Ferdinand VII. restored to absolute power. These events were followed by the death of John VI. King of Portugal in 1825. The constitution of Brazil had provided that its crown should never be united on the same head with that of Portugal; and Don Pedro resigned the latter to his infant daughter Donna Maria, appointing a regency to govern the kingdom during her minority, and at the same time granting a constitutional charter to the European dominions of the house of Braganza. The Spanish government, restored to the plenitude of its absolute authority, and dreading the example of the peaceable establishment of a constitutional government in the neighbouring kingdom, countenanced the pretensions of Don Miguel to the Portuguese crown, and supported the efforts of his partizans to overthrow the regency and the charter. Hostile inroads into the territory of Portugal were concerted in Spain, and executed with the connivance of the Spanish authorities by Portuguese troops belonging to the party of the Pretender, who had deserted into Spain, and were received and succoured by the Spanish authorities on the frontiers. Under these circumstances the

British government received an application from the regency of Portugal, claiming, in virtue of the ancient treaties of alliance and friendship subsisting between the two crowns, the military aid of great Britain against the hostile aggression of Spain. In acceding to that application, and sending a corps of British troops for the defence of Portugal, it was stated by the British minister that the Portuguese constitution was admitted to have proceeded from a legitimate source, and it was recommended to Englishmen by the ready acceptance which it had met with from all orders of the Portuguese people. But it would not be for the British nation to force it on the people of Portugal if they were unwilling to receive it; or if any schism should exist among the Portuguese themselves, as to its fitness and congeniality to the wants and wishes of the nation. They went to Portugal in the discharge of a sacred obligation contracted under ancient and modern treaties. When there, nothing would be done by them to enforce the establishment of the constitution, but they must take care that nothing was done by others to prevent it from being fairly carried into effect. The hostile aggression of Spain, in countenancing and aiding the party



opposed to the Portuguese constitution, was in direct violation of repeated solemn assurances of the Spanish cabinet to the British government, engaging to abstain from such interference. The sole object of Great Britain was to obtain the faithful execution of those engagements. The former case of the invasion of Spain by France, having for its object to overturn the Spanish constitution, was essentially different in its circumstances. France had given to Great Britain cause of war by that aggression upon the independence of Spain. The British government might lawfully have interfered on grounds of political expediency; but they were not bound to interfere, as they were now bound to interfere, on behalf of Portugal by the obligations of treaty. War might have been their free choice, if they had deemed it politic in the case of Spain: interference on behalf of Portugal was their duty, unless they were prepared to abandon the principles of national faith and national honour.<sup>6</sup>

§ 10.  
Inter-  
ference of  
the Chris-

The interference of the Christian powers of Europe in favour of the Greeks, who, after

<sup>6</sup> Mr. Canning's Speech in the House of Commons, 11 Dec. 1826. Annual Register, vol. lxxviii. p. 192.

enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorising such an interference, not only where the interests and safety of other powers are immediately affected by the internal transactions of a particular state, but where the general interests of humanity are infringed by the excesses of a barbarous and despotic government. These principles are fully recognized in the treaty for the pacification of Greece, signed at London on the 6th of July, 1827. The preamble of this treaty sets forth that the three contracting parties, “ penetrated with the necessity of putting an end to the sanguinary contest, which, by delivering up the Greek provinces and the isles of the Archipelago, to all the disorders of anarchy, produces daily fresh impediments to the commerce of the European states, and gives occasion to piracies, which not only expose the subjects of the high contracting parties to considerable losses, but besides, render necessary burdensome measures of protection and repression.” It then states that the British and French governments, having received a pressing request from the Greeks to interpose their mediation with


tian powers of Europe in favour of the Greeks.



the Porte, and being, as well as the Emperor of Russia, animated by the desire of stopping the effusion of blood, and of arresting the evils of all kinds which might arise from the continuance of such a state of things, had resolved to unite their efforts, and to regulate the operations thereof by a formal treaty, with the view of re-establishing peace between the contending parties, by means of an arrangement, which was called for as much by humanity, as by the interest of the repose of Europe. The treaty then provides, (art. 1,) that the three contracting powers should offer their mediation to the Porte by a joint declaration of their ambassadors at Constantinople; and that there should be made, at the same time, to the two contending parties, the demand of an immediate armistice as a preliminary condition indispensable to opening any negotiation. Article 2d provides the terms of the arrangement to be made, as to the civil and political condition of Greece, in consequence of the principles of a previous understanding between Great Britain and Russia. By the 3d article it was agreed that the details of this arrangement, and the limits of the territory to be included under it, should be settled in a separate negotiation between the high contracting powers



and the two contending parties. To this public treaty, an additional and secret article was added, stipulating that the high contracting parties would take immediate measures for establishing commercial relations with the Greeks, by sending to them and receiving from them consular agents, so long as there should exist among them authorities capable of maintaining such relations. That if, within the term of one month, the Porte did not accept the proposed armistice, or if the Greeks refused to execute it, the high contracting parties should declare to that one of the two contending parties that should wish to continue hostilities, or to both, if it should become necessary, that the contracting powers intended to exert all the means, which circumstances might suggest to their prudence, to give immediate effect to the armistice, by preventing, as far as might be in their power, all collision between the contending parties; and, in fact, would conjointly employ all their means in the accomplishment of the object thereof, without, however, taking any part in the hostilities of the contending parties; and would transmit eventual instructions for that purpose to the admirals commanding their squadrons in the Levant. That if these measures did not suf-



vice to induce the Ottoman Porte to adopt the propositions made by the high contracting powers, or if, on the other hand, the Greeks should renounce the conditions stipulated in their favour, the contracting parties would nevertheless continue to prosecute the work of pacification on the basis agreed upon between them; and in consequence they authorized, from that time forward, their representatives in London to discuss and determine the ulterior measures to which it might become necessary to resort.

The Greeks accepted the proffered mediation of the three powers, which the Turks rejected, and instructions were given to the commanders of the allied squadrons to compel the cessation of hostilities. This was effected by the result of the battle of Navarino, with the occupation of the Morea by French troops; and the independence of the Greek state was ultimately recognized by the Ottoman Porte, under the mediation of the contracting powers. If, as some writers have supposed, the Turks belong to a family or set of nations which is not bound by the general international law of Christendom, they have still no right to complain of the measures which the christian powers thought proper to adopt for the

protection of their religious brethren oppressed by the Mohammedan rule. In a ruder age the nations of Europe, impelled by a generous and enthusiastic feeling of sympathy, inundated the plains of Asia to recover the holy sepulchre from the possession of infidels, and to deliver the christian pilgrims from the merciless oppressions practised by the Saracens. The Protestant princes and states of Europe, during the sixteenth and seventeenth centuries, did not scruple to confederate and wage war in order to secure the freedom of religious worship for the votaries of their faith in the bosom of Catholic communities to whose subjects it was denied. Still more justifiable was the interference of the christian powers of Europe to rescue a whole nation, not merely from religious persecution, but from the cruel alternative of being transported from their native land into Egyptian bondage, or exterminated by their merciless oppressors. The rights of human nature, wantonly outraged by this cruel warfare, prosecuted for six years against a civilized and christian people, to whose ancestors mankind are so largely indebted for the blessings of arts and of letters, were but tardily and imperfectly vindicated by this measure ; but its principle was fully

justified by the great paramount law of self-preservation. "Whatever a nation may lawfully defend for itself, it may defend for another people, if called upon to interpose." The interference of the christian powers to put an end to this bloody contest might therefore have been safely rested upon this ground alone, without appealing to the interests of commerce and of the repose of Europe, which, as well as the interests of humanity, are alluded to in the treaty as the determining motives of the high contracting parties.<sup>7</sup>

<sup>7</sup> Another treaty was concluded at London between the same three powers on the 7th of May, 1832, by which the election of Prince Otho of Bavaria as King of Greece was confirmed, and the sovereignty and independence of the new kingdom guaranteed by the contracting parties, according to the terms of the protocol signed by them on the 3d of February, 1830, and accepted by Greece and the Ottoman Porte.

## CHAP. II.

## RIGHTS OF INDEPENDENCE.

EVERY state, as a distinct moral being independent of every other, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other states. Among these is that of establishing, altering, or abolishing its own municipal constitution of government. No foreign state can lawfully interfere with the exercise of this right, unless such interference is authorized by some special compact, or by such a clear case of necessity as immediately affects its own independence, freedom, and security.<sup>1</sup>

§ 1.  
Independence of the state in respect to its internal government.

The approved usage of nations authorizes the proposal by one state of its good offices or mediation for the settlement of the intestine dissensions of another state. When such offer is accepted by the contending parties, it

§ 2.  
Mediation of other foreign states for the settlement of its internal dissensions.

<sup>1</sup> Vide ante, pt. ii. ch. 1, § 4.



becomes a just title for the interference of the mediating power.

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

The republic of Geneva was connected by an ancient alliance with the Swiss cantons of Berne and Zurich, in consequence of which they united with France, in 1738, in offering the joint mediation of the three powers to the contending political parties by which the tranquillity of the republic was disturbed. The result of this mediation was the settlement of a constitution, which giving rise to new disputes in 1768, they were again adjusted by the intervention of the mediating powers. In 1782, the French government once more united with these cantons and the court of Sardinia in mediating between the aristocratic and democratic parties; but it appears to be very questionable how far these transactions,

especially the last, can be reconciled with the respect due, on the strict principles of international law, to the just rights and independence of the smallest, not less than to those of the greatest, states.<sup>2</sup>

The present constitution of the Helvetic confederation was also adjusted in 1813 by the mediation of the great allied powers, and subsequently recognised by them at the congress of Vienna as the basis of the federative pact of Switzerland. By the same act the united Swiss cantons guarantee their respective local constitutions of government.<sup>3</sup>

So also the local constitutions of the different states composing the Germanic confederation may be guaranteed by the diet on the application of the particular state in which the constitution is established; and this guarantee gives the diet the right of determining all controversies respecting the interpretation and execution of the constitution thus established and guaranteed.<sup>4</sup>

<sup>2</sup> Flassan, *Histoire de la Diplomatie Française*, tom. v. p. 78, tom. vii. pp. 27, 297.

<sup>3</sup> Acte Final du Congrès de Vienne, art. 74.

<sup>4</sup> Wiener Schultz-Acte vom 15 Mai, 1820, art. 60. *Corpus Juris Germanici von Mayer*, tom. ii. p. 196.

And the constitution of the United States of America guarantees to each state of the federal union a republican form of government, and engages to protect each of them against invasion, and, on application of the local authorities, against domestic violence.<sup>5</sup>

§ 3.  
Independence of every state in respect to the choice of its rulers.

This perfect independence of every sovereign state, in respect to its political institutions, extends to the choice of the supreme magistrate and other rulers, as well as to the form of government itself. In hereditary governments, the succession to the crown being regulated by the fundamental laws, all disputes respecting the succession are rightfully settled by the nation itself, independently of the interference or control of foreign powers. So also in elective governments, the choice of the chief or other magistrates ought to be freely made, in the manner prescribed by the constitution of the state, without the intervention of any foreign influence or authority.<sup>6</sup>

The only exceptions to the application of

<sup>5</sup> Constitution of the United States,

<sup>6</sup> Vattel, *Droit des Gens*, liv. i. ch. 5, §§ 66, 67.



these general rules arise out of compact, such as treaties of alliance, guarantee, and mediation, to which the state itself whose concerns are in question has become a party; or formed by other powers in the exercise of a supposed right of intervention growing out of a necessity involving their own particular security, or some contingent danger affecting the general security of nations. Such, among others, were the wars relating to the Spanish succession in the beginning of the eighteenth century, and to the Bavarian and Austrian successions in the latter part of the same century. The history of modern Europe also affords many other examples of the actual interference of foreign powers in the choice of the sovereign or chief magistrate of those states where this choice was constitutionally determined by popular election, or by an elective council, such as in the cases of the head of the Germanic empire, the king of Poland, and the Roman pontiff; but in these cases no argument can be drawn from the fact to the right. In the particular case, however, of the election of the pope, who is the supreme pontiff of the Roman Catholic church, as well as a temporal sovereign, the emperor of Austria, and the kings of France

§ 4.  
 Exceptions  
 growing  
 out of  
 compact  
 or other  
 just right  
 of inter-  
 vention.

and Spain, have, by very ancient usage, each a right to exclude one candidate.<sup>7</sup>

§ 5.  
Exclusive  
power of  
civil and  
criminal  
legislation.

The supreme, exclusive power of civil and criminal legislation is also an essential right of every independent state.

This sovereign right extends, with the exceptions hereafter mentioned, to the regulation of all the real (or immovable) and personal (or movable) property within the territory, whether held by a feudal or allodial tenure, and whether it belongs to subjects or foreigners.

Lex loci  
rei sitæ.

The law of the place, where real (or immovable) property is situate, governs in every thing relating to the tenure, the title, and the forms of conveyance of such property. Hence it is that a deed or will of real property executed in a foreign country must be executed with the formalities required by the local laws of the state where the land lies.<sup>8</sup>

Lex  
domicilli.

With respect to personal (or movable) property, the same rule generally prevails, except that the law of the place where the person to

<sup>7</sup> Kluber, *Droit des Gens Moderne de l'Europe*, pt. ii. tit. 1, ch 2, § 48.

<sup>8</sup> Vattel, liv. ii. ch. 8, § 111.

whom it belonged was domiciled at the time of his decease governs the succession *ab intestato* to his personal effects.<sup>9</sup> So also the law of the place where any instrument relating to personal property is executed by a party domiciled in that place, governs, as to the external form, the interpretation and effect of the instrument: *Locus regit actum*. Thus a testament of personal property, if executed according to the formalities required by the law of the place where it is made, and where the party making it was domiciled, is valid in every other country, and is to be interpreted and given effect to according to the *lex loci*.<sup>10</sup>

<sup>9</sup> Huberus, Prælect. tom. ii. lib. ii. tit. 3, *de Conflictu Legum*, §§ 14, 15. Merlin, Répertoire de Jurisprudence, tit. *Loi*, §§ 6, 3. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 16. See also an opinion given by Grotius as counsel in 1613. Henry's Foreign Law, Appendix, p. 196. Yet it has been recently doubted how far a British subject can, by changing his native domicile for a foreign domicile without the British empire, change the rule of succession to his personal property in Great Britain; though it is admitted that a change of domicile within the empire, as from England to Scotland, would have that effect. Per Sir J. Nicholl, in *Curling v. Thornton*, Addams' Eccles. Rep. vol. ii. p. 17.

<sup>10</sup> This principle, laid down by all the text writers, was recently recognised in England, in a case where a native of Scotland domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there, and also in India, having executed a will in India ineffec-

§ 6. The municipal laws of most countries prohibit foreigners from holding real (or immovable) property within the territory of the state. During the prevalence of the feudal system in Europe, the acquisition of land involved the notion of allegiance to the prince within whose dominions it lay, which might

Droit  
d'Aubaine.

tual to convey Scottish heritage; and a question having arisen whether his heir at law (who claimed the heritable bonds as heir) was also entitled to a share of the movable property as legatee under the will, it was held by Lord Chancellor *Brougham*, in delivering the judgment of the House of Lords, affirming that of the court below, that the construction of the will, and the legal consequences of that construction, must be determined by the law of the land where it was made, and where the testator had his domicile, namely, India, *i. e.* by the law of England prevailing in that country; and this, although the will was made the subject of judicial inquiry in the tribunals of Scotland, for these courts also are bound to decide according to the law of the place where the will was made.—*Trotter v. Trotter*, 3 *Wilson & Shaw's Rep. on Appeal Cases in the House of Lords*, pp. 407—414. But it ought to be observed that the precedents respecting the operation of a will of personal property, executed according to the law of the place where it is made, but wanting the formalities required in the country where the property lies, have been considered by very high judicial authority as rather applying between different co-ordinate states of the same empire governed by distinct laws, than as between countries entirely independent of each other.—*Addams' Eccles. Rep.* vol. i. p. 21, *Curling v. Thornton*.

be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the *jus albinatus*, or *droit d'aubaine*, was established, by which all the property of a deceased foreigner (movable and immovable) was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the decedent. In the progress of civilization, this barbarous and inhospitable usage has been by degrees almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French revolution, the *droit d'aubaine* had been either abolished or modified by treaties between France and other states, and it was entirely abrogated by a decree of the constituent assembly in 1791, with respect to all nations. This concession was retracted, and the subject placed on its original footing of reciprocity, by the Code Napoléon in 1803; but this part of the civil code was again repealed by the ordinance of the 14th July, 1819, admitting foreigners to the right of possessing both movable and immovable property in France, and of taking by succession

*ab intestato*, or by will, in the same manner with native subjects. The analogous usage of the *droit de retraction*, or *droit de retraite* (*jus detractus*) by which a tax was levied upon the removal from one state to another of property acquired by succession or by testamentary disposition, has also been reciprocally abolished in most civilized countries.<sup>11</sup>

§ 7.  
Personal  
status.

The sovereign power of municipal legislation also extends to the regulation of the personal rights of the subjects of the state within its territory, to every thing affecting their civil state and condition.

It extends (with certain exceptions) to the supreme police over all persons within the territory, whether subjects or not, and to all criminal offences committed by them within the same.

Some of these arise from the positive law of nations, others are the effect of special compact.

There are also certain cases where the municipal laws of the state, civil and criminal,

<sup>11</sup> Vattel, liv. ii. ch. 8, §§ 112—114. Kluber, *Droit des Gens Moderne de l'Europe*, pt. 2, tit. 1, ch. 2, §§ 32, 33. Von Mayer, *Corpus Juris Confœderationis Germanicæ*, tom. ii. p. 17. Merlin, *Repertoire*, tit. *Aubaine*.

operate beyond its territorial jurisdiction. These are,

I. Laws relating to the state and capacity of persons.

In general, the laws of the state applicable to the civil condition and personal capacity of its citizens operate upon them even when resident in a foreign country.

Laws relating to state and capacity of persons may operate extra-territorially.

Such are those universal personal qualities which take effect either from birth, such as citizenship, legitimacy, and illegitimacy; at a fixed time after birth, as minority and majority; or at an indeterminate time after birth, as idiocy and lunacy, bankruptcy, marriage, and divorce, ascertained by the judgment of a competent tribunal. The laws of the state affecting all these personal qualities of its subjects travel with them wherever they go, and attach to them in whatever country they are resident.<sup>12</sup>

This general rule is, however, subject to the following exceptions:—

1. To the right of every independent sovereign state to naturalize foreigners, and to confer upon them the privileges of their acquired domicile.

Naturalization conferring commercial privileges.

<sup>12</sup> Pardessus, Droit Commerciale, pt. vi. tit. 7, ch. 2, § 1.

Even supposing a natural-born subject of one country cannot throw off his primitive allegiance, so as to cease to be responsible for criminal acts against his native country, it has been determined, both in Great Britain and the United States, that he may become by residence and naturalization in a foreign state entitled to all the commercial privileges of his acquired domicil and citizenship. Thus by the treaty of 1794, between the United States and Great Britain, the trade to the countries beyond the Cape of Good Hope within the limits of the East India Company's charter was opened to American citizens, whilst it still continued prohibited to British subjects: it was held by the Court of King's Bench that a natural-born British subject might become a citizen of the United States, and be entitled to all the advantages of trade conceded between his native country and that foreign country; and that the circumstance of his returning to his native country for a mere temporary purpose would not deprive him of those advantages.<sup>13</sup>

## 2. The sovereign right of every independent

<sup>13</sup> Term Rep. vol. viii. p. 31. Bos. & Pull. Rep. vol. i. p. 43, *Wilson v. Marryatt*.



state to regulate the property within its territory constitutes another exception to the rule.

Thus the personal capacity to contract a marriage, as to age, consent of parents, &c., is regulated by the law of the state of which the party is a subject; but the effects of a nuptial contract upon real (or immovable) property in another state are determined by the *lex loci rei sitæ*. Huberus, indeed, lays down the contrary doctrine, upon the ground that the foreign law, in this case, does not affect the territory immediately, but only in an incidental manner, and *that* by the implied consent of the sovereign, for the benefit of his subjects, without prejudicing his or their rights. But the practice of nations is certainly different, and therefore no such consent can be implied to waive the local law which has impressed certain indelible qualities upon immovable property within the territorial jurisdiction <sup>14</sup>

By the general international law of Europe and America, a certificate of discharge obtained by a bankrupt in the country of which he is a subject, and where the contract was made and

Effect of  
bankrupt  
discharge  
and title of  
assignees  
in another  
country.

<sup>14</sup> Kent's Commentaries on American Law, vol. ii. pp. 183, 184, Note.

the parties domiciled, is valid to discharge the debtor in every other country; but the opinions of jurists and the practice of nations have been much divided upon the question how far the title of his assignees or syndics will control his personal property situate in a foreign country, and prevent its being attached and distributed under the local laws in a different course from that prescribed by the bankrupt code of his own country. According to the law of most European countries, the proceeding which is prior in point of time is deemed prior in point of right, and draws to itself the right to take and distribute the property. The rule thus established is rested upon the general principle that personal (or movable) property is, by a legal fiction, considered as situate in the country where the bankrupt had his domicil. The international bankrupt law of America considers the *lex loci rei sitæ* as prevailing over the *lex domicilii* in respect to creditors, and that the laws of other states cannot be permitted to have an extra-territorial operation to the prejudice of the authority, rights, and interests of the state where the property lies. The supreme court of the United States has therefore determined that both the government under its prerogative

priority, and private creditors attaching under the local laws, are to be preferred to the claim of the assignees for the benefit of the general creditors under a foreign bankrupt law, although the debtor was domiciled and the contract made in a foreign country.<sup>15</sup>

3. The general rule as to the application of personal statutes yields in some cases to the operation of the *lex loci contractus*.

Thus a bankrupt's certificate under the laws of his own country cannot operate in another state, to discharge him from his debts contracted with foreigners in a foreign country. And though the personal capacity to enter into the nuptial contract as to age, consent of parents, and prohibited degrees of affinity, &c. is generally to be governed by the law of the state of which the party is a subject, the marriage ceremony is always regulated by the law of the place where it is celebrated; and if valid there, it is considered as valid every where else, unless made in fraud of the laws of the

<sup>15</sup> Bell's Commentaries on the Law of Scotland, vol. ii. pp. 681—687. Rose's Cases in Bankruptcy, vol. i. p. 462. Kent's Commentaries on American Law, vol. ii. pp. 393, 404—408, 459. Cranch's Rep. vol. v. p. 289, Harrison v. Sterry. Wheaton's Rep. vol. xii. pp. 153—163, Ogden v. Saunders.

country of which the parties are domiciled subjects.

§ 8.  
Lex loci  
contractus.

II. The municipal laws of the state may also operate beyond its territorial jurisdiction, where a contract made within the territory comes either directly or incidentally in question in the judicial tribunals of a foreign state.

A contract, valid by the law of the place where it is made, is, generally speaking, valid every where else. The general comity and mutual convenience of nations has established the rule that the law of that place governs in every thing respecting the form, interpretation, obligation, and effect of the contract, wherever the authority, rights, and interests of other states and their citizens are not thereby prejudiced.

Exceptions  
to its operation.

This qualification of the rule suggests the exceptions which arise to its application. And,

1. It cannot apply to cases properly governed by the *lex loci rei sitæ*, (as in the case before put of the effect of a nuptial contract upon real property in a foreign state,) or by the laws of another state relating to the personal state and capacity of its citizens.

2. It cannot apply where it would injuriously conflict with the laws of another state

relating to its police, its public health, its commerce, its revenue, and generally its sovereign authority, and the rights and interests of its citizens.

Thus if goods are sold in a place where they are not prohibited, to be delivered in a place where they are prohibited, although the trade is perfectly lawful by the *lex loci contractus*, the price cannot be recovered in the state where the goods are deliverable, because to enforce the contract there would be to sanction a breach of its own commercial laws. But the tribunals of one country do not take notice of, or enforce, either directly or incidentally, the laws of trade or revenue of another state, and therefore an insurance of prohibited trade may be enforced in the tribunals of any other country than that where it is prohibited by the local laws.<sup>16</sup>

A marriage contracted in a foreign country, Foreign marriages. by a fraudulent evasion of the laws of the state to which the parties belong, might seem, on principle, to be void in the country of their

<sup>16</sup> Pardessus, *Droit Commercial*, pt. vi. tit. 7, ch. 2, § 3. Emerigon, *Traité d'Assurance*, tom. i. pp. 212—215. Park on Insurance, p. 341. Sixth Ed. The moral equity of this rule has been strongly questioned by Bynkershoek and Pothier.

domicil, though valid under the laws of the place where the marriage is contracted. Such are marriages contracted in a foreign state, and according to its laws, by persons who are minors, or otherwise incapable of contracting, by the law of their own country. These cases seem to form exceptions to the general operation of the *lex loci contractus*, which no state is bound to admit where it injuriously affects its sovereign authority, or the rights and interests of its citizens. But according to the international marriage law of the British empire, a clandestine marriage in Scotland, of parties originally domiciled in England, who resort to Scotland for the sole purpose of evading the English marriage act, requiring the consent of parents or guardians, is considered valid in the English ecclesiastical courts. This jurisprudence is said to have been adopted upon the ground of its being a part of the general law and practice of Christendom, and that infinite confusion and mischief would ensue, with respect to legitimacy, succession, and other personal and proprietary rights, if the validity of the marriage contract was not to be determined by the law of the place where it was made. The same principle has been

recognised between the different states of the American Union, upon similar grounds of public policy.<sup>17</sup>

On the other hand, the age of consent required by the French civil code is considered by the law of France as a personal quality of French subjects, following them wherever they remove; and consequently a marriage, by a Frenchman, within the required age, will not be regarded as valid by the French tribunals, though the parties may have been above the age required by the law of the place where it was contracted.<sup>18</sup>

3. As every sovereign state has the exclusive right of regulating the proceedings in its own courts of justice, the *lex loci contractus* of another country cannot apply to such cases as are properly to be determined by the *lex fori* of that state where the contract is brought in question. § 9. *Lex fori.*

Thus, if a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another,

<sup>17</sup> Haggard's Consist. Rep. vol. ii. pp. 428—433. Kent's Commentaries, vol. ii. p. 93.

<sup>18</sup> Merlin, Répertoire, tit. *Loi*, § 6. Toullier, Droit Français, tom. i. No. 118, 576.

every thing relating to the forms of proceeding, the rules of evidence, and of limitation (or prescription) is to be determined by the law of the state where the suit is pending, not of that where the contract was made.<sup>19</sup>

§ 10.  
Foreign  
sovereign,  
his ambas-  
sador,  
army, or  
fleet, within  
the terri-  
tory of an-  
other state.

III. The municipal institutions of a state may also operate beyond the limits of its territorial jurisdiction, in the following cases :—

1. The person of a foreign sovereign going into the territory of another state is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction. Representing the power, dignity, and all the sovereign attributes of his own nation, and going into the territory of another state under the permission which (in time of peace) is implied from the absence of any prohibition, he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides.<sup>20</sup>

2. The person of an ambassador, or other public minister, whilst within the territory of the state to which he is delegated, is also

<sup>19</sup> Kent's Commentaries, vol. ii. p. 462. Second Ed.

<sup>20</sup> Bynkershoek, de Foro Legat. cap. iii. § 13. cap. ix.  
§ 10.



exempt from the local jurisdiction. His residence is considered as a continued residence in his own country, and he retains his national character unmixed with that of the country where he locally resides.<sup>21</sup>

3. A foreign army, or fleet, marching through, sailing over, or stationed in the territory of another state with whom the foreign sovereign is in amity, are also in like manner exempt from the civil and criminal jurisdiction of the place.<sup>22</sup>

If there be no express prohibition, the ports of a friendly state are considered as open to the public armed and commissioned ships belonging to another nation with whom that state is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under the license implied from the absence of any prohibition, or under an express permission, stipulated by treaty. But the private vessels of one state entering the ports of another, are not exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact. Nor does

<sup>21</sup> Vide infra, pt. iii. ch. 1.

<sup>22</sup> Casaregis, Disc. 136—174.

the exemption of foreign public ships, coming into the waters of a neutral state, from the local jurisdiction, extend to their prize ships or goods captured by armaments fitted out in its ports in violation of its neutrality.<sup>28</sup>

§ 11.  
Jurisdiction of the state over its public and private vessels on the high seas.

4. Both the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other state, are subject to the jurisdiction of the state to which they belong.

*Vattel* says that the domain of a nation extends to all its just possessions, and by its possessions we are not only to understand its territory, but all the rights (droits) it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory, though he admits the right of search for contraband and enemy's property. *Gratius* holds that sovereignty may be acquired over a portion of the sea, *ratione personarum, ut si classis qui maritimis est exercitus, aliquo in loco maris se habeat*. But, as one of his commentators has observed, though there can be no doubt about the jurisdiction of a nation over the

<sup>28</sup> *Vattel*, liv. i. ch. 19, § 216. *Cranch's Rep.* vol. vii. p. 116. *The Exchange*.

persons which compose its fleets when they are out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself. It is not a permanent property which it acquires, but a mere temporary right of occupancy in a place which is common to all mankind to be successively used by all as they have occasion.<sup>24</sup>

This jurisdiction which the nation has over its public and private vessels on the high seas, is exclusive only so far as respects offences against its own municipal laws. Piracy and other offences against the law of nations, being crimes not against any particular state, but against all mankind, may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas.<sup>25</sup>

Though these offences may be tried in the competent court of any nation having, by lawful means, the custody of the offenders, yet the right of visitation and search does not exist in time of peace. This right cannot be

<sup>24</sup> Vattel, liv. ch. 19, § 216. liv. ii. ch. 7, § 80. Grotius, de Jur. Bel. ac Pac. lib. ii. cap. iii. § 13. Rutherford's Inst. vol. ii. b. 2, ch. 9, §§ 8, 19.

<sup>25</sup> Sir L. Jenkins' Works, vol. i. p. 714.

employed for the purpose of executing upon foreign vessels and persons on the high seas the prohibition of a traffic, which is neither piratical, nor contrary to the law of nations, (such, *e. g.* as the slave trade,) unless the visitation and search be expressly permitted by international compact.<sup>26</sup>

Every state has an incontestable right to the service of all its members in the national defence, but it can only give effect to this right by lawful means. Its right to reclaim the military service of its citizens can only be exercised within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any state may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects. But whether it may exercise the same right, in respect to the vessels of other nations, is a question of more difficulty.

In respect to public commissioned vessels belonging to the state, their entire immunity from every species and purpose of search is generally conceded. As to private vessels

<sup>26</sup> Dodson's Adm. Rep. vol. ii. p. 238. The *Louis*.  
Wheaton's Rep. vol. x. pp. 122, 123. The *Antelope*.

belonging to the subjects of a foreign nation, the right to search them on the high seas, for deserters and other persons liable to military and naval service, has been uniformly asserted by Great Britain, and as constantly denied by the United States. This litigation between the two nations, who by the identity of their origin and language are the most deeply interested in the question, formed one of the principal objects of the late war between them. It is to be hoped that the sources of this controversy may be dried up by the substitution of a registry of seamen, and a system of voluntary enlistment with limited service, for the odious practice of impressment which has hitherto prevailed in the British navy, and which can never be extended, even to the private ships of a foreign nation, without provoking hostilities on the part of any maritime state capable of resisting such a pretension.<sup>27</sup>

IV. The municipal laws and institutions of any state may operate beyond its own territory, and within the territory of another state, by special compact between the two states.

§ 12.  
Consular  
jurisdiction.

<sup>27</sup> Edinburgh Review, vol. xi. art. 1. Mr. Canning's Letter to Mr. Monroe, Sept. 23, 1827. American State Papers, vol. vi. p. 103.

Such are the treaties by which the consuls and other commercial agents of one nation are authorized to exercise, over their own countrymen, a jurisdiction within the territory of the state where they reside. The nature and extent of this peculiar jurisdiction depends upon the stipulations of the treaties between the two states. Among christian nations it is generally confined to the decision of controversies in civil cases arising between the merchants, seamen, and other subjects of the state in foreign countries; to the registering of wills, contracts, and other instruments executed in presence of the consul; and to the administration of the estates of their fellow-subjects deceased within the territorial limits of the consulate. The resident consuls of the christian powers in Turkey, the Barbary States, and other Mohammedan countries, exercise both civil and criminal jurisdiction over their countrymen, to the exclusion of the local magistrates and tribunals. This jurisdiction is subject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties, and in offences of a higher grade, the consular functions are similar to those of a police magistrate, or *juge*

*d'instruction.* He collects the documentary and other proofs, and sends them, together with the prisoner, home to his own country for trial.<sup>28</sup>

Every sovereign state is independent of every other in the exercise of its judicial power.

§ 13.  
Independence of the state as to its judicial power.

This general position must, of course, be qualified by the exceptions to its application arising out of express compact, such as conventions with foreign states, and acts of confederation, by which the state may be united in a league with other states for some common purpose. By the stipulations of these compacts it may part with certain portions of its judicial power, or may modify its exercise with a view to the attainment of the object of the treaty or act of union.

Subject to these exceptions, the judicial power of every state is coextensive with its legislative power. At the same time it does not embrace those cases in which the municipal institutions of another nation operate within the territory. Such are the cases of a foreign sovereign, or his public minister, fleet

<sup>28</sup> De Steck, *Essai sur les Consuls*, sect. vii. §§ 30—40. Pardessus, *Droit Commercial*, pt. vi. tit. 6, ch. 2, § 2. ch. 4. §§ 1, 2, 3.

or army, coming within the territorial limits of another state, which, as already observed, are, in general, exempt from the operation of the local laws.<sup>29</sup>

§ 14.  
Extent of  
the judi-  
cial power  
over  
criminal  
offences.

I. The judicial power of every independent state, then, extends, with the qualifications mentioned,—

1. To the punishment of all offences against the municipal laws of the state, by whomsoever committed, within the territory.

2. To the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports.

3. To the punishment of all such offences by its subjects, wheresoever committed.

4. To the punishment of piracy and other offences against the law of nations, by whomsoever and wheresoever committed.

It is evident that a state cannot punish an offence against its municipal laws committed within the territory of another state, unless by its own citizens; nor can it arrest the persons or property of the supposed offender within that territory; but it may arrest its own

<sup>29</sup> Vide ante, § 10.



citizens in a place which is not within the jurisdiction of any other nation, as the high seas, and punish them for offences committed within such a place, or within the territory of a foreign state.

Laws of trade and navigation cannot affect foreigners beyond the territorial limits of the state, but they are binding upon its citizens wherever they may be. Thus offences against the laws of a state prohibiting or regulating any particular traffic may be punished by its tribunals when committed by its citizens, in whatever place; but if committed by foreigners, such offences can only be thus punished when committed within the territory of the state, or on board of its vessels in some place not within the jurisdiction of any other state.

And the laws of treason, which are binding on all persons resident within the territory, since such persons owe a temporary allegiance to the state, may be applied to foreigners if committed within its territory; but these laws may be applied to citizens, in whatever place the offence is committed, since their allegiance travels with them wherever they go.

A distinction is to be noticed respecting the operation of laws of trade upon citizens resident in a foreign country, that where it is

a mere commercial regulation permitting or prohibiting a certain trade, the party resident abroad may have the benefit of his commercial domicile, so far as to exempt him from the operation of the municipal law of his own country, whilst his former allegiance still continues. But if the statute creates a criminal offence, and visits it with personal penalties expressly applicable to all the subjects of the state, it will apply to such offences committed by them when domiciled in a foreign country, by the laws of which the act constituting the crime is not prohibited.

Extra-  
dition of  
criminals.

No sovereign state is bound, unless by special compact, to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes committed in another country, upon the demand of a foreign state or its officers of justice. The extradition of persons charged with or convicted of criminal offences affecting the general peace and security of society is, however, voluntarily practised by certain states as a matter of general convenience and comity.<sup>30</sup>

The delivering up by one state of deserters from the military or naval service of another

<sup>30</sup> Vattel, liv. ii. ch. 6, § 76. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. iii. ch. 3, § 101.

also depends entirely upon mutual comity, or upon special compact between different nations.<sup>31</sup>

A criminal sentence pronounced under the municipal law in one state can have no direct legal effect in another. If it is a sentence of conviction, it cannot be executed without the limits of the state in which it is pronounced upon the person or property of the offender; and if he is convicted of an infamous crime, attended with civil disqualifications in his own country, such a sentence can have no legal effect in another independent state.<sup>32</sup>

§ 15.  
Extra-  
territorial  
operation  
of a  
criminal  
sentence.

But a valid sentence, whether of conviction or acquittal, pronounced in one state, may have certain indirect and collateral effects in other states. If pronounced under the municipal law in the state where the supposed crime was committed, or to which the supposed offender owed allegiance, the sentence, either of conviction or acquittal, would, of course, be an effectual bar (*exceptio rei judicatae*) to a prosecution in any other state. If

<sup>31</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 22. Note to Duponceau's Transl. p. 174.

<sup>32</sup> Martens, Précis, &c., liv. iii. ch. 3, § 86. Kluber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 1, ch. 2, §§ 64, 65.

pronounced in another foreign state than that where the offence is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity, and of no avail to protect him against a prosecution in any other state having jurisdiction of the offence.

It follows as a corollary from these principles, that the practice of delinquents flying from one jurisdiction into another, for the purpose of obtaining a milder punishment or an acquittal in the tribunals of the country where they seek refuge, is wholly unsanctioned by international law and the approved usage of nations.<sup>33</sup>

§ 16.  
Piracy  
under the  
law of  
nations.

The judicial power of every state extends to the punishment of certain offences against the law of nations, among which is piracy.

Piracy is defined by the text writers to be the offence of depredating on the seas, without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other.<sup>34</sup>

The officers and crew of an armed vessel,

<sup>33</sup> Henry on Foreign Law, pp. 46, 47.

<sup>34</sup> See authorities cited in Note to the case of *United States v. Smith*, Wheaton's Rep. vol. v. p. 157.

commissioned against one nation, and depredating upon another, are not liable to be treated as pirates in thus exceeding their authority. The state by whom the commission is granted, being responsible to other nations for what is done by its commissioned cruizers, has the exclusive jurisdiction to try and punish all offences committed under colour of its authority.<sup>35</sup>

The offence of depredating under commissions from different sovereigns at war with each other is clearly piratical, since the authority conferred by one is repugnant to the other; but it has been doubted how far it may be lawful to cruize under commissions from different sovereigns allied against a common enemy. The better opinion, however, seems to be, that although it might not amount to the crime of piracy, still it would be irregular and illegal, because the two co-belligerents may have adopted different rules of conduct respecting neutrals, or may be separately bound by engagements unknown to the party.<sup>36</sup>

<sup>35</sup> Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 17*. Rutherford's *Inst. vol. ii. p. 595*.

<sup>36</sup> Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 17, p. 130*, Duponceau's *Transl. tom. ii. p. 236*. Valin, *Commentaire sur l'Ord. de la Marine*. "The law," says Sir L. Jenkins, "distinguishes between a pirate who is a high-

Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular state, and brought within its territorial jurisdiction for trial in its tribunals.<sup>37</sup>

Distinction  
between  
piracy by  
the law of  
nations  
and piracy  
under  
municipal  
statutes.

This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. Piracy under the law of nations may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that state within whose territorial jurisdiction, and on board of whose vessels, the offence thus created was committed. Thus the crimes of murder and robbery committed by foreigners, on board of a foreign vessel, on the high seas, are not justiciable in

“ wayman, and sets up for robbing, either having no commission at all, or else hath two or three, and a lawful man of war that exceeds his commission.”—*Works*, vol. ii. p. 714.

<sup>37</sup> “ Every man, by the usage of our European nations, is *justiciable* in the place where the crime is committed: so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they may be taken.”—*Sir L. Jenkins' Works*, *ib.*

the tribunals of another country than that to which the vessel belongs ; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign power or its subjects, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no flag whatsoever, these crimes may be punished as piracy under the law of nations in the courts of any nation having custody of the offenders.<sup>38</sup>

The slave trade, though prohibited by the municipal laws of most nations, and declared to be piracy by the statutes of Great Britain and the United States, is not such by the general international law, and its interdiction cannot be enforced by the exercise of the ordinary right of visitation and search. That right does not exist in time of peace, independently of special compact.<sup>39</sup>

§ 17.  
Slave  
trade,  
whether  
prohibited  
by the  
law of  
nations.

The African slave trade, once considered not only a lawful, but desirable branch of commerce, a participation in which was made the object of wars, negotiations, and treaties

<sup>38</sup> Wheaton's Rep. vol. v. pp. 144, 184. United States v. Clintoek, United States v. Pirates.

<sup>39</sup> Dodson's Adm. Rep. vol. ii. p. 210. Le Louis. Wheaton's Rep. vol. x. p. 66. La Jeune Eugenie.

between different European states, is now denounced as an odious crime by the almost universal consent of nations. This branch of commerce was successively prohibited by the municipal laws of Denmark, the United States, and Great Britain, to their own subjects. Its final abolition was stipulated by the treaties of Paris, Kiel, and Ghent, in 1814, confirmed by the declaration of the Congress of Vienna of the 8th of February, 1815, and reiterated by the additional article annexed to the treaty of peace concluded at Paris on the 20th November, 1815. The accession of Spain and Portugal to the principle of the abolition was finally obtained by the treaties between Great Britain and those powers of the 23d September, 1817, and the 22d January, 1815. And by a convention concluded with Brazil in 1826, it was made piratical for the subjects of that country to be engaged in the trade after the year 1830.

Decisions  
of British  
and Ame-  
rican  
courts of  
justice.

This general concert of nations to extinguish the traffic has given rise to the opinion, that, though once tolerated, and even protected and encouraged by the laws of every maritime country, it ought henceforth to be considered as interdicted by the international code of Europe and America. This opinion first



received judicial countenance from the authority of the judgment of the Lords of Appeal in prize causes, pronounced by *Sir W. Grant* in the case of an American vessel, the trade having been previously abolished by the laws of the United States as well as of Great Britain. The trade having been thus prohibited by the laws of both countries, and having been declared to be contrary to the principles of justice and humanity, the court deemed itself authorized to assert that it could not, abstractedly speaking, have a legitimate existence, and was, *prima facie*, illegal, upon principles of universal law. The entire burthen of proof was thus thrown upon the claimant to show that by the municipal law of his own country he was entitled to carry on this traffic. No claimant could "be heard in an application to a court of prize for the restitution of human beings carried unjustly to another country for the purpose of disposing of them as slaves."<sup>40</sup>

The principle of this decision was subsequently questioned by *Sir W. Scott* (Lord Stowell) in the case of the *Louis*, a French vessel, captured by a British cruizer as

<sup>40</sup> Acton's Rep. vol. i. p. 240. The *Amadie*.

having been engaged in the slave trade. In this case it was held that the trade could not be considered as contrary to the law of nations. A court of justice, in the administration of law, could not impute criminality to an act where the law imputes none. It must look to the legal standard of morality—a standard which, upon a question of this nature, must be found in the law of nations, as fixed and evidenced by general, ancient, and admitted practice, by treaties, and by the general tenor of the laws, ordinances, and formal transactions of civilized states; and looking to these authorities, the learned judge found a difficulty in maintaining that the transaction was legally criminal. The slave trade, on the contrary, had been carried on by all nations, including Great Britain, until a very recent period, and was still carried on by Spain and Portugal, and not yet absolutely prohibited by France. It was not, therefore, a criminal traffic by the consuetudinary law of nations; and every nation, independently of special compact, retained a legal right to carry it on. No one nation had a right to force the way to the liberation of Africa, by trampling on the independence of other states, or to procure an eminent good

by means that were unlawful; or to press forward to a great principle, by breaking through other great principles that stood in the way.<sup>41</sup>

A similar course of reasoning was adopted by the supreme court of the United States in the case of Spanish and Portuguese vessels captured by American cruizers whilst the trade was still tolerated by the laws of Spain and Portugal. It was stated, in the judgment of the court, that it could hardly be denied that the slave trade was contrary to the law of nature. That every man had a natural right to the fruits of his own labour, was generally admitted; and that no other person could rightfully deprive him of those fruits, and appropriate them against his will, seemed to be the necessary result of this admission. But from the earliest times war had existed, and war conferred rights in which all had acquiesced. Among the most enlightened nations of antiquity, one of these rights was, that the victor might enslave the vanquished. That which was the usage of all nations could not

<sup>41</sup> Dodson's Adm. Rep. vol. ii. p. 238. See also the case of *Madrazo v. Willes*, determined in the Court of King's Bench in 1820. Barnwell and Alderson's Rep. vol. iii. p. 353.

be pronounced repugnant to the law of nations, which was certainly to be tried by the test of general usage. That which had received the assent of all must be the law of all.

Slavery, then, had its origin in force; but as the world had agreed that it was a legitimate result of force, the state of things which was thus produced by general consent could not be pronounced unlawful.

Throughout Christendom this harsh rule had been exploded, and war was no longer considered as giving a right to enslave captives. But this triumph had not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa had not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. The question then was could those who had renounced this law be permitted to participate in its effects by purchasing the human beings who are its victims?

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles which are sanctioned by the usages, the national acts, and the general assent, of that portion of the

world, of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question must be considered as decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.

In this commerce, thus sanctioned by universal assent, every nation had an equal right to engage. No principle of general law was more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which was vested in all by the consent of all, could be divested only by consent; and this trade, in which all had participated, must remain lawful to those who could not be induced to relinquish it. As no nation could prescribe a rule for others, no one could make a law of nations; and this traffic

remained lawful to those whose governments had not forbidden it.

If it was consistent with the law of nations, it could not in itself be piracy. It could be made so only by statute ; and the obligation of the statute could not transcend the legislative power of the state which might enact it.

If the trade was neither repugnant to the law of nations, nor piratical, it was almost superfluous to say in that court that the right of bringing it for adjudication in time of peace, even where the vessel belonged to a nation which had prohibited the trade, could not exist. The courts of justice of no country executed the penal laws of another ; and the course of policy of the American government on the subject of visitation and search, would decide any case against the captors in which that right had been exercised by an American cruizer, on the vessel of a foreign nation, not violating the municipal laws of the United States. It followed that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace, by an American cruizer, and brought in for adjudication, would be restored to the original owners.<sup>42</sup>

<sup>42</sup> Wheaton's Rep. vol. x. p. 66. *The Antelope*.

II. The judicial power of every State extends to all civil proceedings, *in rem*, relating to real or personal property within the territory.

§ 18.  
Extent of  
the judicial  
power as to  
property  
within the  
territory.

This follows, in respect to real property, as a necessary consequence of the rule relating to the application of the *lex loci rei sitæ*. As every thing relating to the tenure, title, and transfer of real property (or immoveables) is regulated by the local law, so also the proceedings in courts of justice relating to that species of property, such as the rules of evidence and of prescription, the forms of action and pleadings, must necessarily be governed by the same law.

A similar rule applies to all civil proceedings *in rem*, respecting personal property (or moveables) within the territory, which must also be regulated by the local law, with this qualification, that foreign laws may furnish the rule of decision in cases where they apply, whilst the forms of process, and rules of evidence and prescription, are still governed by the *lex fori*. Thus the *lex domicilii* forms the law in respect to a testament of personal property or succession *ab intestato*, if the will is made, or the party on whom the succession devolves resides in a foreign country; whilst at the same time

§ 19.  
Distinction  
between  
the rule of  
decision  
and the  
rule of  
procedure  
as affecting  
cases *in  
rem*.

the *lex fori* of the state in whose tribunals the suit is pending determines the forms of process and the rules of evidence and prescription.

Succession  
to personal  
property  
*ab intestate.*

Though the distribution of the personal effects of an intestate is to be made according to the law of the place where the deceased was domiciled, it does not therefore follow that the distribution is in all cases to be made by the tribunals of that place to the exclusion of those of the country where the property is situate. Whether the tribunal of the state where the property lies is to decree distribution, or to remit the property abroad, is a matter of judicial discretion to be exercised according to circumstances. It is the duty of every government to protect its own citizens in the recovery of their debts and other just claims; and in the case of a solvent estate it would be an unreasonable and useless comity to send the funds abroad, and the resident creditor after them. But if the estate be insolvent, it ought not to be sequestered for the exclusive benefit of the subjects of the state where it lies. In all civilized countries, foreigners, in such a case, are entitled to prove their debts and share in the distribution.<sup>43</sup>

<sup>43</sup> Kent's Commentaries on American Law, 2d ed. vol. ii. pp. 432—434, and the cases there cited.



Though the forms in which a testament of personal property made in a foreign country is to be executed are regulated by the local law, such a testament cannot be carried into effect in the state where the property lies, until, in the language of the law of England, *probate* has been obtained in the proper tribunal of such state, or, in the language of the civilians, it has been *homologated*, or registered, in such tribunal.<sup>44</sup>

Foreign will, how carried into effect in another country.

So also a foreign executor, constituted such by the will of the testator, cannot exercise his authority in another state without taking out letters of administration in the proper local court. Nor can the administrator of a succession *ab intestato*, appointed *ex officio* under the laws of a foreign state, interfere with the personal property in another state belonging to the succession without having his authority confirmed by the local tribunal.

The judgment or sentence of a foreign tribunal of competent jurisdiction proceeding *in rem*, such as the sentences of Prize Courts under the law of nations, or Admiralty and

§ 20. Conclusiveness of foreign sentences *in rem*.

<sup>44</sup> Wheaton's Rep. vol. xii. p. 169. Code Civil, liv. iii. tit. 2, art. 1000.

Exchequer, or other revenue courts, under the municipal law, are conclusive as to the proprietary interest in, and title to, the thing in question, wherever the same comes incidentally in controversy in another state.

Whatever doubts may exist as to the conclusiveness of foreign sentences in respect of facts collaterally involved in the judgment, the peace of the civilized world, and the general security and convenience of commerce, obviously require that full and complete effect should be given to such sentences, wherever the title to the specific property, which has been once determined in a competent tribunal, is again drawn in question in any other court or country.

Transfer of  
property  
under fo-  
reign  
bankrupt  
proceed-  
ings.

How far a bankruptcy declared under the laws of one country will affect the real and personal property of the bankrupt situate in another state, is, (as we have already seen,) a question of which the usage of nations, and the opinions of civilians, furnish no satisfactory solution. Even as between co-ordinate states, belonging to the same common empire, it has been doubted how far the assignment under the bankrupt laws of one country will operate a transfer of property in another. In respect to real property, which generally has

some indelible characteristics impressed upon it by the local law, these difficulties are enhanced in those cases where the *lex loci rei sitæ* requires some formal act to be done by the bankrupt, or his attorney, specially constituted, in the place where the property lies, in order to consummate the transfer. In those countries where the theory of the English bankrupt system, that the assignment transfers all the property of the bankrupt, wherever situate, is admitted in practice, the local tribunals would probably be ancillary to the execution of the assignment by compelling the bankrupt, or his attorney, to execute such formal acts as are required by the local laws to complete the conveyance.<sup>45</sup>

The practice of the English court of chancery in assuming jurisdiction incidentally of questions affecting the title to lands in the British colonies, in the exercise of its jurisdiction *in personam*, where the party resides in England, and thus compelling him, indirectly, to give effect to its decrees as to real property situate out of its local jurisdiction, seems very

<sup>45</sup> See Lord Eldon's observations in *Selkrigg v. Davis*, *Rose's Cases in Bankruptcy*, vol. ii. p. 311. *Vesey's Rep.* vol. ix. p. 77. *Banfield v. Solomon*.

questionable on principle, unless where it is restrained to the case of a party who has fraudulently obtained an undue advantage over other creditors by judicial proceedings instituted without personal notice to the defendant.

But whatever effect may, in general, be attributed to the assignment in bankruptcy as to property situate in another state, it is evident that it cannot operate where one creditor has fairly obtained by legal diligence a specific lien and right of preference, under the laws of the country where the property is situate.<sup>46</sup>

§ 21.  
Extent of  
the judicial  
power over  
foreigners  
residing  
within the  
territory.

III. The judicial power of every state may be extended to all controversies respecting personal rights and contracts, or injuries to the person or property, when the party resides within the territory, wherever the cause of action may have originated.

This general principle is entirely independent of the rule of decision which is to govern the tribunal. The rule of decision may be the law of the country where the judge is sitting, or it may be the law of a foreign state in cases where it applies; but that does not

<sup>46</sup> Kent's Comment. on American Law, vol. ii. pp. 405--408. Second ed.

affect the question of jurisdiction which depends, or may be made to depend, exclusively upon the residence of the party.

The operation of the general rule of international law as to civil jurisdiction, extending to all persons, who owe even a temporary allegiance to the state, may be limited by the positive institutions of any particular country. It is the duty as well as the right of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations as to taking cognizance of controversies between foreigners. It may be assumed or declined, at the discretion of each state, guided by such motives as may influence its juridical policy. All real and possessory actions may be brought, and indeed must be brought, in the place where the property lies: but the law of England, and of other countries where the English common law forms the basis of the local jurisprudence, considers all personal actions, whether arising *ex delictu* or *ex contractu*, as transitory; and permits them to be brought in the domestic forum, whoever may be the parties, and wherever the cause of action may originate. This rule is supported by a legal fiction, which supposes the injury to have been inflicted, or the contract to have been

Depends upon municipal regulations.

Law of England and America.

made, within the local jurisdiction. In the countries which have modelled their municipal jurisprudence upon the Roman civil law, the maxim of that code, *Actor sequitur forum rei*, is generally followed, and personal actions must therefore be brought in the tribunals of the place where the defendant has acquired a fixed domicile.

French  
law.

By the law of France, foreigners who have established their domicile in the country by special license (*autorisation*) of the king are entitled to all civil rights, and, among others, to that of suing in the local tribunals as French subjects. Under other circumstances, these tribunals have jurisdiction where foreigners are parties in the following cases only :—

1. Where the contract is made in France, or elsewhere, between foreigners and French subjects.

2. In commercial matters, on all contracts made in France, with whomsoever made, where the parties have elected a domicile, in which they are liable to be sued, either by the express terms of the contract, or by necessary implication resulting from its nature.

3. Where foreigners voluntarily submit their controversies to the decision of the French tribunals, by waiving a plea to the jurisdiction.

In all other cases where foreigners, not domiciled in France by special license of the king, are concerned, the French tribunals decline jurisdiction, even when the contract is made in France.<sup>47</sup>

The practice which prevails in some countries of proceeding against absent parties, who are not only foreigners, but have not acquired a domicile within the territory, by means of some formal public notice, like that of the *viis et modis* of the Roman civil law, without actual personal notice of the suit, cannot be reconciled with the principles of international justice. So far indeed as it merely affects the specific property of the absent debtor within the territory, attaching it for the benefit of a particular creditor, who is thus permitted to gain a preference by superior diligence, or for the general benefit of all the creditors who come in within a certain fixed period, and claim the benefit of a rateable distribution, such a practice may be tolerated, and in the adminis-

<sup>47</sup> Code Civil, art. 13, 14, 15. Code de Commerce, art. 631. Discussions sur le Code Civil. tom. i. p. 48. Pothier, Procédure Civile, partie i. ch. 1, p. 2. Valin, sur l'Ord. de la Marine, tom. i. pp. 113, 253, 254. Pardessus, Droit Commercial, pt. vi. tit. 7, ch. 1, § 1.

tration of international bankrupt law is frequently allowed to give a preference to the attaching creditor against the law of what is termed the *locus concursus creditorum*, which is the place of the debtor's domicil.

§ 22. Where the tribunal has jurisdiction, the rule of decision is the law applicable to the case, whether it be the municipal or a foreign code; but the rule of proceeding is generally determined by the *lex fori* of the place where the suit is pending. But it is not always easy to distinguish the rule of decision from the rule of proceeding. It may, however, be stated in general, that whatever belongs to the obligation of the contract is regulated by the *lex domicilii* or the *lex loci contractus*, and whatever belongs to the remedy for enforcing the contract is regulated by the *lex fori*.

Obligation and remedy. If the tribunal is called upon to apply to the case, the law of the country where it sits, as between persons domiciled in that country, no difficulty can possibly arise. As the obligation of the contract and the remedy to enforce it are both derived from the municipal law, the rule of decision and the rule of proceeding must be sought in the same code. In



other cases it is necessary to distinguish with accuracy between the obligation and the remedy.

The obligation of the contract, then, may be said to consist of the following parts:—

1. The personal capacity of the parties to contract.

2. The will of the parties expressed as to the terms and conditions of the contract.

3. The external form of the contract.

The personal capacity of parties to contract depends upon those personal qualities which are annexed to their civil condition by the municipal law of their own state, and which travel with them wherever they go, and attach to them in whatever foreign country they are temporarily resident. Such are the privileges and disabilities conferred by the *lex domicilii* in respect to majority and minority, marriage and divorce, sanity or lunacy, and which determine the capacity or incapacity of parties to contract independently of the law of the place where the contract is made, or that of the place where it is sought to be enforced.

It is only those universal personal qualities, which the laws of all civilized nations concur in considering as essentially affecting the capacity to contract, which are exclusively


regulated by the *lex domicilii*, and not those particular prohibitions or disabilities which are arbitrary in their nature and founded upon local policy, such as the prohibition in some countries of noblemen and ecclesiastics from engaging in trade and forming commercial contracts. The quality of a major or minor, of a married or single woman, &c., are universal personal qualities, which, with all the incidents belonging to them, are ascertained by the *lex domicilii*, but which are also every where recognised as forming essential ingredients in the capacity to contract.<sup>48</sup>

Bank-  
ruptcy.

How far bankruptcy ought to be considered as a privilege or disability of this nature, and thus be restricted in its operation to the territory of that state under whose bankrupt code the proceedings take place, is, as already stated, a question of difficulty, in respect to which no constant and uniform usage prevails among nations. Supposing the bankrupt code of any country to form a part of the obligation of every contract made in that country with its citizens, and that every such contract is subject to the implied condition that the

<sup>48</sup> Pardessus, Droit Commercial, pt. vi. tit. 7, ch. 2, § 1.

debtor may be discharged from his obligation in the manner prescribed by the bankrupt laws, it would seem on principle that a certificate of discharge ought to be effectual in the tribunals of any other state where the creditor may bring his suit. If, on the other hand, the bankrupt code merely forms a part of the remedy for a breach of the contract, it belongs to the *lex fori*, which cannot operate extra-territorially within the jurisdiction of any other state having the exclusive right of regulating the proceedings in its own courts of justice; still less can it have such an operation where it is a mere partial modification of the remedy, such as an exemption from arrest and imprisonment of the debtor's person on a *cessio bonorum*. Such an exemption being strictly local in its nature, and to be administered in all its details by the tribunals of the state creating it, cannot form a law for those of any foreign state. But if the exemption from arrest and imprisonment, instead of being merely contingent upon the failure of the debtor to perform his obligation through insolvency, enters into and forms an essential ingredient in the original contract itself by the law of the country where it is made, it cannot be enforced in any other state



by the prohibited means. Thus by the law of France, and other countries where the *contrainte par corps* is limited to commercial debts, an ordinary debt contracted in that country by its subjects cannot be enforced by means of personal arrest in any other state, although the *lex fori* may authorize imprisonment for every description of debts.<sup>49</sup>

The obligation of the contract consists, secondly, of the will of the parties expressed as to its terms and conditions.

The interpretation of these depends, of course, upon the *lex loci contractus*, as do also the nature and extent of those implied conditions which are annexed by the local law or usage to the contract. Thus the rate of interest, unless fixed by the parties, is allowed by the law as damages for the detention of the debt, and the proceeding to recover these damages may strictly be considered as a part of the remedy. The rate of interest is, however, regulated by the law of the place where the contract is made, unless, indeed, it appears that the parties had in view the law of some other country. In that case, the lawful rate

<sup>49</sup> Bosanquet and Puller's Rep. vol. i. p. 131. *Melan v. the Duke of Fitz-James*.

of interest of the place of payment, or to which the loan has reference by security being taken upon property there situate, will control the *lex loci contractus*.<sup>50</sup>

3. The external form of the contract constitutes an essential part of its obligation.

This must be regulated by the law of the place of contract, which determines whether it must be in writing, or under seal, or executed with certain formalities before a notary or other public officer, and how attested. A want of compliance with these requisites renders the contract void *ab initio*, and being void by the law of the place, it cannot be carried into effect in any other state. But a mere fiscal regulation does not operate extra-territorially; and therefore the want of a stamp required by the local law to be impressed on an instrument, cannot be objected where it is sought to be enforced in the tribunals of another country.

There is an essential difference between the form of the contract and the extrinsic evidence by which the contract is to be proved. Thus the *lex loci contractus* may require certain

<sup>50</sup> Kent's Comm. on American Law, vol. ii. p. 460. Second edit.

contracts to be in writing, and attested in a particular manner, and a want of compliance with these forms will render them entirely void. But if these forms are actually complied with, the extrinsic evidence by which the existence and terms of the contract are to be proved in a foreign tribunal is regulated by the *lex fori*.

§ 23. **Conclu-  
siveness of  
foreign  
sentences  
in personal  
actions.** The same reasons which have induced states to give an international effect to testaments, contracts, and other acts *inter vivos* or *causa mortis*, have also induced them to give a similar effect to the judicial proceedings of every state where they are drawn in question in the tribunals of another country. But as *res adjudicata* in one country can have, *per se*, no effect in another, the conclusiveness of foreign sentences and judgments in personal actions is more or less restrained by the usage of different nations, or by special compact between them.

**Law of  
England.** By the law of England, the judgment of a foreign tribunal of competent jurisdiction is conclusive where the same matter comes incidentally in controversy between the same parties, and full effect is given to the *exceptio rei judicatæ* where it is pleaded in bar of a

new suit for the same cause of action. A foreign judgment is *prima facie* evidence where the party claiming the benefit of it applies to the English courts to enforce it, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly obtained. If this is not shown, it is received as evidence of a debt, for which a new judgment is rendered in the English court, and execution awarded. But if it appears by the record of the proceedings on which the original judgment was founded, that it was unjustly or fraudulently obtained, without actual personal notice to the party affected by it; or if it is clearly and unequivocally shown, by extrinsic evidence, that the judgment has manifestly proceeded upon false premises or inadequate reasons, or upon a palpable mistake of local or foreign law; it will not be enforced by the English tribunals.<sup>51</sup>

The same jurisprudence prevails in the United States of America, in respect to judgments and decrees rendered by the tribunals of a state foreign to the union. As between

<sup>51</sup> Knapp's Rep. in the Privy Council, vol. i. p. 274. Frankland v. M'Gusty. Barnwell and Adolphus' Rep vol. ii. p. 757. Novelli v. Ross, vol. iii. p. 951. Bequaet v. M'Carthy.

the different states of the union itself, a judgment obtained in one state has the same credit and effect in all the other states, which it has by the laws of that state where it was obtained; *i. e.* it has the conclusive effect of a domestic judgment.<sup>52</sup>

Law of  
France.

The law of France restrains the operation of foreign judgments within still narrower limits. Judgments obtained in a foreign country against French subjects are not conclusive, either where the same matter comes again incidentally in controversy, or where a direct suit is brought to enforce the judgment in the French tribunals. And this want of comity is even carried so far, that where a French subject commences a suit in a foreign tribunal, and judgment is rendered against him, the exception of *lis finita* is not admitted as a bar to a new action by the same party in the tribunals of his own country. If the judgment in question has been obtained against a foreigner, subject to the jurisdiction of the tribunal where it was pronounced, it is conclusive in bar of a new action in the French tribunals between the same parties. But the

<sup>52</sup> Cranch's Rep. vol. vii. pp. 481—484. *Mills v. Duryee*. Wheaton's Rep. vol. iii. p. 234. *Hampton v. M'Connell*.



party who seeks to enforce it must bring a new suit upon it, in which the judgment is *prima facie* evidence only, the defendant being permitted to contest the merits, and to show not only that it was irregularly obtained, but that it is unjust and illegal.<sup>53</sup>

A decree of divorce, obtained in a foreign <sup>Foreign</sup> country by a fraudulent evasion of the laws of <sup>divorces.</sup> the state to which the parties belong, would seem, on principle, to be clearly void in the country of their domicil where the marriage took place, though valid under the laws of the country where the divorce was obtained. Such are divorces obtained by parties going into another country for the sole purpose of obtaining a dissolution of the nuptial contract for causes not allowed by the laws of their own country, or where those laws do not permit a divorce *à vinculo* for any cause whatever. This subject has been thrown into almost inextricable confusion by the contrariety of decisions between the tribunals of England and Scotland, the courts of the

<sup>53</sup> Code Civil, art. 2123, 2128. Code de Procédure Civil, art. 546. Pardessus, Droit Commercial, pt. vi, tit. 7, ch. 2, § 2, No. 1488. Merlin, Répertoire, tom. vi. tit. *Jugement*. Questions de Droit, tom. iii. tit. *Jugement*. Toullier, Droit Civil Français, tom. x. Nos. 76—86.

former refusing to recognise divorces *à vinculo* pronounced by the Scottish tribunals between English subjects who had not acquired a *bond fide*, permanent domicil in Scotland; whilst the Scottish courts persist in granting such divorces in cases where, by the law of England, Ireland, and the colonies connected with the United Kingdom, the authority of parliament alone is competent to dissolve the marriage, so as to enable either party, during the lifetime of the other, again to contract lawful wedlock.<sup>44</sup>

<sup>44</sup> Dow's Parliament. Cases, vol. i. p. 117. *Torey v. Lindsay*, p. 124. Lolly's case. See Fergusson's Reports of Decisions in the Consistorial Courts of Scotland, *passim*.

## CHAP. III.

## RIGHTS OF EQUALITY.

THE natural equality of sovereign states § 1.  
 may be modified by positive compact, or by Natural equality of states modified by compact and usage.  
 consent implied from constant usage, so as to  
 entitle one state to superiority over another  
 in respect to certain external objects, such as  
 rank, titles, and other ceremonial distinctions.

Thus the international law of Europe has § 2.  
 attributed to certain states what are called Royal honours.  
*royal honours*, which are actually enjoyed by  
 every empire or kingdom in Europe, by the  
 pope, the grand duchies in Germany, and  
 the Germanic and Swiss confederations.  
 They were also formerly conceded to the  
 German empire, and to some of the great  
 republics, such as the United Netherlands  
 and Venice.

These *royal honours* entitle the states by  
 whom they are possessed to precedence over  
 all others who do not enjoy the same rank,

with the exclusive right of sending to other states public ministers of the first rank, as ambassadors, together with certain other distinctive titles and ceremonies.<sup>1</sup>

§ 3.  
Precedence  
among  
princes  
and states  
enjoying  
royal  
honours.

Among the princes who enjoy this rank, the Catholic powers concede the precedence to the pope, or sovereign pontiff; but Russia and the Protestant states of Europe consider him as bishop of Rome only, and a sovereign prince in Italy, and such of them as enjoy royal honours refuse him the precedence.

The emperor of Germany, under the former constitution of the empire, was entitled to precedence over all other temporal princes, as the supposed successor of Charlemagne and of the Cæsars in the empire of the West; but since the dissolution of the late Germanic constitution, and the abdication of the titles and prerogatives of its head by the emperor of Austria, the precedence of this sovereign, over other princes of the same rank, may be considered questionable.<sup>2</sup>

<sup>1</sup> Vattel, *Droit des Gens*, tom. i. liv. ii. ch. 3, § 38. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. iii. ch. 2, § 129. Kluber, *Droit des Gens Moderne*, pt. ii. tit. 1, ch. 3, §§ 91, 92.

<sup>2</sup> Martens, § 132. Kluber, § 95.

The various contests between crowned heads for precedence are matter of curious historical research, as illustrative of European manners at different periods; but the practical importance of these discussions has been greatly diminished by the progress of civilisation, which no longer permits the serious interests of mankind to be sacrificed to such vain pretensions.

The text writers commonly assigned to what were called the great republics, who were entitled to royal honours, a rank inferior to crowned heads of that class; and the United Netherlands, Venice, and Switzerland, certainly did formerly yield the precedence to emperors and reigning kings, though they contested it with the electors and other inferior princes entitled to royal honours. But disputes of this sort have commonly been determined by the relative power of the contending parties, rather than by any general rule derived from the form of government. Cromwell knew how to make the dignity and equality of the English commonwealth respected by the crowned heads of Europe; and in the different treaties between the French republic and other powers, it was expressly stipulated that the same ceremonial

as to rank and etiquette should be observed between them and France which had subsisted before the revolution.<sup>3</sup>

Those monarchical sovereigns who are not crowned heads, but who enjoy royal honours, concede the precedence on all occasions to emperors and kings.

Monarchical sovereigns who do not enjoy royal honours yield the precedence to those princes who are entitled to these honours.

Demi-sovereign or dependent states rank below sovereign states.<sup>4</sup>

These different points respecting the relative rank of sovereigns and states have never been determined by any positive regulation or international pact: they rest on usage and general acquiescence. An abortive attempt was made at the congress of Vienna to classify the different states of Europe, with a view to determine their relative rank. At the sitting of the 10th December, 1814, the plenipotentiaries of the eight powers who signed the treaty of peace at Paris named a committee to which this subject was referred. At the

<sup>3</sup> Treaty of Campo Formio, art. 23, and of Luneville, art. 17, with Austria. Treaties of Basle with Prussia and Spain.

<sup>4</sup> Kluber, § 98.

sitting of the 9th February, 1815, the report of the committee, which proposed to establish three classes of powers, relatively to the rank of their respective ministers, was discussed by the congress; but doubts having arisen respecting this classification, and especially as to the rank assigned to the great republics, the question was indefinitely postponed, and a regulation established determining the relative rank of the diplomatic agents of crowned heads.<sup>5</sup>

Where the rank between different states is equal or undetermined, different expedients have been resorted to for the purpose of avoiding a contest, and at the same time reserving the respective rights and pretensions of the parties. Among these is what is called the usage of the *alternat*, by which the rank and places of different powers is changed from time to time, either in a certain regular order, or one determined by lot. Thus, in drawing up public treaties and conventions, it is the usage of certain powers to *alternate*, both in the preamble and the signatures, so

§ 4.  
Usage of  
the alter-  
nat.

<sup>5</sup> Kluber, Acten des Wiener Congresses, tom. viii. pp. 98, 102, 108, 116.

that each power occupies, in the copy intended to be delivered to it, the first place. The regulation of the congress of Vienna, above referred to, provided that in acts and treaties between those powers which admit the *alternat*, the order to be observed by the different ministers shall be determined by lot.<sup>6</sup>

Another expedient which has frequently been adopted to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing in the order assigned by the *French* alphabet to the respective powers represented by their ministers.<sup>7</sup>

§ 5.  
Language  
used in  
diplomatic  
inter-  
course.

The primitive equality of nations authorizes each nation to make use of its own language in treating with others, and this right is still in a certain degree preserved in the practice of some states. But general convenience early suggested the use of the Latin language in the diplomatic intercourse between the different nations of Europe. Towards the end of the fifteenth century, the preponderance of Spain contributed to the general

<sup>6</sup> Annexe, xvii. à l'Acte du Congrès de Vienne, art. 7.

<sup>7</sup> Kluber, Uebersicht der diplomatischen Verhandlungen des Wiener Congresses, § 164.



diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, has been superseded by the language of France, which, since the age of Louis XIV., has become the almost universal diplomatic idiom of the civilized world. Those states which still retain the use of their national language in treaties and diplomatic correspondence usually annex to the papers transmitted by them a translation in the language of the opposite party, wherever it is understood that this comity will be reciprocated. Such is the usage of the Germanic confederation, of Spain, and the Italian courts. Those states which have a common language generally use it in their transactions with each other. Such is the case between the Germanic confederation and its different members; and between the respective members themselves; between the different states of Italy; and between Great Britain and the United States of America.

All sovereign princes or states may assume whatever titles of dignity they think fit, and may exact from their own subjects these marks of honour. But their recognition by other states is not a matter of strict right, especially

§ 6.  
Titles of  
sovereign  
princes and  
states.

in the case of new titles of higher dignity, assumed by sovereigns. Thus the royal title of King of Prussia, which was assumed by Frederick I. in 1701, was first acknowledged by the emperor of Germany, and subsequently by the other princes and states of Europe. It was not acknowledged by the Pope until the reign of Frederick William II. in 1786, and by the Teutonic knights until 1792, this once famous military order still retaining the shadow of its antiquated claims to the duchy of Prussia until that period.<sup>8</sup> So also the title of Emperor of all the Russias, which was taken by the Czar Peter the Great, in 1701, was successively acknowledged by Prussia, the United Netherlands, and Sweden in 1723, by Denmark in 1732, by Turkey in 1739, by the emperor and the empire in 1745-6, by France in 1745, by Spain in 1759, and by the republic of Poland in 1764. In the recognition of this title by France, a reservation of the right of precedence claimed by that crown was insisted on, and a stipulation entered into by Russia in the form of a *Réversale*, that this change of title should make no alteration in the cere-

<sup>8</sup> Ward's History of the Law of Nations, vol. ii. pp. 245—248. Kluber, Droit des Gens Moderne de l'Europe, pte. ii. tit. 1, ch. 2, § 107, note c.

monies observed between the two courts. On the accession of the Empress Catharine II. in 1762, she refused to renew this stipulation in that form, but *declared* that the imperial title should make no change in the ceremonial observed between the two courts. This declaration was answered by the court of Versailles in a counter-declaration, renewing the recognition of that title, upon the express condition that if any alteration should be made by the court of St. Petersburg in the rules previously observed by the two courts as to rank and precedence, the French crown would resume its ancient style, and cease to give the title of Imperial to that of Russia.<sup>9</sup>

The title of emperor, from the historical associations with which it is connected, was formerly considered the most eminent and honourable among all sovereign titles; but it was never regarded by other crowned heads as conferring, except in the single case of the emperor of Germany, any prerogative or precedence over those princes.

The usage of nations has established certain maritime ceremonials to be observed, either

§ 7.  
Maritime  
ceremo-  
nials.

<sup>9</sup> Flissan, Histoire de la Diplomatie Française, tom. vi. liv. iii. pp. 329—364.

on the ocean, or those parts of the sea over which a sort of supremacy is claimed by a particular state.

Among these is the salute by striking the flag or the sails, or by firing a certain number of guns, on approaching a fleet or ship of war, or entering a fortified port or harbour.

Every sovereign state has the exclusive right, in virtue of its independence and equality, to regulate the maritime ceremonial to be observed by its own vessels, towards each other, or towards those of another nation, on the high seas, or within its own territorial jurisdiction. It has a similar right to regulate the ceremonial to be observed within its own exclusive jurisdiction by the vessels of all nations, as well with respect to each other, as towards its own fortresses and ships of war, and the reciprocal honours to be rendered by the latter to foreign ships. These regulations are established either by its own municipal ordinances, or by reciprocal treaties with other maritime powers.<sup>10</sup>

<sup>10</sup> Bynkershoek, de Dominio Maris, cap. 2, 4. Martens, *Precis du Droit des Gens Moderne de l'Europe*, liv. iv. ch. 4, § 159. Klüber, *Droit des Gens Moderne de l'Europe*, pte. ii. tit. 1, ch. 3, §§ 117—122.

Where the dominion claimed by the state is contested by foreign nations, as in the case of Great Britain in the Narrow Seas, the maritime honours to be rendered by its flag are also the subject of contention. The disputes on this subject have not unfrequently formed the motives or pretexts for war between the powers asserting these pretensions and those by whom they were resisted. The maritime honours required by Denmark, in consequence of the supremacy claimed by that power over the Sound and Belts, at the entrance of the Baltic Sea, have been regulated and modified by different treaties with other states, and especially by the convention of the 15th of January, 1829, between Russia and Denmark, suppressing most of the formalities required by former treaties. This convention is to continue in force until a general regulation shall be established among all the maritime powers of Europe, according to the protocol of the congress of Aix la Chapelle, signed on the 9th November, 1818, by the terms of which it was agreed by the ministers of the five great powers, Austria, France, Great Britain, Prussia, and Russia, that the existing regulations observed by them should be referred to the ministerial conferences at London, and that the

other maritime powers should be invited to communicate their views of the subject in order to form some such general regulation."<sup>11</sup>

<sup>11</sup> J. H. W. Schlegel, *Staats Recht des Königreichs Dänemark*, 1 Theil, p. 412. Martens, *Nouveau Recueil*, tom. viii. p. 73.

## CHAP. IV.

## RIGHTS OF PROPERTY.

THE exclusive right of every independent state to its territory and other property is founded upon the title originally acquired by occupancy, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign states.

§ 1.  
National  
proprie-  
tary rights.

The things belonging to the nation include its public property or domain, and those things belonging to private individuals or bodies corporate within the territory.

§ 2.  
Property of  
the state.

This national proprietary right, so far as it excludes that of other nations, is *absolute*; but in respect to the members of the state it is *paramount* only, and forms what is called the eminent domain.<sup>1</sup>

§ 3.  
Eminent  
domain.

<sup>1</sup> Vattel, *Droit des Gens*, liv. i. ch. 20, §§ 235, 244. Rutherford's *Inst. of Natural Law*, vol. ii. ch. 9, § 6.

§ 4.  
Prescription.

The writers on natural law have questioned how far that peculiar species of presumption arising from the lapse of time which is called *prescription* is justly applicable as between nation and nation; but the constant and approved practice of nations shews that, by whatever name it be called, the uninterrupted possession of territory or other property, for a certain length of time, by one state, excludes the claim of every other, in the same manner as by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him, and the inference fairly to be drawn from his silence and neglect, of the original defect of his title or his intention to relinquish it.<sup>2</sup>

§ 5.  
Conquest  
and disco-

The title of almost all the nations of Europe to the territory now possessed by them in that

<sup>2</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 4. Puffendorf, Jus Naturæ et Gentium, lib. iv. cap. 12. Vattel, Droit des Gens, tom. i. liv. ii. ch. 11. Rutherford's Inst. of Natural Law, vol. i. ch. 8, vol. ii. ch. 9, §§ 3, 6.



quarter of the world was originally derived from conquest, which has been subsequently confirmed by international compacts to which all the European states have successively become parties. Their claim to the possessions held by them in the New World discovered by Columbus and other adventurers, and to the territories which they have acquired on the continents and islands of Africa and Asia, was originally derived from discovery or conquest and colonization, and has since been confirmed in the same manner by positive compact. Independently of these sources of title, the general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract or as positive law, all nations are equally bound by it, since all are parties to it; since none can safely disregard it without impugning its own title to its possessions; and since it is founded upon mutual utility, and tends to promote the general welfare of mankind.

The Spaniards and Portuguese took the lead among the nations of Europe in the splendid maritime discoveries in the East and the West, during the fifteenth and sixteenth centuries.

very confirmed by compact and the lapse of time.

According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims. Hence the famous bull issued by Pope Alexander VI. in 1493, by which he granted to the united crowns of Castille and Arragon all lands discovered, and to be discovered, beyond a line drawn from pole to pole, one hundred leagues west from the Azores, or Western Islands, under which Spain has since claimed to exclude all other European nations from the possession and use, not only of the lands, but of the seas, in the New World west of that line. Independent of this papal grant, the right of prior discovery was the foundation upon which the different European nations, by whom conquests and settlements were successively made on the American continent, rested their respective claims to appropriate its territory to the exclusive use of each nation. Even Spain did not found her pretensions solely on the papal grant. Portugal asserted a title derived from discovery and conquest to a portion of South America, taking care to keep to the eastward of

the line traced by the Pope, by which the globe seemed to be divided between these two great monarchies. On the other hand, Great Britain, France, and Holland, disregarded the pretended authority of the papal see, and pushed their discoveries, conquests, and settlements, both in the East and the West Indies, until conflicting with the paramount claims of Spain and Portugal, they produced bloody and destructive wars between the different maritime powers of Europe. But there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions. Thus the bull of Pope Alexander VI. reserved from the grant to Spain, all lands which had been previously occupied by any other *christian* nation: and the patent granted by Henry VII. of England to John Cabot and his sons authorized them "to seek out and discover all islands, regions, and provinces whatsoever that may belong to heathens and infidels," and "to subdue, occupy, and possess these territories, as his vassals and lieutenants." In the same manner the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote heathen and barbarous lands, countries, and territories, not actually

“ possessed of any christian prince or people,  
 “ and to hold, occupy, and enjoy the same  
 “ with all their commodities, jurisdictions, and  
 “ royalties.” It thus became a maxim of  
 policy and of law that the right of the native  
 Indians was subordinate to that of the first  
 christian discoverer, whose paramount claim  
 excluded that of every other civilized nation,  
 and gradually extinguished that of the natives.  
 In the various wars, treaties, and negotiations,  
 to which the conflicting pretensions of the dif-  
 ferent states of Christendom to territory on  
 the American continent have given rise, the  
 primitive title of the Indians has been entirely  
 overlooked, or left to be disposed of by the  
 states within whose limits they happened to  
 fall by the stipulations of the treaties between  
 the different European powers. Their title  
 has thus been almost entirely extinguished by  
 force of arms, or by voluntary compact, as the  
 progress of cultivation gradually compelled  
 the savage tenant of the forest to yield to  
 the superior power and skill of his civilized  
 invader.

Dispute  
 between  
 Great  
 Britain  
 and Spain  
 relating  
 to Nootka  
 Sound.

In the dispute which took place in 1790,  
 between Great Britain and Spain, relative to  
 Nootka Sound, the latter claimed all the  
 north-western coast of America as far north

as Prince William's Sound, in latitude 61°, upon the ground of prior discovery and long possession, confirmed by the eighth article of the treaty of Utrecht, referring to the state of possession in the time of his Catholic Majesty Charles II. This claim was contested by the British government, upon the principle that the earth is the common inheritance of mankind, of which each individual and each nation has a right to appropriate a share by occupancy and cultivation. This dispute was terminated by a convention between the two powers, stipulating that their respective subjects should not be disturbed in their navigation and fisheries in the Pacific Ocean or the South Seas, or in landing on the coasts of those seas, not already occupied, for the purpose of carrying on their commerce with the natives of the country, or of making settlements there, subject to the following provisions:—

1. That the British navigation and fishery should not be made the pretext for illicit trade with the Spanish settlements, and that British subjects should not navigate or fish within the space of ten marine leagues from any part of the coasts already occupied by Spain.


2. That with respect to the eastern and western coasts of South America and the adjacent islands, no settlement should be formed thereafter by the respective subjects in such parts of those coasts as are situated to the south of those parts of the same coasts, and of the adjacent islands already occupied by Spain; provided that the respective subjects should retain the liberty of landing on the coasts and islands so situated, for the purposes of their fishery, and of erecting huts and other temporary buildings, for those purposes only.<sup>3</sup>

Conven-  
tion be-  
tween the  
United  
States and  
Russia  
respecting  
the North-  
western  
Coast of  
America.

By an ukase of the emperor Alexander of Russia, of the 4-16th September, 1821, an exclusive territorial right on the north-west coast of America was asserted as belonging to the Russian empire, from Behring's Straits to the 51st degree of north latitude, and in the Aleutian islands, on the east coast of Siberia, and the Kurile islands from the same straits to the South Cape in the island of Ooroop, in 45°.51' north latitude. The navigation and fishery of all other nations was prohibited in the islands, ports, and gulfs

<sup>3</sup> Annual Register for 1790, (State Papers,) pp. 285—305; 1791, pp. 208—214, 222—227.

within the above limits; and every foreign vessel was forbidden to touch at any of the Russian establishments above enumerated, or even to approach them within a less distance than 100 Italian miles, under penalty of confiscation of the cargo. The proprietary rights of Russia to the extent of the north-west coast of America specified in this decree, were rested upon the three bases said to be required by the general law of nations and immemorial usage:— that is, upon the title of first discovery; upon the title of first occupation; and, in the last place, upon that which results from a peaceable and uncontested possession of more than half a century. It was added that the extent of sea, of which the Russian possessions on the continents of Asia and America form the limits, comprehended all the conditions which were ordinarily attached to shut seas (*mers fermées*); and the Russian government might consequently deem itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights by measures adapted to prevent contraband trade within the chartered limits of the American Russian Company.



All these grounds were contested, in point of fact as well as right, by the government of the United States, and the question became the subject of negotiation between the two countries.

This negotiation was terminated by a convention signed at Petersburg on the 5-17th of April, 1824, in which it was stipulated that the citizens and subjects of the two powers should not be disturbed in their navigation and fishery, or in the faculty of resorting to the coasts, upon points not already occupied, in any part of the Pacific Ocean, subject to the following conditions:—

1. That the citizens or subjects of the two powers should not resort to any point where the other has an establishment, without special permission.

2. That neither the government nor citizens of the United States should form any establishment upon the north-west coast of America, or any of the adjacent islands *to the north* of 54 degrees and 40 minutes of north latitude; nor should the Russian government or subjects form any establishment *south* of the same parallel. But the ships of both powers, or those belonging to their citizens or subjects, may frequent the interior seas, gulfs, harbours,



and creeks upon the coast, for the purpose of fishing and trading with the natives, excepting in spirituous liquors, fire-arms, other arms, and munitions of war of every description.<sup>4</sup>

The maritime territory of every state extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation.<sup>5</sup>

The term "coasts" includes the natural

<sup>4</sup> Annual Register, vol. lxiv. pp. 576—584. Correspondence between M. de Polatica and Mr. Adams.

<sup>5</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 3, § x. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. De Dominio Maris, cap. 2. Vattel, liv. i. ch. 23, § 289. Valin, Comm. sur l'Ordonnance de la Marine, liv. v. tit. 1. Azuni, Diritto Marit. pt. i. cap. 2, art. 3, § 15. Galiani, dei Doveri dei Principi Neutrali in Tempo de Guerra, liv. i. Life and Works of Sir L. Jenkins, vol. ii. p. 780.

§ 7.  
Extent of  
the term  
coasts or  
shore.

appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water. The rule of law on this subject is *terræ dominium finitur, ubi finitur armorum vis*; and since the introduction of fire-arms, that distance has usually been recognised to be about three miles from the shore. In a case before Sir W. Scott (Lord Stowell) respecting the legality of a capture alleged to be made within the neutral territory of the United States, at the mouth of the river Mississippi, a question arose as to what was to be deemed the shore, since there are a number of little mud islands, composed of earth and trees drifted down by the river, which form a kind of portico to the main land. It was contended that these were not to be considered as any part of the American territory—that they were a sort of “no man’s land,” not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds’ nests. It was argued that the line of territory was to be taken only from the Balise, which

is a fort raised on made land by the former Spanish possessors. But the learned judge was of a different opinion, and determined that the protection of the territory was to be reckoned from these islands, and that they are the natural appendages of the coast on which they border, and from which indeed they were formed. Their elements were derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Whether they were composed of earth or solid rock would not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.<sup>6</sup>

The exclusive territorial jurisdiction of the British crown over the enclosed parts of the sea along the coasts of the island of Great Britain has immemorially extended to those bays called the *King's Chambers*; *i. e.* portions of the sea cut off by lines drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the

The King's  
Chambers.

<sup>6</sup> Robinson's Adm. Reports, vol. v. p. 385 (c). The Anna.

Delaware Bay and other bays and estuaries forming portions of their territory. It appears from Sir Leoline Jenkins, that both in the reigns of James I. and of Charles II. the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbours of Great Britain as to disturb or threaten vessels homeward or outward bound ; and that captures by such foreign cruizers, even of their enemies' vessels, would be restored by the Court of Admiralty if made within the King's Chambers. So also the British "hovering act," passed in 1736, (9 Geo. II. cap. 35,) assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance without payment of duties. A similar provision is contained in the revenue laws of the United States ; and both these provisions have been declared by judicial authority, in each country, to be consistent with the law and usage of nations.<sup>7</sup>

<sup>7</sup> Life and Works of Sir L. Jenkins, vol. ii. pp. 727, 728, 780. Opinion of the United States Attorney-General on the capture of the British ship Grange in the Delaware Bay, 1793. Waite's American State Papers, vol. i. p. 75.

Such regulations can only be justified on the ground of their being essentially necessary to the security and interests of the state. They are not intended to assert an exclusive right of sovereignty and domain over such extensive portions of the sea. Even a claim to contiguous portions is not to be viewed with much indulgence; it is to be strictly construed, and clearly made out. "It is," says Sir *W. Scott*, "a claim of private and exclusive property, over a subject where a general, or at least a common, use is to be presumed; it is a claim which can only arise on portions of the sea, or on rivers flowing through different states. In the sea, out of the reach of common shot, universal use is presumed: in rivers flowing through conterminous states, a common use to the different states is presumed. Yet, in both of these, there may, by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states: the banks

§ 8.  
Claim to  
contiguous  
portions of  
the sea  
for special  
purposes.

Dodson's Adm. Reports, vol. ii. p. 245. *Le Louis*. Cranch's Reports, vol. ii. p. 187. *Church v. Hubbard*. Vattel, Droit des Gens, liv. i. ch. 22, § 288.

“ on one side may have been first settled, by  
 “ which the possession and property may have  
 “ been acquired, or cessions may have taken  
 “ place upon conquests or other events. But  
 “ the general presumption certainly bears  
 “ strongly against such exclusive rights, and  
 “ the title is a matter to be established on  
 “ the part of those claiming under it, in the  
 “ same manner as all other legal demands  
 “ are to be substantiated,—by clear and com-  
 “ petent evidence.”<sup>8</sup>

§ 9.  
 Claims to  
 portions of  
 the sea  
 upon the  
 ground of  
 prescrip-  
 tion.

Besides those bays, gulfs, straits, mouths of rivers, and estuaries which are enclosed by capes and headlands belonging to the territory of the state, a jurisdiction and right of property over certain other portions of the sea have been claimed by different nations, on the ground of immemorial use. Such, for example, was the sovereignty formerly claimed by the republic of Venice over the Adriatic. The maritime supremacy claimed by Great Britain over what are called the Narrow Seas has generally been asserted merely by requiring certain honours to the British flag in those

<sup>8</sup> Robinson's Adm. Reports, vol. iii. p. 339. The *Twee Gebroeders*.

seas, which have been rendered or refused by other nations according to circumstances, but the claim itself has never been sanctioned by general acquiescence.<sup>9</sup>

So long as the shores of the Black Sea were <sup>The Black Sea.</sup> exclusively possessed by Turkey, that sea might with propriety be considered as *mare clausum*; and there seems no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being at the same time portions of the Turkish territory; but since the territorial acquisitions made by Russia, and the commercial establishments formed by her on the shores of the Euxine, both that empire and other maritime powers have become entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognised by the seventh article of the treaty of Adrianople, concluded in 1829, between Russia and the Porte, both as to Russian

<sup>9</sup> Vattel, *Droit des Gens*, liv. i. ch. 23, § 289. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. ii. ch. 1, § 42. *Edinburgh Review*, vol. xi. art. 1, pp. 17 — 19.

vessels and those of other European states in amity with Turkey.<sup>10</sup>

**Baltic Sea.** The supremacy asserted by the king of Denmark over the Sound and the two Belts which form the outlet of the Baltic Sea into the ocean, is rested by the Danish publicists upon immemorial prescription, sanctioned by a long succession of treaties with other powers. According to these writers, the Danish claim of sovereignty has been exercised from the earliest times beneficially for the protection of commerce against pirates and other enemies by means of guard-ships, and against the perils of the seas by the establishment of lights and land-marks. The Danes continued for several centuries masters of the coasts on both sides of the Sound, the province of Scania not having been ceded to Sweden until the treaty of Roeskild in 1658, confirmed by that of 1660, in which it was stipulated that Sweden should never lay claim to the Sound tolls in consequence of the cession, but should content herself with a compensation for keeping up the lighthouses on the coast of Scania. The exclusive right of Denmark was recognised as early as 1368, by a treaty with the Hanseatic

<sup>10</sup> Martens, *Nouveau Recueil*, tom. viii. p. 143.



republics, and by that of 1490 with Henry VII. of England, which forbids English vessels from passing the Great Belt as well as the Sound, unless in case of unavoidable necessity; in which case they were to pay the same duties at Wyborg as if they had passed the Sound at Elsinore. The treaty concluded at Spires in 1544, with the emperor Charles V., which has commonly been referred to as the origin, or at least the first recognition, of the Danish claim to the Sound tolls, merely stipulates, in general terms, that the merchants of the Low Countries frequenting the ports of Denmark should pay the same duties as formerly. The rates of the tariff were first definitely ascertained by the treaty of Christianopel, in 1645, with the Dutch, and this has since served as the standard for the duties payable by other nations *privileged* by treaty. Those not privileged pay according to a more ancient tariff on the specified articles, and one and a quarter per cent. on unspecified articles.<sup>11</sup>

The Baltic Sea is considered by the maritime

<sup>11</sup> Schlegel, Staats-Recht des Königreichs Danemark, 1 Theil, cap. 7, §§ 27—29.

Q<sup>a</sup>. Whether the Baltic Sea is *mare clausum*? powers bordering on its coasts as *mare clausum* against the exercise of hostilities upon its waters by other powers whilst the Baltic powers are at peace. This principle was proclaimed in the treaties of armed neutrality in 1780 and 1800, and by the treaty of 1794 between Denmark and Sweden, guaranteeing the tranquillity of that sea. In the Russian declaration of war against Great Britain of 1807, the inviolability of that sea and the reciprocal guarantees of the powers that border upon it (guarantees said to have been contracted with the knowledge of the British government) were stated as aggravations of the British proceedings in entering the Sound and attacking the Danish capital in that year. In the British answer to this declaration, it was denied that Great Britain had at any time acquiesced in the principles upon which the inviolability of the Baltic is maintained; however she might, at particular periods, have forborne, for special reasons influencing her conduct at the time, to act in contradiction to them. Such forbearance never could have applied but to a state of peace and real neutrality in the north; and she could not be expected to recur to it after France had

been suffered, by the conquest of Prussia, to establish herself in full sovereignty along the whole coast, from Dantzic to Lubeck.<sup>12</sup>

The controversy how far the open sea or main ocean, beyond the immediate vicinity of the coasts, may be appropriated by one nation to the exclusion of others, which once exercised the pens of the ablest European jurists, can hardly be considered open at this day. *Grotius*, in his treatise on the Law of Peace and War, hardly admits more than the possibility of appropriating the waters immediately contiguous, though he adduces a number of quotations from ancient authors, showing that a broader pretension has been sometimes sanctioned by usage and opinion. But he never intimates that any thing more than a limited portion could be thus claimed; and he uniformly speaks of "*pars*," or "*portus maris*," always confining his view to the effect of the neighbouring land in giving a jurisdiction and property of this sort.<sup>13</sup> He had previously taken the lead in maintaining the common right of mankind to the free naviga-

§ 10.  
Contro-  
versy  
respecting  
the domi-  
nion of  
the seas.

<sup>12</sup> Annual Register, vol. xlix. (State Papers,) p. 773.

<sup>13</sup> De Jur. Bel. ac Pac. lib. ii. cap. 3, §§ 8—13.

tion, commerce, and fisheries of the Atlantic and Pacific Oceans, against the exclusive claims of Spain and Portugal, founded on the right of previous discovery, confirmed by possession and the papal grants. The treatise *De Mare Libero* was published in 1609. The claim of sovereignty asserted by the kings of England over the British seas was supported by *Albericus Gentilis*, in his *Advocatio Hispanica*, in 1613. In 1635, *Selden* published his *Mare Clausum*, in which the general principles maintained by Grotius are called in question, and the claim of England more fully vindicated than by Gentilis. The first book of Selden's celebrated treatise is devoted to the proposition that the sea may be made property, which he attempts to show, not by reasoning, but by collecting a multitude of quotations from ancient authors, in the style of Grotius, but with much less selection. He nowhere grapples with the arguments by which such a vague and extensive dominion is shown to be repugnant to the law of nations. And in the second part, which indeed is the main object of his work, he has recourse only to proofs of usage and of positive compact, in order to show that Great Britain is entitled to the sovereignty of

what are called the *Narrow Seas*.<sup>14</sup> Father *Paul Sarpi*, the celebrated historian of the council of Trent, also wrote a vindication of the claim of the republic of Venice to the sovereignty of the Adriatic.<sup>15</sup> *Bynkershoek* examined the general question, in the earliest of his published works, with the vigour and acumen which distinguish all his writings. He admits that certain portions of the sea may be susceptible of exclusive dominion, though he denies the claim of the English crown to the British seas on the ground of the want of uninterrupted possession. He asserts that there was no instance, at the time when he wrote, in which the sea was subject to any particular sovereign, where the surrounding territory did not belong to him.<sup>16</sup> *Puffendorf* lays it down, that in a narrow sea the dominion belongs to the sovereigns of the surrounding land, and is distributed, where there are several such sovereigns, according to the rules applicable to neighbouring proprietors on a lake or

<sup>14</sup> Edinburgh Review, vol. xi. art. 1, p. 16.

<sup>15</sup> Paolo Sarpi, *Del Dominio del Mara Adriatico e sui Reggioni per il Jus Belli della Serenissima Rep. de Venezia*, *Venet.* 1676, 12<sup>o</sup>.

<sup>16</sup> *De Dominio Maris*, Opera Minora, Dissert. V. first published in 1702.

river, supposing no compact has been made, "as is pretended," he says, "by Great Britain;" but he expresses himself with a sort of indignation at the idea that the main ocean can ever be appropriated.<sup>17</sup> The authority of *Vattel* would be full and explicit to the same purpose, were it not weakened by the concession, that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user, on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favour of one nation against another.<sup>18</sup>

§ 11.  
Rivers  
forming  
part of the  
territory  
of the  
state.

The territory of the state includes the lakes, seas, and rivers entirely enclosed within its limits. The rivers which flow through the territory also form a part of the domain, from their sources to their mouths, or as far as they flow within the territory, including the bays or estuaries formed by their junction with the sea. Where a navigable river forms the

<sup>17</sup> De Jure Naturæ et Gentium, lib. iv. cap. 5, § 7.

<sup>18</sup> Droit des Gens, liv. i. ch. 23, §§ 279—286.

boundary of conterminous states, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two states, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy, and long undisturbed possession giving to one of the riparian proprietors the exclusive title to the entire river.<sup>19</sup>

Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable

§ 12.  
Right of  
innocent  
passage  
on rivers  
flowing  
through  
different  
states.

<sup>19</sup> Vattel, *Droit des Gens*, liv. i. ch. 22, § 266. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. ii. ch. 1, § 39.

to rivers flowing from one state through the territory of another into the sea, or into the territory of a third state. The right of navigating, for commercial purposes, a river which flows through the territories of different states, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the state affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.<sup>20</sup>

§ 13.  
Incidental  
right to  
use the  
banks of  
the rivers.

It seems that this right draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the principal right itself. Thus the Roman law, which considered navigable rivers as public or common property, declared that the right to the use of the shores was incident to that of the water; and that the right to navigate a river involved the right to moor vessels to its

<sup>20</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, §§ 12—14; cap. 3, §§ 7—12. Vattel, Droit des Gens, liv. ii. ch. 9, §§ 126—130; ch. 10, §§ 132—134. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, §§ 3—6.



banks, to lade and unlade cargoes, &c. The publicists apply this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for these purposes as means necessary to the attainment of the end for which the free navigation of the water is permitted.<sup>21</sup>

The incidental right, like the principal right itself, is imperfect in its nature, and the mutual convenience of both parties must be consulted in its exercise.

§ 14.  
These rights imperfect in their nature.

Those who are interested in the enjoyment of these rights may renounce them entirely, or consent to modify them in such manner as mutual convenience and policy may dictate. A remarkable instance of such a renunciation is found in the treaty of Westphalia, confirmed by subsequent treaties, by which the navigation of the river Scheldt was closed to the Belgic provinces, in favour of the Dutch. The forcible opening of this navigation by the French on the occupation of Belgium by the arms of the French Republic in 1792, in

§ 15.  
Modification of these rights by compact.

<sup>21</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 15. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, § 8. Vattel, Droit des Gens, liv. ii. ch. 9, § 129.

violation of these treaties, was one of the principal ostensible causes of the war between France on one side, and Great Britain and Holland on the other. By the treaties of Vienna, the Belgic provinces were united to Holland, under the same sovereign, and the navigation of the Scheldt was placed on the same footing of freedom with that of the Rhine and other great European rivers.

§ 16.  
Treaties of  
Vienna  
respecting  
the great  
European  
rivers.

By the treaty of Vienna in 1815, the commercial navigation of rivers, which separate different states, or flow through their respective territories, was declared to be entirely free in their whole course, from the point where each river becomes navigable to its mouth; provided that the regulations relating to the police of the navigation should be observed, which regulations were to be uniform, and as favourable as possible to the commerce of all nations.<sup>22</sup>

By the *Annexe* xvi. to the final act of the congress of Vienna, the free navigation of the Rhine is confirmed "in its whole course, from the point where it becomes navigable to the sea, ascending or descending;" and detailed

<sup>22</sup> Acte Final du Congrès de Vienne, art. 14, 96, 109.

regulations are provided respecting the navigation of that river, and the Neckar, the Mayn, the Moselle, the Meuse, and the Scheldt, which are declared in like manner to be free from the point where each of these rivers becomes navigable to its mouth. Similar regulations respecting the free navigation of the Elbe were established among the powers interested in the commerce of that river, by an act signed at Dresden the 12th December, 1821. And the stipulations between the different powers interested in the free navigation of the Vistula and other rivers of ancient Poland contained in the treaty of the 3d May, 1815, between Austria and Russia, and of the same date between Russia and Prussia, to which last Austria subsequently acceded, are confirmed by the final act of the congress of Vienna. The same treaty also extends the general principles adopted by the congress relating to the navigation of rivers to that of the Po.<sup>23</sup>

The interpretation of these stipulations respecting the free navigation of the Rhine gave rise to a controversy between the king-


§ 17.  
Navigation  
of the  
Rhine.

<sup>23</sup> Mayer, *Corpus Juris Germanici*, tom. ii. pp. 224—239, 298. *Acte Final*, art. 14, 118, 96.

dom of the Netherlands and the other states interested in the commerce of that river. The Dutch government claimed the exclusive right of regulating and imposing duties upon the trade, within its own territory, at the places where the different branches into which the Rhine divides itself fall into the sea. The expression in the treaties of Paris and Vienna "*jusqu' à la mer,*" to the sea, was said to be different in its import from the term "into thesea:" and besides, it was added, if the upper states insist so strictly upon the terms of the treaties, they must be contented with the course of the proper Rhine itself. The mass of waters brought down by that river, dividing itself a short distance above Nimiguen, is carried to the sea through three principal channels, the *Waal*, the *Leck*, and the *Yssel*: the first descending by Gorcum, where it changes its name for that of the *Meuse*; the second approaching the sea at Rotterdam; and the third, taking a northerly course by Zutphen and Deventer, empties itself into Zuyderzee. None of these channels, however, is called the Rhine; that name is preserved to a small stream which leaves the Leck at Wyck, takes its course by the learned retreats of Utrecht and Leyden, gradually dispersing and losing its waters

among the sandy downs at Kulwyck. The proper Rhine being thus useless for the purposes of navigation, the Leck was substituted for it by common consent of the powers interested in the question ; and the government of the Netherlands afterwards consented that the Waal, as being better adapted to the purposes of navigation, should be substituted for the Leck. But it was insisted by that government that the Waal terminates at Gorcum, to which the tide ascends, and where consequently the Rhine terminates ; all that remains of that branch of the river from Gorcum to Helvoetsluys and the mouth of the Meuse is an arm of the sea, enclosed within the territory of the kingdom, and consequently subject to any regulations which its government may think fit to establish.

On the other side, it was contended by the powers interested in the navigation of the river, that the stipulations in the treaty of Paris in 1814, by which the sovereignty of the House of Orange over Holland was revived, with an accession of territory, and the navigation of the Rhine was, at the same time, declared to be free, “ from the point where it “ becomes navigable to the sea,” were inseparably connected in the intentions of the



allied powers who were parties to the treaty. The intentions thus disclosed were afterwards carried into effect by the congress of Vienna, which determined the union of Belgium to Holland, and confirmed the freedom of navigation of the Rhine, as a condition annexed to this augmentation of territory which had been accepted by the government of the Netherlands. The right to the free navigation of the river, it was said, draws after it, by necessary implication, the innocent use of the different waters which unite it with the sea; and the expression "to the sea" was in this respect equivalent to the term "into the sea," since the pretension of the Netherlands to levy unlimited duties upon its principal passages into the sea would render wholly useless to other states the privilege of navigating the river within the Dutch territory.<sup>24</sup>

After a long and tedious negotiation, this question was finally settled by the convention concluded at Mayence the 31st of March, 1831, between all the ripuarian states of the Rhine, by which the navigation of the river was declared free from the point where it becomes navigable into the sea, (*bis in die See*.)

<sup>24</sup> Annual Register for 1826, vol. lxxviii. p. 259—263.

including its two principal outlets or mouths in the kingdom of the Netherlands, the *Leck* and the *Waal*, passing by Rotterdam and Briel through the first-named watercourse, and by Dortrecht and Helvoetsluys through the latter, with the use of the artificial communication by the canal of Voorne with Helvoetsluys: By the terms of this treaty, the government of the Netherlands stipulates, in case the passages by the main sea by Briel or Helvoetsluys should at any time become innavigable, through natural or artificial causes, to indicate other watercourses for the navigation and commerce of the riparian states, equal in convenience to those which may be open to the navigation and commerce of its own subjects. The convention also provides minute regulations of police and fixed toll-duties on vessels and merchandize passing through the Netherlands territory to or from the sea, and also by the different ports of the upper riparian states on the Rhine.<sup>25</sup>

By the treaty of peace concluded at Paris in 1763, between France, Spain, and Great Britain, the province of Canada was ceded to

§ 18.  
Navigation  
of the Mis-  
sissippi.

<sup>25</sup> Martens, Noveau Recueil, tom. ix. p. 252.

Great Britain by France, and that of Florida to the same power by Spain, and the boundary between the French and British possessions in North America was ascertained by a line drawn through the middle of the river Mississippi from its source to the Iberville, and from thence through the latter river and the lakes Maurepas and Pontchartrain to the sea. The right of navigating the Mississippi was at the same time secured to the subjects of Great Britain from its source to the sea, and the passages in and out of its mouth, without being stopped or visited, or the payment of any duty whatsoever. The province of Louisiana was soon afterwards ceded by France to Spain; and by the treaty of Paris, 1783, Florida was retroceded to Spain by Great Britain. The independence of the United States was acknowledged, and the right of navigating the Mississippi was secured to the citizens of the United States and the subjects of Great Britain by the separate treaty between these powers. But Spain having become thus possessed of both banks of the Mississippi at its mouth, and a considerable distance above its mouth, claimed its exclusive navigation below the point where the southern boundary of the United States struck the river. This claim was resisted, and



the right to participate in the navigation of the river from its source to the sea was insisted on by the United States, under the treaties of 1763 and 1783, as well as the law of nature and nations. The dispute was terminated by the treaty of San Lorenzo el Real, in 1795, by the 4th article of which his Catholic Majesty agreed that the navigation of the Mississippi, in its whole breadth, from its source to the ocean, should be free to the citizens of the United States: and by the 22d article, they were permitted to deposit their goods at the port of New Orleans, and to export them from thence, without paying any other duty than the hire of the warehouses. The subsequent acquisition of Louisiana and Florida by the United States having included within their territory the whole river from its source to the Gulf of Mexico, and the stipulation in the treaty of 1783, securing to British subjects a right to participate in its navigation, not having been renewed by the treaty of Ghent in 1814, the right of navigating the Mississippi is now vested exclusively in the United States.

The right of the United States to participate with Spain in the navigation of the river Mississippi was rested by the American government on the sentiment written in deep

characters on the heart of man, that the ocean is free to all men, and its rivers to all their inhabitants. This natural right was found to be universally acknowledged and protected in all tracts of country, united under the same political society, by laying the navigable rivers open to all their inhabitants. When these rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream was in any case obstructed, it was an act of force by a stronger society against a weaker, condemned by the judgment of mankind. The then recent case of the attempt of the emperor Joseph II. to open the navigation of the Scheldt from Antwerp to the sea was considered as a striking proof of the general union of sentiment on this point, as it was believed that Amsterdam had scarcely an advocate out of Holland, and even there her pretensions were advocated on the ground of treaties, and not of natural right. This sentiment of right in favour of the upper inhabitants must become stronger in the proportion which their extent of country bears to the lower. The United States held 600,000 square miles of inhabitable territory on the Mississippi and its branches, and this river with its branches afforded many thousands of miles of navigable

waters penetrating this territory in all its parts. The inhabitable territory of Spain below their boundary and bordering on the river, which alone could pretend any fear of being incommoded by their use of the river, were not the thousandth part of that extent. This vast portion of the territory of the United States had no other outlet for its productions, and these productions were of the bulkiest kind. And, in truth, their passage down the river might not only be innocent, as to the Spanish subjects on the river, but would not fail to enrich them far beyond their actual condition. The real interests, then, of all the inhabitants, upper and lower, concurred in fact with their respective rights.

If the appeal was to the law of nature and nations, as expressed by writers on the subject, it was agreed by them, that even if the river, where it passes between Florida and Louisiana, were the exclusive right of Spain, still an innocent passage along it was a natural right in those inhabiting its borders above. It would indeed be what those writers call an imperfect right, because the modification of its exercise depends, in a considerable degree, on the conveniency of the nation through which they were to pass. But it was still a

right as real as any other right however well defined; and were it to be refused, or so shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation was the counterpart to that of those possessing the shores below, and founded in the same natural relations with the soil and water. And the line at which their respective rights met was to be advanced or withdrawn, so as to equalize the inconveniences resulting to each party from the exercise of the right by the other. This estimate was to be fairly made with a mutual disposition to make equal sacrifices, and the numbers on each side ought to have their due weight in the estimate. Spain held so very small a tract of habitable land on either side below our boundary, that it might in fact be considered as a strait in the sea; for though it was eighty leagues from our southern boundary to the mouth of the river, yet it was only here and there in spots and slips that the land rises above the level of the water in times of inundation. There were then, and ever must be, so few inhabitants on her part of the

river, that the freest use of its navigation might be admitted to us without their annoyance.<sup>26</sup>

It was essential to the interests of both parties that the navigation of the river should be free to both, on the footing on which it was defined by the treaty of Paris, viz. through its whole breadth. The channel of the Mississippi was remarkably winding, crossing and recrossing perpetually from one side to the other of the general bed of the river. Within the elbows thus made by the channel there was generally an eddy setting upwards, and it was by taking advantage of these eddies, and constantly crossing from one to another of them, that boats were enabled to ascend the river. Without this right the navigation of the whole river would be impracticable both to the Americans and Spaniards.

It was a principle that the right to a thing gives a right to the means without which it could not be used, that is to say, that the means follow the end. Thus a right to navigate a river draws to it a right to moor vessels

<sup>26</sup> The authorities referred to on this head were the following: Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2. §§ 11—13; c. 3, §§ 7—12. Puffendorff, lib. iii. cap. 3, §§ 3—6. Wolff's Inst. §§ 310—312. Vattel, liv. i. § 292; liv. ii. §§ 123—139.

to its shores, to land on them in cases of distress, or for other necessary purposes, &c. This principle was founded in natural reason, was evidenced by the common sense of mankind, and declared by the writers before quoted.

The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public, declared also that the right to the use of the shores was incident to that of the water.<sup>27</sup> The laws of every country probably did the same. This must have been so understood between France and Great Britain at the treaty of Paris, where a right was ceded to British subjects to navigate the whole river, and expressly that part between the island of New Orleans and the western bank, without stipulating a word about the use of the shores, though both of them belonged then to France, and were to belong immediately to Spain. Had not the use of the shores been considered as incident to that of the water, it would have been expressly stipulated, since its necessity was too obvious to have escaped either party. Accordingly all

<sup>27</sup> Inst. liv. ii. t. 1. §§ 1—5.

British subjects used the shores habitually for the purposes necessary to the navigation of the river ; and when a Spanish governor undertook at one time to forbid this, and even cut loose the vessels fastened to the shores, a British vessel went immediately, moored itself opposite the town of New Orleans, and set out guards with orders to fire on such as might attempt to disturb her moorings. The governor acquiesced, the right was constantly exercised afterwards, and no interruption ever offered.

This incidental right extends even beyond the shores, when circumstances render it necessary to the exercise of the principal right ; as in the case of a vessel damaged, where the mere shore could not be a safe deposit for her cargo till she could be repaired, she may remove into safe ground off the river. The Roman law was here quoted too, because it gave a good idea both of the extent and the limitations of this right.<sup>28</sup>

The relative position of the United States and Great Britain, in respect to the navigation § 19.  
Navigation  
of the St.  
Lawrence.

<sup>28</sup> Mr. Jefferson's Instructions to U. S. ministers in Spain, March 18, 1792. Waite's State Papers, vol. x. pp. 135—140.

of the great northern lakes and the river St. Lawrence, appears to be similar to that of the United States and Spain, previously to the cession of Louisiana and Florida, in respect to the Mississippi; the United States being in possession of the southern shores of the lakes and the river St. Lawrence to the point where their northern boundary line strikes the river, and Great Britain of the northern shores of the lakes and the river in its whole extent to the sea, as well as of the southern banks of the river, from the latitude 45° north to its mouth.

The claim of the people of the United States, of a right to navigate the St. Lawrence to and from the sea, has recently become the subject of discussion between the American and British governments.

On the part of the United States government, this right is rested on the same grounds of natural right and obvious necessity which had formerly been urged in respect to the river Mississippi. The dispute between different European powers respecting the navigation of the Scheldt in 1784, was also referred to in the correspondence on this subject, and the case of that river was distinguished from that of the St. Lawrence by its peculiar cir-



cumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passed within the dominions of Holland was entirely *artificial*; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great expense. Hence, probably, the motive for that stipulation in the treaty of Westphalia, that the lower Scheldt, with the canals of Sas and Swin, and other mouths of the sea adjoining them, should be kept closed on the side belonging to Holland. But the case of the St. Lawrence was totally different, and the principles on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn acts of the principal states of Europe. In the treaties concluded at the congress of Vienna, it had been stipulated that the navigation of the Rhine, the Neckar, the Meyn, the Moselle, the Maese, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the present judgment of Europe upon the general question. The importance of the

present claim might be estimated by the fact, that the inhabitants of at least eight states of the American union, besides the territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river and the inland seas through which it communicates with the ocean. The right of this great and growing population to the use of this its only natural outlet to the ocean was supported by the same principles and authorities which had been urged by Mr. *Jefferson* in the negotiation with Spain respecting the navigation of the river Mississippi. The present claim was also fortified by the consideration that this navigation was, before the war of the American revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies in the war of 1756. The claim of the United States to the free navigation of the St. Lawrence was of the same nature with that of Great Britain to the navigation of the Mississippi, as recognised by the seventh article of the treaty of Paris, 1763, when the mouth and lower shores of that river were held by another power. The

claim, whilst necessary to the United States, was not injurious to Great Britain, nor could it violate any of her just rights.<sup>29</sup>

On the part of the British government, the claim was considered as involving the question whether a *perfect* right to the free navigation of the river St. Lawrence could be maintained according to the principles and practice of the law of nations.

The liberty of passage to be enjoyed by one nation through the dominions of another was treated by the most eminent writers on public law as a qualified, occasional exception to the paramount rights of property. They made no distinction between the right of passage by a river, flowing from the possessions of one nation through those of another, to the ocean, and the same right to be enjoyed by means of any highway, whether of land or water, generally accessible to the inhabitants of the earth. The right of passage, then, must hold good for other purposes, besides those of trade,—for objects of war, as well as for objects of peace,—for all nations, no less than for any nation in particular, and be attached to artificial

<sup>29</sup> American Paper on the Navigation of the St. Lawrence. Congress Documents, Sessions 1827, 1828; No. 43, p. 34.

as well as to natural highways. The principle could not therefore be insisted on by the American government, unless it was prepared to apply the same principle by reciprocity, in favour of British subjects, to the navigation of the Mississippi and the Hudson, access to which from Canada might be obtained by a few miles of land-carriage, or by the artificial communications created by the canals of New York and Ohio. Hence the necessity which has been felt by the writers on public law, of controlling the operation of a principle so extensive and dangerous, by restricting the right of transit to purposes of *innocent* utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an *imperfect* right. But there was nothing in these writers, or in the stipulations of the treaties of Vienna, respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute, natural right. These stipulations were the result of mutual consent, founded on considerations of mutual interest growing out of the relative situation of the different states concerned in this navigation. The same observation would apply to the various conventional regulations which had been at different

periods applied to the navigation of the river Mississippi. As to any supposed right derived from the simultaneous acquisition of the St. Lawrence by the British and American people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British dominions in North America was made between the new government and that of the mother country.<sup>30</sup>

To this argument it has been replied, on the part of the United States, that if the St. Lawrence were regarded as a *strait* connecting navigable seas, as it ought properly to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits. The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean.

<sup>30</sup> British Paper on the Navigation of the St. Lawrence, Sessions 1827, 1828; No. 43, p. 41.

The right to navigate both (the lakes and the ocean) includes that of passing from one to the other through the natural link. Was it then reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate from the use of a common bounty of nature, necessary to the full enjoyment of them? The distinction between the right of passage, claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things. In the former case, the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the state whose territory is traversed. But in the case of a passage on water no such injury is sustained. The American government did not mean to contend for any principle, the benefit of which, in analogous circumstances, it would deny to Great Britain. If, therefore, in the further progress of discovery, a connexion should be developed between the river Mississippi and Upper Canada, similar to that which exists between the United States and the St. Lawrence, the American government would

be always ready to apply, in respect to the Mississippi, the same principles it contended for in respect to the St. Lawrence. But the case of rivers, which rise and debouche altogether within the limits of the same nation, ought not to be confounded with those which, having their sources and navigable portions of their streams in states above, finally discharge themselves within the limits of other states below. In the former case, the question as to opening the navigation to other nations, depended upon the same considerations which might influence the regulation of other commercial intercourse with foreign states, and was to be exclusively determined by the local sovereign. But in respect to the latter, the free navigation of the river was a natural right in the upper inhabitants, of which they could not be entirely deprived by the arbitrary caprice of the lower state. Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of the European rivers, sufficient to prove that the origin of the right was conventional, and not natural. It often happened to be highly convenient, if not sometimes indispensable, to avoid controversies, by prescribing certain

rules for the enjoyment of a natural right. The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and commerce. Hence the right of navigating the ocean itself, in many instances, principally incident to a state of war, is subjected, by innumerable treaties, to various regulations. These regulations—the transactions at Vienna, and other analogous stipulations—should be regarded only as the spontaneous homage of man to the paramount Lawgiver of the universe, by delivering his great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected.<sup>31</sup>

<sup>31</sup> Mr. Secretary Clay's Letter to Mr. Gallatin, June 19, 1826. Sessions 1827, 1828 ; No. 43, p. 18.



**PART THIRD.**

**INTERNATIONAL RIGHTS OF STATES IN  
THEIR PACIFIC RELATIONS.**



## PART THIRD.

### INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS.

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#### CHAP. I.

##### RIGHTS OF LEGATION.

THERE is no circumstance which marks § 1.  
more distinctly the progress of modern civili- Usage of  
sation than the institution of permanent di- permanent  
plomatic missions between different states. diplomatic  
The rights of ambassadors were known and missions.  
in some degree respected by the classic  
nations of antiquity. During the middle ages  
they were less distinctly recognised, and it  
was not until the seventeenth century that  
they were firmly established. The institution  
of resident permanent legations at all the

European courts took place subsequently to the peace of Westphalia, and was rendered expedient by the increasing interest of the different states in each other's affairs growing out of more extensive commercial and political relations, and more refined speculations respecting the balance of power. Hence the rights of legation have become definitely ascertained, and incorporated into the international code.

§ 2.  
Right to  
send, and  
obligation  
to receive,  
public  
ministers.

Every independent state has a right to send public ministers to, and receive ministers from, any other sovereign state with which it desires to maintain the relations of peace and amity. No state, strictly speaking, is obliged, by the positive law of nations, to send or receive public ministers, although the usage and comity of nations seem to have established a sort of reciprocal duty in this respect. It is evident, however, that this cannot be more than an imperfect obligation, and must be modified by the nature and importance of the relations to be maintained between different states by means of diplomatic intercourse.<sup>1</sup>

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. 5, §§ 55—65. Rutherford's *Institutes*, vol. ii. b. ii. ch. 9, § 20. Mar-

How far the rights of legation belong to dependent or semi-sovereign states, must depend upon the nature of their peculiar relation to the superior state under whose protection they are placed. Thus, by the treaty concluded at Kainardgi, in 1774, between Russia and the Porte, the provinces of Moldavia and Wallachia, placed under the protection of the former power, have the right of sending *chargés d'affaires* of the Greek communion to represent them at the court of Constantinople.<sup>3</sup>

§ 3.  
Rights  
of legation,  
to what  
states be-  
longing.

So also of confederated states ; their right of sending public ministers to each other, or to foreign states, depends upon the peculiar nature and constitution of the union by which they are bound together. Under the constitution of the former German empire, and that of the present Germanic confederation, this right is preserved to all the princes and states composing the federal union. Such was also the former constitution of the United Provinces of the Low Countries, and such is now that of the Swiss confederation. By the constitution

tens, *Précis du Droit des Gens Moderne de l'Europe*, liv. vii. ch. 1, §§ 187—190.

<sup>3</sup> Vattel, liv. iv. ch. 5, § 60. Kluber, *Droit des Gens Moderne de l'Europe*, st. 2. tit. 2, ch. 3, § 175.

of the United States of America every state is expressly forbidden from entering, without the consent of congress, into any treaty, alliance, or confederation, with any other state of the union, or with a foreign state, or from entering, without the same consent, into any agreement or compact with another state, or with a foreign power. The original power of sending and receiving public ministers is essentially modified, if it be not entirely taken away, by this prohibition.

§ 4.  
How affected by civil war or contest for the sovereignty.

The question, to what department of the government belongs the right of sending and receiving public ministers, also depends upon the municipal constitution of the state. In monarchies, whether absolute or constitutional, this prerogative usually resides in the sovereign. In republics, it is vested either in the chief magistrate, or in a senate or council, conjointly with, or exclusive of such magistrate. In the case of a revolution, civil war, or other contest for the sovereignty, although, strictly speaking, the nation has the exclusive right of determining in whom the legitimate authority of the country resides, yet foreign states must of necessity judge for themselves whether they will recognise the

government *de facto*, by sending to, and receiving ambassadors from it, or whether they will continue their accustomed diplomatic relations with the prince whom they choose to regard as the legitimate sovereign, or suspend altogether these relations with the nation in question. So also where an empire is severed by the revolt of a province or colony declaring and maintaining its independence, foreign states are governed by expediency in determining whether they will commence diplomatic intercourse with the new state, or wait for its recognition by the metropolitan country.<sup>3</sup>

For the purpose of avoiding the difficulties which might arise from a formal and positive decision of these questions, diplomatic agents are frequently substituted, who are clothed with the powers, and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honours.

As no state is under a perfect obligation to receive ministers from another, it may annex such conditions to their reception as it thinks

§ 5.  
Condi-  
tional  
reception  
of foreign  
ministers.

<sup>3</sup> Vide ante, pt. i. ch. 2, §§ 17, 18.

fit; but when once received, they are in all other respects entitled to the privileges annexed by the law of nations to their public character. Thus some governments have established it as a rule not to receive one of their own native subjects as a minister from a foreign power; and a government may receive one of its own subjects under the expressed condition that he shall continue amenable to the local laws and jurisdiction. So also one court may refuse to receive a particular individual as minister from another court, alleging the motives on which such refusal is grounded.<sup>4</sup>

§ 6.  
classifica-  
tion of  
public  
ministers.

The primitive law of nations makes no distinction between the different classes of public ministers: but the modern usage of Europe having introduced into the voluntary law of nations certain distinctions in this respect, which, for want of exact definition, became the perpetual source of controversies, an uniform rule was at last adopted by the congress of Vienna, and that of Aix la Chapelle, which put an end to those disputes. By the rule thus established, public ministers are divided into the four following classes:—

<sup>4</sup> Bynkershoek, de Foro Competent. Legatorum, cap. 11, § 10. Martens, Manuel Diplomatique, ch. 1, § 6.



1. Ambassadors, and papal legates or nuncios.

2. Envoys, ministers, or others accredited to sovereigns, (auprès des souverains.)

3. Ministers resident accredited to sovereigns.

4. Chargés d'Affaires accredited to the minister of foreign affairs.<sup>5</sup>

Ambassadors and other public ministers of the first class are exclusively entitled to what is called the *representative* character, being considered as peculiarly representing the sovereign or state by whom they are delegated, and entitled to the same honours to which their constituent would be entitled were he personally present. This must, however, be taken in a general sense, as indicating the sort of honours to which they are entitled; and the exact ceremonial to be observed towards this class of ministers depends upon usage, which has fluctuated at different periods of European history. There is a slight shade of difference between ambassadors ordinary and extraordinary; the former designation being exclusively applied to those sent on

<sup>5</sup> Récez du Congrès de Vienne du 19 Mars, 1815. Protocoll du Congrès d'Aix la Chapelle du 21 Novembre, 1818. Martens, Manuel Diplomatique, ch. 4, § 38.

permanent missions, the latter to those employed on a particular or extraordinary occasion, or residing at a foreign court for an indeterminate period.<sup>6</sup>

The right of sending ambassadors is exclusively confined to crowned heads, the great republics, and other states entitled to royal honours.<sup>7</sup>

All other public ministers are destitute of that peculiar character which is supposed to be derived from representing generally the person and dignity of the sovereign. They represent him only in respect to the particular business committed to their charge at the court to which they are accredited.<sup>8</sup>

Ministers of the second class are envoys, envoys extraordinary, ministers plenipotentary, envoys extraordinary and ministers plenipotentary, and internuncios of the pope.<sup>9</sup>

In the third class are included ministers,

<sup>6</sup> Vattel, *Droit des Gens*, liv. iv. ch. 6, §§ 70—79. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. vii. ch. 2, § 192. Martens, *Manuel Diplomatique*, ch. 1, § 9.

<sup>7</sup> Martens, *Précis, &c.* liv. vii. ch. 2, § 198. Vide ante, pt. ii. ch. 3, § 2.

<sup>8</sup> Martens, *Manuel Diplomatique*, ch. 1, § 10.

<sup>9</sup> Ibid.

ministers resident, residents, and ministers chargés d'affaires accredited to sovereigns.<sup>10</sup>

Chargés d'affaires, accredited to the minister of foreign affairs of the court at which they reside, are either chargés d'affaires *ad hoc*, who are originally sent and accredited by their governments, or chargés d'affaires *par interim*, substituted in the place of the minister of their respective nations during his absence.<sup>11</sup>

According to the rule prescribed by the congress of Vienna, and which has since been generally adopted, public ministers take rank between themselves in each class according to the date of the official notification of their arrival at the court to which they are accredited.<sup>12</sup>

The same decision of the congress of Vienna has also abolished all distinctions of rank between public ministers arising from consanguinity, and family or political relations between their different courts.<sup>13</sup>

A state which has a right to send public ministers of different classes may determine

<sup>10</sup> Martens, Précis, &c. liv. vii. ch. 2, § 194.

<sup>11</sup> Martens, Manuel Diplomatique, ch. 1, § 11.

<sup>12</sup> Revez du Congrès de Vienne du 19 Mars, 1815, art. 4.

<sup>13</sup> *Ib.* art. 6.

for itself what rank it chooses to confer upon its diplomatic agents; but usage generally requires that those who maintain permanent missions near the government of each other should send and receive ministers of equal rank. One minister may represent his sovereign at different courts, and a state may send several ministers to the same court. A minister or ministers may also have full powers to treat with foreign states, as at a congress of different nations, without being accredited to any particular court.<sup>14</sup>

Consuls and other commercial agents, not being accredited to the sovereign or minister of foreign affairs, are not, in general, considered as public ministers; but the consuls maintained by the christian powers of Europe and America near the Barbary States are accredited and treated as public ministers.<sup>15</sup>

§ 7.  
Letters of  
credence.

Every diplomatic agent, in order to be received in that character, and to enjoy the privileges and honours attached to his rank,

<sup>14</sup> Martens, Précis, &c. liv. vii. ch. 2, §§ 199—204.

<sup>15</sup> Bynkershoek, de Foro Competent. Legat. cap. 10, §§ 4—6. Martens, Manuel Diplomatique, ch. 1, § 13. Vattel, liv. ii. ch. 2, § 34. Wicquefort, de l'Ambassadeur, liv. i. § 1, p. 63.

must be furnished with a letter of credence. In the case of an ambassador, envoy, or minister of either of the three first classes, this letter of credence is addressed by the sovereign or other chief magistrate of his own state to the sovereign or state to whom the minister is delegated. In the case of a chargé d'affaires, it is addressed by the secretary, or minister of state charged with the department of foreign affairs, to the minister of foreign affairs of the other government. It may be in the form of a *cabinet letter*, but is more generally in that of a *letter of council*. If the latter, it is signed by the sovereign, and sealed with the great seal of state. The minister is furnished with an authenticated copy, to be delivered to the minister of foreign affairs on asking an audience for the purpose of delivering the original to the sovereign or other chief magistrate of the state to whom he is sent. The letter of credence states the general object of his mission, and requests that full faith and credit may be given to what he shall say on the part of his court.<sup>16</sup>

<sup>16</sup> Martens, Précis, &c. liv. vii. ch. 3, § 202. Wicquefort, de l'Ambassadeur, liv. i. § 15.

§ 8.  
Full  
power.

The full power authorizing the minister to negotiate may be inserted in the letter of credence, but it is more usually drawn up in the form of letters patent. In general, ministers sent to a congress are not provided with a letter of credence, but only with a full power, of which they reciprocally exchange copies with each other, or deposit them in the hands of the mediating power or presiding minister.<sup>17</sup>

§ 9.  
Instruc-  
tions.

The instructions of the minister are for his own direction only, and not to be communicated to the government to which he is accredited, unless he is ordered by his own government to communicate them *in extenso*, or partially, or in the exercise of his discretion, he deems it expedient to make such a communication.<sup>18</sup>

§ 10.  
Passport.

A public minister proceeding to his destined post, in time of peace, requires no other protection than a passport from his own govern-

<sup>17</sup> Wicquefort, liv. i. § 16. Martens, Précis, &c. liv. vii. ch. 3, § 204. Manuel Diplomatique, ch. 2, § 17.

<sup>18</sup> Manuel Diplomatique, ch. 2, § 16.

ment. In time of war, he must be provided with a safe-conduct, or passport, from the government of the state with which his own country is in hostility, to enable him to travel securely through its territories.<sup>19</sup>

A public minister, in passing through the territory of a friendly state, other than that of the government to which he is accredited, is entitled to respect and protection, though not invested with all the privileges and immunities which he enjoys within the dominions of the sovereign to whom he is sent. The extent of respect and protection due to a public minister within the territory of a foreign state other than that to which he is sent, is carried by *Vattel* further than seems to be warranted by reason, the usage of nations, or the authority of other text writers upon international law. The inviolability of ambassadors under that law is by *Grotius* and *Bynkershoek*, among others, understood as binding on those sovereigns only to whom they are sent; and *Wicquefort*, in particular,

§ 11.  
Public  
minister  
passing  
through  
the terri-  
tory of  
another  
state than  
that to  
which he  
is accred-  
ited.

<sup>19</sup> *Vattel*, liv. iv. ch. 7, § 85. *Manuel Diplomatique*, ch. 2, § 19. *Flassan*, *Histoire de la Diplomatie Française*, tom. v. p. 246.

who has been ever considered as the stoutest champion of ambassadorial rights, determines that the assassination of the ministers of Francis I., referred to by Vattel, though an atrocious murder, was no breach of international law as to the privileges of ambassadors. It might be a violation of the right of innocent passage, aggravated by the circumstance of the dignified character of the persons on whom the crime was committed, and even a just cause of war against the emperor Charles V., without involving the question of protection as an ambassador, which arises exclusively from a legal implication which can only exist between the states from and to whom he is sent.<sup>20</sup>

§ 12.  
Duties of  
a public  
minister on  
arriving at  
his post.

It is the duty of every public minister, on arriving at his destined post, to notify his arrival to the minister of foreign affairs. If the foreign minister is of the first class, this notification is usually communicated by a secretary of embassy or legation, or other

<sup>20</sup> Vattel, liv. iv. ch. 7, § 84. Wicquefort, liv. i. § 29, pp. 433—439. Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 5. Bynkershoek, de Foro Competent. Legat. cap. 9, § 7. Rutherford's Instit. vol. ii. b. ii. ch. 9, § xx. Ward's Hist. of the Law of Nations, vol. ii. ch. 17, pp. 334—339.



person attached to the mission, who hands to the minister of foreign affairs a copy of the letter of credence, at the same time requesting an audience of the sovereign for his principal. Ministers of the second and third classes generally notify their arrival by letter to the minister of foreign affairs, requesting him to take the orders of the sovereign as to the delivery of their letters of credence. *Chargés d'affaires*, who are not accredited to the sovereign, notify their arrival in the same manner, at the same time requesting an audience of the minister of foreign affairs for the purpose of delivering their letters of credence.

Ambassadors, and other ministers of the first class, are entitled to a *public* audience of the sovereign; but this ceremony is not necessary to enable them to enter on their functions, and, together with the ceremony of the *solemn entry*, which was formerly practised with respect to this class of ministers, is now usually dispensed with, and they are received in a *private* audience in the same manner as other ministers. At this audience, the letter of credence is delivered, and the minister pronounces a complimentary discourse, to which the sovereign replies. In republican states,

§ 13.  
Audience  
of the so-  
vereign or  
chief ma-  
gistrate.

the foreign minister is received in a similar manner, by the chief executive magistrate or council charged with the foreign affairs of the nation.<sup>21</sup>

§ 14.  
Diplomatic  
etiquette.

The usage of civilized nations has established a certain etiquette to be observed by the members of the diplomatic corps resident at the same court towards each other, and towards the members of the government to which they are accredited. The duties which comity requires to be observed in this respect belong rather to the code of manners than of laws, and can hardly be made the subject of positive sanction: but there are certain established rules in respect to them, the non-observance of which may be attended with inconvenience in the performance of more serious and important duties. Such are the visits of etiquette which the diplomatic ceremonial of Europe requires to be rendered and reciprocated between public ministers resident at the same court.<sup>22</sup>

§ 15.  
Privileges  
of a public  
minister.

From the moment a public minister enters the territory of the state to which he is sent, during the time of his residence, and until he

<sup>21</sup> Martens, Manuel Diplomatique, ch. 4, §§ 33—36.

<sup>22</sup> Manuel Diplomatique, ch. 4, § 37.

leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign or state by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal *status* and rights of property, whether derived from contract, inheritance, or testament. His children born abroad are considered as natives. This exemption from the local laws and jurisdiction is founded upon mutual utility growing out of the necessity that public ministers should be entirely independent of the local authority, in order to fulfil the duties of their mission. The act of sending the minister on the one hand, and of receiving him on the other, amounts to a tacit compact between the two states that he shall be subject only to the authority of his own nation.<sup>23</sup>

<sup>23</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 1—6. Rutherford's Inst. vol. ii. b. ii. ch. 9, § 20. Wicquefort,

The passports or safe conduct, granted by his own government in time of peace, or by the government to which he is sent in time of war, are sufficient evidence of his public character for this purpose.<sup>24</sup>

§ 16.  
Exceptions  
to the ge-  
neral rule  
of exemp-  
tion from  
the local  
jurisdic-  
tion.

This immunity extends, not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides.<sup>25</sup>

The minister's person is in general entirely exempt both from the civil and criminal jurisdiction of the country where he resides. To this general exemption, there may be the following exceptions :

1. This exemption from the jurisdiction of the local tribunals and authorities does not

de l'Ambassadeur, liv. i. § 27. Bynkershoek, de Jure Competent. Legat. cap. 5, 8. Vattel, Droit des Gens, liv. iv. ch. 7, §§ 81—125. Martens, Précis, &c. liv. vii. ch. 5, §§ 214—218. Kluber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 2, § 203.

<sup>24</sup> Vattel, liv. iv. ch. 7, § 83.

<sup>25</sup> Grotius, de Jur. Bel. ac Pac. lib. xviii. §§ 8, 9. Bynkershoek, de Foro Competent. Legat. cap. 13, § 5, cap. 15, 20. Vattel, liv. iv. ch. 8, § 113; ch. 9, §§ 117—123. Martens, Précis, &c. liv. vii. ch. 5, §§ 215—227; ch. 9, §§ 234—237.

apply to the *contentious* jurisdiction which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law.<sup>26</sup>

2. If he is a citizen or subject of the country to which he is sent, and that country has not renounced its authority over him, he remains still subject to its jurisdiction. But it may be questionable whether his reception as a minister from another power, without any express reservation as to his previous allegiance, ought not to be considered as a renunciation of this claim, since such reception implies a tacit convention between the two states that he shall be entirely exempt from the local jurisdiction.<sup>27</sup>

3. If he is at the same time in the service of the power who receives him as a minister, as sometimes happens among the German courts, he continues still subject to the local jurisdiction.<sup>28</sup>

4. In case of offences committed by public ministers affecting the existence and safety of the state where they reside, if the danger is

<sup>26</sup> Bynkershoek, cap. 16, §§ 13—15. Vattel, liv. iv. ch. 8, § 111. Martens, Précis, &c. liv. vii. ch. 5, § 216.

<sup>27</sup> Bynkershoek, cap. 11. Vattel, liv. iv. ch. 8, § 112.

<sup>28</sup> Martens, Manuel Diplomatique, ch. 3, § 23.

urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended state to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the state thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person if justice should be refused by his own sovereign. But the circumstances which would authorize such a proceeding are hardly capable of precise definition, nor can any general rule be collected from the examples to be found in the history of nations where public ministers have thrown off their public character and plotted against the safety of the state to which they were accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. *Grotius* distinguishes here between what may be done in the way of self-defence and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as

a punishment for a crime after it has been committed, yet this law does not oblige the state to suffer him to use violence without endeavouring to resist it.<sup>29</sup>

The wife and family, servants and suite, of the minister, participate in the inviolability attached to his public character. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps in respect to their exemption from the local jurisdiction.<sup>30</sup>

§ 17.  
Personal  
exemption  
extending  
to his  
family,  
secretaries,  
servants,  
&c.

The municipal laws of some, and the usages of most nations, require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to the benefit of this exemption.<sup>31</sup>

<sup>29</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 4. Rutherford's Inst. vol. ii. b. ii. ch. 9, § 20. Bynherhoek, de Foro Competent. Legat. cap. 17, 18, 19. Vattel, liv. iv. ch. 7, §§ 94—102. Martens, Précis, &c. liv. vii. ch. 5, § 218. Ward's Hist. of the Law of Nations, vol. ii. ch. 17, pp. 291—334.

<sup>30</sup> Grotius, lib. ii. cap. 18, § 8. Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, §§ 120—123. Martens, Précis, &c. liv. vii. ch. 5, § 219; ch. 9, §§ 234—237.

<sup>31</sup> Blackstone's Commentaries, vol. i. ch. 7. LL. of the United States, vol. i. ch. 9, § 26.

It follows from the principle of the extra-territoriality of the minister, his family, and other persons attached to the legation or belonging to his suite, and their exemption from the local laws and jurisdiction of the country where they reside, that the civil and criminal jurisdiction over these persons rests with the minister, to be exercised according to the laws and usages of his own country. In respect to civil jurisdiction, both contentious and voluntary, this rule is, with some exceptions, followed in the practice of nations. But in respect to criminal offences committed by his domestics, although in strictness the minister has a right to try and punish them, the modern usage merely authorizes him to arrest and send them for trial to their own country. He may also, in the exercise of his discretion, discharge them from his service, or deliver them up for trial under the laws of the state where he resides, as he may renounce any other privilege to which he is entitled by the public law.<sup>32</sup>

The personal effects or movables belonging

<sup>32</sup> Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 124. Rutherford's Inst. vol. ii. b. ii. ch. 9, § 20. Kluber, pt. ii. tit. 2, §§ 212—214.



to the minister, within the territory of the state where he resides, are entirely exempt from the local jurisdiction ; so also of his dwelling-house ; but any other real property, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is the personal property of which he may be possessed as a merchant carrying on trade, or in a fiduciary character as an executor, &c. exempt from the operation of the local laws.<sup>33</sup>

§ 18.  
Exemption  
of the  
minister's  
house and  
property.

His person and personal effects are not liable to taxation. He is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this latter exemption is, at present, by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages. The hotel in which he resides, though exempt from the quartering of troops, is subject to taxation in common with the other real property of the country, whether it belongs to him or to his government. And

§ 19.  
Duties  
and taxes.

<sup>33</sup> Vattel, liv. iv. ch. 8, §§ 113—115. Martens, Précis, &c. liv. vii. ch. 8, § 217. Kluber, pt. ii. tit. 2, ch. 3, § 210.

though, in general, his house is inviolable, and cannot be entered without his permission by police, custom-house, or excise officers, yet the abuse of this privilege, by which it was converted in some countries into an asylum for fugitives from justice, has caused it to be very much restrained by the recent usage of nations.<sup>34</sup>

§ 20.  
Messen-  
gers and  
couriers.

The practice of nations has also extended the inviolability of public ministers to the messengers and couriers sent with despatches to or from the legations established in different countries. They are exempt from every species of visitation and search in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own government, attesting their official character ; and in the case of despatches sent by sea, the vessel or *aviso* must also be provided with a commission or pass. In time of war, a special arrangement, by means of a

<sup>34</sup> Vattel, liv. iv. ch. 9, §§ 117, 118. Martens, Précis, &c. liv. vii. ch. 5. § 220. Manuel Diplomatique, ch. 3, §§ 30, 31.

cartel or flag of truce, furnished with passports, not only from their own government, but from its enemy, is necessary for the purpose of securing these despatch vessels from interruption, as between the belligerent powers. But an ambassador or other public minister, resident in a neutral country for the purpose of preserving the relations of peace and amity between the neutral state and his own government, has a right freely to send his despatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a power at war with his own country.<sup>35</sup>

A minister resident in a foreign country is entitled to the privilege of religious worship in his own private chapel, according to the peculiar forms of his national faith, although it may not be generally tolerated by the laws of the state where he resides. Ever since the epoch of the Reformation, this privilege has been secured by convention or usage between the Catholic and Protestant nations of Europe. It is also enjoyed by the public ministers and

§ 21.  
Freedom  
of religious  
worship.

<sup>35</sup> Vattel, liv. iv. ch. 9, § 123. Martens, Précis, &c. liv. vii. ch. 13, § 250. Robinson's Adm. Rep. vol. vi. p. 466. The Caroline.

consuls from the christian powers in Turkey and the Barbary States. The increasing spirit of religious freedom and liberality has gradually extended this privilege to the establishment, in most countries, of public chapels attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rites celebrated beyond the walls of the chapel.<sup>36</sup>

§ 22.  
Consuls,  
not en-  
titled to  
the pecu-  
liar privi-  
leges of  
public  
ministers.

Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled by the general law of nations to the peculiar immunities of ambassadors. No state is bound to permit the residence of foreign consuls, unless it has stipulated by convention to receive

<sup>36</sup> Vattel, liv. iv. ch. 7, § 104. Martens, Précis, &c. liv. vii. ch. 6, §§ 222—226. Kluber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 2, ch. 3, §§ 215, 216.

them. They are to be approved and admitted by the local sovereign, and, if guilty of illegal or improper conduct, are liable to have the *exequatur*, which is granted them, withdrawn, and may be punished by the laws of the state where they reside, or sent back to their own country, at the discretion of the government which they have offended. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state.<sup>37</sup>

The mission of a foreign minister resident at a foreign court, or at a congress of ambassadors, may terminate during his life in one of the seven following manners :—

§ 23.  
Termination of public mission.

1. By the expiration of the period fixed for the duration of the mission; or, where the minister is constituted *ad interim* only, by the return of the ordinary minister to his post. In either of these cases, a formal recall is unnecessary.

<sup>37</sup> Wicquefort, de l'Ambassadeur, liv. i. § 5. Bynkershoek, cap. 10. Martens, Précis, &c. liv. iv. ch. 3, § 148. Kent's Comment. on American Law, vol. i. pp. 43—45. 2d Edit.

The passports or safe conduct, granted by his own government in time of peace, or by the government to which he is sent in time of war, are sufficient evidence of his public character for this purpose.<sup>24</sup>

§ 16.  
Exceptions  
to the ge-  
neral rule  
of exemp-  
tion from  
the local  
jurisdic-  
tion.

This immunity extends, not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides.<sup>25</sup>

The minister's person is in general entirely exempt both from the civil and criminal jurisdiction of the country where he resides. To this general exemption, there may be the following exceptions :

1. This exemption from the jurisdiction of the local tribunals and authorities does not

de l'Ambassadeur, liv. i. § 27. Bynkershoek, de Jure Competent. Legat. cap. 5, 8. Vattel, Droit des Gens, liv. iv. ch. 7, §§ 81—125. Martens, Précis, &c. liv. vii. ch. 5, §§ 214—218. Kluber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 2, § 203.

<sup>24</sup> Vattel, liv. iv. ch. 7, § 83.

<sup>25</sup> Grotius, de Jur. Bel. ac Pac. lib. xviii. §§ 8, 9. Bynkershoek, de Foro Competent. Legat. cap. 13, § 5, cap. 15, 20. Vattel, liv. iv. ch. 8, § 113; ch. 9, §§ 117—123. Martens, Précis, &c. liv. vii. ch. 5, §§ 215—227; ch. 9, §§ 234—237.

to send him away without waiting for his recall.

7. By a change in the diplomatic rank of the minister.

When, by any of the circumstances above-mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled to all the privileges of his public character until his return to his own country.<sup>38</sup>

A formal letter of recall must be sent to the minister by his government: 1. Where the object of his mission has been accomplished, or has failed. 2. Where he is recalled from motives which do not affect the friendly relations of the two governments. 3. On account of a misunderstanding between the two governments, or their ministers; as where the court at which the minister resides has demanded his recall, or the government from which he is sent considers its rights to have been violated, or determines to make use of reprisals.

<sup>38</sup> Martens, *Manuel Diplomatique*, ch. 7, § 59; ch. 2, § 15. Précis, &c. liv. vii. ch. 9, § 239. Vattel, liv. iv. ch. 9, § 126.

§ 24.  
Letter of  
recall.

In the two first cases, nearly the same formalities are observed as on the arrival of the minister. He delivers a copy of his letter of recall to the minister of foreign affairs, and asks an audience of the sovereign for the purpose of taking leave. At this audience the minister delivers the original of his letter of recall to the sovereign, with a complimentary address adapted to the occasion.

If the minister is recalled on account of a misunderstanding between the two governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him an audience of leave.

Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character.

Where the mission is terminated by the death of the minister, his body is to be



decently interred, or it may be sent home for interment; but the external religious ceremonies to be observed on this occasion depend upon the laws and usages of the place. The secretary of legation, or, if there be no secretary, the minister of some allied power, is to place the seals upon his effects, and the local authorities have no right to interfere, unless in case of necessity. All questions respecting the succession *ab intestato* to the minister's movable property, or the validity of his testament, are to be determined by the laws of his own country. His effects may be removed from the country where he resided without the payment of any *droit d'aubaine* or *detraktion*.

Although in strictness the personal privileges of the minister expire with the termination of his mission by death, the custom of nations entitles the widow and family of the deceased minister, together with their domestics, to a continuance for a limited period of the same immunities which they enjoyed during his lifetime.

It is the usage of certain courts to give presents to foreign ministers on their recall, and on other special occasions. Some governments prohibit their ministers from

receiving such presents. Such was formerly the rule observed by the Venetian republic, and such is now the law of the United States of America.<sup>39</sup>

<sup>39</sup> Martens, *Précis*, &c. liv. vii. ch. 10, §§ 240—245. *Manuel Diplomatique*, ch. 7, §§ 60—65.

## CHAP. II.

## RIGHTS OF NEGOTIATION AND TREATIES.

THE power of negotiating and contracting public treaties between nation and nation exists in full vigour in every sovereign state which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other states.

§ 1.  
Faculty of  
contracting  
by treaty,  
how limited  
or  
modified.

Semi-sovereign or dependent states have, in general, only a limited faculty of contracting in this manner ; and even sovereign and independent states may restrain or modify this faculty by treaties of alliance or confederation with others. Thus the several states of the North American Union are expressly prohibited from entering into any treaty with foreign powers, or with each other, without the consent of the congress ; whilst the sovereign members of the Germanic Confederation retain the power of concluding treaties of alliance

and commerce not inconsistent with the fundamental laws of the confederation.<sup>1</sup>

The constitution or fundamental law of every particular state must determine in whom is vested the power of negotiating and contracting treaties with foreign powers. In absolute, and even in constitutional monarchies, it is usually vested in the reigning sovereign. In republics, the chief magistrate, senate, or executive council is entrusted with the exercise of this sovereign power.

§ 2.  
 Cartels,  
 truces, and  
 capitula-  
 tions.

There are certain compacts between nations which are concluded, not in virtue of any special authority, but in the exercise of a general implied power confided to certain public agents as incidental to their official stations. Such are the official acts of generals and admirals, suspending or limiting the exercise of hostilities within the sphere of their respective military or naval commands, by means of special licenses to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms, or capitulations for the surrender of a fortress, city, or province. These conventions do not, in general, require the ratification of the supreme power of the

<sup>1</sup> See pt. i. ch. 2, §§ 9—14.

state, unless such a ratification be expressly reserved in the act itself.<sup>2</sup>

Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions*.<sup>§ 3. Sponsions.</sup> These conventions must be confirmed by express or tacit ratification. The former is given in positive terms, and with the usual forms; the latter is implied from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient to infer a ratification by either party, though good faith requires that the party refusing it should notify its determination to the other party, in order to prevent the latter from carrying its own part of the agreement into effect. If, however, it has been totally or partially executed by either party, acting in good faith upon the supposition that the agent was duly authorized, the party thus acting is entitled to be indemnified or replaced in his former situation.<sup>3</sup>

<sup>2</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, §§ 6—8. Vattel, Droit des Gens, liv. ii. ch. 14, §§ 207.

<sup>3</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 16; lib. iii. cap. 22, §§ 1—3. Vattel, Droit des Gens, liv. ii. ch. 14, §§ 209—212. Rutherford's Inst. b. ii. ch. 9, § 21.

§ 4. As to other public treaties: in order to enable a public minister or other diplomatic agent to conclude and sign a treaty with the government to which he is accredited, he must be furnished with a *full power*. Treaties and conventions thus negotiated and signed are, by the law of nature, binding upon the state in whose name they are concluded, in the same manner as any other contract made by a duly authorized agent binds his principal according to the general rules of civil jurisprudence. The question, how far, under the positive law of nations, ratification by the state, in whose name the treaty is made by its duly authorized plenipotentiaries, is essential to its validity, has been the subject of much doubt and discussion among institutional writers. It seems, however, to be the settled usage of nations to require a previous ratification; and this prerequisite is usually reserved by the express terms of the treaty itself. Some writers hold that such ratification is not essential to the validity of the treaty, unless it be expressly reserved in the full power or in the treaty itself; from which they infer that it may be arbitrarily refused when it is thus reserved. Others maintain that it cannot with propriety be withheld, unless for strong and

substantial reasons ; such, for example, as the minister having deviated from his instructions.<sup>4</sup>

The municipal constitution of every particular state determines in whom resides the authority to ratify treaties negotiated and concluded with foreign powers, so as to render them obligatory upon the nation. In absolute monarchies, it is the prerogative of the sovereign himself to confirm the act of his plenipotentiary by his final sanction. In certain limited or constitutional monarchies, the consent of the legislative power of the nation is, in some cases, required for that purpose. In some republics, as in that of the United States of America, the advice and consent of the senate is essential to enable the chief executive magistrate to pledge the national faith in this form. In all these cases it is, consequently, an implied condition in negotiating with foreign powers that the treaties concluded by the executive government shall be subject

§ 5.  
The treaty  
making  
power  
dependent  
on the  
municipal  
constitu-  
tion.

<sup>4</sup> Wicquefort, de l'Ambassadeur, liv. ii. § 15. Vattel, Droit des Gens, liv. ii. ch. 12, § 156 ; liv. iv. ch. 6, § 77. Martens, Précis du Droit des Gens, &c. liv. ii. ch. 2, § 49. Kluber, Droit des Gens Moderne, pt. ii. sect. 1, ch. 2, § 142.

to ratification in the manner prescribed by the fundamental laws of the state.

§ 6.  
Auxiliary  
legislative  
measures,  
how far  
necessary  
to the  
validity of  
a treaty.

The treaty, when thus ratified, is obligatory upon the contracting states, independently of the auxiliary legislative measures which may be necessary on the part of either, in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power expressed in the fundamental laws of the state, or necessarily implied from the distribution of its constitutional powers—such, for example, as a prohibition of alienating the national domain—then the treaty may be considered as imperfect in its obligation, until the national assent has been given in the forms required by the municipal constitution. A general power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made; and among these may properly be included the cession of the public territory and other property, as well as of private property included in the eminent domain annexed to the national sovereignty. If there be no limitation expressed in the fundamental laws of the state, or necessarily implied from the distribu-



tion of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary or expedient.<sup>5</sup>

Commercial treaties, which have the effect of altering the existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each state for their execution. Thus the commercial treaty of Utrecht, between France and Great Britain, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into effect, the British parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of the treaty. In treaties requiring the appropriation of monies for their execution, it is the usual practice of the British government to stipulate that the king will recommend to parliament to make the grant necessary for that purpose. Under the constitution of the

<sup>5</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; ch. 2, §§ 262—265. Kent's Comment. on American Law, vol. i. p. 165. 2d Ed.

urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended state to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the state thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person if justice should be refused by his own sovereign. But the circumstances which would authorize such a proceeding are hardly capable of precise definition, nor can any general rule be collected from the examples to be found in the history of nations where public ministers have thrown off their public character and plotted against the safety of the state to which they were accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. *Grotius* distinguishes here between what may be done in the way of self-defence and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as

Thus the treaty of peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the treaty of 1794, between the same parties, confirmed the titles of British subjects holding lands in the United States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the supreme court of the United States determined that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be divested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions. But independent of this incon-

It follows from the principle of the extra-territoriality of the minister, his family, and other persons attached to the legation or belonging to his suite, and their exemption from the local laws and jurisdiction of the country where they reside, that the civil and criminal jurisdiction over these persons rests with the minister, to be exercised according to the laws and usages of his own country. In respect to civil jurisdiction, both contentious and voluntary, this rule is, with some exceptions, followed in the practice of nations. But in respect to criminal offences committed by his domestics, although in strictness the minister has a right to try and punish them, the modern usage merely authorizes him to arrest and send them for trial to their own country. He may also, in the exercise of his discretion, discharge them from his service, or deliver them up for trial under the laws of the state where he resides, as he may renounce any other privilege to which he is entitled by the public law.<sup>32</sup>

The personal effects or movables belonging

<sup>32</sup> Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 124. Rutherford's Inst. vol. ii. b. ii. ch. 9, § 20. Kluber, pt. ii. tit. 2, §§ 212—214.

The court, therefore, concluded that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, revive upon the return of peace.<sup>8</sup>

*Treaties*, properly so called, or *fœdera*, are those of friendship and alliance, commerce and navigation, which even if perpetual in terms, expire of course:—

§ 8.  
Treaties,  
the operation of  
which  
cease in  
certain  
cases.

1. In case either of the contracting parties loses its existence as an independent state.

2. Where the internal constitution of government of either state is so changed as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded.

Here the distinction laid down by institutional writers between *real* and *personal* treaties becomes important. The first bind

<sup>8</sup> Wheaton's Rep. vol. viii. p. 464. The Society for the Propagation of the Gospel in Foreign Parts, v. the Town of New Haven.

the contracting parties, independently of any change of sovereignty or in the rulers of the state. The latter include only treaties of mere personal alliance, such as are expressly made with a view to the person of the actual ruler or reigning sovereign, and though they bind the state during his existence, expire with his natural life or his public connexion with the state.<sup>9</sup>

3. In case of war between the contracting parties; unless such stipulations as are made expressly with a view to a rupture, such as the period of time allowed to the respective subjects to retire with their effects, or other limitations of the general rights of war. Such is the stipulation contained in the 10th article of the treaty of 1794, between Great Britain and the United States,—providing that private debts and shares or monies in the public funds, or in public or private banks belonging to private individuals, should never, in the event of war, be sequestered or confiscated. There can be no doubt that the obligation of this article would not be impaired by a supervening war, being the very contingency meant to be provided for, and that it must remain in

<sup>9</sup> Vide ante, pt. i. ch. 2, § 20.

full force until mutually agreed to be rescinded.<sup>10</sup>

Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the being of either party, and thus render the compact inapplicable to the new condition of things. It is for this reason, and from abundance of caution, that stipulations are frequently inserted in treaties of peace, expressly reviving and confirming the treaties formerly subsisting between the contracting parties, and containing stipulations of a permanent character, or in some other mode excluding the conclusion that the obligation of such antecedent treaties is meant to be waived by either party. The reiterated confirmations of the treaties of Westphalia and Utrecht, in almost every subsequent treaty of peace or commerce between

§ 9.  
Treaties  
revived  
and con-  
firmed on  
the re-  
newal of  
peace.

<sup>10</sup> Vattel, liv. iii. ch. 10, § 175. Kent's Comment. on American Law, vol. i. p. 176. 2d Ed.

the foreign minister is received in a similar manner, by the chief executive magistrate or council charged with the foreign affairs of the nation.<sup>21</sup>

§ 14.  
Diplomatic  
etiquette.

The usage of civilized nations has established a certain etiquette to be observed by the members of the diplomatic corps resident at the same court towards each other, and towards the members of the government to which they are accredited. The duties which comity requires to be observed in this respect belong rather to the code of manners than of laws, and can hardly be made the subject of positive sanction: but there are certain established rules in respect to them, the non-observance of which may be attended with inconvenience in the performance of more serious and important duties. Such are the visits of etiquette which the diplomatic ceremonial of Europe requires to be rendered and reciprocated between public ministers resident at the same court.<sup>22</sup>

§ 15.  
Privileges  
of a public  
minister.

From the moment a public minister enters the territory of the state to which he is sent, during the time of his residence, and until he

<sup>21</sup> Martens, *Manuel Diplomatique*, ch. 4, §§ 33—36.

<sup>22</sup> *Manuel Diplomatique*, ch. 4, § 37.



be applied to every species of right and obligation that can exist between nations; to the possession and boundaries of territories, the sovereignty of the state, its constitution of government, the right of succession, &c. ; but it is most commonly applied to treaties of peace. The guarantee may also be contained in a distinct and separate convention, or included among the stipulations annexed to the principal treaty intended to be guaranteed. It then becomes an accessory obligation.<sup>11</sup>

The guarantee may be stipulated by a third power not a party to the principal treaty, by one of the contracting parties in favour of another, or mutually between all the parties. Thus by the treaty of peace concluded at Aix la Chapelle in 1748, the eight high contracting parties mutually guaranteed to each other all the stipulations of the treaty.

The guaranteeing party is bound to nothing more than to render the assistance stipulated. If it prove insufficient, he is not obliged to indemnify the power to whom his aid has been promised. Nor is he bound to interfere to the

<sup>11</sup> Vattel, *Droit des Gens*, liv. ii. ch. 16, §§ 235—239. Kluber, *Droit des Gens Moderne de l'Europe*, pt. ii. tit. 2, sect. 1, ch. 2, §§ 157, 158.

prejudice of the just rights of a third party, or in violation of a previous treaty rendering the guarantee inapplicable in a particular case. Guarantees apply only to rights and possessions existing at the time they are stipulated. It was upon these grounds that Louis XV. declared in 1741 in favour of the elector of Bavaria against Maria Theresa, the heiress of the emperor Charles VI., although the court of France had previously guaranteed the Pragmatic Sanction of that emperor, regulating the succession to his hereditary states. And it was upon similar grounds that France refused to fulfil the treaty of alliance of 1756 with Austria, in respect to the pretensions of the latter power upon Bavaria in 1778, which threatened to produce a war with Russia. Whatever doubts may be suggested as to the application of these principles to the above cases, there can be none respecting the principles themselves, which are recognised by all the text writers.<sup>12</sup>

These writers make a distinction between a *Surety* and a *Guarantee*. Thus Vattel lays it down, that where the matter relates to things

<sup>12</sup> Vattel, liv. ii. ch. 16, § 238. Flassan, Histoire de la Diplomatie Française, tom. vii. p. 195.

which another may do or give as well as he who makes the original promise, as for instance the payment of a sum of money, it is safer to demand a *surety* (caution) than a *guarantee* (garant). For the surety is bound to make good the promise in default of the principal; whereas the guarantee is only obliged to use his best endeavours to obtain a performance of the promise from him who has made it.<sup>13</sup>

Treaties of alliance may be either defensive or offensive. In the first case, the engagements of the ally extend only to a war really and truly defensive; to a war of aggression first commenced, in point of fact, against the other contracting party. In the second, the ally engages generally to cooperate in hostilities against a specified power, or against any power with whom the other party may be engaged in war.

An alliance may also be both offensive and defensive.

General alliances are to be distinguished from treaties of limited succour and subsidy. Where one state stipulates to furnish to

§ 11.  
Treaties of  
alliance.

§ 12.  
Distinction  
between  
general  
alliance

<sup>13</sup> Vattel, § 239.

and treaties of limited succour and subsidy.

another a limited succour of troops, ships of war, money, or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succour the enemy of the opposite belligerent. It only becomes such so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. Such, for example, have long been the accustomed relations of the confederated cantons of Switzerland with the other European powers.<sup>14</sup>

§ 13.  
*Casus fœderis* of a defensive alliance.

*Grotius*, and the other text writers, hold that the *casus fœderis* of a defensive alliance does not apply to the case of a war manifestly unjust, *i. e.* to a war of aggression on the part of the power claiming the benefit of the alliance. And it is even said to be a tacit condition annexed to every treaty made in time of peace, stipulating to afford succours in time of war, that the stipulation is applicable only to a just war. To promise assistance in an unjust war would be an obligation to commit injustice, and no such contract is valid. But, it is added, this tacit

<sup>14</sup> Vattel, *Droit des Gens*, liv. iii. ch. 6, §§ 79—82.

restriction in the terms of a general alliance can be applied only to a manifest case of unjust aggression on the part of the other contracting party, and cannot be used as a pretext to elude the performance of a positive and unequivocal engagement without justly exposing the ally to the imputation of bad faith. In doubtful cases, the presumption ought rather to be in favour of our confederate, and of the justice of his quarrel.<sup>15</sup>

The application of these general principles must depend upon the nature and terms of the particular guarantees contained in the treaty in question. This will best be illustrated by specific examples.

Thus the States General of Holland were engaged, previously to the war of 1756, between France and Great Britain, in three different guarantees and defensive treaties with the latter power. The first was the original defensive alliance, forming the basis of all the subsequent compacts between the two countries, concluded at Westminster in 1678. In the preamble to this treaty, the preservation of each other's

Alliance  
between  
Great Bri-  
tain and  
Holland.

<sup>15</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 13; cap. 25, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. ii. ch. 12, § 168. liv. iii. ch. 6, §§ 86—96.

dominions was stated as the cause of making it; and it stipulated a mutual guarantee of all they already enjoyed, or might thereafter acquire by treaties of peace, "in Europe only." They further guaranteed all treaties which were at that time made, or might thereafter conjointly be made, with any other power. They stipulated also to defend and preserve each other in the possession of all towns or fortresses which did at that time belong, or should in future belong, to either of them; and, that for this purpose, when either nation was attacked or molested, the other should immediately succour it with a certain number of troops and ships, and should be obliged to break with the aggressor in two months after the party that was already at war should require it; and that they should then act conjointly with all their forces, to bring the common enemy to a reasonable accommodation.

The second defensive alliance then subsisting between Great Britain and Holland was that stipulated by the treaties of barrier and succession of 1709 and 1713, by which the Dutch barrier on the side of Flanders was guaranteed on the one part, and the Protestant succession to the British crown on the other: and it was mutually stipulated, that in case

to the minister, within the territory of the state where he resides, are entirely exempt from the local jurisdiction ; so also of his dwelling-house ; but any other real property, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is the personal property of which he may be possessed as a merchant carrying on trade, or in a fiduciary character as an executor, &c. exempt from the operation of the local laws.<sup>32</sup>

§ 18.  
Exemption  
of the  
minister's  
house and  
property.

His person and personal effects are not liable to taxation. He is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this latter exemption is, at present, by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages. The hotel in which he resides, though exempt from the quartering of troops, is subject to taxation in common with the other real property of the country, whether it belongs to him or to his government. And

§ 19.  
Duties  
and taxes.

<sup>32</sup> Vattel, liv. iv. ch. 8, §§ 113—115. Martens, Précis, &c. liv. vii. ch. 8, § 217. Kluber, pt. ii. tit. 2, ch. 3, § 210.

though, in general, his house is inviolable, and cannot be entered without his permission by police, custom-house, or excise officers, yet the abuse of this privilege, by which it was converted in some countries into an asylum for fugitives from justice, has caused it to be very much restrained by the recent usage of nations.<sup>34</sup>

§ 20.  
Messengers and  
couriers.

The practice of nations has also extended the inviolability of public ministers to the messengers and couriers sent with despatches to or from the legations established in different countries. They are exempt from every species of visitation and search in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own government, attesting their official character; and in the case of despatches sent by sea, the vessel or *aviso* must also be provided with a commission or pass. In time of war, a special arrangement, by means of a

<sup>34</sup> Vattel, liv. iv. ch. 9, §§ 117, 118. Martens, Précis, &c. liv. vii. ch. 5. § 220. Manuel Diplomatique, ch. 3, §§ 30, 31.



cartel or flag of truce, furnished with passports, not only from their own government, but from its enemy, is necessary for the purpose of securing these despatch vessels from interruption, as between the belligerent powers. But an ambassador or other public minister, resident in a neutral country for the purpose of preserving the relations of peace and amity between the neutral state and his own government, has a right freely to send his despatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a power at war with his own country.<sup>35</sup>

A minister resident in a foreign country is entitled to the privilege of religious worship in his own private chapel, according to the peculiar forms of his national faith, although it may not be generally tolerated by the laws of the state where he resides. Ever since the epoch of the Reformation, this privilege has been secured by convention or usage between the Catholic and Protestant nations of Europe. It is also enjoyed by the public ministers and

§ 21.  
Freedom  
of religious  
worship.

<sup>35</sup> Vattel, liv. iv. ch. 9, § 123. Martens, Précis, &c. liv. vii. ch. 13, § 250. Robinson's Adm. Rep. vol. vi. p. 466. The Caroline.

consuls from the christian powers in Turkey and the Barbary States. The increasing spirit of religious freedom and liberality has gradually extended this privilege to the establishment, in most countries, of public chapels attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rites celebrated beyond the walls of the chapel.<sup>56</sup>

§ 22.  
Consuls,  
not en-  
titled to  
the pecu-  
liar privi-  
leges of  
public  
ministers.

Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled by the general law of nations to the peculiar immunities of ambassadors. No state is bound to permit the residence of foreign consuls, unless it has stipulated by convention to receive

<sup>56</sup> Vattel, liv. iv. ch. 7, § 104. Martens, Précis, &c. liv. vii. ch. 6, §§ 222—226. Kluber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 2, ch. 3, §§ 215, 216.

them. They are to be approved and admitted by the local sovereign, and, if guilty of illegal or improper conduct, are liable to have the *exequatur*, which is granted them, withdrawn, and may be punished by the laws of the state where they reside, or sent back to their own country, at the discretion of the government which they have offended. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state.<sup>37</sup>

The mission of a foreign minister resident at a foreign court, or at a congress of ambassadors, may terminate during his life in one of the seven following manners :—

§ 23.  
Termination of public mission.

1. By the expiration of the period fixed for the duration of the mission; or, where the minister is constituted *ad interim* only, by the return of the ordinary minister to his post. In either of these cases, a formal recall is unnecessary.

<sup>37</sup> Wicquefort, de l'Ambassadeur, liv. i. § 5. Bynkershoek, cap. 10. Martens, Précis, &c. liv. iv. ch. 3, § 148. Kent's Comment. on American Law, vol. i. pp. 43—45. 2d Edit.

2. When the object of the mission is fulfilled, as in the case of embassies of mere ceremony ; or where the mission is special, and the object of the negotiation is attained or has failed.

3. By the recall of the minister.

4. By the decease or abdication of his own sovereign, or the sovereign to whom he is accredited. In either of these cases, it is necessary that his letters of credence should be renewed ; which, in the former instance, is sometimes done in the letter of notification written by the successor of the deceased sovereign to the prince at whose court the minister resides. In the latter case, he is provided with new letters of credence ; but where there is reason to believe that the mission will be suspended for a short time only, a negotiation already commenced may be continued with the same minister confidentially *sub spe rati*.

5. When the minister, on account of any violation of the law of nations, or any important incident in the course of his negotiation, assumes himself the responsibility of declaring his mission terminated.

6. When, on account of the minister's misconduct, or the measures of his government, the court at which he resides thinks fit

to send him away without waiting for his recall.

7. By a change in the diplomatic rank of the minister.

When, by any of the circumstances above-mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled to all the privileges of his public character until his return to his own country.<sup>38</sup>

A formal letter of recall must be sent to the minister by his government: 1. Where the object of his mission has been accomplished, or has failed. 2. Where he is recalled from motives which do not affect the friendly relations of the two governments. 3. On account of a misunderstanding between the two governments, or their ministers; as where the court at which the minister resides has demanded his recall, or the government from which he is sent considers its rights to have been violated, or determines to make use of reprisals.

<sup>38</sup> Martens, *Manuel Diplomatique*, ch. 7, § 59; ch. 2, § 15. *Précis*, &c. liv. vii. ch. 9, § 239. Vattel, liv. iv. ch. 9, § 126.

In the two first cases, nearly the same formalities are observed as on the arrival of the minister. He delivers a copy of his letter of recall to the minister of foreign affairs, and asks an audience of the sovereign for the purpose of taking leave. At this audience the minister delivers the original of his letter of recall to the sovereign, with a complimentary address adapted to the occasion.

If the minister is recalled on account of a misunderstanding between the two governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him an audience of leave.

Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character.

Where the mission is terminated by the death of the minister, his body is to be

decently interred, or it may be sent home for interment; but the external religious ceremonies to be observed on this occasion depend upon the laws and usages of the place. The secretary of legation, or, if there be no secretary, the minister of some allied power, is to place the seals upon his effects, and the local authorities have no right to interfere, unless in case of necessity. All questions respecting the succession *ab intestato* to the minister's movable property, or the validity of his testament, are to be determined by the laws of his own country. His effects may be removed from the country where he resided without the payment of any *droit d'aubaine* or *detraktion*.

Although in strictness the personal privileges of the minister expire with the termination of his mission by death, the custom of nations entitles the widow and family of the deceased minister, together with their domestics, to a continuance for a limited period of the same immunities which they enjoyed during his lifetime.

It is the usage of certain courts to give presents to foreign ministers on their recall, and on other special occasions. Some governments prohibit their ministers from

receiving such presents. Such was formerly the rule observed by the Venetian republic, and such is now the law of the United States of America.<sup>39</sup>

<sup>39</sup> Martens, *Précis, &c.* liv. vii. ch. 10, §§ 240—245. *Manuel Diplomatique*, ch. 7, §§ 60—65.



## CHAP. II.

## RIGHTS OF NEGOTIATION AND TREATIES.

THE power of negotiating and contracting public treaties between nation and nation exists in full vigour in every sovereign state which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other states.

§ 1.  
Faculty of  
contracting  
by treaty,  
how limit-  
ed or  
modified.

Semi-sovereign or dependent states have; in general, only a limited faculty of contracting in this manner; and even sovereign and independent states may restrain or modify this faculty by treaties of alliance or confederation with others. Thus the several states of the North American Union are expressly prohibited from entering into any treaty with foreign powers, or with each other, without the consent of the congress; whilst the sovereign members of the Germanic Confederation retain the power of concluding treaties of alliance

and commerce not inconsistent with the fundamental laws of the confederation.<sup>1</sup>

The constitution or fundamental law of every particular state must determine in whom is vested the power of negotiating and contracting treaties with foreign powers. In absolute, and even in constitutional monarchies, it is usually vested in the reigning sovereign. In republics, the chief magistrate, senate, or executive council is entrusted with the exercise of this sovereign power.

§ 2.  
 Cartels,  
 truces, and  
 capitulations.

There are certain compacts between nations which are concluded, not in virtue of any special authority, but in the exercise of a general implied power confided to certain public agents as incidental to their official stations. Such are the official acts of generals and admirals, suspending or limiting the exercise of hostilities within the sphere of their respective military or naval commands, by means of special licenses to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms, or capitulations for the surrender of a fortress, city, or province. These conventions do not, in general, require the ratification of the supreme power of the

<sup>1</sup> See pt. i. ch. 2, §§ 9—14.

state, unless such a ratification be expressly reserved in the act itself.<sup>2</sup>

Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions*.<sup>§ 3. Sponsions.</sup> These conventions must be confirmed by express or tacit ratification. The former is given in positive terms, and with the usual forms; the latter is implied from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient to infer a ratification by either party, though good faith requires that the party refusing it should notify its determination to the other party, in order to prevent the latter from carrying its own part of the agreement into effect. If, however, it has been totally or partially executed by either party, acting in good faith upon the supposition that the agent was duly authorized, the party thus acting is entitled to be indemnified or replaced in his former situation.<sup>3</sup>

<sup>2</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, §§ 6—8. Vattel, Droit des Gens, liv. ii. ch. 14, §§ 207.

<sup>3</sup> Grotius, de Jur. Bel. ac Pae. lib. ii. cap. 15, § 16; lib. iii. cap. 22, §§ 1—3. Vattel, Droit des Gens, liv. ii. ch. 14, §§ 209—212. Rutherford's Inst. b. ii. ch. 9, § 21.

§ 4.  
Full power  
and ratifi-  
cation.

As to other public treaties: in order to enable a public minister or other diplomatic agent to conclude and sign a treaty with the government to which he is accredited, he must be furnished with a *full power*. Treaties and conventions thus negotiated and signed are, by the law of nature, binding upon the state in whose name they are concluded, in the same manner as any other contract made by a duly authorized agent binds his principal according to the general rules of civil jurisprudence. The question, how far, under the positive law of nations, ratification by the state, in whose name the treaty is made by its duly authorized plenipotentiaries, is essential to its validity, has been the subject of much doubt and discussion among institutional writers. It seems, however, to be the settled usage of nations to require a previous ratification; and this prerequisite is usually reserved by the express terms of the treaty itself. Some writers hold that such ratification is not essential to the validity of the treaty, unless it be expressly reserved in the full power or in the treaty itself; from which they infer that it may be arbitrarily refused when it is thus reserved. Others maintain that it cannot with propriety be withheld, unless for strong and

substantial reasons ; such, for example, as the minister having deviated from his instructions.<sup>4</sup>

The municipal constitution of every particular state determines in whom resides the authority to ratify treaties negotiated and concluded with foreign powers, so as to render them obligatory upon the nation. In absolute monarchies, it is the prerogative of the sovereign himself to confirm the act of his plenipotentiary by his final sanction. In certain limited or constitutional monarchies, the consent of the legislative power of the nation is, in some cases, required for that purpose. In some republics, as in that of the United States of America, the advice and consent of the senate is essential to enable the chief executive magistrate to pledge the national faith in this form. In all these cases it is, consequently, an implied condition in negotiating with foreign powers that the treaties concluded by the executive government shall be subject

§ 5.  
The treaty  
making  
power  
dependent  
on the  
municipal  
constitu-  
tion.

<sup>4</sup> Wicquefort, de l'Ambassadeur, liv. ii. § 15. Vattel, Droit des Gens, liv. ii. ch. 12, § 156 ; liv. iv. ch. 6, § 77. Martens, Précis du Droit des Gens, &c. liv. ii. ch. 2, § 49. Kluber, Droit des Gens Moderne, pt. ii. sect. 1, ch. 2, § 142.

to ratification in the manner prescribed by the fundamental laws of the state.

§ 6.  
Auxiliary  
legislative  
measures,  
how far  
necessary  
to the  
validity of  
a treaty.

The treaty, when thus ratified, is obligatory upon the contracting states, independently of the auxiliary legislative measures which may be necessary on the part of either, in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power expressed in the fundamental laws of the state, or necessarily implied from the distribution of its constitutional powers—such, for example, as a prohibition of alienating the national domain—then the treaty may be considered as imperfect in its obligation, until the national assent has been given in the forms required by the municipal constitution. A general power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made; and among these may properly be included the cession of the public territory and other property, as well as of private property included in the eminent domain annexed to the national sovereignty. If there be no limitation expressed in the fundamental laws of the state, or necessarily implied from the distribu-

tion of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary or expedient.<sup>5</sup>

Commercial treaties, which have the effect of altering the existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each state for their execution. Thus the commercial treaty of Utrecht, between France and Great Britain, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into effect, the British parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of the treaty. In treaties requiring the appropriation of monies for their execution, it is the usual practice of the British government to stipulate that the king will recommend to parliament to make the grant necessary for that purpose. Under the constitution of the

<sup>5</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; ch. 2, §§ 262—265. Kent's Comment. on American Law, vol. i. p. 165. 2d Ed.

United States, by which treaties made and ratified by the president, with the advice and consent of the senate, are declared to be "the supreme law of the land," it seems to be understood that the congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry the treaty into effect.<sup>6</sup>

§ 7.  
Transitory  
conven-  
tions per-  
petual in  
their  
nature.

General compacts between nations may be divided into what are called *transitory conventions*, and *treaties* properly so termed. The first are perpetual in their nature, so that being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in some cases, be suspended during war, they revive on the return of peace without any express stipulation. Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favour of one nation within the territory of another.<sup>7</sup>

<sup>6</sup> Kent's Comment. vol. p. 286. 2d Ed.

<sup>7</sup> Vattel, Droit des Gens, liv. ii. ch. 12, § 192. Martens, Précis, &c. liv. ii. ch. 2, § 58.



Thus the treaty of peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the treaty of 1794, between the same parties, confirmed the titles of British subjects holding lands in the United States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the supreme court of the United States determined that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be divested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions. But independent of this incon-

testable principle, on which the security of all property rests, the court was not inclined to admit the doctrine, that treaties become, by war between the two contracting parties, *ipso facto* extinguished, if not revived by an express or implied renewal on the return of peace. Whatever might be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to the subject, it was satisfied that the doctrine contended for was not universally true. There might be treaties of such a nature, as to their object and import, as that war would necessarily put an end to them; but where treaties contemplated a permanent arrangement of territory, and other national rights, or in their terms were meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by war. If such were the law, even the treaty of 1783, so far as it fixed the limits of the United States, and acknowledged their independence, would be gone, and they would have had again to struggle for both, upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

The court, therefore, concluded that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, revive upon the return of peace.<sup>8</sup>

*Treaties*, properly so called, or *fœdera*, are those of friendship and alliance, commerce and navigation, which even if perpetual in terms, expire of course:—

§ 8.  
Treaties,  
the opera-  
tion of  
which  
cease in  
certain  
cases.

1. In case either of the contracting parties loses its existence as an independent state.

2. Where the internal constitution of government of either state is so changed as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded.

Here the distinction laid down by institutional writers between *real* and *personal* treaties becomes important. The first bind

<sup>8</sup> Wheaton's Rep. vol. viii. p. 464. The Society for the Propagation of the Gospel in Foreign Parts, v. the Town of New Haven.

the contracting parties, independently of any change of sovereignty or in the rulers of the state. The latter include only treaties of mere personal alliance, such as are expressly made with a view to the person of the actual ruler or reigning sovereign, and though they bind the state during his existence, expire with his natural life or his public connexion with the state.<sup>9</sup>

3. In case of war between the contracting parties; unless such stipulations as are made expressly with a view to a rupture, such as the period of time allowed to the respective subjects to retire with their effects, or other limitations of the general rights of war. Such is the stipulation contained in the 10th article of the treaty of 1794, between Great Britain and the United States,—providing that private debts and shares or monies in the public funds, or in public or private banks belonging to private individuals, should never, in the event of war, be sequestered or confiscated. There can be no doubt that the obligation of this article would not be impaired by a supervening war, being the very contingency meant to be provided for, and that it must remain in

<sup>9</sup> Vide ante, pt. i. ch. 2, § 20.

full force until mutually agreed to be rescinded.<sup>10</sup>

Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the being of either party, and thus render the compact inapplicable to the new condition of things. It is for this reason, and from abundance of caution, that stipulations are frequently inserted in treaties of peace, expressly reviving and confirming the treaties formerly subsisting between the contracting parties, and containing stipulations of a permanent character, or in some other mode excluding the conclusion that the obligation of such antecedent treaties is meant to be waived by either party. The reiterated confirmations of the treaties of Westphalia and Utrecht, in almost every subsequent treaty of peace or commerce between

§ 9.  
Treaties  
revived  
and con-  
firmed on  
the re-  
newal of  
peace.

<sup>10</sup> Vattel, liv. iii. ch. 10, § 175. Kent's Comment. on American Law, vol. i. p. 176. 2d Ed.

the same parties, constituted a sort of written code of conventional law, by which the distribution of power and territory among the principal European states was permanently settled, until violently disturbed by the partition of Poland and the wars of the French revolution. The arrangements of territory and political relations substituted by the treaties of Vienna for the ancient conventional law of Europe, and doubtless intended to be of a similar permanent character, have already undergone very important modifications in consequence of the late French revolution of 1830, by which the alliance between the great powers has been broken into two confederacies, repugnant in their origin and principles, and continually threatening to disturb a settlement which has not yet acquired that solidity which general acquiescence and the lapse of time can alone give to such transactions.

§ 10.  
Guaran-  
tees.

The convention of guarantee is one of the most usual international contracts. It is an engagement by which one state promises to aid another where it is interrupted, or threatened to be disturbed in the peaceable enjoyment of its rights by a third power. It may

be applied to every species of right and obligation that can exist between nations; to the possession and boundaries of territories, the sovereignty of the state, its constitution of government, the right of succession, &c. ; but it is most commonly applied to treaties of peace. The guarantee may also be contained in a distinct and separate convention, or included among the stipulations annexed to the principal treaty intended to be guaranteed. It then becomes an accessory obligation.<sup>11</sup>

The guarantee may be stipulated by a third power not a party to the principal treaty, by one of the contracting parties in favour of another, or mutually between all the parties. Thus by the treaty of peace concluded at Aix la Chapelle in 1748, the eight high contracting parties mutually guaranteed to each other all the stipulations of the treaty.

The guaranteeing party is bound to nothing more than to render the assistance stipulated. If it prove insufficient, he is not obliged to indemnify the power to whom his aid has been promised. Nor is he bound to interfere to the

<sup>11</sup> Vattel, *Droit des Gens*, liv. ii. ch. 16, §§ 235—239. Kluber, *Droit des Gens Moderne de l'Europe*, pt. ii. tit. 2, sect. 1, ch. 2, §§ 157, 158.

prejudice of the just rights of a third party, or in violation of a previous treaty rendering the guarantee inapplicable in a particular case. Guarantees apply only to rights and possessions existing at the time they are stipulated. It was upon these grounds that Louis XV. declared in 1741 in favour of the elector of Bavaria against Maria Theresa, the heiress of the emperor Charles VI., although the court of France had previously guaranteed the Pragmatic Sanction of that emperor, regulating the succession to his hereditary states. And it was upon similar grounds that France refused to fulfil the treaty of alliance of 1756 with Austria, in respect to the pretensions of the latter power upon Bavaria in 1778, which threatened to produce a war with Russia. Whatever doubts may be suggested as to the application of these principles to the above cases, there can be none respecting the principles themselves, which are recognised by all the text writers.<sup>12</sup>

These writers make a distinction between a *Surety* and a *Guarantee*. Thus Vattel lays it down, that where the matter relates to things

<sup>12</sup> Vattel, liv. ii. ch. 16, § 238. Flassan, Histoire de la Diplomatie Française, tom. vii. p. 195.



which another may do or give as well as he who makes the original promise, as for instance the payment of a sum of money, it is safer to demand a *surety* (caution) than a *guarantee* (garant). For the surety is bound to make good the promise in default of the principal; whereas the guarantee is only obliged to use his best endeavours to obtain a performance of the promise from him who has made it.<sup>13</sup>

Treaties of alliance may be either defensive or offensive. In the first case, the engagements of the ally extend only to a war really and truly defensive; to a war of aggression first commenced, in point of fact, against the other contracting party. In the second, the ally engages generally to cooperate in hostilities against a specified power, or against any power with whom the other party may be engaged in war.

An alliance may also be both offensive and defensive.

General alliances are to be distinguished from treaties of limited succour and subsidy. Where one state stipulates to furnish to

§ 11.  
Treaties of  
alliance.

§ 12.  
Distinction  
between  
general  
alliance

<sup>13</sup> Vattel, § 239.

and treaties of limited succour and subsidy.

another a limited succour of troops, ships of war, money, or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succour the enemy of the opposite belligerent. It only becomes such so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. Such, for example, have long been the accustomed relations of the confederated cantons of Switzerland with the other European powers.<sup>14</sup>

§ 18.  
*Casus fœderis* of a defensive alliance.

*Grotius*, and the other text writers, hold that the *casus fœderis* of a defensive alliance does not apply to the case of a war manifestly unjust, *i. e.* to a war of aggression on the part of the power claiming the benefit of the alliance. And it is even said to be a tacit condition annexed to every treaty made in time of peace, stipulating to afford succours in time of war, that the stipulation is applicable only to a just war. To promise assistance in an unjust war would be an obligation to commit injustice, and no such contract is valid. But, it is added, this tacit

<sup>14</sup> Vattel, *Droit des Gens*, liv. iii. ch. 6, §§ 79—82.

restriction in the terms of a general alliance can be applied only to a manifest case of unjust aggression on the part of the other contracting party, and cannot be used as a pretext to elude the performance of a positive and unequivocal engagement without justly exposing the ally to the imputation of bad faith. In doubtful cases, the presumption ought rather to be in favour of our confederate, and of the justice of his quarrel.<sup>15</sup>

The application of these general principles must depend upon the nature and terms of the particular guarantees contained in the treaty in question. This will best be illustrated by specific examples.

Thus the States General of Holland were engaged, previously to the war of 1756, between France and Great Britain, in three different guarantees and defensive treaties with the latter power. The first was the original defensive alliance, forming the basis of all the subsequent compacts between the two countries, concluded at Westminster in 1678. In the preamble to this treaty, the preservation of each other's

Alliance  
between  
Great Bri-  
tain and  
Holland.

<sup>15</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 13; cap. 25, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. ii. ch. 12, § 168. liv. iii. ch. 6, §§ 86—96.

dominions was stated as the cause of making it; and it stipulated a mutual guarantee of all they already enjoyed, or might thereafter acquire by treaties of peace, "in Europe only." They further guaranteed all treaties which were at that time made, or might thereafter conjointly be made, with any other power. They stipulated also to defend and preserve each other in the possession of all towns or fortresses which did at that time belong, or should in future belong, to either of them; and, that for this purpose, when either nation was attacked or molested, the other should immediately succour it with a certain number of troops and ships, and should be obliged to break with the aggressor in two months after the party that was already at war should require it; and that they should then act conjointly with all their forces, to bring the common enemy to a reasonable accommodation.

The second defensive alliance then subsisting between Great Britain and Holland was that stipulated by the treaties of barrier and succession of 1709 and 1713, by which the Dutch barrier on the side of Flanders was guaranteed on the one part, and the Protestant succession to the British crown on the other: and it was mutually stipulated, that in case

either party should be attacked, the other should furnish, at the requisition of the injured party, certain specified succours ; and if the danger should be such as to require a greater force, the other ally should be obliged to augment his succours, and ultimately to act with all his power in open war against the aggressor.

The third and last defensive alliance between the same powers was the treaty concluded at the Hague in 1717, to which France was also a party. The object of this treaty was declared to be, the preservation of each other reciprocally, and the possession of their dominions, as established by the treaty of Utrecht. The contracting parties stipulated to defend all and each of the articles of the said treaty, as far as they relate to the contracting parties respectively, or each of them in particular ; and they guarantee all the kingdoms, provinces, states, rights, and advantages, which each of the parties at the signing of that treaty possessed, confining this guarantee to Europe only. The succours stipulated by this treaty were similar to those above-mentioned ; first, interposition of good offices, then a certain number of forces, and lastly, declaration of war. This treaty was renewed by the quadruple

alliance of 1718, and by the treaty of Aix la Chapelle, 1748.

It was alleged on the part of the British court that the States General had refused to comply with the terms of these treaties, although Minorca, a possession *in Europe*, which had been secured to Great Britain by the treaty of Utrecht, was attacked by France.

Two answers were given by the Dutch government to the demand of the stipulated succours :—

1. That Great Britain was the aggressor in the war; and that unless she had been first attacked by France, the *casus fœderis* did not arise.

2. That admitting that France was the aggressor in Europe, yet it was only in consequence of the hostilities previously commenced in America, which were expressly excepted from the terms of the guarantees.

To the first of these objections it was irresistibly replied by the elder Lord *Liverpool*, that although the treaties which contained these guarantees were called defensive treaties only, yet the words of them, and particularly that of 1678, which was the basis of all the rest, by no means expressed the point clearly in the sense of the objection, since they guaranteed "all the rights and possessions,"

of both parties, against "all kings, princes, republics, and states;" so that if either should "be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of his states, territories, rights, immunities, and freedom of commerce," it was then declared what should be done in defence of these objects of the guarantee, by the ally who was not at war; but it was nowhere mentioned as necessary that the attack of these should be the first injury or attack. "Nor," continues Lord Liverpool, "doth this loose manner of expression appear to have been an omission or inaccuracy. They who framed these guarantees certainly chose to leave this question, without any further explanation, to that good faith which must ultimately decide upon all contracts between sovereign states. It is not presumed that they hereby meant that either party should be obliged to support every act of violence or injustice which his ally might be prompted to commit through views of interest or ambition; but, on the other hand, they were cautious of affording too frequent opportunities to pretend that the case of the guarantees did not exist, and of eluding thereby the principal

“ intention of the alliance : both these incon-  
“ veniences were equally to be avoided ; and  
“ they wisely thought fit to guard against  
“ the latter, no less than the former. They  
“ knew that in every war between civilised  
“ nations, each party endeavours to throw  
“ upon the other the odium and guilt of the  
“ first act of provocation and aggression ; and  
“ that the worst of causes was never without  
“ its excuse. They foresaw that this alone  
“ would unavoidably give sufficient occasion  
“ to endless cavils and disputes, whenever the  
“ infidelity of an ally inclined him to avail  
“ himself of them. To have confined, there-  
“ fore, the case of the guarantee by a more  
“ minute description of it, and under closer  
“ restrictions of form, would have subjected to  
“ still greater uncertainty a point, which, from  
“ the nature of the thing itself, was already  
“ too liable to doubt :—they were sensible  
“ that the cases would be infinitely various ;  
“ that the motives to self-defence, though  
“ just, might not always be apparent ; that  
“ an artful enemy might disguise the most  
“ alarming preparations ; and that an injured  
“ nation might be necessitated to commit  
“ even a preventive hostility before the  
“ danger which caused it could be publicly



“ known. Upon such considerations these  
“ negotiators wisely thought proper to give  
“ the greatest latitude to this question, and  
“ to leave it open to a fair and liberal con-  
“ struction, such as might be expected from  
“ friends, whose interests these treaties were  
“ supposed to have for ever united.”<sup>16</sup>

His Lordship's answer to the next objection, that the hostilities commenced by France in Europe were only in consequence of hostilities previously commenced in America, seems equally satisfactory, and will serve to illustrate the good faith by which these contracts ought to be interpreted. “ If the reasoning  
“ on which this objection is founded was  
“ admitted, it would alone be sufficient to  
“ destroy the effects of every guarantee, and  
“ to extinguish that confidence which nations  
“ mutually place in each other on the faith  
“ of defensive alliances: it points out to  
“ the enemy a certain method of avoiding  
“ the inconvenience of such an alliance;  
“ it shows him where he ought to begin his  
“ attack. Let only the first effort be made upon  
“ some place not included in the guarantee,

<sup>16</sup> Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations. By Charles, Earl of Liverpool. 1st Ed. 1757.

“ and after that he may pursue his views  
“ against its very object without any appre-  
“ hension of the consequence : let France  
“ first attack some little spot belonging to  
“ Holland in America, and her barrier would  
“ be no longer guaranteed. To argue in  
“ this manner is to trifle with the most  
“ solemn engagements. The proper object  
“ of guarantees is the preservation of some  
“ particular country to some particular power.  
“ The treaties above-mentioned promise the  
“ defence of the dominions of each party  
“ in Europe, simply and absolutely, when-  
“ ever they are *attacked* or *molested*. If in  
“ the present war the first attack was made  
“ out of Europe, it is manifest that long ago  
“ an attack hath been made in Europe ; and  
“ that is beyond a doubt the case of these  
“ guarantees.

“ Let us try, however, if we cannot discover  
“ what hath once been the opinion of Holland  
“ upon a point of this nature. It hath already  
“ been observed that the defensive alliance  
“ between England and Holland, of 1678, is  
“ but a copy of the twelve first articles of the  
“ French treaty of 1662. Soon after Holland  
“ had concluded this last alliance with France,  
“ she became engaged in a war with England.

“ The attack then began, as in the present case,  
“ out of Europe, on the coast of Guinea; and  
“ the cause of the war was also the same—a  
“ disputed right to certain possessions out of  
“ the bounds of Europe, some in Africa, and  
“ others in the East Indies. Hostilities having  
“ continued for some time in those parts, they  
“ afterwards commenced also in Europe. Im-  
“ mediately upon this, Holland declared that  
“ the case of that guarantee did exist, and  
“ demanded the succours which were stipu-  
“ lated. I need not produce the memorials of  
“ their ministers to prove this: history suffi-  
“ ciently informs us that France acknowledged  
“ the claim, granted the succours, and entered  
“ even into open war in the defence of her  
“ ally. Here, then, we have the sentiments of  
“ Holland on the same article in a case mi-  
“ nutely parallel. The conduct of France also  
“ pleads in favour of the same opinion, though  
“ her concession in this respect checked at  
“ that time her youthful monarch in the first  
“ essay of his ambition, delayed for some  
“ months his entrance into the Spanish pro-  
“ vinces, and brought on him the enmity of  
“ England.”<sup>17</sup>

<sup>17</sup> Liverpool's Discourse, p. 86.

Alliance  
between  
Great Bri-  
tain and  
Portugal.

The nature and extent of the obligations contracted by treaties of defensive alliance and guarantee will be further illustrated by the case of the treaties subsisting between Great Britain and Portugal, which has been before alluded to for another purpose.<sup>18</sup> The treaty of alliance, originally concluded between these powers in 1642, immediately after the revolt of the Portuguese nation against Spain and the establishment of the house of Braganza on the throne, was renewed in 1654 by the protector Cromwell, and again confirmed by the treaty of 1661 between Charles II. and Alfonso VI., for the marriage of the former prince with Catharine of Braganza. This last-mentioned treaty fixes the aid to be given, and declares that Great Britain will succour Portugal "on all occasions when that country is attacked." By a secret article, Charles II., in consideration of the cession of Tangier and Bombay, binds himself "to defend the colonies and conquests of Portugal against all enemies, present or future." In 1603 another treaty of defensive and perpetual alliance was concluded at Lisbon between Great Britain and the States-General on

<sup>18</sup> Vide ante, pt. ii. ch. 1, § 9.

the one side, and the king of Portugal on the other; the guarantees contained in which were again confirmed by the treaties of peace at Utrecht, between Portugal and France, in 1713, and between Portugal and Spain, in 1715. On the emigration of the Portuguese royal family to Brazil, in 1807, a convention was concluded between Great Britain and Portugal, by which the latter kingdom is guaranteed to the lawful heir of the house of Braganza, and the British government promises never to recognise any other ruler. By the more recent treaty between the two powers, concluded at Rio Janeiro in 1810, it was declared, "that the two powers have agreed on an alliance for defence and reciprocal guarantee against every hostile attack, conformably to the treaties already subsisting between them, the stipulations of which shall remain in full force, and are renewed by the present treaty in their fullest and most extensive interpretation." This treaty confirms the stipulation of Great Britain to acknowledge no other sovereign of Portugal but the heir of the house of Braganza. The treaty of Vienna, of the 22d January, 1815, between Great Britain and Portugal, contains the following article:—"The treaty of alliance

“ at Rio Janeiro, of the 19th February, 1810,  
“ being founded on temporary circumstances,  
“ which have happily ceased to exist, the said  
“ treaty is hereby declared to be of no effect;  
“ without prejudice, however, to the ancient  
“ treaties of alliance, friendship, and guarantee,  
“ which have so long and so happily subsisted  
“ between the two crowns, and which are  
“ hereby renewed by the high contracting par-  
“ ties, and acknowledged to be of full force  
“ and effect.”

Such was the nature of the compacts of alliance and guarantee subsisting between Great Britain and Portugal, at the time when the interference of Spain in the affairs of the latter kingdom compelled the British government to interfere for the protection of the Portuguese nation against the hostile designs of the Spanish court. In addition to the grounds stated in the British parliament to justify this counteracting interference, it was urged, in a very able article on the affairs of Portugal, contemporaneously published in the *Edinburgh Review*, that although, in general, an alliance for defence and guarantee does not impose any obligation, nor, indeed, give any warrant to interfere in intestine divisions, the peculiar circumstance of the case did

constitute the *casus fœderis* contemplated by the treaties in question. A defensive alliance is a contract between several states, by which they agree to aid each other in their defensive (or, in other words, in their just) wars against other states. Morally speaking, no other species of alliance is just, because no other species of war can be just. The simplest case of defensive war is where our ally is openly invaded with military force, by a power to whom she has given no just cause of war. If France or Spain, for instance, had marched an army into Portugal to subvert its constitutional government, the duty of England would have been too evident to render a statement of it necessary. But this was not the only case to which the treaties were applicable. If troops were assembled, and preparations made, with the manifest purpose of aggression against an ally; if his subjects were instigated to revolt, and his soldiers to mutiny; if insurgents on his territory were supplied with money, with arms, and military stores; if, at the same time, his authority were treated as an usurpation, all participation in the protection granted to other foreigners refused to the well-affected part of his subjects, while those who proclaimed their hostility to his person were

received as the most favoured strangers;—in such a combination of circumstances, it could not be doubted that the case foreseen by defensive alliances would arise, and that he would be entitled to claim that succour, either general or specific, for which his alliances had stipulated. The wrong would be as complete, and the danger might be as great, as if his territory were invaded by a foreign force. The mode chosen by his enemy might even be more effectual, and more certainly destructive, than open war. Whether the attack made on him be open or secret, if it be equally unjust, and exposes him to the same peril, he is equally authorised to call for aid. All contracts, under the law of nations, are interpreted as extending to every case manifestly and certainly parallel to those cases for which they provide by express words. In that law, which has no tribunal but the conscience of mankind, there is no distinction between the evasion and the violation of a contract. It requires aid against disguised as much as against avowed injustice; and it does not fall into so gross an absurdity as to make the obligation to succour less where the danger is greater. The only rule for the interpretation of defensive alliances seems to be, that every



wrong which gives to one ally a just cause of war, entitles him to succour from the other ally. The right to aid is a secondary right, incident to that of repelling injustice by force. Wherever he may morally employ his own strength for that purpose, he may with reason demand the auxiliary strength of his ally.<sup>19</sup> Fraud neither gives nor takes away any right. Had France, in the year 1715, assembled squadrons in her harbours and troops on her coasts; had she prompted and distributed writings against the legitimate government of George I.; had she received with open arms battalions of deserters from his troops, and furnished the army of the earl of Mar with pay and arms when he proclaimed the pretender; Great Britain, after demand and refusal of reparation, would have had a perfect right to declare war against France, and, consequently, as complete a title to the succour which the States-General were bound to furnish by their treaties of alliance and guarantee of the succession of the house of Hanover, as if

<sup>19</sup> Vattel's reasoning is still more conclusive in a case of guarantee:—"Si l'alliance défensive porte un garantie de toutes les terres que l'allié possède actuellement, le *casus fœderis* se déploie toutes les fois que ces terres sont envahies ou menacées d'invasion."—Liv. iii. ch. 6. § 91.

the pretended king, James III., at the head of the French army, were marching on London. The war would be equally defensive on the part of England, and the obligation equally incumbent on Holland. It would show a more than ordinary defect of understanding to confound a war defensive in its *principles* with a war defensive in its *operations*. Where attack is the best mode of providing for the defence of a state, the war is defensive in principle, though the operations are offensive. Where the war is unnecessary to safety, its *offensive* character is not altered, because the wrong-doer is reduced to defensive warfare. So a state, against which dangerous wrong is manifestly meditated, may prevent it by striking the first blow, without thereby waging a war in its principle offensive. Accordingly, it is not every attack made on a state that will entitle it to aid under a defensive alliance; for if that state had given just cause of war to the invader, the war would not be on its part defensive in principle.<sup>20</sup>

<sup>20</sup> “ Dans une alliance défensive le *casus foederis* n'existe pas tout de suite que notre allié est attaqué. Il faut voir s'il n'a point donné à son ennemie un juste sujet de lui faire la guerre. S'il est dans le tort, il faut l'engager à donner une satisfaction raisonnable.”— *Vattel*, liv. iii. ch. 6, § 90.

The execution of a treaty is sometimes § 14.  
 secured by *hostages* given by one party to Hostages  
 the other. The most recent and remarkable for the  
 example of this practice occurred at the execution  
 of Aix-la-Chapelle, in 1748, where the restitu- of treaties.  
 tion of Cape Breton in North America, by  
 Great Britain to France, was secured by several British peers sent as hostages to Paris.<sup>21</sup>

Public treaties are to be interpreted like § 15.  
 municipal laws and private contracts. Such Interpretation of  
 is the inevitable imperfection and ambiguity treaties.  
 of all human language, that the mere words  
 alone of any writing, literally expounded, will  
 go a very little way towards explaining its  
 meaning. Certain technical rules of inter-  
 pretation have therefore been adopted by  
 writers on ethics and public law, to explain  
 the meaning of international compacts in cases  
 of doubt. These rules are fully expounded  
 by *Grotius* and his commentators, and the  
 reader is referred especially to the principles  
 laid down by *Vattel* and *Rutherford*, as con-  
 taining the completest view of this important  
 subject.<sup>22</sup>

<sup>21</sup> Vattel, liv. ii. ch. 16, §§ 245—261.

<sup>22</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 16. Vattel, liv. ii. ch. 17. Rutherford's Inst. b. ii. ch. 7.

§ 16 mediation. Negotiations are sometimes conducted under the mediation of a third power, spontaneously tendering its good offices for this purpose, or upon the request of one or both of the litigating powers, or in virtue of a previous stipulation for that purpose. If the mediation is spontaneously offered, it may be refused by either party; but if it is the result of a previous agreement between the two parties, it cannot be refused without a breach of good faith. When accepted by both parties, it becomes the right and the duty of the mediating power to interpose its advice, with a view to the adjustment of their differences. It thus becomes a party to the negotiation, but has no authority to constrain either party to adopt its opinion. Nor is it obliged to guarantee the performance of the treaty concluded under its mediation, though, in point of fact, it frequently does so.<sup>23</sup>

§ 17. diplomatic history. The art of negotiation seems, from its very nature, hardly capable of being reduced to a systematic science. It depends essentially on personal character and qualities, united with a

<sup>23</sup> Kluber, *Droit des Gens Moderne de l'Europe*, pt. ii. tit. 2, § 1; ch. 2, § 160.

knowledge of the world and experience in business. These talents may be strengthened by the study of history, and especially the history of diplomatic negotiations; but the want of them can hardly be supplied by any knowledge derived merely from books. One of the earliest works of this kind is that commonly called *Le Parfait Ambassadeur*, originally published in Spanish by Don Antonio de Vera, long time ambassador of Spain at Venice, who died in 1658. It was subsequently published by the author in Latin, and different translations appeared in Italian and French. Wicquefort's book, published in 1679, under the title of *L'Ambassadeur et ses Fonctions*, although its principal object is to treat of the rights of legation, contains much valuable information upon the art of negotiation. Callieres, one of the French plenipotentiaries at the treaty of Ryswick, published in 1716 a work entitled *De la Manière de Negocier avec les Souverains*, which obtained considerable reputation. The Abbé Mably also attempted to treat this subject systematically, in an essay entitled *Principes des Negotiations*, which is commonly prefixed as an introduction to his *Droit Publique de l'Europe* in the various editions of the works of that

author. A catalogue of the different histories which have appeared of particular negotiations would be almost interminable, but nearly all that is valuable in them will be found collected in the excellent work of M. Flassan, entitled *L'Histoire de la Diplomatie Française*. The late Count de Ségur's compilation from the papers of Favier, one of the principal secret agents employed in the double diplomacy of Louis XV., entitled *Politique de tous les Cabinets de l'Europe pendant les Règnes de Louis XV. et de Louis XVI.*, with the notes of the able and experienced editor, is a work which also throws great light upon the history of French diplomacy. A history of treaties from the earliest times to the emperor Charlemagne, collected from the ancient Latin and Greek authors, and from other monuments of antiquity, was published by Barbeyrac in 1739. It had been preceded by the immense collection of Dumont, embracing all the public treaties of Europe from the age of Charlemagne to the commencement of the eighteenth century.<sup>24</sup> The best collections of the more modern European treaties are those

<sup>24</sup> Corps Universel Diplomatique du Droit des Gens, &c. 8 tomes fol. Amsterd. 1726—1731. Supplement au Corps Universel Diplomatique, 5 tomes fol. 1739.

published at different periods by Professor Martens, of Göttingen, including the most important public acts upon which the present conventional law of Europe is founded. To these may be added Koch's *Histoire abrégée des Traités de Paix depuis la Paix de Westphalie*, continued by Schöll. A complete collection of the proceedings of the congress of Vienna has also been published in German, by Kluber.<sup>25</sup>

<sup>25</sup> Acten des Wiener Congresses in den Jahren, 1814 und 1815; von J. L. Kluber, Erlangen, 1815 und 1816; 6 Bde. 8vo.

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