the dogmas of the lawyers "amounted to an unqualified assertion that enemy's property of every sort is *res nullius* to the other belligerent." As soon as men begin to rise above the level of facts accomplished, and to cast about them for theories, they shrink from pleading brute force as a claim to anything; they seek to find some basis of moral right, even when violence is the real basis of the claim; and of this tendency no better illustration can be given than these refinements of the Roman lawyers.

Sir H. S. Maine further asserts that "occupancy and the rules into which the Roman lawyers expanded it, are the sources of all modern international law on the subject of capture in war, and of the acquisition of rights in newly discovered countries." The learned jurist does not point out, however, that the application of the Roman doctrine to the New World in the sixteenth and seventeenth centuries was made by means of a new definition of *nullus*. The maritime powers did not acknowledge the savages as their enemies, or plead the conqueror's rights in relation to their Western claims. "The English possessions in America were not claimed by right of conquest, but of discovery," says Chief Justice Marshall, "and such was the claim of the other powers that divided the New World." They had not seized the possessions of their enemies by force, but had occupied what belonged to nobody. Practically, discovery, when consummated, was conquest, but theoretically, it was something very different. An enemy overcome in battle was *nullus* according to the Roman law, but another definition, and one more consonant with the temper of the times, was now adopted. This definition was supplied by the Roman Church.

The new definition of *nullus* was, a heathen, pagan, infidel, or unbaptized person. "Paganism, which meant being unbaptized," says Dr. Lieber, "deprived the individual of those rights which a true jural morality considers inherent in each human being." The same writer also

states that the Right of Discovery is founded "on the principle that what belongs to no one may be appropriated by the finder;"[1] but this principle becomes effectual only when supplemented by the Church definition of *nullus*. That definition supplied the lacking premise in the demonstration. Grant that *res nullius* is the property of the finder; that an infidel is *nullus;* that the American savage is an infidel, and the argument is complete. That the Church, one of whose great duties is to protect the weak and helpless, should have supplied one-half the logic that justified the spoliation and enslavement of the heathen, is one of the anomalies of history.

We have seen that the Roman law furnished a full legal justification for the appropriation of the New World by the Christian nations. They had but to hold the savages their enemies and to treat them acordingly. That was the simple and direct path to the predestined goal. They chose another path. The causes that led to their choice will be considered in another place more fully; but here it is pertinent to say that to use the Church definition rather than the Roman one, was more in accordance with the theological temper of the times. That definition would also well blend with the missionary aspect of discovery and colonization, to which many Frenchmen and Spaniards gave much attention. At all events, while the dogmatic habit of mind was not strong enough to establish the Popes' donations in public law, it was strong enough to cause the acceptance of the new definition of *nullus*. This is abundantly shown by the quotations made above.

Perhaps the strongest proof of the correctness of the view now advanced is furnished by the commissions, charters, and patents granted to explorers by the Kings of England. Henry VII, in 1496, commissioned John Cabot and his sons "to seek out and discover all islands, regions, and provinces whatsoever that may belong to heathens and in-

[1] Miscellaneous Writings, II, 28.