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THE CANONS OF INTERNATIONAL LAW

By T. BATY

INTERNATIONAL LAW

By T. BATY & J. H. MORGAN

WAR: ITS CONDUCT AND LEGAL RESULTS

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THE CANONS OF INTERNATIONAL LAW

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TO

SIR JOHN ALLSEBROOK SIMON

One of His Britannic Majesty's Most Honourable Privy Council; Knight Commander of the Royal Victorian Order; Fellow of All Souls' College in the University of Oxford; Hon. D.C.L., Oxford; Hon. LL.D., Cambridge; Hon. LL.D. Edinburgh; sometime His Majesty's Attorney-General, and Secretary of State. With admiration of his many talents—a talent for friendship being not the least.

PREFACE

INTERNATIONAL Law has been too much regarded in the recent past as a mass of details, to be settled partly by precedent and partly by the taste of commentators.

The object of the Author, in the following pages, is not to embark on questions of detail and the discussion of particular cases. It is to ascertain and to reinforce certain guiding principles, the recognition of which appears to be necessary if the Law of Nations is not to degenerate into a morass of conflicting opinions, or of ukases dictated from Geneva.

I have, however, taken the opportunity of incorporating the results of researches into some infrequently explored sources, such as the Folio Prize Appeals in the Inner Temple Library.

As I have the honour to be in the employment of the Japanese Government in an advisory capacity, it is proper to say that the opinions expressed in the following pages represent solely my own private conclusions and opinions, which are probably in many respects divergent from those entertained by the Government of Japan. My sincerest thanks are due to that Government for the permission to publish the work.

For the shortcomings of the work, of which I am extremely conscious, my distance from Europe may, perhaps, be accepted as some excuse. I must express my great indebtedness to my friend Dr. T. A. Walker, and his son, Mr. W. Legh Walker, of Emmanuel College, Cambridge, who have kindly seen the book through the press.

"Les violations du droit des faibles par des belligérants forts seront toujours possibles en fait, et les prétextes ne manqueront jamais de les colorer de teintes juridiques. L'histoire enrégistre ces faits et note ces prétextes. Le droit les juge et les condamne. Le jurisconsulte a pour inéluctable devoir d'arracher de le face de la force pure, comme de la face de la fraude, le masque de droit" (Baron Descamps).

T. BATY.

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ABBREVIATIONS

A.J.I.L. = American Journal of International Law.
C.R. = Christopher Robinson's Admiralty Reports.
Clunet = Journal de Droit International Privé.
I.T.P.A. = Inner Temple Folio Prize Appeals (formerly Dr. Lushington's).
L.M. & R. = Law Magazine and Review.
Moo. Int. L. D. = Moore's International Law Digest.
R.D.I. = Revue de Droit International.
R.G.D.I.P. = Revue Générale de Droit International Public.
S.P. = British State Papers.

CHAPTER I

STATES

§ 1. States

It is universally agreed that, in spite of the modern theories which make individuals subjects—and sometimes the only subjects—of International Law, it nevertheless has something to do with States. It will therefore be well to set out the States of the modern world. In former parlance they were indifferently called Nations also: and, although some scientific writers insist that this is improper, and that a nation is simply a people, whether organized in a State or not, this appears to be a pedantic objection, and in popular language the Nations of the world mean precisely what the scientific writer prefers to style States.

THE NATIONS OF 1929.

SOVEREIGN STATES.

Name.	Population (estimated).	Government.
China	445,000,000	Republic
United Kingdom of Great Britain and Northern Ireland	377,000,000	Kingdom and Colonies, etc.
United States of North America	140,000,000	Federation
Union of Socialist Soviet Republics	140,000,000	Federation
France	110,000,000	Republic and Colonies, etc.

Name.	Population (estimated).	Government.
Japan	84,000,000	Empire
Germany	65,000,000	Federation
Holland	56,000,000	Kingdom
Italy	45,000,000	Kingdom
Brazil	31,000,000	Republic
Poland	27,000,000	Republic
Spain	24,000,000	Kingdom
Roumania	18,000,000	Kingdom
Portugal	16,500,000	Republic
Mexico	16,000,000	Republic
Czecho-Slovakia (Bohemia, Moravia and part of Silesia)	14,300,000	Republic
Egypt	14,000,000	Kingdom
Turkey	13,700,000	Republic
Yugo-Slavia (Servia)	13,000,000	Kingdom
Abyssinia	11,000,000	Empire
Argentine	10,000,000	Republic
Persia	10,000,000	Kingdom
Siam	10,000,000	Kingdom
Hungary	8,000,000	Kingdom
Belgium	7,600,000	Kingdom
Greece	7,000,000	Republic
Austria	6,500,000	Republic
Sweden	6,250,000	Kingdom
Afghanistan	6,000,000	Kingdom
Colombia	6,000,000	Kingdom
Bulgaria	5,500,000	Kingdom

Name.	Population (estimated).	Government.
Nepal	5,500,000	Kingdom
Peru	5,500,000	Republic
Chili	4,000,000	Republic
Switzerland	4,000,000	Federation
Cuba	3,500,000	Republic
United Kingdoms of Denmark and Iceland	3,500,000	Kingdom
Finland	3,500,000	Republic
Yemen	3,500,000	Theocracy
Venezuela	3,027,000	Republic
Norway	3,000,000	Kingdom
Tibet	3,000,000	Theocracy
Bolivia	2,300,000	Republic
Hayti	2,300,000	Republic
Ecuador	2,000,000	Republic
Latvia	2,000,000	Republic
Liberia	2,000,000	Republic
Lithuania	2,000,000	Republic
Uruguay	1,700,000	Republic
San Salvador	1,700,000	Republic
Guatemala	1,600,000	Republic
Hejaz and Najd	1,600,000	Kingdom
Esthonia	1,200,000	Republic
Albania	1,000,000	Kingdom
Iceland (See Denmark)	1,000,000	Kingdom
San Domingo	1,000,000	Republic
Honduras	679,000	Republic

Name.	Population (estimated).	Government.
Paraguay	700,000	Republic
Nicaragua	640,000	Republic
Costa Rica	550,000	Republic
Panama	450,000	Republic
Luxemburg	275,000	Grand Duchy
Liechtenstein	10,000	Principality
Vatican (Papal State)	?	

DOUBTFULLY SOVEREIGN STATES.

Canada	9,000,000	Kingdom
South Africa	8,000,000	Kingdom
Australia	6,000,000	Kingdom
Ireland	4,500,000	Kingdom
Irak	3,000,000	Kingdom
New Zealand	1,500,000	Kingdom
Newfoundland	275,000	Kingdom

SEMI-SOVEREIGN STATES.

Name.	Population (estimated).	Government.
Prussia	37,000,000	German Overlordship
Manchuria	11,000,000	Chinese Overlordship
Bavaria	7,000,000	German Overlordship
Morocco	5,000,000	Franco-Spanish Overlord-[ship

Name.	Population (estimated).	Government.
Saxony	4,700,000	German Overlordship
Mongolia	4,000,000	Soviet Overlordship
Wurtemburg	2,500,000	German Overlordship
Baden	2,200,000	German Overlordship
Hesse	1,300,000	German Overlordship
Hamburg	1,000,000	German Overlordship
Sarre : Saar	713,000	Society of Nations
Mecklenburg-Schwerin	660,000	German Overlordship
Sarawak	600,000	British Overlordship
Oman	550,000	British Overlordship
Oldenburg	520,000	German Overlordship
Brunswick	500,000	German Overlordship
Danzig	390,000	Polish Overlordship
Anhalt	350,000	German Overlordship
Lubeck	312,000	German Overlordship
Johore	285,000	British Overlordship
Bhutan	250,000	British Overlordship
Lippe	154,000	German Overlordship
Bremen	121,000	German Overlordship
Bahrein	115,000	British Overlordship
Mecklenburg-Strelitz	107,000	German Overlordship
Waldeck	56,000	German Overlordship
Tonga	27,000	British Overlordship
Monaco	23,000	French Overlordship
San Marino	13,000	Italian Overlordship
Andorra	6,000	Franco-Urgel Overlordship

§ 2. Semi-Sovereign States

It will be observed that in this list the "States" of the American Union do not appear at all. The reason is that they are not States in the sense of Nations. No one supposes that Virginia is a Nation, or that Nebraska is. In technical language, they are "not known to International Law." Why is this? Many a *mi-souverain* state is less populous and less strong. That is not important, for a state does not need to be either rich, strong, or populous. But many a *mi-souverain* state has been more liable to be interfered with and controlled by its suzerain or protector, by the terms of their union, than the American States are liable to be by the Federal authorities.[1] The Ionian Islands, when under the protection of Great Britain, were a state: but they were scarcely as free from British dictation as modern Malta [2] (which is certainly not a state)—not to speak of the freedom from Federal dictation enjoyed by Alabama. Why were the Ionian Islands a state, while Alabama is only a "State"?

The answer is, that the *mi-souverain* state is an anomaly The normal state proves its existence by its independence.

[1] The difficulty of securing federal control over the several States is by no means new. In 1824 S. Carolina interdicted the immigration of persons of negro blood. Sir Stratford Canning addressed a strong remonstrance to the United States, and characterized as "an outrage" the seizure of certain mulattos on board British ships in Charleston harbour. The U.S. Attorney-General (Wirt) expressed his opinion that the legislation was unconstitutional and void, as an interference with the commercial powers of Congress and the Treaty powers of the Federal Senate. South Carolina declined to admit the argument. See 12 S.P. 640, 642. Resolutions of S.C. Senate, Dec., 1824.

[2] It is well known that in the case of *The Ionian Ships* (2 Spinks, 212), it was laid down that Great Britain might have made the Ionian Islands a party to the Crimean War (though in fact she had not done so). But it is less well known that instructions were given, long before, to the effect that British authorities in Turkish territory had no right to assume jurisdiction over Ionian ships in respect of alleged violations of Turkish or Ionian law, or to send them to Corfu to be dealt with (Aberdeen to Saunders, 16 Aug. 1843). (32 *Brit. State Papers*, 563.) It was held as long ago as the seventeenth century that a vessel is not necessarily an enemy of the enemy of the suzerain (*Ludquharn v. Seaton*, 1 Stair's Decisions, 418, 425).

If a community is not independent, but has definitely resigned certain of its powers and capacities to another, then it rests with the general sentiment of the world to determine whether it shall be considered to have a separate though subordinate existence, or not. If diplomatic relations are kept up with it by the outside world, it almost necessarily follows that its separate state existence continues. But if its diplomatic relations are entirely in the hands of its protector, it does not follow that it retains no international status. It may. Madagascar, while under French protection prior to 1886, had a distinct international status. The French operations of that year were genuine war. Yet Madagascar had no foreign relations any more than the Ionian Islands had. Whether a community which does not enjoy complete sovereignty, therefore, will be regarded as a state, with the international rights and duties of a state, will depend on a variety of considerations. Chief among these is the fact of its previous independent existence and general recognition. States will be slow to assume that one of their number has been submerged. Its resignation of powers will be interpreted, if possible, as allowing it still to exist. Two autonomous communities may be in precisely the same position as regards their relations to their suzerain, and neither may have any diplomatic relations with the outside world: but the one may be recognized as *mi-souverain*, while the other may not be recognized at all—merely because the former has been known in its more independent days. And there are many other circumstances to be considered before it can be definitely pronounced that a given community is a state invested with something less than full and complete sovereignty, or is not a state at all.

A few years ago, semi-sovereignty seemed to be a curiosity which was rapidly disappearing from the world. For instances of it we had to look to Khiva, Zanzibar, and other oriental places, where the abnormal

conditions of the meeting of alien civilizations made it suitable to cloak the acquisitiveness of Imperialist nations in the garments of feudal superiority: and to the two or three microscopic communities in which purely historical and geographical conditions created a survival of "protected" states in Europe—Andorra, San Marino, Monaco. But latterly we have begun to ask ourselves whether we shall not be forced to return to the conception of a divided international sovereignty.

What, for instance, is the international position of Australia and Canada? Having been introduced at Versailles into the International Circle, they can no longer be said to have no international personality. Unlike the States of the American Union, which fought like paladins in 1862 to deny their own international existence, Canada and Australia, not to speak of the other self-governing colonies, must be reckoned with by foreigners as self-determined entities. Most likely they are independent entities: sovereign states, united with Great Britain in a sort of implied Confederation. But it is at least arguable, in spite of the frequent mention of "equal terms," that they are the semi-sovereign members of an Empire whose fully sovereign member is the United Kingdom. It is probable that the world does not yet look upon the self-governing Dominions of the Crown as entirely independent units, bound only by contractual relations. The relations of the ex-colonies to the United Kingdom have not been laid down in terms. A rather vague understanding between certain Ministers (entirely unable of themselves to sign away the rights of the people) is the thin vesture in which they are clad. Should a future Government of the United Kingdom declare at some time of crisis that legislative control has never been abandoned, and that they are not bound by their predecessors' declarations, can it be positively stated that the world at large would feel that a sovereign state was being foully attacked? Or would it more probably feel that the limits of sove-

reignty accorded to a semi-sovereign state were in dispute? It may plausibly be urged that the latter would be the case: and, if so, the ex-colonies and Ireland can hardly be said, as yet, to be fully sovereign.[1] No express proclamation has been made of their independence: no Envoys are interchanged between their governments: nearly independent as they are, it might well be said that they are not entirely so: and the chief reason why it is not said is that it is entirely impossible to say what the limitations on their independence are. Could, for instance, Canada make war on Australia? Could Canada quit the Empire? Could she make war on Siam? The example shows that the institution of semi-sovereignty is not yet out of date.

§ 3. Nations

In fact, the term "state" is a technical and artificial one. No one talks of "states" in ordinary conversation. No one remarks in the Wimbledon train that—"the state which we had better be allied with is Turkey—or Austria." Common parlance speaks of Nations—or, more commonly and perplexingly, of "Countries." The standard term which the people use to denote what the jurist styles a "state" is a "country." This is an ambiguous word, which the jurist rejects accordingly as unsuitable. But, after all, it is the current term for a "state," and it is necessary to examine its implications. For the jurists a "state" is nothing more nor less than the ordinary reader's word "country," used in one of its ordinary senses. What does it mean? "An organized people"; that is, an assemblage of human beings among whom the will of an ascertainable number

[1] In the case of Ireland, moreover, definite limitations are imposed on the Irish Government: and these do not appear to be wholly contractual, nor altogether in the nature of servitudes. For instance, the Constitution of Ireland cannot be altered by the Irish parliament, and so serious a deviation from sovereignty cannot be represented as a servitude.

habitually prevails. But when we come to analyse this apparently simple conception, it breaks up in the most perplexing way. "An assemblage"—good: but the assemblage is constantly changing. The assembled persons are different this evening from what they were this afternoon. Is the state not a different state? If we say it is a fluctuating assemblage of persons, and remains the same in spite of their fluctuations, then we immediately ask ourselves—"Within what limits?" And as soon as we ask that question, we are faced with the question of territorial limits. Professor Holland remarks that the "assemblage" "generally" occupies a certain territory: but modern international law is essentially territorial. And the very ambiguity of the word "country," which may mean indifferently the state and "the place," points to the inextricable way in which the idea of the state is bound up with the physical territory in which it has its being. "Our own country"—it is impossible to dissever it from the distant hills, and the leafy lanes, the rivers and the green hedges—yes, and the homely factory towns and the warm glow of twilight windows. Disentangle them to the utmost, there will never be a residuum of human nature from which physical nature is eliminated. Greece, to the Greek, was not all high thought and civic virtue embodied in humanity: it was much more the springing grace of trees and the proud declivities of mountains embodied in the Dryad and the Oread. So that when, forsaking the bald definition of a state as "a people," we try to contemplate the state as an Idea, we cannot dissociate that Idea from the actual physical territory which is the home of the nation.[1] The conception of the state accordingly becomes one of the most obscure. Practically, as well as theoretically, the element of Territory is seen to be the decisive factor. Not only

[1] Though there is no necessity to proceed, with Maître Duguit, to regard the territory as an indivisible integral element in the existence of the State, inalienable and essential.

does it furnish a clear and stable criterion of the persons who constitute the state, but the whole conception of each particular state is shot through, and coloured by, the physical beauty of its land. And this not only for its own people, but for all. Whatever a perverse tourist may think of Norwegians, must he not think nobly of Norway ?

Thus the state, even for purposes of International Law, is not so simple a thing as readily to be caught up in a definition. It is a complex function whose elements are the people, their culture and traditions, the land they live in, and their organization as a coherent whole. International Law cannot afford to neglect common usage, and to deal with states as though they were something different from the common conception of them. Definitions of the term vary from the most banal to the most mystical. A state, in some definitions (such as that of Austin) is a fortuitous body of persons who are kept together by a permanent bond of subordination and control : in others, it is an Idea, and the momentary population and the physical features of the territory are its manifestations or its tools. We shall not attempt a definition : but we shall take the freedom of pointing out that no definition is adequate, and to suggest that, on the whole, the simpler and more pedestrian definitions are the most nearly satisfactory. The definitions which see in the state the development of a mystical soul obscure the fact that, if a country suddenly abandoned all its traditions and culture, it would nevertheless certainly remain a state so long as it retained its organization. It is true, and it would be unwise to forget the fact, that this osseous structure of states is generally and normally the outcome of a National Idea, working for its expression in the creation of a land and the culture and traditions of a People. But it would be still more unwise to forget that it need not necessarily be so.

In the positive class of definitions, the state is

definitely subordinated to the individual. The object of the state is "ut cives feliciter degant." It is to secure to the individual the opportunity of the fullest self-development—perhaps to the bulk of the individuals, perhaps to all, perhaps to a selected class. But it always regards the culture of the individual as the proper aim of Humanity—and it regards the state as a relatively unimportant means of securing it. It has nothing in common with the mystical class of definitions, which affect to regard the individual as invariably insignificant in comparison with the state, and valuable only as its raw material. So Kant regards the object of all law as the protection and harmonization of the freedom of individuals. In fact, the modern tendency to treat the individual as unimportant in comparison with the state —"Who lives, if England dies? Who dies, if England lives?"—is a re-echo of the post-mediæval era of Divine Right: it only substitutes for the crowned symbol some other symbol such as a flag or a name. An American President—not remarkable, perhaps, for the subtlety of his mental processes—is reported to have presented his children with copies of a monarchical foreign book as a guide to patriotic thought. At the same time he warned the family that he hoped they would never, like the misguided foreigner, bow down before a monarch. So would they please erase the Sovereign's name wherever they found it, and substitute "the American flag"! The absurdity of refusing to accept a Sovereign—"the sacramental Man who sums up a Nation," in Chesterton's phrase—and substituting for him two square yards of coloured calico does not appear to have struck his sense of humour.

It is singular that the more mystical theories of the state have some affinity with a more or less materialist philosophy. Reflection will show why this should be so. An idealist philosophy is inclined to regard the individual as pursuing an eternal quest of union with the ideal. The ideal is very differently conceived of by different

individuals, and each eternally pursues his or her own. To a materialist, the individual does not persist: his efforts are insignificant, and Humanity offers the most promising subject of progress by human effort. But Humanity is single, and a little dull; separate Nations supply the element of variety and interest, the want of which makes Humanity yawn at itself as an ideal. It is true that Hegel's idealistic philosophy exalts the state, but it can only be regarded as exceptional.

If, without attempting a definition, one were to venture on a summary of the essentials of a state, it might be better to lay stress less on the element of subjection of the people to an ascertainable will, than on the existence among the people, or the bulk of the people, of a certain mutual reliance, not participated in by the outside world. The degree of this reliance varies, but it is greater than the reliance which is placed in human beings, or even in civilized human beings, merely as such. The fact of its existence enables the state to be personified as a gracious and inspiring figure, which confers signal benefits on the individual, and which is tinged with qualities drawn from the features of the land, and (in very varying degrees) from the culture of the population. But it does not necessarily enable the state to be regarded as a god, to whom the enthusiastic worship of the individual is due, and in whose service he must gladly throw himself and his dearest to be crushed and annihilated. The "England" which, in Nelson's immortal signal, expected that the Fleet would do its duty, was no mystical Britannia on a penny, but the living and breathing English people at home.

"England expects," signalled Nelson, and with obvious truth. But when some one said to a French public man, "France expects" (some fancy of his own), the politician drily responded—"La France? Who is the lady?" The snub was justified, for it is fatally easy to ascribe to an abstraction one's own desires and sentiments. The English have an affectionate pride in the British

King and the British Flag: but it is an affection a long way short of idolatry; and the normal English and Scots regard with a mixture of incomprehension and pitying tolerance, as only fit for children, the "Empire Day" parades and concomitant compulsory flag-worship. As for the sending of children to prison-schools because their parents refuse to permit them to salute the American flag, we are frankly incredulous in England and Scotland of such possibilities. "Before men made us citizens, Great Nature made us men"—and the best Scotswoman is not she who is trying to be a Scotswoman, but she who is trying to be a fairy princess.

§ 4. Sovereignty

It has just been tentatively suggested, that mutual reliance, rather than common subjection, is the true mark of a state. But how are other people, who do not participate in this consciousness, to be aware of it? The answer is, that the outward and visible sign of statehood is Sovereignty.

A million people cannot consult together: cannot communicate their ideas, invite opinions on them, and weigh the replies. They cannot cross-examine one another nor estimate the value of each others' opinions. Even in the small cantons of Switzerland, the daily work of administration could never be carried on or even be supervised or directed by assemblies of the people. A directing person or body inevitably emerges: the mutual reliance of the members of the state includes a mutual confidence that the direction of this person or body will normally be followed. Sometimes that mutual reliance is reduced to so low an ebb, that its content, as in most modern states, includes little more, and the only confidence which the ordinary individual can place in his fellows is a confidence that they will obey a tyrant's decrees. But it does not seem necessary that the central organ should be coercive, and speak with the voice of Sinai. It is sufficient that it should be directive, and

its direction normally accepted. We have then a patent fact which is readily ascertainable by the outside world. There is a definite, limited, person or body of persons who actively and personally controls affairs. In every civilized state, there are some who manage, and some who are managed: and in that simple fact lies the whole essence of sovereignty.

It was not until mediæval thought went to wreck in the welter of the sixteenth and seventeenth centuries, and the distorted Tudor and Valois tyrannies appeared, that the coercive theory of sovereignty was popularized by Bodin and Hobbes. It ran its course, and came to an inglorious end in the dreary pages of Austin. It has left a dangerous legacy in the conception of sovereignty as omnipotence. Sovereignty never meant omnipotence—except perhaps in the mouth of Boniface VIII—it was simply *supernitas*, the state of being superior. It was apparent that in every country there were those who managed affairs, and those who did not and could not. Those who did were the sovereign part of the state: those who did not were the subject part. Sovereignty was majestic, splendid, reverend; but it laid no claim to omnipotence. And the ingenuous youths of the present day who are so fond of telling us that no government is sovereign, because no government is omnipotent, are wasting their breath.

Those who are so eager, in our day, to decry the conception of sovereignty are in reality only endeavouring to substitute for a congeries of sovereignties one single sovereignty. That is, for comparatively somewhat amenable sets of managers, they would substitute one yet more unapproachable and irresponsible set of managers for the world. Twenty years ago the present writer ventured to suggest that the clamant need of the world was the *morcellement* of political power. It was suggested that a system of localism[1] or regionalism, in which the

[1] Cf. Rolin Jaequemyns, R.D.I., 1873. "I view great cities," says Jefferson, "as pestilential to the health, the morals and the liberties of the nation." (Jefferson to Dr. Rush, 28 Sept. 1801, in *Life*, by Tucker, II., 71).

sovereignty should reside in the smallest possible areas, so as to be readily responsive to the needs and desires of the community, was the only system which would afford a real share in the management of affairs to the individual. Subsequent events have only confirmed that conviction.

Sovereignty—the fact that among the people of a given territory there is a definite and unique order for managing affairs—not necessarily coercive, but at any rate directive, is the sole and the necessary criterion by which foreign observers can establish the existence or non-existence of a state.

It will be apparent that the sovereignty of the people is accordingly always a misnomer. If the sovereign denotes the person or persons who manage affairs, it is obvious that the people cannot be a sovereign, however much their real or supposed average wishes may be consulted by the sovereign, and however large a share they or some of them have in appointing him. What is intended by the phrase is that, if the people came together, and if they or the great bulk of them could communicate with each other, and become aware of their agreement, on any action, that action could be accomplished. And that is true of any empire or monarchy: if the people are agreed, and know that they are agreed, the soldiers and sailors are included in their agreement, and no power in the country could stand against their agreement. The ordinary American or Frenchman has as little share in arranging things as the ordinary Briton under George III, and to say that he has a chance of it is as true as to say that every Turk has a chance of being Grand Vizier, and every Catholic a chance of being Pope.

§ 5. Independence

Sovereignty is, therefore, primarily a matter of Constitutional Law. It regards the internal organization

of the state. It has been invariably represented as a matter of the distribution of power in a state; the sovereign person or body has been regarded as imposing his or their will on the subject portion of the nation by force. Even from the historical point of view, that is untrue. The sovereign has certainly exerted force, but how did he come by it? and how does he retain it? Only through the existence of a common reliance by each of his subjects on the certainty that their fellows will do his bidding. It seems, therefore, truer to regard sovereignty as the exercise of general supreme direction within a state by a definite and limited number of people (who alone are physically capable of detailed discussion and united action). There is no need to imply that the sovereign receives, or is entitled to, implicit obedience from the subjects. Earl Bigod was certainly a subject of King Edward the Third; yet he answered his sovereign's unlawful declaration—"Sir Earl, you shall either go or hang!" with—"Sir King, I will neither go nor hang!" A subject is not a slave. Government is essentially not coercion but direction, as is apparent from its etymology (*guberna*, the helm).

But, on the other hand, since, by definition, the sovereign alone manages the affairs of the country, there cannot be any one else managing them. Although it cannot transgress the limits, if any, which are set in the minds of its subjects to its powers of direction and control, it is absolved from all subjection to the management of others. And this freedom of the sovereign power appears conspicuously in its intercourse with foreigners. No one directs and controls affairs in its own country but itself; therefore no foreign authority does so. A sovereign must be independent. The sovereign is the seal and symbol of the Independence of the Nation.

Sovereignty, therefore, although primarily a conception of constitutional law, nevertheless very appropriately denotes international independence: and to

say that a state is a " sovereign state " is equivalent to saying that it is an independent state.

But, just as to say that a person or body is sovereign is not to say that he is or that they are despotic, or to deny that he or they are subject to constitutional law, so to say that a State is sovereign and independent is not to deny that it is subject to international law, including the obligation of treaties. When we say that a State is subject to the Law of Nations, implanted in the hearts of educated people throughout the world, and subject incidentally to the obligations which it has taken upon itself, we do not deny or impair its sovereign independence. When we endeavour to put it under a managing authority, whether Société des Nations, World Court, Concert of Ambassadors, or whatever else, then we are threatening its sovereignty, and very seriously.

But this sovereignty is partible. The school of jurisprudence which, relying solely on force as a criterion, exhibits sovereignty as despotism naturally cannot admit the notion of its partibility. A despot ruling by force cannot share his power—for who is to enforce on him the limitation ? It we say that universal opinion will enforce it on him, we introduce the indefinite element which is abhorrent to this school of thought, and we put in their hands a weapon which it is against the conscience of its members to wield. Their despot cannot be restrained; such is their creed from Bodin to Austin. Therefore they cannot admit *mi-souveraineté*, or the notion of a Federal State. But sovereignty in the reasonable acceptation of the word is partible enough, provided it is not frittered away in the partition.

Federal constitutions and semi-sovereignty, both of which suppose the partition of sovereign functions, are perfectly explicable.

Federalism, so far from being a *pis-aller*, is the real conciliation of Freedom with Security.

§ 6. Status and Contract. International Servitudes

It is necessary, however, carefully to distinguish between the position of a state which has resigned certain functions of sovereignty, and that of one which has contracted not to exercise them. It is the vital difference between status and contract. It may be most clearly expressed by saying that in the one case, if the state in question attempts to exercise the given function, it cannot do so, whilst in the other case, it will do wrong to do so. If it has resigned its power, plainly it no longer possesses it. A state which has ceded an island is a mere invader if it subsequently sends troops there. A state which has promised not to garrison an island of its own, and then sends troops there, breaks its word, but the troops are not invaders. There may be many excuses for failing to fulfil an engagement; not a few of them perfectly valid in morals. The other party may have failed to keep to his part of the bargain; he may have given cause for reprisals in another matter (there is no need to pay the baker while he is owing you for professional advice): impossibility may prevent the fulfilment of the promise: the promising state may cease to exist or may cede the object concerned: other claimants may have a prior or a concurrent right to performance: war puts an end to promises, as a rule: or again, national bankruptcy or something in the nature of prescription may supervene. In all these cases, the right of the promisee, resting as it does solely on the personality of the promising state and its ability to satisfy its engagements, may prove inefficacious. But if the treaty is not a contract but a conveyance, the right acquired by the opposite party is thenceforward entirely independent of the will, of the capacity and even of the very existence, of the conveying party. This is the first commonplace of municipal law—the vital distinction between the right *in personam*, which depends

for its fulfilment on the personality of the party, and the right *in rem* which does not. But it is specially difficult to draw the distinction in practice, when the Law of Nations is concerned. It is well known that in the classical Roman Law, the mode of granting a servitude, *i.e.*, a " real " right over another's land or goods, valid not only through the medium of the grantor, and subject to the accidents attaching to his personality, but independent of the future history of the grantor, and valid against all the world, was by " pacts and stipulations "—to put it simply, by promises. What was apparently a personal promise availed to create a " real " right, not dependent at all on the future power and capacity of the party. So, in England, certain promises made by the transferors of land " ran "—and for all one knows, despite the Earl of Birkenhead, still " run "—with the land, and do not depend at all on their enforceability against the person who made them.

So in International Law, there is little in form to distinguish a contract from a conveyance. A cession of territory—the crudest instance of the conveyance of a real right—is normally included along with contractual matters of very various and unrelated kinds in a single treaty.[1]

Consequently, it is very easy to assert that a nation has resigned its powers, so as to be incapable of exercising them : or, on the other hand, to argue that all it has done was to undertake to refrain from their exercise. The presumption is said to be in favour of sovereignty[2]—that is, in favour of construing language as creating a personal engagement only. Practice is perhaps rather the other way. An engagement not to have diplomatic relations with other foreign countries, and to leave the conduct of foreign affairs in the hands of the other party, would almost certainly be construed as a resignation of the power of negotiation and legation, and not merely

[1] Vide *infra* " Treaties."
[2] Hall, *International Law* (Ed. VI), 169.

as a contract not to exercise it.[1] The difficulty and delicacy of the question are, nevertheless, great.[2] And they are not lessened by the diplomatic smoothness which masks under the form of a promise the loss of a status.

What is necessary, however, is to keep the distinction in mind, and to be sure, in concluding agreements, that both parties, whether they express or disguise their common intention, have at least formed one: and that an ambiguous situation is not created unless it was meant to be. The particular instance afforded by the renunciation of certain elements of sovereignty, such as the control of foreign relations, is only an example of a principle which has wide ramifications which are scarcely sufficiently recognized. For example, the question of the possibility of creating an International servitude remained somewhat doubtful when the North Atlantic Fisheries Arbitrators expressly contradicted the possibility.[3] Rights of fishery in territorial waters, rights of access to the shore, rights to erect sheds thereon and other rights of user, would, if that contradiction were correct, always and necessarily be mere promises, subject to all the risks of promises, and easily withdrawn by any state which is prepared to pay damages.[4] Clearly they cannot confer any immunity from the local law on those who avail themselves of their provisions: at the lowest, very express immunity would have to be accorded. But if an international servitude is possible, and if these rights become as much the property of the cessionary

[1] Soderhjelm (*Démilitarisation des iles d'Aland*) rejects the idea that the demilitarization of the Aland Islands is a "real" servitude.

[2] Labrousse (*Les Servitudes en D.I. Public*) extends the idea of an international servitude so as to extend to almost every treaty obligation. Capitulations, financial control, promises to exclude Jews from Gibraltar, promises to permit foreign post-offices in Turkey—all these are nothing but personal engagements, which would disappear in case of foreign conquest.

[3] *N. Atlantic Coast Fisheries Arbitration Proceedings* (American Report), I, 77. Mr. E. Root's speech on International Servitudes (*ib.* Vol. XI, pp. 212 *et seq.*) is a most admirable exposition of the institution.

[4] Cf. *infra*, "Treaties, Transitory and Executory."

as a ceded fortress or islet, the position is totally different. The state which exercises its right of fishery, right of way, right of building and resort, or whatever it may be, is not availing itself of a promise, it is exercising its independent right. And in carrying it through by open force, it is not necessarily waging war, or exercising violent reprisals, any more than when it drives away a foreign vessel by force from its own harbours. Nor, in carrying it through, is it bound to have any regard to the local law: it is there as an over-riding exception to the local law. The extreme inconvenience of such a state of things is no doubt what weighed with the North Atlantic Arbitrators in their pronouncement. Yet in conceivable cases the benefit might easily outweigh the inconvenience: and almost simultaneously with the Arbitrators' *ipsi dixerunt* condemning international servitudes to extinction, the French and the Germans were creating international servitudes in West Africa.

More recently still, the Polish rights in the Free City of Danzig have been created as the only possible solution of the Polish and Prussian entanglement: and no one would question that these are "real" rights, not depending on the will and personality of the Free City. And yet rights of way are precisely those servitudes with regard to which particularly pressing problems arise. For it is agreed that a neutral state cannot possibly allow the troops of one belligerent to pass over its territory. Nor can its personal promise made antecedently to war, to allow them to pass, alter the situation: one cannot promise to do an unlawful act, and performance becomes impossible when the object of a promise becomes unlawful. But, on the other hand, if one cedes a right of passage, the cession ought to be just as valid for all time and upon all occasions, as if one ceded a fortress. The right to pass does not rest on a promise; it is in the nature of property, and it binds the land into whosesoever sovereignty it may come.

Again, while the North Atlantic Arbitrators were solemnly rejecting the idea of servitudes in International Law, the International Lease was beginning to be adopted as a convenient means of temporary cession. It was not, indeed, a new invention,[1] and there is no question that the international lease conveys a real right, and does not rest merely on the promise by the lessor of undisturbed possession. Certainly the attempt to evict the lessee would not be the breach of an undertaking but a warlike attack. As we write, word comes of a probable settlement of the Arica–Tacna question, an integral element of which is that certain channels shall "enjoy" (the U.S. President means "shall be subject to") a prior servitude in favour of Peru where they cross the territory of Arica attributed to Chili.

In what category are we to place the possession vested in the belligerent occupant of territory? Suppose that during belligerent occupancy encroachments are made on the occupied territory by a third Power, or complaints are made by a third Power of the conduct of inhabitants of the occupied zone? It would seem hard, in the latter case, either on the one hand to deny the third party all redress, or, on the other, to hold the evicted Power responsible for the acts of persons whom it could not control, or the occupants responsible for the acts of persons who are not subject to his laws, and with whom he is only temporarily connected. It would seem that the military occupant is in the position of an international sheriff or distrainor. War is the litigation of nations, and the fact of occupancy must be admitted to be legitimate. The analogy of servitude does not therefore arise, and, whatever answer may be given to the problems raised, it is not on that analogy that they fall to be answered.

[1] In 1849, the island of Tigre was leased by Honduras for 18 months to the United States.

§ 7. The Canons of International Law

These perpetually renewed collections of human beings, holding together in a particularly high degree, as evidenced by the common affairs being managed within a definite area by a definite, limited body of persons, have inter-relations, which are tending constantly to increase. And the common consciousness, mainly inarticulate, of these human beings, regarding the rules which ought to regulate those relations constitutes the Law of Nations. Statesmen are guided by it. Jurists endeavour to discover it. But neither statesmen nor jurists make it. Statesmen can make treaties; but treaties do not make law: they depend on the law. Only a great statesman or a great jurist can make International Law: and that only by the indirect process of changing the mind of the people of the globe.

This law has extraordinary excellencies, and extraordinary difficulties. It is by no means to be reckoned a defect or a difficulty, that it is not a law which disposes of irresistible physical force, or of any physical force. Physical force has no more to do with law than wigs and parchment have. The common consciousness of a binding obligation may eventuate in the exertion of physical force, but it need not be created by it. Law is always spoiled by the injection of the arbitrary commands of a ruler backed by force: the common consciousness degenerates into the degraded consciousness of a simple necessity—to do as you are told.[1] And it makes no difference whether the ruler is a frank autocrat like the Czar Peter, a less frank despot disguised, like a Rosas or a Louis Napoleon, under the veil of a manipulated plebiscite, or a still less candid tyrant group called "the party leaders," who are really a co-opted body as self-

[1] Mr. R. Washburn Child and Mr. Laski are, as these pages go to press, directing public attention to the dangers of an omnipotent Legislature. Its omnipotence is a mere bogey from the divinity of the Roman Emperors and the Stuart Kings.

elected and self-centred as any oligarchy of the past. Their ukases are fatal to Law.

It is the special glory of the Law of Nations that, so far, it has triumphantly overridden the policeman. When we come to think of it, there is no real necessity that laws should be "enforced" by penalties—no real need for "secondary," "sanctioning" or "adjective" rights. For, clearly, we are here faced by an infinite series: the "secondary" right needs to be protected by a "tertiary" right: and so on *ad infinitum*. The Law may very well choose to visit breaches of its prescriptions with penalties: but that is a secondary and non-essential matter. The essential is the common sense of binding obligation: and the common assurance that John Styles ought to be left undisturbed in Whiteacre may or may not be supplemented by a common assurance that, if he is disturbed, somebody must reinstate him and put the disturber in prison. International Law has gone straight to the heart of the matter. It has established beneficent common understandings: and trusted to their existence to secure their observance. It is, indeed, often said that "the litigation of Nations is War"—but it is surprising how few wars have been waged for the assertion of a legal right. Certainly the World War was not: the Franco-Prussian War was not: the Servo-Bulgarian War was not: the Turko-Italian War was not: the First and Second Balkan Wars were not: the Græco-Turkish War was not: the Crimean War was not. Examples might be multiplied, and, indeed, the observation is a commonplace.

International Law overrides the policeman, and can do very well without him. Equally is it able to do without a Legislature—and not only able, but exultant. Legislatures are not so popular to-day that one need labour the point. They are, at the best, as likely to contradict the deep sense of justice in the minds of the people as to formulate it. If they are not the obedient scribes of bureaucracies, they are the battle-grounds of

faction. They pass a Land Valuation Act one decade, and pick it to pieces the next. They give effect, not to the general will, but to majority, and frequently to minority, desires. Thus they are irreconcilable enemies of International Law, which rests on common consent. A Legislature inevitably tends to become the tool of a party—itself the tool of its irresponsible chiefs. This would be a melancholy fate for International Law, whose only true legislature is the opinion of the civilized world. Any self-styled International Legislature must be a pitiable dwarf in the Giant's Robe. Everywhere the world is curbing its legislators—Spain and Italy have clipped their wings—the Far West has definitely put the brake on their activities, and even England is beginning to think about a Constitution. It is not the time for International Law to be provided with a Legislature.

Nor does it call for an authoritative Code. We are apt to speak glibly of the codification effected by Justinian, without reflecting that it was the tombstone, as well as the monument, of the Roman Law. The Law of Rome was at its best and highest development at the time when a code was not thought of, and the *jurisprudentes* were working out the law of a refined society by giving their opinions on each case as it arose in the first two centuries A.D. Justinian's Code was the petrifaction of a dead law. It would not work—it never did work. Napoleon I's Code has been smothered by a vast tumulus of Commentaries. Codification is a good signpost, but a bad locomotive. The energy of the world will never be confined within the limits of a dropsical and meandering Statute, born to be explained and circumvented, glossed, riddled and disliked.

International Law is, therefore, in the peculiar position of having no legislator: and the longer it does without one the better, for otherwise it would no longer be order, but orders. It is happy in having no code, a thing which is only an exceptionally long and scrappy

statute, for lawyers to exercise their teeth upon. It bows to no sovereign set of managers. It rests upon the universal conviction of what is right. It is a necessary corollary that its rules must of necessity be simple, certain and objective, while nevertheless elastic. These four requirements are the Canons of International Law.

1. Simplicity.—Resting on the deep consciousness of unrelated and uncommunicative individuals, differing from each other literally as East from West, unable to agree on refinements, and still less to articulate their agreement or difference, the Law of Nations must be simple. It must embody the few broad principles upon which they can all agree, and the plain deductions from them. International Law is impatient of subtlety and of the fine-spun deductions of self-appointed prophets. Exceptions and refinements are not natural to it. A law-court can refine and distinguish to its heart's content. It can be corrected by the legislature, or its distinctions can be, in their turn, "distinguished." But the Law of Nations knows no such variableness or subtlety. For good or ill, it rests on a foundation which demands simplicity. It must be simple, to be understood. For, if it is not understood, it does not exist. The Law of Nations speaks alike to Finn and Spaniard, Brazilian and Siamese, Italian and Scotsman. It finds its sanction in an appeal to their common sense. The appeal must be simple.

2. Certainty.—And the rule must be certain. To cast doubt or questioning on an established rule of International Law is to go far to destroy it. Deriving its force from the common belief of a multitude of heterogeneous elements, the Law of Nations contains an element of weakness, due to the fact that this common belief is exceedingly difficult to create and to prove. International Law cannot bear novel theories and subtle questionings. Harmless as these may be in the sphere of municipal law, where they dash their waves with a pleasing splash against the solid rocks of daily practice,

they are infinitely mischievous in the realm of International Law, where intercourse is sparse and rudimentary, and where the common understanding, so painfully created and established, rests to a great extent on accepted theories. All the efforts of the jurist ought to be devoted to reinforcing this basis of understanding, as the engineer reinforces a dyke against the sea. To wreck it is to bring chaos in again. It is the inevitable tendency of the academic mind to seek credit by advancing spectacular innovations. When we are dealing with the Law of Nations, such a course is fatal. It does not introduce, as in other sciences, a pleasantly piquant corrective to established notions;—in so far as it is effective, it destroys the subject-matter of the science which it pretends to advance.

3. Objectivity.—Further, the rule must be objective. It must be capable of easy application by the ascertainment of plain facts. It must leave nothing to speculation regarding motives, intentions and desires. These will always be matters of opinion: consequently the result of admitting them in the application of an International Rule will invariably be to deprive it of the character of a rule altogether. It will become a rule which the most heterogeneous peoples can apply, each according to his private opinion—and there will be nothing to prevent the strongest party from acting on his own. The tests and criteria of International Law must always be plain matters of fact.

4. Elasticity.—At the same time, the rules of International Law must be elastic. It is quite true that International Law is not a petrified fossil. An indulgent critic—the late Dr. Bellot—complained of a certain insignificant writer that that author considers there should never be any change in the Law of Nations and insists on applying to the facts of the twentieth century the standards of the eighteenth. Far from it. What I insisted on was that nobody had ever shown what were the reasons for change. No pretence of an in-

vestigation, not only of a scientific and accurate kind but of any kind, had been made into the factors of the situation. My own opinion, indeed, was that investigation would show that the old rules were substantially applicable to the circumstances of the present. They held the field. But I was perfectly willing to admit that they must be changed, and had been changed, if anybody would have demonstrated how and why. Nobody did: several people belonging to states, whose supposed interest it was that the law should be changed, asserted that it was changed. That was all: and it was not convincing.

But nothing is more certain than that International Law does move. Only we must be sure that it has, before we say so. Take the question of the exemption from capture of private property at sea. The vast majority of the people of the Continent and probably of America desired it: not a few authors laboriously demonstrated that the law commanded it. But the resistance of England prevented any such change in the old established law from being admitted. On the other hand, such changes as the substitution of the measured rights of blockade and contraband-seizure for the unrestricted right to forbid all trade with an enemy rapidly and incontrovertibly established themselves. The rules of humane war have progressed in the same degree. No one would maintain now that it is lawful to kill non-combatants for no military necessity, to refuse quarter, or to pillage private houses. The law does certainly progress. But one ought to be sure of one's ground before proclaiming the change. It must be shown to be, not merely desirable, but accepted throughout the globe. And, in default of any impartial arbitrator between belligerents and neutrals, it is unsafe to assume that either neutrals or belligerents have been convinced by the logic of circumstances that the law has been definitely changed to their own disadvantage.

CHAPTER II

THE CANON OF SIMPLICITY

We shall now examine in detail the four canons which have been laid down, and shall illustrate them by the light of actual discussions which have arisen concerning various points of International Law.

And in the first place, to treat of the necessity for Simplicity. We may, under this head examine the following subjects :—

§ 1. Ambassadors and Consuls.
§ 2. Exterritoriality of Foreign Sovereigns and Heads of States.
§ 3. Exterritoriality of Foreign Armies.
§ 4. Merchant Ships as Territory.
§ 5. Straits and Isthmuses as Territory.
§ 6. Bays and Gulfs as Territory.
§ 7. Lakes as Territory.
§ 8. River Transit : Water Supply.
§ 9. Canal Transit.

§ 1. Ambassadors and Consuls

1. Exterritorial Position. — The position of an Envoy has exercised the ingenuity of writers for centuries. That careful and prolonged discussion resulted in the general acceptance of the theory of Ex-territoriality as the best summary of the peculiar immunities and privileges attaching to the character of a Foreign Mission. The Ambassador or other Envoy had from classical times been treated as peculiarly sacred—what

exactly were the consequences of that privileged character? The answer was, that in principle he must be treated as though he had never left his home country: as though he were altogether out of the territory. The theory has been treated as though it involved a fiction: as though the Envoy were supposed to have remained throughout in his own country, contrary to the obvious fact. But there is no need to invoke a fiction. The Envoy need not be supposed never to have left his own land: all that the theory involves is that he must be treated, as far as possible, as if he were still there. Two simplicities here seem to conflict. The simplicity of Exterritoriality is faced by the simplicity of Sovereignty. This has led a popular school of recent authors, zealous for the simplicity of sovereignty, to deny the theory of exterritoriality, and to substitute a new doctrine, which, extremely plausible though it sounds, really strikes at the root of an Ambassador's position. The new doctrine is expressed to be that an Envoy's immunities and privileges are precisely co-extensive with the necessity for them. They are to be narrowly limited to what is needed for the due performance of his functions. Such a doctrine is naturally obnoxious to at least three of our Canons. It abolishes simplicity in favour of a complicated inquiry into what is, or is not, necessary: it does away with the easy objective test of whether the individual is an Envoy or not, substituting a difficult inquiry into matters of opinion: and it attacks the certainty of a rule which very few would formerly have been found to question.

The consequence is that occasions of dispute, and opportunities of friction, are rapidly growing in this sacred field. As a matter of fact, the novel doctrine is a thoroughly short-sighted one. In proclaiming that the sole reason for the immunities of an Ambassador is that he may be enabled to discharge his duties, it forgets that a prime necessity for the proper performance of his functions is that he shall not be harassed by perpetual

anxiety as to whether he is or is not transgressing the limits of his privilege, and as to whether or not he may properly be invaded at any moment by the territorial authorities. An Envoy needs to have his mind completely quit and clear of all these harassing possibilities. And the position of one who is serenely clear of them is exactly expressed by the conception of Ex-territoriality. An Ambassador cannot satisfactorily perform his duties unless he is regarded as though he were well outside the territory. The phrase is not a fiction, it is a metaphor. Its acceptance sealed the secure position of an Envoy in the most satisfactory fashion possible. It was a conception that could be grasped by all the world—by the footman and the street loafer as well as by the Second Secretary. The modern undemocratic conception removes the question of the Envoy's privileges to the realm of the ideas of a chancery clerk.

Compare the position of an Envoy secure in the quasi-sacred character, which has been found by ages of experience in classical, mediæval and modern times to be essential to his untrammelled activity, with that of a minister liable at every turn to create an "incident" by his acts. The Greeks, when they threw the Persian Envoys to their death, knew that this was a flagrant departure from the Law of Nations, and by their act proclaimed that their hostilities with the Persian were irremediable and eternal. The Japanese intimated the same, when two thousand years later they killed the emissaries of Genghis Khan. In each case it was war to the knife: the invader openly threatened subjugation, and thereby put himself and his envoys outside the Law. Apart from such startling occurrences, in which the extraordinary sacredness of an Ambassador's position was used to demonstrate the extraordinary impiety of his master's acts, the Envoy has always enjoyed an absolute immunity, which is only, and scarcely, forfeited in the most dire cases of necessity. If the modern Envoy has to consider at every moment whether he or his staff

may not be inviting the attentions of the local police and process-servers, it should be obvious that his position is radically changed. He needs for the fit performance of his work, not only immunity but the easy consciousness that his immunity cannot be challenged.

As Mr. Deák observes (R.D.I. (1928), p. 561)—"Le procés et les poursuites instituées pour ces actes *privés* peuvent contrarier les fonctions *officielles* de l'agent."

Again, if a large staff of secretaries is maintained by a given Mission, will any one argue that the juniors have no diplomatic privileges, because they are totally unnecessary?

It is a minor consideration, that the prestige of a sovereign is lowered by the spectacle of his chosen representative being subjected to civil or criminal proceedings in the country which has entertained him as such. But it is possible to make too light of this consideration. The authors who insist on looking at the matter in a severely practical light, and to make the strict necessities of his work the limit of an Envoy's immunities, seem to go too far in ignoring this aspect of the case. The Ambassador of the King of Italy is not only in London to do the business of Italy, but, whether we like it or not, he embodies in the popular mind the dignity of the Kingdom: and its dignity is not measured by its business.

2. Customs, Rates and Taxes.—It is to be regretted that so much confusion attends the comparatively small topic of an Envoy's exemption from taxation. The theory and practice of the United Kingdom are particularly strict in this matter; some states, on the other hand, are very liberal; while a third group act on principles of reciprocity. But if we adhere to our Canon of Simplicity, it will be at once apparent that in principle the liberal policy is the correct one. If the envoy and his staff are to be treated as if they were not in the country, the free import of articles for their own

consumption ought logically to be permitted, and they ought to be exempt from all general and local levies which are not in the nature of payment for services rendered or for goods supplied. Regarding the question of Customs, no more frequent immunity is enjoyed, and none more greatly abused. Not only is it obviously possible for a subordinate diplomat, in some countries, to obtain free imports for his friends, or even, perhaps, for sale; but other less innocent activities may be covered by the exemption of his imports from surveillance. It is easy, therefore, to understand that nations should be anxious to put a stop to the possibility of such mal-practices, which, as a matter of history, were rife in bygone days. On the whole, however, there is no need to derogate from the clear simplicity of the rule of ex-territoriality. Diplomacy, the premier profession of the world, doubtless has its black sheep. But diplomats are few; their imports are readily known and checked: any marked increase is immediately noted, and investigation and explanations will naturally follow. There will always be a small leakage; but there is no reason to suppose that it would ever be serious. Diplomatists are continually changing their posts: it would be as difficult as dangerous for them to establish an illicit trade. In any case, the question of imports can, and probably should, always be made the subject of special agreement. A state is not bound to receive envoys, and it may well make their reception conditional.

With regard to taxes and local dues (styled in England "rates"), the same principle should prevail, of putting the Envoy and Staff in the same situation as if they had remained at home. No doubt they receive benefits from the various general organs of administration maintained by the country—but these are not maintained for their benefit; and as the streets would have to be swept and the police paid, whether the Mission was there or not, there is no obligation on its members to pay general or local taxes. For water supplied, or

electric power consumed, or letters carried, or telegrams transmitted, there is no reason why the Mission should not pay. The rights of envoys to telegraph in cipher has sometimes been specially stipulated : it is not sufficiently recognized that an envoy has not, as such, any right to use the public post or telegraphs at all. Nor have other aliens.

3. The Staff and its Privileges.—Diplomats, as has just been remarked, are few. The curious point has sometimes been raised of whether there is any limit to the size of an Envoy's staff. The opinion has been offered by Pradier-Fodéré, that quite a moderate limit exists, and that a state may properly object to an overgrown staff, perhaps on the ground that its creation amounts to the securing of diplomatic privileges for persons engaged in other than diplomatic activities.

The precedence *inter se* of diplomats other than heads of missions appears never to have been the subject of formal correspondence or regulation. The most difficult question concerns the position of naval and military attachés. The appointment of naval and military attachés seems to be comparatively recent : in the British House of Commons in 1861, Viscount Palmerston made a statement regarding the position of such officers, evidently as though it were a novelty. Questioned as to their position relatively to the Ambassador's principal civil assistant, the Foreign Minister, somewhat airily, remarked that it might be left to their own good sense not to claim precedence over the regular First Secretary. On the nebulous theory that they are in some way independently accredited to the Sovereign as the personal representatives of their own Sovereign in his or her quality of Supreme Head of the Forces of the Crown, there has sometimes been advanced for these military and naval representatives a tentative claim to independent precedence, which seems no more admissible than a claim by the Chaplain to independent precedence as representing the Head of his Church. According to

the present British regulations the naval and military attachés rank next after the principal Civil Secretary, and, if of general or fleet rank, they precede him. Why the appointment of such officers should ever have been tolerated is somewhat difficult to understand.

The civil attachés are, on the other hand, very junior officers. Recently, however, the passion of all nations for trade [1] has eventuated in the institution of "commercial attachés," whose rank varies from an approximation to that of military and naval attachés to a quite subordinate status. The chief officer of a mission is the First Secretary, now usually dignified in Embassies and in some Legations with the picturesque title of "Councillor." The history of this innovation will be found in a paper by the present writer in Vol. XV of the Grotius Society's Transactions. It hinges on the Teutonic affection for the title of "Rath." The designation spread from the Austrian and Prussian Embassies to those of Russia, then to those of France (where it was introduced, dropped, and again reintroduced), and of the United Kingdom. Last of all, the United States succumbed, and the bitter wail of Mr. Hitchcock, their Envoy in St. Petersburg, who complained that his First Secretary was nothing thought of in that he was not called "Rath," was at last heard, though too late for his own personal solace.[2] The title is, however, a title merely: and as between the different missions in the same capital, the senior civil officer will not be deprived of his seniority because he is styled First Secretary and not Councillor.[3]

The question of the precedence *inter se* of the junior members of different missions is a matter usually regulated by the protocol of the Capital of the Power to

[1] "I am every day," says Lord Malmesbury (*Diaries & Corr.* ii. 166), "confirmed in my opinion that *Trade narrows the mind*, and that a nation which is *nothing but commercial* must end like this, in becoming despicable, enervated and woe-begone." Malmesbury to Carmarthen, 8 Nov. 1785.

[2] See Moo. Int. L.D., iv. 436.

[3] *Ibid.* See Hitchcock to Sherman, 30 Apr. 1898. For. Rel. U.S. (1898), 581.

which they are accredited. The Treaties of Vienna (1814) and of Aix-la-Chapelle (1818), which regulated the precedence of Envoys, are silent in this respect. The general practice seems to be to accord the personnel of the various Missions precedence varying with that of their respective chiefs, and depending, therefore, not on the length of their own residence but on that of the latter. The staffs of Ministers Plenipotentiary will naturally come after those of Ambassadors, and precede those of Ministers Resident (a small and diminishing category): while those of Chargés d'affaires will come last of all. A curious difficulty is, however, created by the possible existence of "interim" chargés d'affaires. When an Ambassador or Minister quits his post temporarily, whilst remaining accredited, he almost invariably appoints a Chargé d'affaires to carry on the business of the mission in his absence. It seems beyond doubt that such an "interim" chargé d'affaires is a "Chargé d'affaires," however temporary his appointment—and if so, he comes into the Fourth Class of public ministers according to the enumeration of the Treaty of Aix-la-Chapelle.[1] As that Treaty makes no distinctions between chargés d'affaires according to the permanent or interim character of their appointment, it would seem as though the interim chargés d'affaires of embassies and legations ought to rank indiscriminately *inter se* according to the dates of the intimation of their appointment to the Minister of Foreign Affairs to whom they are accredited, along with the permanent Chargés d'affaires of Powers whose missions are normally headed by such officers. This is not, however, invariably the practice. Interim chargés d'affaires are sometimes regarded as not being within the intention of the Fourth Class of the Treaty of Aix-la-Chapelle, and are placed after all permanent Chargés d'affaires.[2] And, among

[1] The Treaty is of course not binding except as between a comparatively few Powers.

[2] So in Imperial Russia: see Satow, *Diplomatic Practice*, i. p. 346; where is noted an interesting case of an Austrian chargé d'affaires

themselves, those who are carrying on *ad interim* the functions of Ministers are sometimes postponed to those who are carrying on *ad interim* the function of Ambassadors. The only foundation for such precedence is to suppose that interim chargés d'affaires are not really chargés d'affaires at all—and that the Treaty of Aix was thinking solely of permanent chargés d'affaires appointed directly by the Foreign Minister and not indirectly through an accredited Minister or Ambassador.

Sometimes a "Councillor" or First Secretary is invested with the character of Minister. To give him the precedence of a Minister, however (except, of course, at home, where his sovereign can do anything), he must, it is conceived, be duly accredited to the Sovereign. If not, his appointment as interim Chargé d'affaires cannot confer on him any precedence over the Chargés d'affaires, interim or permanent, of other Powers. His precedence is derived solely from his functions, and not from the rank with which his own Sovereign sees fit to invest him —unless that rank should be very exalted indeed.[1] Even a Prince of the Empire, like Prince Henry of Reuss, employed in diplomacy as a Secretary, took his due diplomatic precedence, and an officer who is accorded the style of a Minister, without being actually accredited as such,[2] has no title to precede senior heads of missions who are not Ministers.[3]

ad interim who had arrived earlier who challenged the precedence of a French chargé d'affaires *en titre*; the matter was settled amicably by their walking arm-in-arm.

[1] Granville (*Life* by Fitzmaurice i. 210), when special Ambassador at St. Petersburg, notes that a Prince of Hesse claimed to take precedence of him at a private dinner. Granville's opinion was that the Prince had no real right to do so, but he tactfully told the hostess that he "hoped in any case she would treat himself as a friend."

[2] Note the extraordinary powers with which Mr. House was, in October, 1927, furnished by President Wilson. Seymour, *The Intimate Papers of Colonel House*, iii. 210. It must be a curious question what was the legal effect of this instrument, which was addressed,

[3] Of course, no treaty is necessary before two countries can exchange Envoys. The American Minister at Madrid, Carmichael, spoke of his "fourteen years' residence at a Court with which we had no treaty." ("The Mission of W. Carmichael to Spain" (A.J.I.L., 1928, p. 923)).

The usage seems to be spreading of regarding the Mission as a kind of corporation. Correspondence is occasionally carried on in its name, and embassies are established without Ambassadors. It is conceived that this is an innovation, and one which demands careful scrutiny. The essence of an embassy is the Ambassador, and the essence of a legation is the Minister or Chargé d'Affaires. He alone has credentials: the staff of the Mission are simply his assistants—and to speak of the Embassy or Legation as an entity apart from him is surely to introduce an element of confusion which may be productive of unexpected embarrassments. In the same way, the Ministry of Foreign Affairs is the Minister: he alone is responsible, and he alone has authority. To veil this fact by allowing subordinates to write in the name of the Ministry as a collective unit, and not in their own names by direction of the Minister, seems scarcely a commendable practice, though it is apparently an increasing one.

4. Rank.[1]—There is a perceptible movement in favour of the abolition of all distinction between public ministers abroad. The four classes recognized by the Treaty of Aix-la-Chapelle—Ambassador, Minister Plenipotentiary, Minister Resident, and Chargé d'Affaires—derive their origin mainly from the desire of states to avoid the supposed heavy expenses attendant on the position of an Ambassador. "Ministers" began, therefore, to be sent who were not supposed to represent their Sovereign

not to the Heads of States, but to "the Prime Ministers of Great Britain, France and Italy." It ran as though addressed to a commercial firm: "Gentlemen, I have taken the liberty of commissioning my friend, Mr. Edward M. House, the bearer of this letter, to represent me in the general conference presently to be held by the Governments associated in war with the Central Powers, and in any other conferences he may be invited, and thinks it best, to take part in for the purpose of contributing what he can to the clarification of common counsel, the concerting of the best possible plans of action, and the establishment of the most effective methods of co-operation. I bespeak for him your generous consideration . . . . " Probably in constitutional and international law the letter had no effect at all, and it was, in fact, never presented.

[1] Satow, *Diplomatic Practice*, is a mine of information on all subjects relating to Envoys. Pradier-Fodéré is also very full and complete.

personally, but only for the purposes of negotiation and business. As their consequence increased, so did their expenses, so that the class of "Ministers Resident," who were supposed to observe rather than to negotiate, appeared, to sustain the tradition of economy. The Chargé d'Affaires already existed, but as he is only accredited to the Foreign Minister, and not to the Sovereign, there were practical conveniences in appointing a Minister Resident. That class of Minister, however, is rapidly disappearing with the disappearance of the old advantages which attached to the fact of being accredited to a crowned head: and the distinction between Ambassadors and Ministers Plenipotentiary is also becoming trivial. It is incorrect to say that only the "Great Powers" send and receive Ambassadors; it is very frequent for secondary Powers to exchange Ambassadors with countries which are in a specially important situation relatively to them. Thus Portugal exchanges Ambassadors with the United Kingdom, and the Argentine Republic with the United States. A Minister in an important post, moreover, may be actually a more influential and regarded personality than an Ambassador. A minor court is often the focus of affairs. For instance, in the period immediately preceding the French Revolution (1784), the post of British Envoy at The Hague was one of the first importance, although Holland in itself was a secondary Power. It was not desired by the British government to convert its Legation into an Embassy, and yet it was most important that a diplomatist of the ripest experience should temporarily be maintained there. But how could an ex-Minister to Russia be asked to proceed to Holland as a Minister? The difficulty was solved, after a fashion, by appointing Lord Malmesbury to be Minister "with the salary, and emoluments of an Ambassador," until the States-General should send an Ambassador to England.[1] Malmesbury thought that it would have been much

[1] Malmesbury, *Diaries and Corr.* ii. 73.

better to waive the point of etiquette (that Holland did not send an Ambassador to Britain), when he could have carried on negotiations "with the same force as the French," who maintained an Ambassador. But the King would not give up the etiquette, though Lord Carmarthen agreed with Malmesbury. It was not until 1788[1] that the latter was appointed Ambassador. Meanwhile, it may be noted that although he had the salary and emoluments of an Ambassador, he had not that rank. But in 1823, in somewhat similar circumstances, the Earl of Granville (then Viscount) was sent to The Hague (so Lord Fitzmaurice, his son's biographer says)[2] as "Minister to The Hague with the rank of Ambassador."[3] This seems to be a contradiction in terms—either Lord Granville was an Ambassador, or he was not. If he was not, he could not be invested with the status of an Ambassador by the expression of a wish that he should have it.

No such anomaly in fact occurred. All that Lord Fitzmaurice means is that Granville was formally appointed Ambassador to The Hague, but in such a way as to differ in no other respect from the Minister usually there maintained—presumably in salary and allowances. For[4] already on 14 Nov. 1823, a notice in the *Gazette*, stated that the King had been pleased to appoint him to be his Majesty's Ambassador Extraordinary and Plenipotentiary to H.M. the King of the Netherlands, though his credentials were not forwarded until 21 February, 1824.

When, on the death of Charles XII of Sweden, relations between the British and Swedish courts were resumed by the despatch of Lord Carteret to Queen Ulrica, he was instructed to negotiate at first as Minister Plenipotentiary, in which character he had credentials.

[1] Malmesbury, *Diaries and Corr.* ii., p. 416 (14 Mch.).
[2] *Life of Second Earl Granville*, i. 4.
[3] He had been Ambassador to Russia fifteen years before; and was transferred to Paris in 1824.
[4] Fitzmaurice, *cop. cit.* i. 3.

At a suitable moment he was to produce those accrediting him as Ambassador.[1]

5. Diplomatic Immunities.—Difficulties are sometimes created by the fact that the privileges and immunities of all persons connected with the mission are not identical. The Head of the Mission, together with his family, secretaries and attachés, enjoys them in the most complete degree. There is really little or no distinction to be drawn between them, although the British practice has at times been to accord the Chief a more complete exemption from Customs control. As to couriers and messengers, Mr. Fish, when Secretary of State in America cited and adopted the statement of Calvo,[2] that—"Les immunités dont jouissent les ministres publics s'étendent aux messagers, aux courriers de cabinet, aux porteurs de dépêches officielles, et généralement à toutes les personnes remplissant une mission quelconque pour le compte d'un ambassadeur" [scil. "*envoyé*"]. This seems to express the law.

The menials, on the other hand, enjoy no exemption whatever, except in so far as their presence in the Envoy's residence incidentally protects them, and in so far as courtesy to the Envoy dictates their being unmolested. But there is a penumbra of officials with regard to whom the matter is not so simple. The doctor, the private secretary, the chaplain, the tutor and the governess are examples of these. Apparently, if they are paid by the State, or if the appointment is honorary, such personages participate in the immunities of the Mission: it probably is otherwise if they are paid by the diplomat out of his private purse.

6. Remedies against Envoys and their Staffs.—The ex-territoriality of the Envoy and his staff does not extend to enabling them to disturb the peace and safety of the neighbourhood. There are three remedies which may in such a case be resorted to:

[1] D. F. Chance, *Dip. Corr.*, Vol. i. (Sweden), p. 112.

[2] For which see now Vol. III. (*Digest International*), p. 829, 2 para. 1537.

1. Formal application may be made for the recall of the diplomat: or he may be required to quit the country: or in extreme cases summarily and forcibly expelled.
2. Retorsion or Reprisals may be adopted.
3. The diplomat's conduct may be resisted by public or private force.

Each of these requires a word or two of comment. To require a diplomat to quit the country has not infrequently been adopted as a means of evincing dissatisfaction: in particular the government of the United States of America has been prompt to take this line in cases where most countries would have been content with less drastic action. It cannot be termed illegal. In two or three cases, however—that of Count Gyllenborg in London is the standard example—the Envoy has been arrested and imprisoned, and his cabinet rifled.[1] The present writer does not think that it is to push personal prepossessions too far to declare that these sporadic cases were simply illegalities. Diplomatic intercourse could not go on if they were repeatedly committed. It is doubtless a temptation, when all that is wanting to complete a case against an Envoy is formal proof, to seize his person and to search his archives. But it is a temptation that ought to be resisted. As culpable is it to violate his correspondence. It is a crime against international intercourse and good faith. If an Envoy is suspected, he ought to be dismissed.

To the stock cases of detention of an Ambassador (a fortunately obsolete abuse) we may add those of Phelippeaux, French Ambassador to Savoy in 1708, and Alopæus, Russian Ambassador to Sweden in 1716 (Lafargue, *Les Rèprèsailles*, 81). For a case of expulsion, see 24 S.P. 1377 (Portuguese Minister from Sardinia).

Again, Rasumoffski, the Minister of Russia in Sweden, was expelled by Gustavus III in 1788, for addressing a

[1] The case of Mr. Jackson in Stockholm can be explained as an act of retorsion, if scarcely justified as such.

note to "the king and all those of the nation who are associated in the government." This was highly offensive, because it suggested the invalidity of the recent *coup d'état* by which the king of Sweden did away with the paralysing incumbrances on the royal power. Rasumoffski delayed his departure from the 18th June to the 11th August.

Retorsion and Reprisals are very appropriate methods of securing satisfaction. Of Reprisals we shall speak further in the sequel. Retorsion consists in imitating the conduct which is complained of. If an envoy is unreasonably or discourteously dismissed, the dismissal of the envoy of the delinquent country furnishes a ready means of retorsion. The refusal of due privileges to an envoy may be met by a like refusal. If the retorsion is not strictly on the same plane as the act complained of it is really a case of reprisals.

The third remedy, that of Self-help, has been the subject of curiously little investigation. Diplomatists are, as we said, few: they belong to a law-abiding class, and they are constitutionally circumspect. The principal difficulty in this connection is caused by the fact that an Envoy does not carry his character stamped on his person. Mistakes may readily be made by zealous or meticulous constables and guardians of the peace—and if they are honest and reasonable mistakes, all that can be expected is a cordial expression of regret that they should have occurred. It cannot be supposed that every metropolitan policeman should be well acquainted with the appearance of all the personnel of the *corps diplomatique*. Circumstances may, however, make the mistake less reasonable, and in such cases apology and further action may be called for.[1] The dignity of an Envoy is such, that all appearance of derogation from it must be the subject of keen regret. No doubt an affront to the

[1] So long ago as 1338, the Spanish Envoy, Juan Gomez, was mistakenly seized by an English freebooter, the *Marjory* of Southampton and liberated by special writ of the English King. (Rymer, *Foedera*, 4 Jan. 1888).

person of an Envoy is a more serious matter than an affront to the dignity of his subordinates. An Envoy, however, who is interfered with, will be well advised to refrain from entering into physical conflicts, except in sheer self-defence of his person and property. They can only weaken his position and impair his dignity.

Setting aside questions of mistake, if the Envoy's person is known, there can be next to no excuse for interference with him on the part of private individuals or public authorities. It would be a mistake to hold that he is bound to obey the laws of the country in which he finds himself. Certainly, in the privacy of his own residence, he is free to disregard it entirely:[1] and, when he or his staff quit their residence, it follows from the principle of ex-territoriality that they should be as far as possible exempt from its provisions. This does not, however, make any of them a chartered libertine. It is certain that the Envoy and his staff must respect private rights of person and tangible property, as ascertained by the local law: and that if they attempt to violate them, they can be forcibly resisted by private and public force. It seems fairly well established, further, that they must refrain from disturbing the public peace and safety. A nation, in consenting to receive an Envoy, does not expect to receive a volcano. An attaché ought not to exceed the speed limit for pleasure, and if he does, though it would be improper to take him into custody, his conduct might well be the subject of a request for his removal. He ought not to wander about in the streets intoxicated, or noisily throwing crackers; and if he does, it would not be too much if he were to be politely escorted to the Legation. But in all such cases, and *à fortiori* in graver ones, there can be no assumption over a diplomat of penal jurisdiction. The minimum force that is necessary for the protection of persons and

[1] This has long been established with regard to the exercise of religion. The Envoy is free to do as he likes in private, but he is not to obtrude his religion on the public.

tangible property is all that can be exerted. If an Envoy, in a country which prohibited smoking, were to smoke a cigar in public, it might be bad taste, but it could scarcely be a fair subject of complaint; still less of forcible interference. Those more ideal rights which are differently regarded in different countries—rights to reputation, to the society of consorts and children, to monopolies, literary and industrial, to free passage on the public ways, to respect for religious, political and social susceptibilities—are more difficult to deal with. The whole question of the limits of self-defence is one of the most difficult to settle satisfactorily, even in municipal law. The gross physical fact of invasion of the person by assault, or invasion of tangible property by trespass, is everywhere considered to excuse more or less violence in retort. But, when we pass beyond that, we are on very dubious ground. Take, for example, the violation of religious susceptibilities. Laughing in loud ridicule of a religious procession might anger a populace and provoke violence far more than obstreperous pushing through a crowd might do. Can an Envoy be forcibly restrained from the former, as it seems obvious he can from the latter? The good sense of diplomatists deprives us of any serviceable examples. We have to go back to the year, when, as is recorded in the Diplomatic Correspondence of the United States, the American Minister to Brazil was ordered by a policeman to dismount from his horse, on the approach of the carriage of the Empress (at a period when the Imperial Family exacted a kind of Byzantine homage). The constable certainly did not attempt to pull the Envoy off his horse—but the Minister complained officially of the order, which was persisted in after he had explained who he was. There have probably been not a few cases in which an Envoy's baggage has been attempted to be overhauled at the Customs, and still more cases in which such incidents have happened with regard to subordinate members of missions, but they do not seem to have

been immortalized in print. Sir A. Hardinge touches on one such case in *A Diplomatist in Europe*,[1] in which he remarks that Baron Desmichels, the French Ambassador—"a somewhat imperious personage"—had a scene with the frontier authorities at Irun, in Spain, about 1883.

With regard to the position of diplomatists when passing through third countries, simplicity dictates that they shall either enjoy full diplomatic privileges or none. And since no one supposes that they enjoy the former—and since, moreover, it is not in practice optional to accept or refuse such transient meteors—the existing practice is clearly right, according to which they are entitled to nothing more than the courtesy which would naturally be shown to any visiting high official. In their own country, of course, Envoys enjoy as high or as low rank as the sovereign chooses to confer on them. It is quite a modern innovation, deriving probably from French practice, to style a gentleman "Ambassador" or "Minister Plenipotentiary," when he is not, as a matter of fact, accredited to anybody, or endowed with any powers, plenipotentiary or other, but is vegetating peacefully in the country, or in the Foreign Office. An "Ambassador" is an ambassador to somebody: a "Minister" is a minister at some seat of government. To use the title to denote that a person occupies a particular rank in the hierarchy of the diplomatic service is to obscure the true nature, and to lessen the true dignity, of the position.

Before passing from the subject of elegance of nomenclature, the harsh translation of "près" by "near" may be noted. "Près" can literally mean "near"; but as we never do in fact speak in common English of an ambassador "near" the Queen of Holland, or of a Minister "near" the government of the Bolivian Republic, the ridiculous mental picture called up by the quaint translation suggests a diplomatist in difficulties

[1] p. 49.

endeavouring to negotiate with some one to whom he is "near," but not quite near enough! The real English phrase is "at the court of," or "at the seat of Government of," the sovereign or state.

7. Special Agents.—As diplomatic officers are divided by the Règlement of Aix-la-Chapelle into four classes, it would be a stultification of that instrument if fresh classes could be introduced. There seems to be no doubt, therefore, that, if an agent is appointed to conduct affairs with a foreign government, the precise name given to him does not matter. It seems to be questioned whether, in order to confer on him the diplomatic character, it is not essential that he should be "accredited," that is, that the foreign Power should be invited to give credit to his statements, and thus that he should be put in a position to engage, at any rate within limits, the responsibility of his government. An agent who is despatched with the title of Envoy or Minister, merely to collect information, and who is recommended to the good offices of the rulers of the country visited, but who is not in terms "accredited," may possibly be entitled only to a courteous and complimentary reception. The better opinion is, however, that if a personage is furnished with letters naming him as sent in the quality of an Ambassador, Minister or even Agent, or Chargé d'Affaires, he ought to be received as a diplomat. It is believed not to be usual to add a "credit" clause to the credentials issued on the occasion of complimentary missions, which seems to show that it is not essential to the diplomatic character. It would be an entire mistake, however, to suppose that a Treaty between the two countries concerned, or any previous communication whatever, is a necessary preliminary, to the despatch of an Embassy or Legation. In fact, the very purpose of an Envoy's mission may be to negotiate a treaty. And although, when diplomatic relations have once been put on a secure footing, it is the invariable practice of nations to obtain preliminary approval of

the person whom they propose should be received by another as an Envoy, there is no reason why this should be observed on the occasion of a first mission. Naturally, if it is headed by an objectionable personage, the country in which it arrives may refuse to receive it. But, as intercourse between the two nations theoretically begins from the moment of diplomatic approach, it seems illogical to suppose that even unofficial intercourse respecting the acceptability of an Envoy can take place at an earlier date.

A good deal of attention has been devoted lately to the position of special agents who are sent abroad for various purposes, not usually diplomatic. These may be classified as follows :—

1. Plenipotentiaries to International Congresses and Conferences.
2. International Arbitrators, and persons in a similar situation, *e.g.*, Boundary Commissioners.
3. Judges of the International Court of Arbitration.
4. Judges of the Court of International Justice.
5. Officials of the *Société des Nations*.
6. Officials of the various International administrative agencies, such as the Universal Postal Union.

The privileges of some of these agents are enumerated by Treaty—but unfortunately not always in precise terms. In particular, the status of the officials of the *Société des Nations*, in Switzerland, in their own countries, and in other countries, has been the subject of acute controversy. The status of Plenipotentiaries to International Congresses is universally admitted to be the same as that of Ambassadors and Ministers : considerable difficulty is, however, occasioned as regards the relations of a Special Plenipotentiary to the permanent Ambassador of the same Power. The former will often be the more important personality, but his credentials are not to the local sovereign, but to the Congress. Tact is the only remedy for the situation.

It seems unnecessary to allow the immunities of diplomacy to those agents who are stationed abroad simply to carry out the provisions of multilateral treaties establishing communications, ports and sanitation. And it would appear desirable to lean against any sweeping conferment of diplomatic privilege on the clerical staff of the *Société des Nations*, even in Switzerland.

8. Consuls.—With regard to Consuls, the tendency of the moment is to abolish the distinction between the diplomatic and consular careers. The increasing preoccupation of nations with matters of trade is largely responsible for this. The stimulation and investigation of trade was the grand function of consuls—and now that it has become a matter of direct interest to embassies and legations, the diplomatic and consular spheres have tended to coalesce. This tendency has been accelerated by the practice of some states to make their diplomatic and consular officers a single service, and to eliminate as far as possible the consul who is primarily a private individual, and who has not made the service of the Foreign Office his career. In this case, the consular service is practically a branch of the diplomatic service, and the inclination of such states is naturally to assimilate their position and privileges to those of the diplomat, and simultaneously to exhibit some willingness to diminish diplomatic privileges. That tendency is strengthened by the fact that in countries of a remote civilization, and particularly in those where a system of extra-territoriality prevailed, the position of a consul did really to some extent approximate to that of a diplomatic officer. As long, however, as the sharp separation between the two services continues in some countries, it is impossible that these tendencies should have any practical result. Perhaps it may be permissible to regret the prospect of assimilation. Variety is always commendable. The few highly privileged diplomatists dealing with matters of politics, and the

comparatively unprivileged[1] consuls dealing mainly with commerce, and drawing fresh vigour by recruitment from the ranks of practical business men, constitute a reciprocating engine which is in many ways ideal. It is certain that consuls "*de carrière*" have no title to precedence over the so-called "trading" consuls. If a person is worthy of a sovereign's confidence as a consul, that confidence is entitled to respect on all hands. Aurelian made his horse a consul, and we would not go so far as to say that international respect need be accorded to a horse: but there is certainly no rule which puts consuls who are exclusively engaged in the service of their own government in any privileged position. Dr. Ignaz Brüll was long the Consul-General of the United Kingdom at Pesth: he was (it is believed) a Hungarian, and not a British subject, nor does it appear that he had gone through successive stages in the consular career. Nothing, in fact, is more common, in the British service than for a consulate to be conferred on a literary man or on a political supporter. Charles Lever was at one time Consul at Trieste. The distinction attempted to be drawn is therefore not between the paid and the unpaid consul, nor between the subject and the alien consul, nor exactly between the consul who has passed or is passing through the various grades of the consular career and the consul who is taken from the outside. No one could have contested that Lever, devoting his whole time to his duties and in receipt of a handsome salary, was a regular consul "*de carrière*," though he expected no promotion and had served no apprenticeship. The attempted distinction being thus uncertain and ambiguous, the only safe course is to make no difference between consular officers, and to accept the sovereign's commission as sufficient to entitle any such officer to all the compliments and precedence due to his rank.

[1] Cf. *People of N. York v. Savitsh* (1921, N.Y. Gen. Sess.), 116 Misc. 531, cited *Yale Law Journal* (1922), 563.

In the case of any consular officer whatever, nevertheless, Webster's words are true [1]—" The rights of the Spanish consul, a public officer residing here under the protection of the United States government, are quite different from those of the Spanish subjects who have come into the country to mingle with our citizens, and here to pursue their private business and objects. The former may claim special indemnity; the latter are entitled to such protection as is afforded to our own subjects."

The leading privilege of consuls is the inviolability of their official archives, and their exemption from public duties which might interfere with the due performance of their functions. They may not be required to serve on juries, but, provided that it does not interfere with their official duties, and that the case does not touch upon their official knowledge, they are not exempt from giving evidence before the Courts (except, of course, by treaty). The best and clearest authoritative exposition of this rule is to be found in Mr. Hay's note to the American Minister to Nicaragua of 27 April, 1899.[2]

§ 2. Exterritoriality of Foreign Sovereigns and Heads of States

The common impression that the Head of a republican state is not entitled abroad to the same privileges, immunities and honours as the King of a monarchy, rests on a profound misconception. It is fancied that in the case of a monarchy the King or other ruler is sovereign, whilst in a republic it is the people who are sovereign. As we have seen above, the idea that a people is or can be sovereign is an absurdity—the very idea of sovereignty rests on the hypothesis that in any organized community some are sovereign *superani* and above others. That the monarch is complimentarily

[1] *Works*, vi. 511.

[2] See Moo. Int. L.D. v. 85, § 714, and For. Rel. U.S. (1899), 566–8.

styled "sovereign," whilst the head of a republican state is not, should not obscure the fact that their position is identical—each is the Head of the state, however he came to be so, and whether (as in the France of Louis XIV) he transcends the state or not. Each is logically entitled to equal honours and immunities abroad. When the headship of the state is in joint hands, as in ancient Sparta, and perhaps in modern Moscow and mediæval Venice, it is generally possible to find a "King archon" on whom the honours of the headship are concentrated. It is believed that on various occasions of the visit of South and Central American Presidents to Europe, the honours which would have been paid to royal personages have sometimes been dispensed with. This is comparable to the practice of royal personages travelling *incogniti* to save expense and trouble: but it cannot affect the fact that, as heads of their respective states, these personages could not have been subjected to the law of the different countries which they visited.

§ 3. Exterritoriality of Foreign Armies

The exterritoriality of foreign armies on the soil of a country is now usually a matter of elaborate regulation. We need scarcely do more than mention the cases of the British Corps in France and Belgium. Without such agreements, their position is, however, assimilated in a large measure to that of an army of occupation. It is an exceedingly difficult and thorny subject. In order to deal with it, we must first assume that the alien forces are in the country with the consent, if not at the invitation, of the local power. Otherwise the case becomes one of Occupation. It may be laid down that by the admission of such a force the local power intends to invest it with all the immunities necessary for its maintenance and discipline. The local authorities have, therefore, no right to interfere with its members, while actually within its lines, but the rights of the army to interfere

with the local population, and the rights of the latter to defend themselves against its unauthorized acts, are exceedingly obscure, and it is always better to define them by agreement. The instances afforded by the presence of Austrian troops in the Italian States, which were virtually under Austrian protection in the earlier part of the nineteenth century, afford some light on the complicated problem. In particular, the ineffectual disavowal by the Grand Duke of Tuscany of responsibility for the acts of Austrian troops in Florence is of importance. In the upshot, the representations of Great Britain prevailed, and damages were offered to a British subject injured by an Austrian officer.[1]

§ 4. Merchant Ships as Territory

"That the vessels of a Nation are considered a part of its Territory (with the exception of the belligerent right only), is a principle too well established to be brought into discussion," wrote Monroe to the Plenipotentiaries of the United States of America in 1814.[2]

Little or no difficulty arises in the case of men-of-war which come within the territorial waters of a state: and it seems to be generally admitted that it is not the fact of their armament, but that of their ownership and commission, which makes it everywhere recognized that they ought to be free from all local forcible interference, unless in the last resort it should become necessary to expel them. That they, in their turn, ought to conform to the reasonable regulations laid down for the use of territorial waters, and to the regulations, reasonable or not, laid down for the use of harbours and ports, is equally generally admitted, and a breach of this obligation may involve the responsibility of their state. Some difficulty is occasioned by the existence of state-

[1] 60 S.P. 1186: cf. the author's *International Law*, 125.

[2] Monroe to Plenipotentiaries, 5 April, 1814, 1 Brit. St. Papers (part 2), 1558.

owned, or state-operated, vessels which are not fighting ships, but there is no reason why exemption should not be accorded to all vessels under direct state management and control, whether for purposes of war or not. It is the control, and the consequent direct responsibility, of the state, from which the exemption flows: not the intended use of the vessel. The fact of the commission of its commander ought to be decisive.[1] Whether he is commissioned to fight or to carry coals, he directly serves the sovereign. The attempted distinction, which is sometimes drawn between a fighting seaman and a peaceful seaman, is arbitrary and unsubstantial. Sometimes its propounders are so struck with its unsubstantiality that in despair they make their definition of a fighting officer or ship dependent on his or its inclusion in some official list: but it is obvious that a state can put anybody in any list it likes.

To depart from the simple rule that the public character of a vessel is determined by the fact that she is in the service of the State, and to refer it to her being commanded, and to some undefined extent manned, by persons belonging to a force which is under some special, but undefined, degree of discipline, is obviously unsatisfactory. Such an attempt is only another outcome of that *étatisme*, which sees in an honorary consul an inferior consul, and which is inclined to allow vessels of the regular navy great latitude in dealing with neutral merchantmen and to refuse the power of capturing enemy vessels to private ships. It would introduce ambiguity and friction where none need exist. And it might have unexpected results: a passenger liner commanded and manned by officers and men of a Naval Reserve might easily come within the definition of a man-of-war as a vessel whose ship's company was part of a disciplined fighting force.

[1] See Moore, *Int. D.* II, 562; Borchard *Reply Brief of German Shipowners before War Claims Arbitration*, 1928, p. 7 (a case regarding the mercantile character of a chartered supply ship), where the question is very fully and acutely examined. Cf. also the *Attualita* (238 Fed. Rep. 911): the *Annette* Law, Rep. (1919), p. 105.

In the Courts, authority is setting strongly in the direction of holding the fact of direct State control decisive. After an interval in which it was strongly argued that a ship employed by a nation in trade ought not to enjoy the privileges of a man-of-war, it has now been held in several cases, both in Europe and America, that no such distinction exists, affirming the old doctrine of *The Parlement Belge* [1] to that effect.

Cable-ships, fleet auxiliaries, tank-vessels, light-ships (the list might be indefinitely extended), if nationally controlled, ought to enjoy the immunities of national vessels. That their masters are not included in a particular force called " The Navy " can make no essential difference, except to the born snob. No doubt most countries have a more or less regularly organized Navy, which exists primarily for warlike purposes, and may be under specially smart discipline : but the line between the Navy and other national vessels, though very marked and clear in some countries, may be just as indistinct and uncertain in others. Direct national control is the essential thing.

The really difficult problem is presented by the merchant-ship or the pleasure yacht.

Simplicity requires us to recognize that the adoption of a vessel by any country, evidenced by conceding to it the right to wear its flag as the emblem of its national character, is the sole and sufficient criterion of its nationality.[3] The inveterate English opinion to the contrary, making the ship's national character depend on the nationality of the owners, is motived simply by a prepossession in favour of the capture of private property at sea. If private property, in the shape of a ship, can be shielded by being placed on the register of a neutral state, an important part of the enemy's resources clearly acquires an exemption which it would not other-

[1] A typical one is *Compania Mercantil Argentina* v. *U.S. Shipping Board* (1924), 157 L. T. 299.

[2] L. R. 5 P. D. 197.

[3] See Declaration of London, Art. 57.

wise secure. But there is no rule of International Law which requires that private property shall be exposed to the maximum amount of maritime capture.

Even in English practice, the instances of condemnation of ships duly provided with a neutral flag and pass are far less common and unambiguous than is often supposed. Many are cases of fraudulent transfer,[1] after, or in contemplation of, the outbreak of war. Some are *dicta*, such as those of Lushington, D.C.L., in the *Industrie*[2] and the *Primus*[3], and possibly the *Fortuna*.[4] In the *Susa*[5] there seems to have been nothing of an official character to connect the ship with the neutral. In the *Fortuna*[6] the American character was admittedly assumed only as a disguise. The recent cases of the *Hamborn*[7] and the *Proton*[8] (Dutch and Greek flags respectively) are of course unambiguous and emphatic: and the Board in those cases was astute to evade the adoption (subsisting at the time of capture) by the Crown of Art. 57 of the Declaration of London, holding that it did not amount to a "waiver" of the Crown's rights: an extraordinary opinion: it can scarcely be supposed that their Lordships were unanimous.

We need hardly cite anything to show that the use of the enemy flag and pass is sufficient to condemn.[9]

The exterritoriality of a private merchant-ship, admitted to be such, may be considered under three heads: the ship may be on the high seas, in the territorial waters of a foreign state, or in a foreign river or port.[10] Applying our Canon of Simplicity, we should

[1] See the presumptions contained in the Declaration of London, Arts. 55, 56; and the *Sechs Geschwistern* (1801), 4 C. R. 100.
[2] Spinks, E. & A. R. i. 444.
[3] *Ibid.*, i. 353, ii. 1.
[4] 1 Dods., 87.
[5] 2 C. R. 154.
[6] *Ibid.* 92.
[7] (1919) A. C. 993.
[8] (1918) A. C. 578.
[9] The *Vreede Scholtys* (10 Jan. 1804), 5 C. R. 5 (*n*); the *Diana* (*Hunt*, Master) (1 March, 1806) 5 C. R. Appx. II: the *Vrow Elizabeth*, 5 C. R. 2 (6 Sept. 1803).
[10] As to the technical meaning of "a port" in English law, see "What is a Port?" by the present writer, *apud Law Quarterly Review*, October, 1918. The question is important in prize law, and has a direct

expect to find that in each case the vessel either does or does not possess exterritoriality, and that an uncertain and ambiguous middle state is avoided. So far as the high seas are concerned, this is the accepted fact. A foreign vessel on the high seas is absolutely free from foreign interference, except for the abnormal privileges of belligerents and for the long-established right of controlling pirates. The abnormal belligerent powers of interference with neutrals can only be exercised by duly commissioned vessels, whose commanders are entrusted with that power. Unlike captures from the enemy, they cannot be effected by private individuals. Pirates, however, may be controlled by anybody: the rule permitting them to be apprehended by any one who comes across them, as *hostes humani generis*, was laid down long before the existence of professional navies—and the commander of a merchantman may just as well capture a pirate at sea as a highwayman on shore. Moreover, while the powers of a belligerent may be exercised on suspicion, the power of controlling pirates was shown by Webster, in his famous correspondence with Lord Aberdeen, to be one which is exercised by the party at his own risk. If he turns out to have acted on a mistake, however reasonable, his conduct will have no legal justification. The control of pirates is therefore no derogation from the immunity of a ship at sea: for she must be a pirate before the possibility of foreign control arises.

The essence of piracy in English common law is violent depredation at sea, or from the sea: but this scarcely seems to coincide with the "piracy" of International Law. The purpose of plunder is said in many definitions to be essential, and although possibly other crimes, such as assassination in private revenge, might be counted as piracy, yet it seems clear that the essence

bearing on the question of goods which have been landed, and are on shore. It is conceived that the decision of Evans, P., in *The Roumanian* was wrong. (1915) P. 26, affd. (1916, 1 A. C. 124).

of the idea is, or at least was, that the pirate lives by indiscriminate plunder. Violent acts committed in the absence of all authority or responsibility on the part of any established state have, however, in recent times, been presented as the essential mark of piracy. This is an innovation which our Canon of Certainty warns us to resist. It is certain that the older authorities would not have regarded revolutionary acts as piracy, even when committed against the subjects of other states. The element of a general predatory intention is wanting. The opprobrious epithet of " piracy " is flung about too lightly. The *Alabama*, duly commissioned by an organized, if revolutionary, government, and acting for political aims, was a " pirate " in the eyes of Federal journalists: the *Huascar*, similarly commissioned in Peru, was a " pirate " in those of a British admiral: the technical fact that the commissioning powers were only *de facto* governments was allowed to obscure the truth that these vessels were really nothing like pirates. One is not *hostis humani generis* because one is trying to be free—in spite of Art. X of the Compact of the *Société des Nations*. It is certainly inconvenient and annoying that vessels should exercise belligerent rights over neutral commerce, when no established Power is responsible for their actions. But there are many remedies. The recognition of belligerency may be withdrawn: the established government may be appealed to, to permit measures of self-help and self-protection: the revolutionary government may be unofficially approached with a view to compensation or accommodation: a certain degree of self-help is certainly competent. It is by no means needful to fly to the drastic course of calling men " pirates " whose only offence is that they are in violent conflict with a possibly tyrannical government. It is certainly a very delicate question how far self-help may be permissible in such cases, if exercised without the consent of the established government against which the unauthorized vessel is in revolt.

If the belligerency of the rebels has been recognized, the position is different from what it is in the case of a vessel which has not been led to believe that she can properly exercise the privileges of a belligerent man-of-war. But it does not follow that, because belligerency has not been recognized, indiscriminate measures of self-protection are admissible. There may have been no occasion for formal recognition; and the naval officers of a foreign Power ought not to assume that it could not be conceded in the circumstances. Even if not conceded, the measures of protection ought to be confined to the defensive, and should never, except in cases of atrocity, extend to attacking or apprehending the rebel ship. The action of the *Shah* and the *Amethyst* against the *Huascar* was as indefensible as it was unsuccessful.

The whole matter needs careful consideration. In the Far East the *débâcle* of the Chinese and Russian Empires, and of the moderate republics which arose on their ruins, has led to sporadic cases of operations by vessels which flew the flag of no formally recognized State. Conspicuous among these were those of the fleet of the Eastern Siberian government which was organized for a time at Vladivostock.[1] That was to all intents and purposes a sovereign government, and as much entitled to be so as Esthonia or the Soviet Union. It was never, however, expressly and formally recognized by any State—but it would have been absurd to term its officers "pirates." At the same time, it is impossible to admit that a knot of rebels with little or no prospect of success can interfere with foreign shipping at their sweet will, subject to a responsibility in damages which may never be effective. The correct principle is difficult to discover; but the desire of revolutionaries to keep on good terms with other Powers will generally lead them to exercise sufficient restraint, and so long as they confine themselves

[1] It is said never even to have submitted to the Kerensky republic: but to have continued to the last to fly the colours of the Empire.

to imitating, with strict propriety, the prize captures of a belligerent, they ought not to be interfered with by foreign vessels, except in self-defence. And, if their belligerency has not been recognized, there is no reason why a foreign vessel should not resist visit or capture by such vessels, nor why she should not be actively supported by her own men-of-war, and those of friendly states, in resistance. But it is obviously to go far beyond such self-defence to render attack impossible by capturing or sinking the rebel vessel, merely on account of her previous behaviour, unless it has been marked by circumstances of atrocity. And it is to go a great deal further still to treat her people as pirates—which means the ignominious death of the worst criminal.

It is remarkable that the definitions of piracy vary widely. As the sole important [1] exception in normal times to the immunity of a vessel on the high seas, it is obviously a most important matter. The almost entire absence of attempts on the part of states to interfere with foreign vessels on the ground of piracy indicates that the definition is in reality very narrow. Some authors attach themselves to the absence of any state responsibility—others to the fact of plunder—others to the fact of violence—others to the indiscriminate nature of its exercise. But the true criterion is that which is the subject of so much difficulty in questions of extradition—the political or non-political motive of the acts committed or threatened. The absence of state responsibility is not decisive, for there may be piratical states. The absence of desire for plunder is not decisive: a millionaire who should sail about violently kidnapping or murdering Jews would be a pirate. The absence of discrimination of nationalities

[1] A minor exception occurs in the case of capture on "hot pursuit" of a vessel which is chased from within territorial waters on an accusation of some infringement of law committed therein. There must be a real challenge and pursuit, in such a case: it is obviously not sufficient that the vessel should be sighted and followed on her intended course. See *Fur-Seal Arbitration Proceedings*, Vol. 14 (Amer. Ed.) 74.

is not decisive: if a sea-robber confined his attentions to Italian vessels, because he was better able to deal with them, on account of language or of peculiarities of naval architecture, he would certainly be a pirate still. The real point which causes authors to repeat that a pirate exercises no discrimination between states is that he works for private motives and not for political ends. Usually, a robber does not discriminate between states, simply because he does not work for political ends. If the aim of a commander in interfering with shipping is primarily to effect direct political ends then, whatever he is, he is not a pirate.

A pirate is *hostis humani generis*: and this ancient maxim is still the best key to unlock problems of piracy. Maritime violence there must be—or at least the direct threat of it. But such definitions as "robbery with violence at sea" would make a pirate of the seaman who knocks the cook down to take a photograph from him. Piracy seems to involve the use of the ship as an instrument (including the assumption of control over a ship): it involves violence or the threat of violence: and it involves the absence of a primary political intent. It is generally agreed, as we have seen, that the proceedings of revolutionary vessels are not piracy merely because no recognized state is responsible for them, even though they should affect *quasi* neutrals, and even though no state of belligerency may have formally been proclaimed. They may degenerate into piracy, as was held in the case of the *Eliza Cornish*. Revolutionaries, who do things which even recognized states would not be justified in doing, may incur severe treatment, but, it is submitted, that it is not that of pirates. In the *Eliza Cornish* case, and that of the *Florida*, they killed the masters of two foreign vessels in port and placed the ships in their own service. The right of *angary* might have justified the seizure of the vessels in port, in the case of an established state, and one is not prepared to say that, if done, as it was,

with a political motive, it could constitute piracy. But it may be doubted whether the right of *angary* can be enforced by the slaughter of recalcitrant masters—and it is on the footing that it cannot that the treatment of the *Eliza Cornish* in the English Courts must be justified. It was a strong case, and the present writer can hardly think that the British and United States would have been justified in asserting the ship to be piratical: though undoubtedly the drastic steps which those states took in the nature of self-help could be justified on other grounds, namely, the desirability of recovering their vessels from the possession of persons who had no title to them, and had seized them in circumstances of slaughter which no civilized nation would have perpetrated. The case is, nevertheless, on the line:[1] it probably gave the impetus to the British attempt to capture the insurrectionary Peruvian *Huascar* as a "pirate." This vessel had merely taken coal out of British ships, as contraband, without any circumstances of atrocity—and the action of the *Shah* and *Amethyst* seems plainly to have been the indiscretion of an admiral. The Eastern Siberian provisional government, which succeeded the fall of the Czars, possessed men-of-war which continued to fly the Imperial flag, and whose status was sometimes regarded as questionable. No one attempted to treat them as pirates.

The constant local quarrels, largely dynastic, which characterized the nineteenth-century politics of the Malay peninsula, brought about an amount of interference with foreign commerce[2] which the scandalized (and smarting) Singapore merchants stigmatized as "piracy." They were driven to distinguish common plundering piracy by the odd style of "*bonâ fide* piracy."

[1] It must be remembered that the sole question before Dr. Lushington—(regarding whose decisions there is an ill-natured saying in the Temple that they were "always wrong")—was one of prize-money. There was no question of treating the crew as pirates, nor any discussion between the British and foreign governments.

[2] See the writer's *Debt-Slavery in the Malay Peninsula*, Law Magazine and Review, May and August, 1901.

There is no doubt that the interferences of which they complained were purely political in their object, and were not piracy at all.

An instructive case in this connection is *Banque Moustaca, etc.* v. *Motor Union Insurance Co.* (*Times*, 18 Jan., 1923; cit. Sir Graham Bower, K.C.M.G., in *Transactions Grotius Society* (1925), p. 49.) It arose in the course of the Græco-Turkish war of 1920. The seizure of a ship by armed Turks under the orders of "a person of low character and indifferent morals and formerly a brigand," who had arrived at a position of political authority, was held to be a seizure "dominantly and mainly political and military," and therefore an act of war and not of piracy, though apparently uncommissioned.

In the case of the *Cayalte*,[1] Mr. Seward held that where the motive of the seizure of a ship was not "robbery and plunder," but to effect a return to the parties' native land, and where there was no contemplation of "that general hostility which enters into the definition of the crime," there was no piracy. He cited the *Amistad* (15 Peters, 594), in which slaves, who rose in defence of their liberty and seized the Spanish ships in which they were being illegally conveyed, were held in the U.S.A. not to be pirates. These cases seem to be inconsistent with our principle that the test of piracy is whether or not its violence is done for private advantage. But the defence of one's personal liberty and property is not "advantage" but rather "necessity"; and it would seem proper to extend it to the reasonable defence of the liberty and property of others.

The problem of the liability of states in respect of the dealings of their vessels with supposed pirates seems never to have been adequately dealt with. Acts of self-defence against vessels reasonably supposed to

[1] Phillimore (I. 488, § 356) makes the *animus furandi* essential; so does Story (*U.S.* v. *Smith*, 5 Wheaton, 163); but Dana seems justified in requiring only an intention to commit flagitious acts.

be such would seem to be at any rate excusable; but for acts going beyond self-defence, such as the assumption of jurisdiction, a vessel would appear to act at her peril, and takes the risk of a stranger's being a pirate or not. The acts of a man-of-war or other government ship in this respect doubtless engage the responsibility of her government—but will the same result follow if it is a private vessel which makes an honest and reasonable, but mistaken, attempt at apprehending a supposed pirate? For the acts of private persons a government is not usually responsible: yet the close identification of merchantmen with the nation, and the control which is exercised over them by Admiralties, added to the desirability of some effective responsibility being forthcoming for forcible acts on the high seas done by persons who have not thrown off all state control, make us inclined to hold that a state should be held responsible for such acts of attempted jurisdiction over supposed pirates, even when performed by merchantmen or yachts. To say that a merchantman should never under any circumstances attempt to apprehend a pirate would be as excessive as to say that a householder ought never to attempt to apprehend a burglar. The distinctions made by English law—according to which a mistaken apprehension is justifiable in a public authority if made reasonably, and justifiable in a private person if (1) a felony has been in fact committed, and (2) reasonable ground of suspicion exists against the arrested party—are of course out of place in this connection. In our view, a public or private vessel interferes with the ship of another state in peace-time at her peril, except in the single case of patent self-defence. This has been recognized ever since Webster laid down the principle in his correspondence with Lords Ashburton and Aberdeen. The British contention had been that they were entitled in the suppression of the slave-trade to examine American vessels to see whether they were really such. Webster denied this, and insisted that British cruisers acted at

their peril. If they were right in thinking that a ship was liable to seizure under the treaty, then they could board and seize her. But if they were wrong, no matter how reasonable their suspicions were, they had no right to interfere with the vessel in order to verify them. They must take the risk of their convictions. With this Lord Aberdeen agreed.[1]

It is always incumbent, nevertheless, on a private vessel, to stop and communicate by signal or voice, with a man-of-war, upon request: and it seems that the request may be made and enforced by gun-fire.[2] This involves, however, no liability to further interference, except in war-time or at the peril of the state to which the man-of-war belongs. Whether the rule would apply to the war-ships of insurgents, not recognized as belligerents, is more than doubtful.

An unlawful exercise of force (public or private) on a vessel on reasonable or unreasonable suspicion of piracy may well be a ground of liability in damages: but it does not of itself make the actor guilty of piracy, because it is exercised for public and not for private objects. It may do so, however, if it is only the cloak of private designs. Difficulty might arise in the case of an honest but grossly stupid mistake. It would seem that the imputation of piracy could not be incurred in such a case.

The curious case of the *Marianna Flora*, in which two men-of-war each suspected the other of being a pirate, was scarcely settled in a satisfactory way,[3] and caused a division of judicial opinion.

Could a naval Jameson Raid be regarded as piratical? We have seen that insurrectionists are not necessarily pirates, even if they interfere to some extent, as a

[1] Webster to Everett, 28 March, 1843; 6 Webster's Works, 331 sqq. Curtis, Life of Webster, II, 165.

[2] Cannon-shot preceded by a blank discharge; not rifle-fire, the blank discharge of which may be misunderstood. See the case of the *Tangier*, 74 S.P., 1212.

[3] (1826), II Wheaton, 1: Evans, *Cases on International Law*, 75.

belligerent, rightly or wrongly, might, with foreign shipping; subject to their being treated as pirates if their wrong-doing melts into atrocity. But can an attack on one state by uncommissioned persons belonging to another be considered as piratical? If its objects are to assist an existing insurrection in the state attacked, it would not appear, however reprehensible, to be piratical in its nature. But if its object were mere conquest, or the incitement of rebellion, there seems no reason why such a predatory expedition should not be piracy. It must often be difficult to draw the line in practice between public and private aims—between politics and profit: but that does not affect the principle. That the object of an insurrection may be to seize on the material benefits of political control does not deprive it of a political character. A selfish political movement remains a political movement. But an invasion by private aliens, the sole object of which is to make themselves masters of the whole or part of the territory invaded, appears to be necessarily dictated by private aims. The case might be put of an enthusiastic John Brown making a private expedition against a small state in order to control its government and free the indentured labourers there. There is little doubt that such an expedition would be piratical, whilst a precisely similar expedition genuinely organized from within might constitute a regular political insurrection. An expedition making no pretence of aiming at political control, but directed simply to the private end of freeing the labourers by force, would clearly be piratical.

The older definitions seem to imply that piracy must be part of a course of conduct and not a single isolated act. In municipal law this is certainly not the case: a single act is sufficient to constitute piracy, without any addiction to the profession. It seems to be no otherwise in International Law: though the point is worth examination. One does not easily become *hostis humani generis* because of a single act, and it seems probable

that in the mind of the older authorities a pirate was a man who lived by piracy.

On the whole, we may conclude that there is a tendency on the part of authors and statesmen to extend the definition of piracy: a tendency which ought to be resisted, as it does not comport with the general conscience to make honest political rebels subjects of general suppression by ignominious penalties as pirates.

The imputation of piracy is apt to be rather hastily made: thus Phillimore, on the authority of Garden, thinks a vessel which is unprovided with a flag and papers may be treated as a pirate![1]

Hobart Pasha threatened, when blockading Crete in 1868, to treat any vessel which should fire on the blockading squadron as a pirate[2]—a convenient doctrine for blockaders, but unsustainable. Such a vessel probably identifies herself with the blockaded enemy or rebels: a very different thing. Hobart chased the armed Greek blockade-runner *Enosis* into Greek waters and demanded her surrender at Syra.

The fact is, piracy—true, *bonâ fide* piracy, in the intriguing phrase of Singapore—which seventy years ago was active even in the Mediterranean, is a bygone thing save in odd corners like the coast of China: and the effort is now to bring within the definition of piracy political acts which no one, when piracy was a live thing, would have called piracy at all. A remedy is needed for nuisances on the high seas which do not amount to piracy. It must be found, not in a distorted application of the law of piracy, but in a wise application of the principle of self-defence.

We have said that the liability to apprehension as a pirate is no real exception to the immunity of a national vessel on the high seas. For the pirate has put off her national character.

[1] *Int. Law*, I. 291, § 204. Garden, however, only speaks of a "forban" (*Traité de Diplomatie*, I. 406).

[2] 59 S. P. 613, 635, 640.

The possibility of interference by belligerents is a real exception to her immunity. It is a relic of mediæval days, and can only be justified as an abnormal exception. The existence of this infrequent and abnormal power was not considered by such eminent authorities as Webster, Cavour, Lord Lyndhurst and Lord Blackburn[1] as affecting the general principle of exterritoriality, according to which a vessel under the national flag is assimilated to national territory, and held equally to be exempt from violation by foreign force. This principle of the sanctity of the national flag came out clearly in the well-known case of the *Trent* in the American Civil War, where, without due process of law, Southern officers were forcibly extracted from a British steamer. But it seems somewhat to have weakened of late years. The principle that a neutral vessel may be sunk, instead of being brought in for adjudication, adopted by the great military empires, is fundamentally inconsistent with the exterritorial character of vessels: yet there was little emotion when the Russians sank British vessels [2] in the Japanese war, except indeed when they accidentally sank fishing-boats in the North Sea. Nor was the sinking of the *W. P. Froye* by the Germans much resented in the United States. In France, the sentiment of regard for the flag still persists. The seizures by Italy of French mail boats—*Tavignano* and *Cagliari*—during the Tripoli war provoked real emotion in France, although they were perfectly justifiable as belligerent acts. France has always been peculiarly, and rightly, sensitive as to the immunity of her mercantile marine.[3]

It is presumed, also, that in case of extreme necessity some control might be lawfully exercised on a foreign vessel on the high seas. If she should attack a vessel of

[1] See 48 British State Papers, 428; Lawrence, *Visit and Search*, 182.
[2] See the writer's *Britain and Sea-Law*, pp. 2 *seq.*, and *infra*.
[3] Cf. the very recent case of the *Lotus*, in which a French mail-steamer collided with a Turkish ship with the loss of several Turkish lives. The master was arrested, tried and condemned to a short prison term, in Turkey, and this was sustained by the Court of the Société des Nations, by a majority of one.

a different country, either through some aberration of the master, or through a mistaken idea that she was a pirate or an unlawful combatant, there is no doubt that the vessel attacked can retaliate in self-defence: though, here again, an attack on the delinquent vessel would not usually be justified after the immediate danger has passed. So, if she attacks the shore.

But "taken by and large," the ship which keeps to herself on the high seas is unassailable there. When lying in ports and harbours does the same hold? France is inclined to say that it does: she allows the foreign vessel within her ports to behave as an *enclave*, free from all disturbance by the local authorities unless "the peace of the port" is violated. The *Newton* and the *Sally*[1] are commonly cited as instances of this. But it does not appear that France has ever claimed, or that any other country has ever conceded, that French ships in foreign ports are as of right entitled to this exemption. The case of the *Charles et Georges*,[2] in which a French ship was seized as a slaver in Mozambique, and eventually given up to France by the Portuguese, is scarcely an instance to the contrary: the French claim was not based so much on the exterritoriality of the ship, as on the presence on board her of a French government agent, a fact which, this government held, made all proceedings against her an insult to France. Simplicity seems to require that, whatever latitude the local government may concede *ex gratia*, there is no right to require that a ship which enters the ports or harbours of another country shall be in any respect exempt from the local law.

The jurisdiction was emphatically upheld by Lord Granville in the case of the *Léon XIII*, in which the master was arrested on the deck of a foreign ship for not complying with a writ of *habeas corpus* issued at Singapore to test the legality of his imprisonment of

[1] See Pitt-Cobbett, Leading Cases (1st Edition), 44.
[2] (1858) 49 S. P. 621.

two engineers. (74 S. P. 1194 : Monier to Marquis de la Vega de Armija.)

The United States have acted very strongly on this principle in enforcing the strict observance of the prohibition laws of the United States on board foreign vessels.

The case of ships passing through territorial waters presents more difficulty. Are they to be assimilated to vessels on the high seas and exempted from, or to vessels in port and subjected to, the local law ? or are they to occupy an intermediate position ? Again recurring to the conception of simplicity, one's inclination is to pronounce for absolute immunity or complete subjection: and it seems best to assimilate the territorial waters to territory, and so to concede an absolute right of control to the local law. Thus Holland, in 1916, arrested a German vessel passing through the Scheldt.[1] This principle avoids all difficulties and disputes, and any fine-spun debates as to whether the act in question regarded the ship alone or produced direct effects outside it. If it is desired to avoid the local jurisdiction, it can easily be accomplished by making a detour of a mile or two, and remaining outside the three-mile limit. Moreover, if the ship is entirely subject to the local law if she comes within the limit of territorial waters, little or no necessity for any exceptions will arise : while, if she is held, in principle, to be exterritorial there, a number of perplexing and dubious exceptions will have to be laid down. For instance, the photographing of military zones could never be allowed : the hovering of ships off the shore must clearly be controlled ; and a host of other exceptions involving most difficult questions must be laid down. Or, if general exceptions are laid down regarding the safety of the territory, they will eat up the rule.

[1] Clunet (1916), p. 657.

§ 5. Straits and Isthmuses as Territory

1. Isthmuses.—The assertion of a right of way through straits and across isthmuses is, in the circumstances of a congested modern world, becoming a matter of more and more importance. It is easier to deal with the Isthmus, because as yet no one has ventured to assert a legal right to cross the actual landed territory of a state; and the conflicts of jurisdiction which would ensue, as well as the precise limits and conditions under which such a right would fall to be exercised, would introduce a confusion into the affairs of the local Power, which so far no one has suggested that it is bound to accept. When Roosevelt's materialistic mind perceived the advantages of a Panama Canal, he saw that the only way to accomplish the fact was to disestablish Colombia and "take the Isthmus." There was no half-measure possible. The isthmus of Suez remained an undisputed Egyptian preserve all through the construction of the Suez Canal; and, although a British occupation ultimately supervened, it would not have done so if Ismail had paid his debts. Neither Britain nor France forced him to construct the Canal; in fact, he would have had all the support of Britain against France in resisting its construction had he wished. There is no doctrine of public utility which can force a Power whose territory lies across the channels of trade to permit its passage. Why should it be called upon to make other Powers richer at the cost of its own privacy and homogeneity? It is not improbable that the attempt will be made, in the name of enlightenment and progress, to assert such rights of transit—probably in the shape of a right to construct, or to require the construction of, railways and canals. It cannot be too firmly resisted, because it implies an essential exaltation of riches above freedom. In order that one state may be richer, another is to have its self-determination impaired. And although it may not seem to the eager claimant to be impairing it to furnish

it with the railways, aerodromes and highways which it finds agreeable itself, the point is, that the recalcitrant state is entitled to have its own opinion in the matter. Even if it entertains no objections to foreign transit and modern methods of transit in the abstract, and merely stands out for the highest price it can get, in reliance on its special geographical situation, there is no reason in morals why it should not do so. The general material interests of the world may be retarded by its selfishness: but there is a higher and more important interest than the general material welfare of the world; and that is the right of states to live their own life in their own way. The progress of humanity can better be served by the interplay of a diversity of states, than by a standardized uniformity, imposing on each state an unwelcome interference with its territory in the interests of a certain six per cent.

2. Straits.—But with regard to Straits, the matter is somewhat different. A ship passes through territorial waters a self-contained unit. It interferes with nobody; it can be easily supervised: at the worst, it emits oil or smoke into the air or into the fluid ocean, and possibly causes uneasiness to the Revenue authorities or to the police. Consequently, there have not been wanting many to argue that the balance of convenience is strongly in favour of a compulsory right of way. Much depends on the situation of the straits: a strait leading to the waters of a single Power only is naturally in a different position from that of a strait leading from one ocean to another.

Our Canon of Simplicity would lead us to pronounce against all such qualifications of the territorial right, and the parallel case of Rivers strongly supports such a conclusion. The navigation of a river may furnish the only means by which a riparian state can reach the sea: yet the better opinion is that, apart from treaty, there is no right of transit. And the geographical and political circumstances of straits vary so widely that a single rule

according a right of transit in all cases would be unworkable. In support of this opinion we have the long acquiescence in the claimof Denmark to deny the passage of the Belts and Sound, and to levy tolls on shipping traversing those waters. And although she eventually abandoned that practice, on the insistence of the American Republic, it was on terms of receiving compensation, which certainly would not have been payable if her action had been unsustainable in law. We have the equally long acquiescence in the claim of the Porte to close the Bosphorus and the Dardanelles, and, although this was only enforced latterly in the case of men-of-war, there is no possibility of arguing that a right of navigation can exist (apart from contract) which is limited to particular sorts of ships.

At any rate, there can be no pretence that states are entitled to force their way through the territorial waters of other states merely on the ground of convenience or cheapness. That the route from Asia to America might in certain cases be somewhat shortened by proceeding through the Inland Sea of Japan,[1] or the rough Cape Horn passage avoided by voyaging through the Straits of Magellan, or the route from North to South simplified by passing between East India Islands, cannot entitle foreign powers to use those narrow passages. When European powers insisted on passing the Shimonoseki Straits, it was because the right to do so

[1] The widest entrance, *i.e.* the southern (the Bungo Channel), is some eight miles wide from Sekizaki to Sadanomisaki (or to the islet of Kagoshima), but it is divided into two by the island of Takashima. The distance between this and the coast of Kiüshiü is about one and three-quarters nautical miles, and as it is an island of some dimensions its distance from the coast of Shikokŭ is about four and a half nautical miles—or less, if outlying islets and rocks to the east are, as they should be, taken into account. The configuration of the bays seaward of these channels to west and east of Takashima offers a beautiful puzzle to advocates of the ten-mile mouth theory. That theory is sometimes extolled on the ground that to adhere to the three-mile limit leaves an awkward curvilinear triangle at the entrance to the "bay." But the inelegance is only in appearance. There is no need to have a "bay" neatly closed in by a straight line on the map. The practical need is for a line which will enable the simple question to be answered—"Was the occurrence three miles from the nearest land?"

was understood to have been conceded to them by treaty.

Again, should the territorial Powers on an inland sea, such as the Baltic, combine to desire to close the entrance, there is much less plausibility in the claim to traverse the strait than when it is only the state or states which are the riparian powers at the strait itself, which desires or desire to do so.

Denmark's insistence on the right to cut off the Baltic ports from the ocean was a very different thing from the desire of the Baltic Powers to interdict that sea to foreign ships-of-war.

The Anglo-French fleet was, indeed, permitted to pass into the Baltic in 1854 by Sweden and Denmark without its being supposed to constitute an infringement of neutrality on the part of these powers. This seems to argue that there was an international right of passage;[1] but, on the other hand, Denmark and Sweden successfully interdicted the passage to belligerents in the recent war of 1914. The Straits of Magellan were claimed as Chilian and neutral in the war of 1914.[2]

On the whole, convenience, simplicity and practice unite in admitting the right of states over straits lying within the three-mile limit to be perfect and complete—and certainly not to be subordinated to the pecuniary interests or to the convenience of others. The complications which would ensue from a departure from this clear principle are incalculable: for each case would have to stand upon a calculation of its own multifarious circumstances. Probably the Sound and Belts case is concluded by the acquiescence of Denmark: though it must be remembered that many new States are no parties to the old arrangement; in particular, Esthonia, Latvia, Finland, Lithuania, Poland, Soviet Russia and Danzig. Similarly, the Black Sea straits are subject

[1] It is needless to say that the right contractually resigned by Denmark at the instance of the United States concerned merchant ships alone.

[2] See A.J.I.L. (1920), 826 *n.*

to a conventional *régime* which is unlikely to be disturbed by outside States. Phillimore considers the exclusive right of the British Crown to "the Bristol Channel, to the channel between Ireland and Great Britain and to the channel between Scotland and Ireland," to be "uncontested." [1] That certainly is not the view taken by the English Courts which have denied the exclusive right at a point well up the Bristol Channel in the case of the *Fagernes*.[2] The United States, however, are still often said to claim the sovereignty of Delaware Bay and Chesapeake Bay: if this is to be maintained in the future, it must be as by exceptional prescription.[3]

When two or more nations border on straits which are less than six miles in width (*i.e.*, in which there are points which are distant less than three miles from the nearest point on each bank), the boundary ought to be drawn at equal distances between them. This is a different rule from that which obtains in the case of rivers, when the *thalweg* or deepest channel is taken as the part to be equally divided. Rivers being for the most part quite narrow, the navigable channel is of prime importance; as the supply of water is limited, it is impossible to divert the channel without interfering with riparian rights. It is otherwise in the case of a strait: one power may have the whole of the *thalweg*,[4] but it is open to the other riparian powers to make a

[1] *Int. Law.* I., § 189.

[2] *The Fagernes*, 71 S. J. 634; 164 L.T. 105; 64 L. J. 107.

[3] *Vide infra.* Similar claims (see Hall, I. L. 149) were made in the eighteenth century to the G. of Bothnia by Sweden, to the Zuider Zee by Holland and to the Belts and Sound by Denmark, and were then uncontested.

[4] This is denied in many American cases: but, it is conceived, on too close an analogy with the case of rivers. It would be absurd and dangerous to allow one riparian state to control almost the whole of the waters of a strait merely because the deepest soundings ran close to the shores of the other. See *State of Louisiana* v. *State of Mississippi* (1906) 202 U. S. 1. (*apud* Evans, *Cases on Int. Law*, p. 61), and cases cited in argument (p. 25). In *State of Louisiana* v. *State of Illinois* (147 U. S. 1), the *thalweg* rule was properly applied to the Mississippi: Louisiana contending for the *medium filum* and Illinois for the "usual steamboat" channel.

channel for themselves by dredging. The question of responsibility for artificial works which have a damaging effect on the opposite side of a strait, whether six miles wide or less, never seems to have been considered. It is singular that, while it has been powerfully urged that bays and gulfs ought to be regarded as territorial waters within a ten-mile chord, nothing but a six-mile limit has ever been put forward in the case of straits.

Such apparent appropriations of wide straits as occur in the partition treaties of Spain and Great Britain with the United States in 1899 and 1846 [1] respectively, are, it is believed, misinterpreted when read in that sense. The intention in these cases, in drawing a boundary many miles distant from the principal shores concerned, is not to affect to appropriate the sea as against third parties, or even as against themselves, but to make it clear that any land, to one side or the other, shall, as between themselves, be regarded as belonging to one or other of them. In the Spanish case, there was actually an island (Isla de Palmas) claimed by Holland, on the U.S. side of the so-called "boundary." Obviously there could be no intention to include that, if it were really Dutch, in the American acquisition.[2]

§ 6. Bays and Gulfs as Territory

Assuming that we are right in maintaining, under our canon of Certainty, the continuance of the rule which limits territorial waters to a distance of three miles from low-water-mark at ordinary tides, it remains to consider whether any exceptional position ought to be accorded to gulfs and bays. According to the Canon of Simplicity, there ought not: and it does not appear that any such concessions are made in practice. It is asserted that Delaware Bay and Chesapeake Bay in the United States, and Conception Bay in British North America are

[1] *Parl. Papers, N. America*, 1878, No. 10.
[2] See A.J.I.L., October, 1928: article by Prof. Jessup.

exceptions: but are these anything more than the unsustainable relics of the old claims of nations to control wide areas of sea? As is well known, Denmark claimed in the sixteenth century the whole sea from Norway to Iceland; Sweden claimed the Baltic, Venice the Adriatic, Britain the Narrow Seas. These claims have long disappeared: and these modern relics of the same exclusive notion would seem to be hard to justify by any logical process. They have seldom been asserted positively, so that they are difficult to sustain even on the facile ground of prescription. Such national claims to appropriate the high seas do not come before public opinion as a meritorious proposition. The old English claim to the "King's Chambers," arrived at by stretching an imaginary line round the coast from headland to headland[1] and counting everything within its ambit as English waters, has long been receded from: yet it was as respectable as the claims under consideration. In the instance of Delaware Bay, which is eighteen miles wide, there is indeed the case of the *Grange*,[2] which was a British vessel captured in those waters in 1793 by the French, and restored to her owners at the instance of the United States. The Chesapeake Bay is narrow (twelve miles wide)—and might be regarded as an *à fortiori* case.[3] But these claims can only be vested on a doubtful prescription.

Cape Cod Bay, thirty-two miles wide, can scarcely be regarded as a serious subject of claim at all. The same may be said of the supposed pretension of Canadian authorities to close the Bay of Chaleur, fourteen and a

[1] The whole idea of the "King's Chambers" is modern and artificial. The headlands were selected by a committee appointed by James I, who invented the pretension. See *Charteris*, "Wide Bays," *apud* 23*rd Report* (*Berlin*) *of the Int. Law Assoc.*

[2] 1 Op. A.-G. of U.S. 32: 1 Am. St. Papers, 73. *Stetson* v. *U.S.* (Moore, *Int. Arb.* IV. 4332–4341).

[3] It was held territorial in *The Alleganean* (Scott; 143). It is curious that the waters of Delaware Bay have formed the subject of dispute between two States of the American Union, Delaware and New Jersey, and the Federal authorities—the state of Delaware claiming the whole up to L.W.M. on the Jersey shore. *State* v. *Morris*, 1 Harris (Del.), 326.

half miles wide at the narrowest part, and sixteen at the headlands, mentioned by A. R. Gordon in his report to the International Law Association in 1892,[1] and the equally unsubstantial desires of W. Australia to claim "all bays the headlands of which are in sight of one another," and in particular Exmouth Gulf (twelve and a half miles across) and Sharks Bay, with its approach (thirteen and a half miles and twenty miles respectively). Nor can we consider the Norwegian claim to the waters of Romsdal's Amt,[2] and the Vaeranger Fiord (thirty-two miles), or the Swedish claim to Laholm Bay any more consistent with sound principle.

The once fashionable theory, which regards bays as territorial if (or rather in so far as) they can be inclosed by a ten-mile line across the mouth, is best treated in connection with the theory, in practice almost inseparable from it, that the imaginary ten-mile line is to be treated as if it were part of the coast-line, and the three-mile zone measured seaward therefrom.[3] It may be said, since the North Atlantic Fisheries Case, to be an exploded theory.

Britain is sometimes thought to go beyond these dubious claims, and to assert a right of territory to the whole of Conception Bay in Newfoundland, twenty miles wide at the entrance: but the case of *The Direct U.S. Cable Co., Ltd.* v. *The Anglo-American Telegraph Co. Ltd.*[4] is inconsistent with the principle of *the Fagernes*[5]

[1] See *15th Report of the Association for the Reform of the Law of Nations* (*Int. Law Assoc.*), 1893.

[2] *Ibid.*, p. 25 (n.1). "A line drawn at the distance of one geographical mile (from) and parallel to a line from Storholm crossing Skraapen (outside Haro), Gravskiaar (outside Ona), and Kalven (the outermost of the Orksjaerne), to the outermost Jaevaleholm (outside Grip), is to be regarded as the seaward limit of the corresponding (?) coast of Romsdal's Amt, in which fishing is reserved exclusively for the population of this country."—Royal Resolution (Sweden and Norway), 9 September, 1889. [3] *Vide infra,—The Three-Mile Limit.*

[4] (1877) L.R. 2 A.C. 394. In *R.* v. *Cunningham* (1859), Bell, *Cr. Cas.* 86, the ship was close to the shore, and the opinion that the British Channel was entirely within the British jurisdiction was not necessary to the decision. Evans, *Cases in International Law*, p. 71, notes that in two arbitrations reported in Moo. *Int. Arb.* IV, 4342, 4344, the Bay of Fundy and the sea between headlands in C. Breton Island were held not to be territorial. [5] *Supra.*

and the *Eclipse*,[1] and must be regarded as obsolete. Hudson Bay, indeed, has been said to be included in British territorial waters, although no question on the point has ever arisen,[2] and the pretensions of Russia[3] to close the White Sea, which is little wider, have consistently been resisted by Great Britain.

These pretensions do not seem capable of allowance. The Inland Sea of Japan, closed as it is by four channels respectively, one mile (the O-Seto Channel on the west), four miles (the Bungo Channel between Sadonomisaki and the islet of Takashima on the south), one mile (the Naruto Channel) and about four miles (between Yura and the islet of Tomogashima on the east) wide, is clearly Japanese exclusive territorial water.[4]

Such cases as that of the Bay of Cancalé, in France, which is seventeen miles wide at the entrance[5] may be justified on the ground of actual occupation of the bed of the sea, where the fishermen cultivate beds of oysters. It is not unlikely that such an occupation might be admitted even if the cultivation were far out at sea: thus the British jurisdiction over the pearl-fisheries of Ceylon, which are not in bays at all, may be best justified on this footing.[6]

§ 7. Lakes as Territory

As regards inland bodies of water such as the Caspian Sea, the Boden-See and the Lake of Geneva, it would appear that the whole extent of such waters is regarded

[1] 15 Moo. P. C. 267.

[2] In 1818 the American plenipotentiaries (Gallatin and Rush), when negotiating the Treaty of that year with Great Britain, spoke of "the right of fishing in Hudson's Bay beyond three miles from the shore—a right which could not exclusively belong to . . . any nation." See *N. Atlantic Fisheries Arbit.* II. 306.

[3] Aubert, R. G. D. I. P. 1894, p. 440.

[4] See *U.S. Senate Documents*, Vol. XX. part 1, p. 410, where the right of passage through the Straits of Shimonoseki is referred to as "a grave question," the straits being "wholly the territory of Japan."

[5] Possibly also the Bay of Gounville.

[6] *Vide infra.*

as divisible *per medium filum* between the riparian powers, and the Baltic has at various times been supposed to be subject to the same principle, as when the riparian powers assumed to close it to vessels of war. There seems no real reason why this should not be allowed, so long as the entrance is entirely within the control of riparian powers. As regards the Great Lakes of America, the same principle ought to be admitted. The acquisition by other Powers of territory bordering on such a closed sea cannot alter its character, as is seen in the case of the Black Sea. Moore (*Int. L. D.* § 135) thinks that an interior sea belongs to the marginal owners "in proportionate parts," but unless he means "in proportion to their riparian interest," this can hardly be so: as the total extent of their territorial area may change from time to time. More probably, the interior sea is divided equally, according to the length of each state's riparian boundary.[1]

§ 8. River Transit: Water Supply

The position of riparian states in regard to rivers traversing their territory has been to a great extent regulated by treaty, and in particular by the international arrangements for the principal great waterways of Europe. But the development of more remote quarters of the globe, and the obvious possibility of a re-distribution of territory in Europe itself, make the ascertainment of the principles of law still an important and interesting topic.

The assertion, on the ground of convenience, of a right of way to the sea and to the lower riparian states residing in the upper riparian states across that portion of a navigable river which traverses an intermediate one, has been eloquently made by various theorists,

[1] Phillimore, *International Law*, I. 2, § 205.

but appears to have received no support in practice,[1] and it is completely contrary to our Canon of Simplicity. If we depart from the principle of complete sovereignty, we introduce an alien element within the heart of the state, an element which is subject to a vague and indefinite control, and which enjoys uncertain and speculative rights. For a *quid pro quo* one nation may concede such privileges to another, making at the same time whatever elaborate provisions it can for the regulation of so delicate a matter. But an enforced intrusion of such a character can never be acceptable. Commercial convenience can never outweigh national safety and solidarity.

More difficult problems are presented by the question of the subtraction of water from rivers and lakes. Canada and the United States some years ago solved the question by establishing a joint Boundary Waters Commission[2] to decide questions regarding the water boundaries between the two countries. A curious position has arisen through the independent action of the authorities of Chicago, who, for sanitary purposes, have drawn off so much of the water of the Great Lakes as permanently to lower their level and that of the connecting streams by some six inches. Some of the American states which were damnified by this sued the state of Illinois, and other states which apparently had an opposite interest were made parties to the suit. Mr. Hughes was appointed by the Supreme Court to inquire into the matter, and he reported that, although the subtraction was *primâ facie* unlawful, it had been legalized by Congress on the ground of sanitary necessity. This did not, of course, conclude the rights of Canada, and her diplomatic protests are still pending. Appa-

[1] See Hall, *International Law*, where it is observed that such small states as Anhalt-Coethen were recognized by such powerful ones as Austria, Saxony and Prussia to have a complete right to permit or refuse the navigation of that part of the rivers lying within their territories: p. 138 (n.) (6th Edition).

[2] See A.J.I.L. (April, 1928)—an article by Prof. Mackay of Halifax.

rently, the Joint Water Commission, above referred to, has not been invoked. There must be some principle applicable to the case—and it is difficult to deduce it from the rules of the Roman Law, since they proceeded on the assumption, inadmissible in International Law, that all rivers were public property. It can scarcely be doubted, however, that (as in Roman Law) a subtraction of water working damage to others, or rendering the river less navigable, is unlawful, whatever the advantage to one's self. Something hinges on the ownership of the Great Lakes. In American municipal jurisprudence it is believed that they are assimilated to the high seas.[1] But something is to be said for the opinion advanced above, that, as enclosed bodies of fresh water, they, like the Lake of Geneva, the Lake of Constance, and the Caspian Sea, are the exclusive property of the riparian states, viz., Canada and the United States *ad medium filum*. Clearly, at the time when they were *enclaves* of British territory, they were entirely British; and the effect of the treaty recognizing the independence of the United States was seemingly rather to divide them than to put them in the situation of *mare magnum*. The boundary is quite clearly laid down (Treaty of 1783, Art. 2), "through the middle of said lake."[2] It is difficult to see how they can, internationally, be assimilated to the high seas; or, indeed, how they can with propriety be so assimilated in municipal law. At all events, the subtraction of water from them to a sensible extent so as to cause damage cannot but be regarded as an interference with the property of the state. If we recur to English principles of jurisprudence, the proposition is clear. Underground water flowing in an underground channel may be drawn off—but the water of lakes and streams can only be taken by agreement or servitude, or by a riparian proprietor in

[1] *U.S.* v. *Rodgers* (1893), 150 U. S. 249, 256. Justices Gray and Brown dissented; and the case is contrary to *Tyler's* case, 7 Michigan, 161.

[2] Different boundaries are laid down with regard to L. Superior.

proportion to his reasonable needs. In private law, such needs may be (1) drinking and domestic purposes; (2) watering cattle; (3) irrigation; (4) manufacturing purposes.[1] Such use may be held, internationally, entirely to justify the subtraction of water for sewage purposes; but its admissibility is subject, in private law, to the qualification that the right of inferior owners (or, it is presumed, opposite owners), must not be materially interfered with.[2] A lowering of the level by six inches is a material diminution, and Mr. Hughes was therefore right in reporting that it was *primâ facie* illegal, as within the United States. Mr. Evarts, the eminent Foreign Minister of the United States, urged in 1880 [3] that the diversion by Mexicans of the water of the Rio Grande to the prejudice of Texans "would be in direct opposition to the rights of riparian owners," but in 1895 [4] the U.S. Attorney-General advised that the subtraction of water by the United States from that river constituted no interference with any right of the lower riparian owners. It may be said that his argument is consistent with that simplicity which would recognize the fullest sovereignty in each country of the waters within its territory. But this appears to be just one of the cases in which there is a danger of rushing into over-simplicity. The vital necessity of water to human life has, in all ages and in all countries, been considered to give the lower riparian proprietors a right to receive a substantially uninterrupted flow of water—in fact, to obstruct the flow would really be to infringe the sovereignty of the lower proprietors, by altering the accustomed nature of their territory, and converting a water-course into a dry bed. It could never be contended that by creating a dam in its own territory, one country

[1] Ratanlal, *Torts*, p. 254 (Bombay).

[2] Ratanlal cites many Indian authorities for this, of which *Warran Bapuji* v. *Changu Has Patil*, 8 Bombay Law Reports, 87 (1904), is one of the latest.

[3] Foreign Rel. U.S. (1880), 752, 784; Cf. Moo. Int. Dig. § 132.

[4] Moore, *ubi sup.*

was entitled to submerge the territory of another ;[1] and the diversion or substantial diminution of a stream would seem to incur the same objection. There is no general rule " sic utere tuo ut alienum non lædas " : but to use one's own territory in such a fashion as directly to alter the obvious physical features of our neighbour's is surely to go beyond what is permissible, whether it takes the form of abstracting water from it, sending water upon it, or cutting a regular flow of water off from it. The United States cannot be entitled to drain the Great Lakes dry ; and it would equally seem that they cannot lower the level, unless to an inappreciable or trivial extent.

Such a right to the continued flow of water in its accustomed manner in a defined and visible channel seems to be a real international servitude, whose existence it is scarcely possible to deny. Probably the question has by this time already been referred to the Boundary Waters Mixed Commission which has been wisely created by Canada and the United States for the solution of these very questions.

§ 9. Canal Transit

Superficially similar to river transit and straits transit, canal transit presents a fundamentally different problem. Canals are made by human labour ; and a canal with locks resembles not so much a strait as a series of tanks. There can be no pretence of any general right to navigate such a work. Nor can there be supposed to be any natural right, resting on general convenience, to utilize an isthmus for the purpose of constructing a canal. Convenience and fifteen per cent. are great, but sovereignty and security are greater, little as Colonel Roosevelt may have realized it. There is a very good

[1] Cf. Phillimore, *Int. Law*, I. 389, § 279. " A state is bound to receive within its boundaries the waters which *naturally* flow within its boundaries from a conterminous state," citing *Hertius* (*Prolegom.*, S. 3. in Comm. et Opercul. II. 3, p. 66).

and practicable route for a canal connecting the Atlantic and Pacific, which runs through the valley of the Atrato, traversing the heart of Colombia. No one would seriously argue that Colombia can lawfully be forced to construct, or to permit the construction of, such a canal. Only materialistic opportunism could attempt to justify such a breach of international decency. It is curious that so sober a supporter of legality as Sir T. Erskine Holland should, in his book *Studies on International Law*, advance the doctrine that canals ought, for the benefit of all nations, to be assimilated to natural straits.[1] Few nations would care to construct or permit ship-canals, if the consequence was to be to render them penetrable at will by miscellaneous foreign vessels. It would be to discourage enterprise to inform a nation that in cutting a canal it was licensing strangers to penetrate its borders. Besides which, it would be thoroughly unjust. The territory of a nation is its most precious material possession: it is not to be deprived or controlled in the free disposition of it because it is conveniently situated for other people's trade.

[1] P. 277. He observes that this view has been criticized by T. J. Lawrence, *Essays on disputed questions in modern International Law*.

CHAPTER III

THE CANON OF CERTAINTY

UNDER the head of Certainty we propose to deal with matters settled by an accepted solution, which ought, in the best interests of good relations, to remain undisturbed. Such are :—

§ 1. Sovereignty and the Inviolability of Territory.
§ 2. Landing Parties.
§ 3. Pacific Blockades.
§ 4. Independence and Interdependence.
§ 5. The Three-Mile Limit.
§ 6. Enemy Character in Prize.

§ 1. SOVEREIGNTY : INVIOLABILITY OF TERRITORY

1. " Pacific " Violence.—The elementary, cardinal and essential feature of the Law of Nations, as we have it, is that each nation is entitled to do as it likes within its own territory. If that essential is not fulfilled (within the wide limits of its not scandalizing other nations by its brutality), the Law loses its coherence and sense. A nation, to be a nation, must be free from foreign interference. We shall elsewhere [1] indicate how important it is that the simplicity of this freedom should be absolute, and how surely the adoption of any qualifying principle, affording a handle for foreign dictation, will be made an instrument of vassalage and an occasion of friction and resentment. We proceed to develop the related proposition that the immunity from foreign interference

[1] Chapter III, § 4, " Independence and Interdependence."

enjoyed by an independent state must not only be complete, but assured. It must not only be unembarrassed by qualifications affording occasions for dispute and aggression. It must also be, certainly and assuredly, unassailable by force, except in the event of war. All violent aggression against the territory of a nation must be regarded in the light of open hostilities.[1]

It may be said that this is not a pacific sentiment. In reality, it is pacific enough. Peace is not really promoted by the permission of hostile violence under a pacific name. It is of no use to abolish war in name if warlike operations are permitted in fact. The Allied occupation of Crete in 1897, and the German seizure of Tsingtao in the same year—the latter a disgraceful act—were *pessimi exempli*, and they led in the fulness of time to the Italian bombardment of Corfu in 1923. The British occupation of Corinto in 1895 was no more respectable: nor was the French occupation of Mitylene in 1901.[2] The action of President Wilson in bombarding Vera Cruz is equally impossible to justify on any theory consistent with national independence. All these acts really amounted to war, if words have any meaning.

The essential vice of such operations—for no State of any degree of power would suffer such invasions of its territory—is that they are insulting and that they are one-sided: besides shaking the very foundation of International Law, the fundamental postulate of which is respect for territory. Tamper with that, and the whole system sinks to ruin. Instead of nations, we should soon have only an amorphous morass of populaces.

They are attempted to be justified under the head of

[1] "Acts of violence wanting that sanction are mere acts of rapine and piracy"—Wildman, *International Law*, ii. 5.

[2] The French have been rather disposed to ignore this salutary principle of respect for territory. Their expedition against the Druses in 1850 was scarcely veiled by the reluctant acquiescence of the Porte, while their occupations of the Morea in 1828 and of Chantabun in Siam in 1885 were certainly war: engagements were fought of considerable magnitude in the course of them. We may put in the same category the bombardment of Foo-chow in 1885. Cf. the writer's *Danger-Signals in International Law* (Yale Law Journal, 1924–5, p. 457).

Reprisals, which also was the alleged justification for the thoroughly unjust and unlawful proceeding termed a " pacific " blockade.[1] · Reprisals have been known for centuries as a legitimate means of securing self-redress : but nobody ever imagined that they included bombardment, occupation or other violent invasions of territory. Practically all authors limit them to acts accomplished in the State's own territory, or (exceptionally) on the high seas. Bluntschli [2] gives a typical list, including seizure of the offender's property in one's own territory, interruption of communications, expulsions and exclusions, detention of hostages, imprisonment of persons, repudiation of treaty obligations and the withdrawal of private privileges and protection. He does not mention the ravage of territory. Heffter [3] only mentions the suspension of engagements, the suspension of friendly intercourse and the seizure and sequestration of persons and property. None of these has the least air of invasion or bombardment. Rougier, who has written recently and elaborately on the topic,[4] never mentions military occupation as a permissible method of Reprisals.

Lafargue, who has devoted a whole monograph of nearly 300 pages to Reprisals, treats only of Retorsion, Sequestration, Interruption of Intercourse, Expulsions, Hostages, Embargo and Pacific Blockade.

Calvo [5] mentions " detention des territoires," but he gives no example. Hall [6] allows " anything " as Reprisals, and fatuously argues that because extreme violence is permissible in war, subject to all its risks, responsibilities and embarrassments, therefore all but extreme violence is permissible as Reprisals, subject to no risks, responsibilities or embarrassments whatever. His naïve assumption that, because the greater includes

[1] *Vide The Institute of International Law and Pacific Blockade*, Law Magazine and Review, August 1896, p. 285.
[2] " Das Moderne Völkerrecht," § 500.
[3] *Droit International de l'Europe*, § 110.
[4] *apud* R.G.D.I.P. (1910).
[5] *Droit International*, § 1811.
[6] *Int. Law* (6th Ed.), 363.

the less, therefore any one-sided violence is justified as a substitute for two-sided war, is beneath argument. "Reprisals," in Woolsey's opinion, are inhuman, and "will, it is hoped, before long entirely cease."

M. Politis [1] remarks that it is impossible to deny that violent Reprisals constitute an act of war beyond the possibility of doubt, and fall under the prohibition of Art. 12 of the Compact of the Société des Nations. "Quelle que soit la pureté de l'intention de l'auteur des réprésailles elle ne peut modifier en quoi que ce soit la nature des choses." And it is quite obvious that such violent methods as actual military force exercised in another State's territory must either produce instant war, or else confer an unjust and one-sided advantage on the strong. In either event they are no fit channel for reprisals to take.

The reprisals indicated by Marshal Radetzy in case the Canton of Ticino should fail to immobilize Sardinian fugitive soldiers, in 1848, were :—

(1) The expulsion of Tessinois from Lombardy and Venetia.
(2) The interruption of all commercial relations.
(3) The employment of all possible means to repel any invasion.

Even with regard to semi-civilized communities, Queen Victoria has put on record her disapproval of these forcible measures of redress :—

"The Queen is glad to see that the barbarous (she cannot qualify it otherwise) suggestion of the Commander in British Burma, to burn the village of Malacca,[2] and to destroy its coco-nut trees, in revenge for the massacre of a ship's company, has been disapproved. H.M. would have been better pleased, however, if the disapproval of the suggestion had been based upon a general con-

[1] R.G.D.I.P. (1924) 1 (Les réprésailles entre États Membres de la Société des Nations). See also per M. Alberic Rolin, *Le Conflit Italo-Grec* (*Independance Belge*), Oct., 1923).

[2] This cannot be the Malayan town of Malacca, which is an old European settlement.

demnation of a system too often, she fears, adopted in the East, of imitating the barbarities of a half-savage people, rather than of setting them the example of a policy founded on Christian principles. H.M. feels very strongly on this subject. It is not the first time the Queen has lamented this tendency on the part of Englishmen in the East, and she trusts to you to lose no opportunity of discouraging it." [1]

Despagnet and De Boeck point out that the world would be horrified if an innocent person were to be put to death in time of profound peace, as a measure of Reprisals. Yet a bombardment is far worse. If the modern law of nations does not permit private individuals to be put to death under the head of Reprisals, much less can they be killed wholesale by bombardment or by forcible invasion which as patriots they have the right and duty to resist.

Another asserted plea for the exercise of violence in foreign territory is the highly artificial one that there is no war unless there is an intention to make war: and that, so long as the aggressor proclaims his peaceful purity, and is not in fact resisted, he can pursue his march with universal commendation and full neutral support. There seems much more practical sense in the opinion of De Boeck and Despagnet, that acts speak louder than words, and that the will to war can never be absent when a nation tries to effect its designs by open force and invasion. "The essence of war," they observe, "is the employment of force to support one's claims." [2] Those who think otherwise are obliged to admit that if the force is resisted by force a state of war supervenes: but why should not the invaded state be equally at liberty to aver that it is not entering upon a war? [3]

[1] Gen. Grey to Rt. Hon. Sir Stafford Northcote (Secretary for India), 10 August, 1867.

[2] See *Conditional War*, in Law Magazine and Review, 1899, p. 436: *Facilis descensus Averni*, *Ibid.*, 1898, p. 106; the *Situation in Crete*, *ibid.*, 1897, p. 161.

[3] See *Pacific Blockade*, in Law Magazine and Review, 1896.

Why should it incur the odium of commencing a war, and lighting the torch of Bellona? It is absurd to suppose that if it withdraws its forces before the invasion, manœuvring for time or position, there is no war in existence because the troops have not actually clashed in battle.

Lord Stowell, in the *Nayade*, is quite conclusive on this point, as against Hall and his school. Laurence had argued that "there was nothing in this case to show that Portugal was at any time at war with France: that if the government of Portugal submitted to suffer injury and indignity rather than give a pretext to the rapacious ambition of France by declaring war," there could be a state of peace despite the French invasion. But Lord Stowell held that, "in cases of this kind it is by no means necessary that both countries should declare war. Whatever might be the prostration and submissive demeanour on one side, if France was unwilling to accept that submission, and persisted in attacking Portugal, it was sufficient;—and it cannot be doubted by anybody who has attended to the common state of public affairs, that Portugal was considered as engaged in war with France." [1]

Again, neutrals have a right to know when war begins, and it begins on declaration or on violent acts, not on a change of heart or intention on the part of one side or the other. Neutral obligations are now so heavy that a clear line of demarcation must in all fairness to neutrals be drawn between peace and war. But if a country may be invaded in peace time, the line between peace and war will become impossible to draw. It will depend on the exact mental attitude of the two parties, and at this neutrals can only blindly guess.

Most important of all, a state which launches out on its career of violence with proclamations of peace in its mouth will find itself dispensed from all the encumbrances and restrictions with which the path of a

[1] *The Nayade*, 4 C. R. 251.

belligerent is beset. It need not be afraid that the fortune of war will turn against it, nor that the inevitable losses of battle will annoy its populace, or weaken its resources. It can tell its Parliament that it is not at war and does not need their constitutional sanction for its acts. It is dispensed from observing all the *temperamenta* laid down in the The Hague Conventions. It can draw supplies in perfect security from friends of both parties who would otherwise be neutral: its ships can lurk in the shelter of their ports, and its armies and coffers can be recruited in their towns. It can obtain a fleet from a Power which ought not to accommodate it with a stand of rifles. That one state may equip another with means to occupy a province and bombard a coast, whilst it could not lend it the slightest assistance if its aim were merely to rectify a boundary by honourable and open war, is a *reductio ad absurdum* of such a proposition. Sometimes it is said that, as the greater includes the less, a modified degree of violence must necessarily be an admissible substitute for war; which is to say that unregulated and one-sided violence is on the same footing as ordered and reciprocal hostilities.

The doctrine is merely another facet of the attempt of powerful states to get their way in minor states without any of the risks and responsibilities and restraint of war. For the risk that the weaker state will prefer unrestricted war to unjust, but not quite unrestricted, violence is negligible. Such an arrogant calculation, relying on the weakness of the assailed in order to assail it with complete impunity, is repulsive. And it ought to be impossible—violent coercion is in essence war.[1] It

[1] The pronouncement of the Committee of Jurists consulted by the Council of the Société des Nations on the question of the bombardment of Corfu by Italy, to the effect that there are occasions on which one nation may commit acts of force within the territory of another without war, can only be regarded as a gratuitous encouragement to a fatal delusion. It is literally accurate, because the cases of self-preservation, necessary self-defence and consent offer occasions for its application; but it suggests a far wider scope, and can only give a handle to aggressive Powers in the future, who are thus absolved from all the inconveniences of war on the easy condition of saying they are at peace. Calvo (§ 1811)

can only be treated as war, whether the invader likes it or not. Lord Balfour well observed in Parliament, on the occasion of the Brito-German operations against Venezuela in 1902 :—" Does the hon. gentleman imagine that you can take the ships of another Power and blockade its ports, without a state of war ? Evidently a blockade does involve a state of war." [2]

Violence in peace time is the certain parent of anarchy. For other states will not be content to see one state helping itself by violent means : they too will interfere, and a clashing battlefield of conflicting forces will replace the State.

In short, there is war whenever there is an invasion with the intention of imposing the invader's will by force. Whether there exists along with this intention a further intention to avoid its legal and normal consequences is a matter of perfect indifference to any one who has not erected subjective intention into a fetish." It is impossible to admit that one party, by trading on the weakness of the other and on his unwillingness to declare war, should be able to exert all the pressure of war without any of its embarrassments, risks and losses.

An invasion is essentially a coercive or punitive measure : it differs in some degree from an occupation carried out without any ulterior demand on the state affected, and effected in its protection, though not necessarily at its request : *e.g.* the French occupation of Ancona and Rome and the Austrian occupation of Ferrara : not that such an act can be altogether

is apparently prepared to admit anything as Reprisals, on the terms that the act complained of shall have been " manifestly contrary to all reason and justice." Of course no aggressor will fail to proclaim what the acts of his opponent were. The whole discussion is thus removed to the region of opinion, and all definite security disappears. Calvo, in a rather characteristic manner, thus in effect encourages what he terms "the revolting abuse " of Reprisals exercised on grounds satisfactory only to the state which exercises them. And Hall's quaint idea that states may pull each other to pieces without war, so long as they are careful to call their acts " reprisals," may be dismissed as the fantastic aberration of a declared advocate of the policy of providing strong states with additional weapons against weak ones.

[2] 116 Hansard, Parliamentary debates (4th Ser., 1902), Col. 1491.

approved or esteemed lawful. Cardinal Antonelli characterized the Austrian action in 1848 in the Papal States as war, and indeed Papal troops had fought the Austrians and received Piedmont garrisons in Ferrara. The British action in Egypt in 1882 was legally sustainable, as having the express consent of the Khedive. The occupation of the Principalities by Russia in 1853 constitutes no exception to the scrupulous observance of the principle that invasion is war. The circumstances were peculiar. The invaded districts were autonomous and very favourable to the invaders. The Russian step was rather in the nature of assistance to a mi-souverain state than an invasion of its suzerain.

Even in the case of armed support afforded to prospective rebel communities, it can hardly be termed invasive war. Had a British force been landed at Charleston immediately prior to the American Civil War, it would certainly have been a *casus belli*, and would certainly have led to war; but considering that the troops would have been warmly welcomed on the spot, it may be at least dubious whether it would have constituted war in itself.

At the same time, recurring to the occupation of the Principalities, Lord Palmerston, who was a realist politician, and by no means a sentimental admirer of weak states, wrote four years later to Queen Victoria concerning this step—"Your Majesty seems to consider an invasion of Schleswig, part of the Danish Dominions, for the ostensible purpose of taking a material guarantee for the revocation, as regards Schleswig, of the Constitution of last November, as a natural and legitimate proceeding; but does not your Majesty remember, that it was a similar proceeding by Russia, when she invaded the Danubian Principalities as a material guarantee, that roused the indignation of Europe, drew down the condemnation of Great Britain, and led directly to the war against Russia?"

2. Self-Preservation and Self-Defence. — Apart,

however, from invasion, styled "pacific," as a means of coercion, there remains the question of invasion or violence as a means of Self-redress, or Self-defence. All such violence is inconsistent with the simplicity of territorial sovereignty, and it is a matter to be severely deprecated and condemned. The only exception is in the case of Self-preservation: where, that is, the very existence or integrity of the state is seriously threatened, and the threat can only be countered by a trivial invasion of the sovereignty of another. Even here immediate explanations and apologies must be made.[1] The classical case is that of the P.S. *Caroline*, which was the intended instrument of an armed expedition, organized in the United States, and intended to co-operate with Fenian rebels, in order to wrest Canada from the British Crown in 1841. It was not at that date realized that Canada would be successively regarded in the not remote future as an encumbrance and as an independent sovereign state; and the prospect of losing the colony was rightly regarded as a vital threat to the Empire. Shots having been actually fired into Canada by the expedition, a local Canadian force crossed into the United States, seized and burnt the *Caroline*, and shot two of her crew. This the United States condoned, as a measure of self-protection against a vital danger.[2] Webster emphasized that such a measure, to be permissible, must be taken under a necessity "instant, overwhelming, leaving no choice of means, and no moment for deliberation." It may be doubted whether the existence of half an hour

[1] See *The Relation of Insurgents to Invaders*, Yale Law Journal (1926-7), p. 966.

[2] See Pres. Tyler's Message, 11 August, 1842. Lord Grey is said to have told Lord Chief Justice Campbell that the destruction of the *Caroline* was "quite wrong." Campbell's *Life*, p. 19 (2nd Edit.). When S. Albans in Vermont was pillaged in 1869 by Confederates having a base in Canada, instructions by the military authorities that they should if necessary be pursued into Canada by the Federal forces were promptly cancelled by the President (Moore, *I.L. Digest*, II, 367. § 210. The arrest of a deserter, Tyler, in Canada in 1863 was handsomely apologized for by the instructions of the President: the deserter was discharged and the officer who arrested him was dismissed (*Ibid.*, p. 270).

for deliberation should affect the necessity, and perhaps that branch of the definition is rhetorical.[1] But a serious question arises as to whether the principle would cover more ordinary cases of self-defence. When the integrity of an Empire is concerned, and the immediate danger can be removed by the destruction of a small ship with a little loss of life, not only is there a great disproportion between the evil and the remedy, but the evil is absolutely very grave. Suppose the disproportion to remain, but the evil to be comparatively slight, is self-protection admissible? The issue is between Self-Preservation and Self-Defence: and on the whole, the tendency of late has been to extend the right of self-defence to minor cases. Particularly have the United States been vigorous in asserting a right to pursue marauders into adjacent territory—a right which they would hardly allow, except in observance of treaty provisions, to be exercised against themselves. The danger done by cattle-raiders can hardly be said to be "overwhelming," but, in his avowed paramount solicitude for "life and property," Mr. Evarts used language in 1878 which seemed to assert a right to cross the Mexican border with the purpose of breaking up and arresting mere marauding bands. The proper remedy in such cases is evidently diplomatic. Incursions into friendly territory, with whatever laudable object, can only be justified by the imperative necessities of danger to the State: or perhaps in some minor cases where the disproportion is very great: thus, the trampling down of fences in one country by a company engaged in extinguishing a fire in the other might be fairly excusable. But the disproportion must be extreme. It may be, as Mr. Evarts surmises, the first duty of a government to protect life and property. But, obviously, no government can guarantee everything everywhere: and its failure in some respects can by no

[1] Webster was probably thinking of the circumstances of the particular case, in which, had there been "time for deliberation," a reference to the U.S. Government might have prevented the necessity for the violation of territory.

means furnish other countries with a general license to step in and supplement its real or supposed deficiences. Mexico firmly objected in 1877 to any such pretensions,[1] and the United States officers were consequently enjoined "not to be hasty in pursuit across the border, except in an aggravated case"! [2]

It is a plausible contention, that if dangerous elements exist in one country on the borders of another, the latter ought to be allowed to exercise that control over them which the former is unable to exert. But it is the old fallacy of preferring convenience to justice. There is no international right of abating a nuisance. If the border territory is dangerous, the proper remedy is not to invade the neighbouring jurisdiction but to make proper diplomatic complaints, and, if necessary, reprisals. A violent course can only produce resentment, friction, a sense of unequal treatment, and eventual conflict.

Mere plots, without any threat of immediate force, can never justify the use of armed force in foreign territory: the seizure of the Duke of Enghien in Bavarian territory by Napoleon I was one of the immediate causes of the combination against the Emperor which resulted in Leipzig and Waterloo: the seizure of Sir George Rumbold in the neighbourhood of Hamburg was of a piece with the same lawless policy, which made all the people of Europe realize that no liberties remained to them if they conflicted with the interests of France.

[1] She expressed her intention of meeting force by force. Compare also the language of Mr. Forsyth (Sec. of State) in 1839, "An armed force in the service of the Republic of Texas . . . has crossed the acknowledged boundary between the U.S. and that country . . . for the avowed purpose of punishing certain Indians for alleged depredations within the limits of Texas. Against this insult and outrage you will promptly and in strong terms remonstrate . . . and inform the Texan government that it is expected adequate measures will be adopted by it to prevent a recurrence of such acts, which, if repeated, would inevitably lead to collisions between the troops of the two countries, which there would be great reason to deplore." *Moo. Int. L. D.* II. 363; § 209.

[2] See *For. Rel. U.S.* (1877) 418, 419, cited *Moo. Int. L. D.*, § 219 (II. 423). Half a century before Jackson had, on the assumption that Spain could not, or would not, control her Indians in Florida, invaded the territory to attack the Indians, and had incidentally attacked the Spaniards. This was mere brigandage.

Plots have at various times been carried on against Austria, Prussia and Russia in Switzerland or in Turkey, and the fact has occasioned protests, but never violence, which, in such cases, can only take the shape of war. The invasion of Portugal by Spain in pursuit of Don Carlos in 1834 seems a case of flagrant wrong, only explained by the unpopularity of King Miguel (whom it eventually ruined) and the certainty that Britain and France would be complaisant.

The analogy of the abatement of a nuisance by a private individual would be misleading. For the territory of a state is not analogous to the property of a private person: it is part of its essential essence. The analogy is closer to a private person's occupied house; and in few systems of Private Law can an occupied house be broken open by strangers for private self-redress.

That self-defence, when legitimate, need not be limited to one's own defence, but may extend to the defence of states unjustly attacked, appears to follow from the analogy of private law. Baron Descamps [1] observes that—"Le peril crée, comme l'on a dit, un lien sacré de confraternité entre les hommes et peut leur imposer le devoir d'assister dans certains cas les victimes d'une injuste agression. . . . On ne saîsit pas à première vue, en droit de gens, le titre juridique sur lequel on pourrait se fonder pour . . . interdire toute assistance quelconque, et de laisser en toute hypothèse les faibles à la merci des forts."

3. Intervention.—The question of whether it is war for a state actively to assist rebels is examined elsewhere.[2] It is of course always illegitimate.

Is it, however, illegitimate for a state to assist the operations of a Government against rebels? There is much authority to the effect that this constitutes an improper attack on the State in question. The proposition appears to be that each nation must abstain from

[1] *Le Nouveau Droit International*, R.D.I. (1929), 21.
[2] *The Relation of Invaders to Insurgents*, Yale Law Journal, May, 1927, 966.

all interference with the political affairs of every other. But it seems that this proposition only obtained currency because of the bad, or at least unpopular, nature of the Governments which were propped up in the nineteenth century by the Holy Alliance. Had it been the popular international Governments of Sardinia or Switzerland that had been maintained by the friendly force of sympathetic Powers, it is doubtful whether the proposition would ever have been advanced. The Austrian intervention maintaining the sway of a King of Naples, and the French intervention maintaining the despotism of a King of Spain, gave a bad odour to intervention. Nor was the British intervention in Portugal, in support of a *soi-disant*, but hated, Liberalism, calculated to improve its standing.

But the truth is that a state is not merely the people, but the people in their organized aspect. It is an idea crystallized in the rule of a particular Government. And it is this idea, not any and every movement which may possibly be able, if left to itself, to wield supreme physical force within the borders of the state, that foreign nations are bound to respect. Who would not admit that, as against an incursion of bandits from the woods, or of reckless and brutal men from the gold-diggings, a foreign nation would be right in coming to the assistance of a peaceable and unwarlike population whose Government these undesirable elements should endeavour to subvert? The principle of the Tobar doctrine,[1] that states are entitled to afford assistance to established governments, is only to say that states are entitled to assist other states to maintain their organized existence. It may well to that extent be heartily approved.

When, for instance, the United States, through Mr. Hughes, when Secretary of State in 1924, assisted the Mexican government to maintain itself by selling it arms and ammunition, no exception could reasonably

[1] The refusal of recognition to revolutionary governments which have succeeded in thoroughly establishing their power is, on the contrary, unjuridical and unjust, and in the long run impracticable.

be taken. It was only what Austria had rightly done one hundred years before in Naples, and France in Cadiz.

It is not necessary, however, to accord approval to the further proposition, that a nation, having forced a Government on another country, is entitled to maintain it there. Such a nation is a trespasser *ab initio*, and it cannot invoke the results of its own wrong as an excuse or justification for further wrong-doing. Its only respectable attitude is to apologize and depart.

Nor, as above remarked, is it anything but unlawful to assist rebels: and if the assistance takes a violent form it must constitute war. The prevention, by the United States President, of action on the part of Colombia to subdue the Panama rebellion was an entirely unlawful interference with the affairs of a foreign state, and is universally so regarded.

The U.S. interferences in Nicaragua, Haiti, San Domingo and Honduras show how impossible it is to draw a line, as Borchard does, between "political" and "non-political" interference. For the "non-political" interference on behalf of American merchants, prospectors and financiers in those countries took the "political" form of forcing on the states in question rulers favourable to the American interests. These armed interventions, ostensibly directed to the protection of American property, inevitably became interventions directed to the expulsion of governments unfavourable, and to the support of governments favourable, to American finance. They are as illegal as anything could well be, and have done much to cause uneasiness on the American continent.

These interferences, ostensibly for protection, led straight to the establishment of United States control. Rougier (*R. de D.I.P.* 1910), though favourable in theory to some amount of self-help, admits that in practice it always leads to the loss of independence. Such cases of self-help do not show that self-help is lawful: they

only show that the countries in question were falling under the sway of the United States.

4. Violent Defence of Foreign Interests.—But if invasion undertaken in order to protect one's own borders be questionable—and the case of the *Caroline* shows that the United States are rightly keen to question it when attempted against themselves—the use of armed force to protect the lives and property of one's people who are in a foreign country is still more liable to objection. It has been the subject of deliberate justification in a recent speech by Mr. Hughes, the doctrine of which is all of a piece with the assertion that nations are bound to be quiet and orderly in the interests of trade. According to Mr. Hughes, if a state is temporarily unable to preserve order, any and all foreign states are at liberty to come in and help themselves. This is clearly a license to anarchy. What is to be the responsibility to other nations of the interferers ? What are to be their relations among themselves ? How far do they displace the State affected in its rights and obligations ? When, if at all, do their acts drift into war upon it ? Obviously, the openings for aggression, blackmail, and disputes are infinite if such self-help be for one moment admitted. It might be plausibly said that Chinese property was not safe in California on account of the Alien Land Laws, and that Washington confessedly cannot control that State. Would China be justified in policing California ? Would an Asiatic Coalition ? Evidently such an action would be war.

With greater justice the U.S. Minister at Lima wrote on 30 July, 1897 [1]—" This town [Iquique] being occupied by, if not the head-quarters of, the military forces of Peru and Bolivia, the Chilian fleet undoubtedly had the right to attack and even to destroy the town itself. . . . And such occupancy by the military forces of the allies might itself be looked upon as notice to the inhabitants that, if they continued to reside in it, they must do so

[1] 70 S.P. 1207. Christiancy to Merriam.

subject to all the risks of war, and that among these risks is that of a bombardment. . . . What I have said of the inhabitants applies equally to the people of other, and neutral, nations there residing, and to their property. By continuing their residence in such a place, under such circumstances, they all equally assume all the risks incident to such a situation, and the attacking party are not bound to make (and practically could very seldom make) any discrimination."

Several alleged instances of the use of force for the protection of subjects turn out on examination not to bear that character. Many are cases of threats—successful threats—of bombardment: and it cannot be asserted at the present day that to bombard an open town and destroy innocent life and property in order to secure a monetary demand, or the release of a prisoner whose imprisonment might be made the subject of arbitration, is anything but a shocking misuse of power. Others are cases of unrecognized communities or countries not within the circle of Occidental nations (*e.g.* Bluefields, Fiji, etc.). The case of the seizure of the S.S. *Haytian Republic*, in 1888, was not a case of violation of territory, but merely concerned the seizure by America of an American vessel taken as a prize into Haytian waters. It seems a case of absolutely illegal action of a most reprehensible kind.

The general admission that one state ought not to inflict the evils of war or violent process on another in order to collect a debt (the "Drago Doctrine") must logically involve the supersession of violence exerted for the purpose of collecting damages. If debts cannot be collected, then damages for injuries can hardly be put on a higher plane. Nor is it easy to see why a state should be subjected to violence for failing to make its subjects pay their debts, when it is not liable to violence for failing to pay its own.

The proposition that a country should be kept perfectly safe for the benefit of foreigners would have

appeared startling in the nineteenth century, and would still appear startling if bluntly stated. It affords the maximum of occasions for friction and resentment, and it is entirely inconsistent with the principle of self-determination to create a privileged class in the midst of the nation to whom the laws and the standards of the country are not applicable. The root-principle of International Law is the avoidance of conflicts and violence by alloting to each separate public its own area of ground, in which it can work out its own destiny in its own way. The interposition of foreign force to create a privileged status for persons engaged in controlling and withdrawing the benefit of the natural resources of the land is fundamentally inconsistent with this. Its sole effective object is to make the people of another country a little better off, or (more likely) a little more numerous: and this is altogether a trivial object, compared with the grand object of state-life—viz. the development of one's own genius in one's own way in one's own limited sphere.

The Hughes Doctrine is destructive of the vital nerve of International Law, which is not Business but Self-Determination.

It is sometimes imagined that the acts of those nations which have forcibly interfered in recent years for the protection of their people in China are open to the same criticism. But the analogy totally fails. In Nankin and in Canton, indeed, there existed governments which could have been negotiated with, and it may be difficult to excuse the slaughter of uncounted Chinese there, even for the laudable object of protecting a British or an American consul. If the only way of saving an American consulate in Lancashire and its inhabitants from destruction by a landslide were to blow up a street by gunfire from an American gunboat in the Mersey, it is probable that the act would be strongly objected to by the British people. When United States sailors were landed at Kingston after the Jamaica

earthquake, they were promptly invited to return to their ships. Not even Palmerston, with his "*Civis Romanus sum*," laid down the proposition that one state could at its own hand supersede the authority of another in its own interests. In Tsi-nan, however, there existed no settled government. The town was attacked, indeed, by Nankin troops—but they had no more legal right there than Japan had. Only the crowned ghost of an ideal united China was sovereign there. Pekin, then under the control of the Manchurian chief, Chang-Tso-Lin, certainly was not. The Chinese Government had ceased to exist: China had become a geographical expression: a settled Government existed at Nankin, and another at Mukden, and the former was attacking the latter. Legally, the rest of China was no-man's-land, and lay open to annexation. Japan fulfilled her obvious duty, and, refraining from annexation, limited her action to protecting her people in that region. International Law takes no account of ghosts. It does not consider China "China" when "China" is only a memory and an aspiration. There was no one Chinese government to whom to look for order in Tsi-nan: consequently the only remedy (short of annexation) was to secure order by one's own efforts. Neither the Mukden chief nor the Nankin faction had ever ruled Tsi-nan: neither of them had any title to rule it. Contrast this with the case of an established, though weak and distracted, government and the difference will be at once apparent. In the one case there is a real established government embodying the unity of the State. In the other there are only hopes, ambitions, desires and recollections.

§ 2. Landing Parties

A minor aspect of the same desire to protect life and property at all costs is seen in the occasional practice of landing troops in cases of civil commotion, ostensibly

for the protection of life and property against marauders. It can easily be seen how such a step may drift into active or passive intervention on behalf of the established government or against it. In such cases it tends to become permanent, and to lose all its original character as a measure directed against mere non-political crime. Such acts of force on foreign soil ought always to be referred to the express request or invitation of the territorial government, and probably such invitations were the origin of the practice.

Thus, when, in 1864, Monte Video was threatened by an attack by a composite force of rebels, Argentine and Brazilian, the Uruguayan government requested the co-operation of forces from foreign ships of war. The Diplomatic Body replied that protection would be afforded to the " banks and other public establishments," " as on former occasions," on notice from the Government that the danger of internal commotion was imminent; and naval arrangements were made for the protection of the banks, legations and customs-house. But it was stated that, with regard to general security, the Diplomatic Body must limit itself to taking *ad hoc* such measures as the interests of their countrymen might dictate. In fact, no disturbances took place.[1] Subsequently, the British Minister asked Earl Russell " whether it is the intention of H.M. government to permit [!] the bombardment of Monte Video by the Brazilian Commander-in-Chief to take place," or whether they would not prefer to authorize himself to concert measures to prevent it. Russell curtly told him not to interfere until he had instructions to do so. When Paysandû was sacked (2 Jan. 1865), the British gunboats

[1] 66 Brit. S.P. p. 1204. The British Admiral was instructed from home to confine his interference to these cases, unless the British Envoy at the desire of the Government of the Republic should request him to afford protection against internal commotion : *Romaine to Eliot, ib.* 1208. Marines were sent at that request on 9 January, 1865, to protect two Uruguayan banks, the Government having compelled them to suspend specie payments and being apprehensive of disturbance. Protection was also accorded to an English bank there : pp. 1240, 1246, 1228.

seem to have limited their action to conveying refugees from one port to another.[1] The Government declared their intention of burning Monte Video if taken by the enemy: the British Minister tried to induce the Diplomatic Body to pronounce that no government contemplating such a thing could look for moral support; but only the Prussian agreed: the French, Italian and Spanish Envoys declined to assent. When Monte Video, on 22 February, 1865, was taken, without bombardment, the foreign naval forces, at the request of the President, occupied the Government house and Custom-house, and were requested by the invading commander to continue to do so for the moment: but the next day they were replaced by the invading forces.[2]

The orthodox doctrine is that residents of foreign nationality must take the risks of civil war or insurrection, as of foreign war, and that the State in which they live is not bound to compensate them at all, or, at any rate, on no higher a scale than it may adopt to compensate its own subjects. Still less can it be allowed to interfere actively of its own accord for their protection. A certain tendency, however, has been observed of late years for powerful States to insist on the immunity of their subjects from the consequences of civil commotion. It does not appear that this is legitimate: such States would certainly not allow themselves to be hampered in putting down rebellion at home out of consideration for the lives and property of aliens. The practice must be regarded as unjuridical, and a mere abuse. A State ought not to be hampered in settling its own domestic differences by the fact that foreigners have been allowed to reside in its midst. Cases of such foreign interference by open force are, even so, few as yet.[3] It is under

[1] *Ibid.*, p. 1232.

[2] *Ibid.*, p. 1247.

[3] Sometimes the actual conduct of hostilities has been interfered with, though very seldom, and quite illegally. Borchard (*Dip. Protection*, p. 451) reports that a foreign government insisted on the observance of a neutral zone in Dominica in 1904 and 1914, and in Honduras in 1911. These were only instances of arrogance. Would the U.S. have

the influence of such illegitimate ideas that forces have on various occasions been stationed in foreign cities where an insurrection is in progress, for the protection of their countrymen, without either the express or tacit consent of the local power.

It is difficult to discover what actually has taken place when troops were landed in cases of disturbance: normally and ostensibly their action seems to be limited to the prevention of wanton plunder by private robbers: but in some cases it has extended to assuming the government of the country, and maintaining in power a nominally national Government subservient to the foreign power.

Troops were landed at Salonica when riots occurred on the massacre of the French and German consuls there in 1876: while Moore [1] notes that British and American forces were temporarily landed at Bluefields when it was retaken by Nicaragua from insurgents, and that American forces were stationed at Pekin in 1899. It is also noted that Mr. Hill, Acting Secretary of State, stated in 1900 (11 Sept.) that the Government had a right, and had on occasion exercised it in China and elsewhere, "to land forces and adopt all necessary measures to protect the life and property of our citizens, whenever menaced by lawless acts which the government or local authority is unwilling or unable to prevent." Such a broad doctrine—though recently repeated by Mr. Hughes—would clearly enable any country to interfere by force in the management of any other which happened to be in a more or less disturbed condition—and would certainly have justified the United States in landing troops in Ireland at any time between 1880 and 1922. As we have noted, when U.S naval forces

allowed Britain to dictate to them a neutral zone in 1862? It is true that foreign nations assumed to exercise a certain control over the conduct of hostilities in Brazil in 1893. But that only regarded the measures taken by insurrectionary leaders: as foreigners had no other effective remedy against rebels, they might well claim to be allowed to protect themselves against them. Moo. *Int. L. D.* ii. 1113).

[1] See Moore, *Int. L. Digest*, ii. 401.

landed troops in Jamaica on the occasion of the Kingston earthquake the Governor secured their immediate withdrawal: and it cannot be supposed that an insurrection confers any wider rights than an earthquake. The occasions on which the U.S. have landed protective forces are discussed in Clark's *Right to protect citizens in foreign countries by landing forces* (pp. 31, 47). But it is clear that, if Great Britain were suppressing an insurrection in Liverpool or Dublin, the landing of American forces would not be for a moment allowed: nor would such a refusal be generally regarded as a *casus belli*. What a strong Power would never permit cannot lawfully be forced on a weaker one.

It may be concluded that the well-advertised "landing of troops for Protection of Subjects in Civil Disturbances," is a measure which depends on the consent of the local sovereign, and which is restricted in principle to the prevention of violent assaults on foreign persons and property by irresponsible marauders, and possibly by the insurrectionists. Further than that, there seem to be few instances of anything which was not either (1) war, or (2) illegal pretension.

The protection of Embassies and Legations in countries which are not completely within the orbit of Occidental feeling (*e.g.*, Corea, China, etc.) is a different matter, and appears to some experts to be sanctioned by custom. But in 1895, Mr. Adee, U.S. Foreign Minister (Sec. of State), wrote (8 July), advising the Minister to Corea that the department wished to discourage the practice of maintaining a Legation guard at Seoul, and to leave the duty and responsibility of protection with the Corean government.[1]

On the whole, the opinion, that (except perhaps for Embassies, Legations and Consulates) there is no right to land troops in disturbed countries for the protection of foreign residents, is based less on an academic deduction from any theory of sovereignty than on the

[1] *Int. L. D.* ii. 401.

admitted principle of the Equality of States, and on the certain fact that no State of anything like equal force would tolerate the uninvited presence of foreign troops for that purpose, however great and harmful a temporary disorder existing in some part of its dominions might be.

3. Self-help and War.—It may be doubted, however, whether such minor acts of unlicensed self-help necessarily constitute war. It is important to determine the point in view of the renunciation of "war" by the Kellogg Treaty.

(1) Forcible acts of self-preservation, as above defined, viz. acts of comparatively trivial violence, which are strictly necessary in order to avoid an immediate threat of violence to the integrity and institutions of a State, and where no choice of means and no moment for deliberation exist, cannot, in general, constitute war. The theory underlying them is that the threatened State does for itself what the territorial State would surely do for it if there were time to convince it of the emergency. If, therefore, there be a true case of Self-Preservation, it cannot, in general, constitute war or be treated as war.

(2) Forcible acts of self-defence, as in the case of invasion to suppress border raids, and forcible acts of self-protection, as in the case of landing troops, may conveniently be treated together with forcible acts which, not being exactly acts of self-preservation, are nevertheless represented as pacific.

All these cases, with one small exception to be referred to subsequently, are entirely illegal, except where accomplished by consent. The question of whether they constitute war will, however, depend to some extent on their magnitude, and, above all, on the question of whether the force is exerted against private persons or against the public, the public authorities, and public rights.

Military operations, on however small a scale, must probably always be regarded as war. They cannot but

constitute a threat to the independence of the territorial authorities. And of course bombardment is war in any sane interpretation of the term. As in the cases of piracy and extradition, we may take it that interference by foreign forces with private individuals, though probably unlawful, will not amount to war, whilst interference with the public, with public authorities and public rights, will do so. The use of the military in just the same way as an armed civilian sentinel might be used could not be war, whereas an organized military patrol, enforcing by penalties regulations on the inhabitants, must, I think, certainly be regarded as such. Still something must depend on scale. While it would be absurd to say that Italy was peacefully bombarding Corfu, it is not quite absurd to say that Lord Rosebery was peacefully breaking into the Corinto Custom House.

The small exception alluded to above arises when a comparatively considerable evil can be averted in one country by a disproportionately trivial exercise of force in the neighbouring territory, and there is no time to invoke the permission or help of the territorial state. It is, on a microscopic scale, analogous to the self-preservation of its integrity and existence by a nation. Unlike Self-preservation, its lawfulness is questionable, because the absolute value of the interest to be protected is small. But, whether lawful or otherwise, it does not seem to amount to war. It is plainly limited by the circumstances to a very small field, and there is no desire to overcome the authority of the territorial power.

If on any extensive scale in the matter of interference with the government, institutions, or military operations of the country, self-help seems to be clearly of a warlike nature. But if it is confined strictly to the police protection of foreigners (I do not think it need necessarily be of one's own subjects) against private crime facilitated by a state of disorder, it does not appear

to amount to war, or to be forbidden by the Kellogg Treaty. Even if the troops are ordered away by the Government, and refuse to withdraw, still, if their duties are steadily limited to affording such protection, although their position may be illegal, it scarcely amounts to war. If, however, they begin to preserve order generally, to interfere with administration, or to dictate to the Government or to its military or civil authorities, it appears to me that such force does amount to what Despagnet and De Boeck call "one country's getting its own way by force in the territory of another," which they rightly term the essence of war.

§ 3. "Pacific" Blockade

A coercive measure which, again, has been attempted to be justified by the obsolescent institution of Reprisals, is the so-called Pacific Blockade. This dates only from 1827, and its exercise has been infrequent in the present century, if indeed it has been resorted to at all since 1897. It has two forms: one, which is now universally admitted to be illegitimate, in which the vessels of third parties are captured, just as in warlike blockade—and another, more insidious, in which only the vessels of the other party are attacked. In either form it must be pronounced entirely contrary to principle—and, as a novelty destitute of merit, it cannot be considered as a legitimate weapon in the armoury of nations.

We may at once dismiss the discredited and discarded first form.[1] It was resorted to by the Allies in 1827 against the Greek coast of Turkey; it ran out in the violent measures of substantial war (Navarino and the French invasion of the Morea) which secured the independence of Greece. The French proceedings against Portugal in 1831 were spoken of in England as "war":

[1] See the cases detailed by Atherley Jones, *Commerce in War*, pp. 106 *seq.*, and in the writer's *International Law*, pp. 252 *seq.*

and, when the Scheldt was blockaded in 1832,[1] the French were assaulting Antwerp. A British "blockade" of New Grenada in 1837, resulting apparently in the seizure of one French and one Grenadan vessel, is hardly worth mentioning. It was vitiated by fatal irregularities.[2] The French blockade of Argentina, 1838–40, and the Franco-British blockade in 1845 both led to nothing; the French and British were obliged in the end to recognize Rosas, and to abandon their demands on him. The British Treaty with Argentina in 1849 and the French in 1858 were, indeed, in the nature of treaties of peace. Palmerston admitted that blockade was a purely belligerent right, and that a formal peace should be made with Rosas.[3] Britain and France agreed to salute the Argentine flag and to restore captured vessels of war: captured merchantmen were to be reciprocally restored. The French blockaded Mexican ports in 1838, and here again a land invasion supervened.[4] The blockade of Gaëta by Piedmont, in 1865, during the rebellion against the King of the Two Sicilies, who had taken refuge in that town, was clearly a warlike measure. The royal forces were besieged there by the insurrectionists; war was going on; and the action of Piedmont can only be regarded as a participation in it.

Lübeck, on the occasion of the Mexican adventure, protested against the notion that without war her ships could be seized.[5]

In 1864, Brazil blockaded Uruguayan ports, but she proceeded also to attack and capture Paysandu.[6]

[1] Scarlett (Lord Abinger) considered this to be war: "Instead of declaring war before you begin hostilities, we begin hostilities and declare that we are at peace all the time. We are knocking down the Dutch in pure affection and kindness" (*Memoir of Lord Abinger*, 156: 22 Nov. 1831).

[2] See the writer's *International Law*, p. 103, and *Brit. State Papers*, vol. 26, pp. 194, 211, 227, 256.

[3] 37 *S.P.*, p. 7.

[4] 27 *S.P.* 1176 *seq.*, *Ibid.*, 197. The proceedings were treated as war by Mexico.

[5] *Annuaiere de l'Inst. de Droit Int.* (1887), 292.

[6] Baty, *International Law*, 257.

Before the warlike character of her proceedings had become manifest, Lord Russell had written to the British Minister at Rio: [1] "It was competent to the Brazilian government, in order to obtain justice for wrong inflicted upon its subjects, to have recourse to reprisals against the Republic of Uruguay; but it was not competent to the Brazilian government to stop, visit, or take any cargo whatever out of neutral vessels, as a subsidiary means of accomplishing that end. That right of interfering with the commerce of the neutral is incident, and incident only, to a state of war."

In 1858, Ecuador was blockaded "peacefully" by Peru: this operated as war, concluded in 1860 by a treaty of peace.[2]

In 1884,[3] France blockaded Formosa, and this likewise was treated by Lord Granville, the British Foreign Secretary, as an act of war: [4] "Bombardments and other hostilities have taken place, and the French government have proclaimed to neutral Powers that any . . . ships attempting to enter those ports, to which they have the right of access by treaty, will be captured. H.M. Government cannot admit any such novel doctrine as that British ships are liable to capture for entering certain treaty ports in China in time of peace. But they maintain that a state of war exists, and therefore they do not deny the right of the French government to establish an effective blockade of the ports in question, according to the laws of war, and to capture neutral vessels attempting to force it."

Lord Granville thus accentuated his previous words (11 Nov. 1884), when he wrote: "The contention of the French government, that a 'pacific blockade' confers on the blockading power the right to capture

[1] Russell to Lettsom, 24 Dec. 1864 (*Brit. State Papers*, vol. 66, 1208).
[2] See 50 *Brit. S.P.* 1086 (Treaty of 25 Jan. 1860).
[3] Very similar proceedings—an asserted "peaceful" blockade, accompanied by heavy fighting—were taken by France in Siam in 1893. See 87 *Brit. S.P.* 303.
[4] *Ibid.*, vol. 76, p. 423.

and condemn the ships of third nations for breach of such a blockade, is opposed to the opinions of the most eminent statesmen and jurists of France and to the decisions of its tribunals, and it is in conflict with well-established principles of international law."

In the end a treaty of peace was made between China and France.[1] In the same fashion, the Anglo-German blockade of Venezuelan ports in 1897 was an ordinary warlike blockade. In the proclamation of blockade,[2] " neutrals " are specifically referred to. In fact, Venezuelan batteries fired on British and German ships, Venezuelan men-of-war were sunk, and the proceedings terminated with a regular treaty of peace.

" Does the hon. and learned gentleman suppose," asked Lord (then Mr.) Balfour of Mr. Healy, " that without a state of war you can take the ships of another Power and blockade its ports ? " And so Lord Lansdowne wrote (13 January, 1903): " The establishment of a blockade created *ipso facto* a state of war between Great Britain and Venezuela." And Lord Grey said in 1909: " It is no good talking of ' peaceful ' blockade. Blockade is blockade. It is the use of force. . . . Do not let the House think that by smooth words, such as by applying the adjective ' peaceful ' to blockade, you are going to minimize the ultimate consequences of the step you are taking." [3] An even greater statesman, the Duke of Wellington, observed in connection with the proposal to enforce the suspension of hostilities upon the Belgians in 1832: " It must be well known to a noble Lord who signed the protocol [Palmerston], that a neutral Power can have no right to blockade the ports and seize the ships of one of the belligerents " (9 Hansard, 3rd. ser. c. 877).

[1] Granville to Waddington, 26 Nov. 1884. *British State Papers*, vol. 76, pp. 426 *seq.*, p. 1020, and cf. p. 423.

[2] *Brit. State Papers*, vol. 87 (1903): *Venezuela*, *London Gazette*, 19 Dec. 1902.

[3] *Times*, 28 May, 1909 (8 c.).

It is plain that none of these examples, which are all that are to be discovered, establishes the legitimacy of "pacific" blockade. All [1] which were not completely ineffective were supplemented by violent acts of a clearly warlike character. And the Argentine proceedings, which were not so accompanied, failed of result; and, even so, were admitted to be war, and were concluded by a formal peace.

Turning to the case in which the ships of one Power alone are seized, it is apparent that this is nothing more or less than General Reprisals under a new name. Special Reprisals were a legitimate, if decaying, pacific institution. They consisted in seizing vessels upon the high seas, as security for liquidated damages of practically admitted amount.[2] But General Reprisals, viz. orders for bringing in all the shipping of the other party in order to put pressure on it, were tantamount to war.[3] "Without war," declared Palmerston,[4] "one cannot adopt such far-reaching measures." Brunnow, speaking of Palmerston's Greek proceedings in 1850, held the same language, and turned it against Palmerston himself. "Le blocus," said Brunnow, "dépasserait, à mon avis, la limite où les représailles toucheraient à l'état d'hostilité envers la Grèce."

Such occasions of general reprisals appear almost all to have been directed against Greece. It need only be said as to the case of 1850 that Palmerston's measures have been universally condemned. As to the singular

[1] Except perhaps the insignificant Grenadan case, in which the object of the blockade had been obtained before it took place! 95 *Brit. S.P.* 481, Lansdowne to Herbert.

[2] Cf. The seizure by Britain in 1864 of five Brazilian ships. 54 *S.P.* 799, 841. So, the reprisals against Greece in 1850 were vehemently asserted by Palmerston to be "not a blockade"; and, whatever they were, Queen Victoria termed them "hostilities." See Dalling's *Palmerston*, iii. 327; *Letters of Queen Victoria*, ii. 277; 39 *S.P.* p. 694.

[3] In the *Maria Magdalena* (Hay and Marriott, 247), there had been a declaration of general reprisals against France, but no declaration of war, by Great Britain. It was held that a British subject's goods going to France could be condemned for trading with the enemy. (Cited by Sir Graham Bower, *Trans. Grotius Society*, 1925, p. 46.)

[4] *Ut suprà.*

proceedings of 1886 and 1897, the former is perhaps the only real instance of a " blockade " of this kind not accompanied by warlike violence, and issuing in success. The proceedings of 1897 were very anomalous. The " blockade " had nothing in common with blockade. The Powers were at war neither with Greece nor with Turkey : [1] they did not make general reprisals against Greece : what they did was to interdict Greek ships from approaching Crete, where the Greek population was in insurrection against Turkey. By what right they did this remains unascertained : these proceedings of 1886 and 1897 (in the latter case the Powers eventually, in Turkish interests, invaded Turkish territory and superseded the Turkish government) [2] can only be ascribed to flat anarchy. No British, Austrian, German, French, Russian or Italian government would have permitted such proceedings against themselves.[3]

It is apparent, therefore, that, except when the vessels of third parties are seized the measure has really only a single case to support it :—the curious mode of pressure placed upon Greece by the Great Powers in 1886. The measures of 1897 were not a blockade, and did not resemble one. Those taken against Greece in 1850 and Brazil in 1864 were asserted by their authors to be nothing but special reprisals for liquidated damages, and few proceedings have received more unanimous condemnation than the former (Palmerston being censured by his own country's House of Lords). Pacific Blockade as a general method of putting pressure upon a nation has this sole affair of 1886 to rest on : and it is not

[1] 39 *S.P.* 499.

[2] See *The Situation in Crete, Law Magazine and Review* (1897), p. 161.

[3] The opinions of authors on the whole subject of Pacific Blockade will be found collected and analysed in the *Law Magazine and Review* (1896), 285. Mr. Hogan's monograph on the subject is devoted to rehabilitating the institution; but the conception is condemned by Westlake (*International Law*, II. 16), and the present writer has heard it strongly objected to by the late Lord Phillimore. It may be noted that the court in *Talbot* v. *Seeman* (1 Cranch, 1) considers that the United States were "in a state of partial war" with France: although no hostilities had taken place except on the high seas.

enough. A single instance cannot justify a thoroughly one-sided and insolent proceeding.

"H.M. Government," we read in the Counter-Case of Great Britain at the Alabama Arbitration (p. 21), "knows of no distinction between more dignified and less dignified powers; it regards all sovereign states as enjoying equal rights and equally subject to all ordinary international obligations; and it is firmly persuaded that there is no state in Europe or America which would be willing to claim or accept any immunity in this respect on the ground of its inferiority to others in extent, military force or population." Such a statement, unimpeachably correct as it is, is inconsistent with the idea underlying "pacific blockade"; namely, that a powerful state may presume on its strength in order to preserve the illusion of peace while exercising the pressure of war.

Lafargue [1] cites Fauchille as saying, "Ce n'est pas la guerre que les grands puissances veulent éviter, ce sont les inconvénients de le guerre." Pistoye and Duverdy criticize Guizot when he said, "Nous faisons un blocus; ce qui n'est pas la guerre complète, la guerre déclarée." They reply with reason, "On n'avait pas déclaré la guerre, mais on la faisait! . . . Pour nous qui considérons le réalité des choses la guerre existait." Geffcken notes that a blockade has not the isolated and limited character which is of the essence of reprisals. Gessner says that Pacific Blockade only endeavours to secure this aim by an easier method than going to war, while Hautefeuille is unable to reconcile the idea of peace with the institution of a blockade. Cauchy, as I have shown in an article previously cited,[2] is wrongly cited as approving of it: all he says is that a blockade is as lawful as any other method of waging war. There remain only a handful of German jurists who approve

[1] *Les Représailles.*

[2] L. M. & R. 1896—*The Institute of International Law and Pacific Blockade.*

the practice—Bluntschli, Bulmerincq and Perels, to whom Lafargue adds Calvo, Ferguson and Wharton.

§ 4. Independence and Interdependence

1. Self-Determination. — "Do, or do not, the nations advance from Independence to Interdependence?" asks Dr. T. A. Walker in his invaluable "*Science of International Law.*" It is a fair question; but we must be careful that we do not beg the answer. If by interdependence we mean social and economic dependence on one another, the answer certainly is in the affirmative. But many thinkers in these days are inclined to put a political interpretation on the term, and to represent the nations as in a hurry to part with large segments of their sovereignty in favour of something which is not very well defined, but which generally boils down to signify the nominees of a few select governments.

Nothing is more notable in the development of modern international law than the rapidly increasing strictness with which states are held accountable for any injury sustained by foreigners within their borders. But it is a somewhat one-sided stringency. In the present fluid state of the subject it is a very frequent occurrence to find powerful countries exacting damages and apologies for mishaps to their people from weak states. But it is by no means so common a phenomenon to see powerful countries admitting a corresponding liability to weak ones.[1] No doubt the wolf has always an advan-

[1] Two cases illustrate this point very forcibly. In each case a sentry shot a foreigner—in the first case when attempting to stop a deserter by firing along the public road (the man was allowed to work in public, under a single guard); in the second case by a somewhat premature challenge. In the former case, the U.S. declined responsibility; in the latter they demanded and obtained under protest $10,000 from Honduras. In the former case (that of a British lady, Miss Cadenhead), an arbitral award sustained the refusal of liability in 1913 (see A.J.I.L. (1914), 665). It may be doubted whether their Government would have been readily satisfied that the affair was not due to carelessness, had it happened in Honduras or Hayti. Cf. the *Pears* case, *For. Rel. U.S.* (1900), 674, where Honduras was made to pay the U.S. £2,000 in similar circumstances (see Baty, *Int. Law*, 237).

tage over the lamb as a litigant; but, when the law itself is vague and indefinite, the wolf can not only devour the lamb, but it can prove that it was right to do so. Assured law is the sole shield of the weak.[1] Doubtful law deprives them of their only protection: the opinion of mankind.[2]

The law in this matter of aliens was formerly simple. It was not a matter of right for an alien to intrude into the commonwealth—it was a matter of favour. If it was conceded, and the alien came in, he entered at his own risk. Few cases, if any, are cited, in which one sovereign complained of the maltreatment of his subjects by another. Travellers must be content. Gradually, the establishment of a certain minimum of protection for person and property was recognized. But it was a minimum only: a stranger must not be barbarously used. Commercial treaties, where they existed, raised the standard in some degree; but the safety for which they stipulated was nothing more than exemption from official extortion or oppression. It is only in the present century that attempts have been boldly and repeatedly made to ensure a high standard of treatment and even protection for foreigners abroad. It would seem that these attempts have gone too far. They have gone a long way towards placing foreigners, especially when in weak and undeveloped countries, in a privileged position, and thus towards breaking down the sense of national consciousness and national honour.

The essential characteristic of a nation is that it is free within its own borders to live its own life and to apply its own ideas. We need not go so far as to set up a mathematically infinite liberty for it within its borders.

[1] That it is an effective shield and a genuine protection appears from the respect in which it was held by a realist like Bismarck: "The whole weight of all imponderables, which weigh far heavier than material weights, will be on the side of our opponents whom we have attacked" (*Reichstag*, 6th Feb. 1888).

[2] Cf. Baron Descamps, *Le Droit International et la thèse de la Nécessité, passim*; also *Le Droit International Nouveau* (R. D. I. (1929) 11).

There is a limit to what it may do. It must not scandalize its neighbours by horrible barbarity. But, short of that, a nation is not really a nation unless it is free from external dictation and control. The sharp divergences which sunder Humanity are only capable of conciliation by being left to operate apart, each people working in its own territorial limits. The Wars of Religion were only put an end to by an agreement to differ. The Catholic and the Protestant no longer tried to enforce their respective ideals at the point of the sword. *Cujus regio, ejus religio:* the Catholic might be Catholic in Bavaria, and the Protestant be Protestant in Pomerania. Territory and perfect self-determination within the territory are a *sine qua non* of the State.

But the genius of a people may be for disorder: A nation may enjoy civil war. It may prefer the rifle to the ballot-box, or even to the cash-box; and although we may disagree, we cannot refuse to admit that this is its own affair.

The desire to standardize the nations and to enforce the scrupulous protection of person and property upon them all, is nothing more respectable in origin than a desire for greater commercial prosperity. It is to keep the merchant safe, to keep the surveyor undisturbed, to keep the engineer secure, to keep the banker comfortable, that a high standard of treatment for aliens is insisted upon. And why does the merchant go abroad? why is he followed by the banker, the engineer, the surveyor, and their satellites? The facile answer—"To satisfy the greed of the capitalist"—will not be given here. But it certainly is to satisfy the material desires of somebody. And the question arises, Is it well that the people of some nations should be somewhat better off, at the cost of depriving other nations of their full and complete self-determination? Any one who reflects on the irritation and *malaise* which are caused by the most benevolent interference with individual liberty will be in no doubt as to the answer.

the modern exploiter that he should have a fair hearing in the Courts. The Courts must give him a decision that his Government approves. If the law debars them from giving such a decision, so much the worse for the law. It is not enough for the modern exploiter that he receives equal treatment with the native. He demands better treatment, and much better treatment. He must not only have a due application of the native law, but the native law must be such as his Government considers just.

So far, the evil has not gained a great hold on the world: it is mainly in the area of the Caribbean—in Mexico, San Domingo, Hayti, Nicaragua, San Salvador—that it has raised its head. But it is a very menacing phenomenon. It is easy to say that the resources of the world are here for the benefit of all, and that they ought not to be appropriated by any single state. Such an appropriation is by far a lesser evil than the intrusion of foreign force.

It would be out of place here to detail the cases which lead us to the conclusion that a concerted attempt is being made throughout the world to control the action of States, and to defy the laws of States in the interests of what is styled "big business." Only a few of the most recent symptoms will be cited.

In the *American Journal of International Law* for July, 1928, there are set out two interesting judicial decisions. Both are arbitration awards delivered between the United States of America and Mexico. In *Richards' Case*, Mexico was decreed to pay nine thousand dollars, not because every precaution had not been taken to prevent the unfortunate death of Richards: nor because any agent of the Government had been concerned in his assassination: but simply and solely because it appeared to the wisdom of the arbitrators that every effort had not been made to capture and penalize the murderers. The ground of the award was that at one stage of a difficult and dubious case there

was great delay in proceeding against certain accused persons; in fact, the proceedings were dropped. The only ground of prosecution was that the dead man had expressed a fear of being killed by the persons in question, and one would be much surprised to hear that a United States prosecutor would feel bound to press proceedings to conviction against an American whom a foreign Government accused of murder on such slender grounds after he had been acquitted by the trial court. The acquittal was in 1922, and the complaint of America was simply that the appeal against it was not pressed. How could it possibly injure the United States to the extent of about £2000 that parties who were possibly and presumably innocent should not be prosecuted *à l'outrance*? It is intelligible that, where a Government is really responsible for an injurious act, compensation should be made to the injured party; but the doctrine engrafted upon it, that a Government must pay up unless it makes every human effort to convict and penalize somebody, is consonant with no principle of justice or of reason. It amounts, in essence, to dictating to a State what its criminal law is to be, whom it is to consider proper to be prosecuted, and which of its courts it is to respect. Mr. Richards may have been a most estimable personage, and his relatives similar personages, but it cannot be said to have been worth nine thousand dollars to them to reflect that somebody had been imprisoned or slaughtered for his death. It would have been more nearly worth five hundred dollars or so; and it is obvious that the exaction of a full indemnity was a mere means of putting pressure on the Mexican Government to adopt American standards of trial, evidence and prosecution. Indeed, the standard set was far more stringent than the standards of America. Mexico was warned to prosecute to the bitter end by successive appeals any one accused of assassinating an American. What is this, but to introduce a privileged class into the polity of Mexico?

The idea of exacting a full indemnity in case of failure to use every effort to secure a conviction is in reality only a means of eluding the well-established principle that a Government is not as a rule liable for the acts of private persons.

In *Turner's* case, Mexico was held responsible for the death in prison of an untried prisoner, not on account of any ill-treatment, but merely because he had been detained too long.

Turner was in jail from about 1 April to 14 June 1899 (say ten weeks); then he escaped, was re-incarcerated about 1 September, and died on 28 January 1900: *i.e.*, about five months afterwards. The Mexican Law enacts that the preliminary investigation must be concluded in five months; and because of this irregularity (if it were such in the case of an escaping prisoner) the arbitrators came to the astonishing conclusion that Mexico must be responsible for all that happened to him during his incarceration, and must pay his widow four thousand dollars. Is it credible that Great Britain, if a prisoner died in an English jail in circumstances where his detention was questionable by English law, would be ordered to pay £800, or anything, on account of his decease?

These two cases, taken at random from current literature, show the intensity of the movement to introduce a privileged position for the subjects of powerful States in the territory of weak ones, by holding the latter responsible, by hook or by crook, if they come to harm.

2. Judicial Independence.—Another case, *Chattin's*, is of capital interest, because, more flagrantly than *Turner's Case*, it strikes at the authority of the Courts. In this, and three other like cases, Mexico found she had to pay the total sum of twenty thousand dollars, or over £4,000 (the claimants amongst them wanted £40,000), because citizens of the U.S. had been convicted of embezzlement and duly imprisoned by the Mexican

courts.[1] It is a satisfaction to know from Mr. van Vollenhoven, the umpire, that "an international tribunal can never replace the element of the judge's being convinced of the accused's guilt." It is less satisfactory to hear that (though "only in extreme cases, and then with great reserve") an international tribunal can look into "the legality and sufficiency of the evidence." In the case under review—without stating that it was an extreme case, or evincing any extraordinary reserve—the umpire immediately proceeds to look into it, and pronounces his opinion on it (which is not unfavourable). But he finds the proceedings irregular to a degree, and gives Chattin four thousand dollars. And why? Two grounds are alleged. Undue delay and insufficient information respecting the charge are found by the umpire to have been present: and the umpire expresses his disapproval and indignation at the non-observance by the Mexican Court of "international standards."

There are, and ought to be, no "international standards." There is no reason, beyond a moderate material advantage, for aliens choosing to live abroad; and there is every reason against giving them a privileged position there.

There is a still more serious reason for questioning the assumption by the umpire of the position of an international lawgiver, in his repudiation of the respect which used to be everywhere accorded to the courts of justice. It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are. The executive and the legislature represent the expression of its will. The courts of justice represent the colourless and impartial expression of justice in the interpretation of its will. Consequently, sound doctrine requires that the decisions of courts of justice everywhere shall be

[1] It should be noted that the sentence was not final, and that the claimant was released by a political mob which broke open the jail.

respected (though, of course, not necessarily enforced) abroad.

If the procedure and decisions of courts cease to be treated *ex officio* with implicit respect, the whole authority of courts and judges everywhere is lessened. Unless and until a particular court is definitely objected to as corrupt or unprincipled, and its title to respect as a normal court once for all destroyed, any questioning of its action in any particular case is a blow, not to itself alone, but to the independence and authority of the judiciary throughout the world. The great principle of respect for the *chose jugée* receives a shock which it will not indefinitely continue to survive.

Mr. Justice Harlan remarked, in the course of the Fur-Seal Arbitration in 1893, that "Judges in the United States are independent of the Government."

"Not as a nation?" asked Baron de Courcel.

"Yes," reiterated the Judge, "they are independent of the nation." Mr. Carter (Counsel for the U.S.) took up the thread—"If a French citizen should have the misfortune to be involved in litigation in the United States, and a judgment should be pronounced against him, and should he appeal to his own government, and the government should appeal to the United States, he would be told that he had no remedy; but the government of the United States was not responsible for the conclusion to which the judges came. . . . He had had a fair trial, he had had the same opportunities which citizens of the United States have, and that is all the United States could give him." Mr. Carter apprehended that a similar answer would be made in a similar case by the government of France; and although Baron de Courcel was "not quite sure," he did not definitely negative the proposition.[1]

It is a matter of universal interest that there shall be judicial institutions to which the executive cannot dictate. If the local executive cannot control

[1] *Fur-Seal Arbit., Oral Argument of J. C. Carter*, p. 107; cf. p. 109.

its courts, neither should it be responsible for their acts. Responsibility will inevitably introduce control.[1]

"If the character of those tribunals be respectable, impartial and independent, their decisions are to be regarded as final. . . . In almost innumerable cases of reclamations sought by citizens of the United States against Spain for alleged captures, seizures and other wrongs committed by Spanish subjects, the answer has been that the question has been fairly tried before an impartial Spanish Tribunal having competent jurisdiction, and decided against the claimant; and with the sufficiency of this answer the government of the United States has acquiesced. . . . If the tribunal be competent . . . free from unjust influence . . . impartial and independent, and if it has heard the case fairly, its judgment is to stand as decisive of the matter before it" (D. Webster, *Works*, VI, 403).

It is not necessary to deny that, if it chooses to maintain a corrupt and bad tribunal, a country may be answerable for the consequences. But that is not because the tribunal is its agent, but because it is corrupt and bad. In principle, a country is entitled to have the law that it likes, the procedure that it likes, and the speed of trial that it likes: and the attempt to impose an enlightened "international standard" for aliens can only result in increasing enmity and resentment. Mr. Van Vollenhoven subjects the conduct of the judges in the Chattin case to a severe scrutiny, and, because the proceedings were not finished within seven months, he concludes that there was undue delay. He does not inquire into the reasons for delay; nor does he seem to reflect that in Europe, if not in America, it may often be several months before an accused is brought to trial.

[1] It should be noted that the topic of the relations of the courts to foreign powers has at least three branches: (1) The action of the courts as a primary measure of redress for an independent injury; (2) Alleged injury primarily sustained by or through the improper behaviour of a court; (3) The failure of a court to adjudge penalties against an alleged wrongdoer.

The umpire also severely criticizes the manner in which evidence, and hearsay evidence, was produced to the court in the absence of the accused: but really a Mexican tribunal is not obliged to accept the American rules of evidence! He comments in detail on the slovenly way in which the court, in his judgment, sought for evidence in the case. But unless and until a court is absolutely deprived of credit in the eyes of the world it ought to be allowed to conduct its own trials in its own way. A Latin court conducts its trials in the "inquisitorial" method, which is not the Anglo-Saxon way. It necessitates constant and long adjournments, and it does not necessarily require that the accused should be confronted with the witnesses. But because the judge found that entries in an official paper were damning against the accused, Mr. Van Vollenhoven blames him because he did not try "to have it explained." Chattin himself could give no satisfactory explanation—and why was the judge to discover one for him? The umpire blames the judge for not summoning one Virgen, who "might have been" mixed up in Chattin's dealings, and another clerk who had been dismissed for embezzlement. This is puerile: he *might* have summoned half Mazatlán. That there was no domiciliary search of the accused's houses is mentioned as a fault: it is news to us that domiciliary search is usually regarded as beneficial to the accused. Finally, "it seems highly improbable" that there was any oral or cross-examination": *ergo*, Anglo-Saxon methods having been discarded, "the Commission would render a bad service to the government of Mexico if it failed to place the stamp of its disapproval and even indignation on the proceedings."

It is to be feared that there would be few criminal judgments rendered in France or Italy on which such a Commission would not feel called upon to expend the force of its indignant virtue.

The whole case comes to this—that the umpire

thought the case might have been better tried. And if a State is to be responsible to foreigners in large amounts whenever the trial methods adopted by their judges could have been improved upon, it is obvious that powerful States will not tolerate such a state of things, and that weak, remote, unusual States will alone be oppressed by it.

We have devoted so much space to the case because it raises the all-important question of Denial of Justice. Given the general principle of respecting judicial decisions, an exception is of course to be found when the judiciary refuses to act, or to act judicially, or is prevented from doing so. Denial of Justice occurs in such an event. It is only such "denials of justice" that cause state responsibility. It is not Denial of Justice when its laws are what other countries may consider unjust, or when a law court renders a supposedly unjust decision. Denial of justice is, in this connection, simply the refusal of a normal trial by the tribunals in the accustomed manner, provided that that manner is not glaringly unjust by common consent of the civilized world.

The great principle of judicial independence is surely worth maintaining.

3. Aliens Abroad.—It is much to be wished that the topic be disembarrassed of all the confusion which has attended it since the introduction of the term *déni de justice*, and that it should be placed upon a simple, coherent, and acceptable basis.

Starting with the principle that it cannot be maintained that the intrusion of "international standards," in the interest of commercial profit, is a greater necessity to the world than the right of each nation to live its own life in its own way without foreign interference, we are driven to lay down the first essential :—

1. *No nation is entitled in principle to complain of the treatment of its people abroad, unless this amounts to savage barbarity.*

It is found in practice, however, that, on the plea that the aliens have been "invited," which in most cases they have not, and that they must not be "entrapped" by the implied promise of protection, a provision which is in most cases a figment of the imagination, a somewhat more stringent standard is set up, especially when a treaty exists which admits the alien to enter the territory. As this more exacting standard is entirely vague and arbitrary, States endeavour to eliminate all question of its application by the ready and appropriate method of pointing to their courts. Thus we get a second principle :—

2 *No nation is entitled to complain of the treatment of its people abroad unless the Courts have first been appealed to for redress.*

This affords an easy method of escaping from the demands which go beyond the terms of Principle I, without raising the difficult and dangerous general question of what treatment exactly an alien is entitled to expect. Particularly is this so in the case of weak countries. Vagueness always operates to the disadvantage of the weak.

A step further is taken when we proceed to lay down, more dubiously, that :—

3. *The decision of a recognized Court of Justice is conclusive on the particular matter on which it has pronounced, unless the court is impugned as a dishonest, corrupt or imbecile tribunal.*

This proposition would not be accepted by the school of thought which insists on regarding the Courts as mere engines of government. We have already given our reasons for regarding it as an essential postulate, if the beneficent system of the *séparation de pouvoirs*, and the freedom of the judiciary from the control of the executive are to be preserved.

The Courts are, of course, bound to decide in accordance with the local law, so that we get a corollary :

4. *The authority of the local law is decisive.*

That is, aliens are not entitled to complain of the local law as denial of justice. Whether it places them in a less favourable position than the native, or not, is a matter in which States are entirely entitled to please themselves. Whether it is in accordance with foreign ideas of justice or not is equally a matter which States are entitled to decide for themselves If our present system of international law is to continue, and to function in peace, the irritation of a privileged [1] community in their midst, or of a community to whom they wish to apply special treatment and cannot do so, must at all costs be avoided. And the cost is not great. The paramount desire of nations, as of individuals, is to be let alone. Extra prosperity in a world of irritated states is less desirable than a world of contented states.

We may add finally :—

5. *The attempt to define the minimum rights of aliens is excessively difficult.*

Few such attempts have been made. One of the most thorough is that of Mr. Rougier, in the *Revue générale de Droit International Public* for 1910.[2] But it yields no useful result; in spite of the ability of Mr. Rougier and of the intensity of his application, he only demonstrates that any attempt to define ends in a platitude which serves only to give aggressive States a handle for oppression.[3] Let us say that the alien is entitled to life, liberty and property. But we know that his life may be taken if necessary for the avoidance of greater evils—as when a street is blown up to prevent the spread of fire—or as a penalty for crime. Liberty is infringed in the modern State at every turn; whilst

[1] They are none the less "privileged" if they are secured the same treatment as the native. For the latter has no security: a portion of their number may be denied the rights of the rest.

[2] *La Théorie de l'Intervention de l'Humanité*, pp. 468–526. Rougier thinks that, besides life and liberty, the alien is entitled to "legality," *i.e.*, freedom from arbitrary dictation. But in cases of invasion, or catastrophe, every one knows that legality goes by the board. Taxation, again, may be very arbitrary in practice.

[3] Interventions on the ground of humanity, he admits, are in practice always a first step towards subjugation: p. 525.

when we come to property, we find the widest divergence as to its acquisition and disposition. An equivoque, such as the terms "literary property," "industrial property," may lead one State to force on another an entire revolution in its patent law and its way of regarding monopolies.

4. Monopolies and Corporations—Foundations.—Nothing is more plainly a subject for the free determination of a state than the manner in which it shall regard Monopolies, and the decision of the question whether it shall regard them as the rewards of enterprise or as fetters on development. We are so accustomed to regard Copyright as a natural and necessary thing, that we forget that Lord Camden and such thinkers as Dr. Wakley, the editor of *The Lancet*,[1] consider it as an annoying institution which only prostitutes the literary profession and enriches publishers. Anyhow, it is a question on which a nation is entitled to have its own opinion. Lord Russell of Killowen has said, "There is no such thing as the recognition, internationally, of copyright or of patent-right, except by Treaty." Yet, if "property" is to be secure, it is a very short step to asserting that such monopolies must be valid everywhere.

There is a strong current of opinion in favour of attributing a Nationality to Commercial Corporations, only restrained by the violent difference of opinion which develops as to what the "nationality" ought to be. Sometimes the place of working, sometimes the place of management, sometimes the first place of incorporation, sometimes the nationality of the directors, sometimes that of the majority of the shareholders, appears as the favourite formula. And if such a doctrine were admitted, we should find governments interfering on behalf of these entities as "persons." It would be much more reasonable for them to claim a nationality for dogs and cats—yet nobody seems to have done anything like this, except perhaps when Mr. J. G. Blaine

[1] See *Law Magazine and Review*, Nov. 1909, p. 59.

asserted an American nationality for the fur-seal.[1] If the nationality of commercial corporations were admitted we should find nations compelled to admit all the uncongenial, and even absurd, rights which other countries may think fit to create through the medium of incorporation. It is no answer to say that each country may affix any terms it likes to the admission of foreign companies, for—

1. It is practically impossible to study the whole company law of every foreign state, and to frame regulations appropriate to each case.
2. The restrictions may very likely render the whole system unworkable.
3. They will be certain to be complained of as tantamount to the exclusion of the company, if at all far-reaching.[2]

In point of fact, the intense desire found among European Continental lawyers to attribute a nationality to commercial, financial and industrial corporations is due to the entirely novel conception of

[1] *Fur-Seal Arbit., Oral Argument of Great Britain*, 233 (Amer. Edit.). See also Delisle (*L'Interprétation des Lois I*, 519), who observes that incorporeal "property" such as "la propriété littéraire et artistique" is considered to be a matter of municipal ("civil") law, and as such to be entitled to no international recognition, unless by treaty. So also in the case of patents (*Ibid.*, 521).

[2] Many, but by no means most, modern commercial treaties stipulate for the recognition of corporations, particularly in the quality of litigants, and sometimes expressly add that this does not imply their admission to operate. Such clauses need the most careful examination. As long as there is so much theoretical uncertainty as to the real nature of a corporation, the clause demands the most careful consideration on the part of States which are not in a position to enforce their own ideas on the subject. What, after all, does the recognition of the existence of a corporation mean? Does it necessarily imply that execution cannot be had against the shareholders individually on a judgment against them under their corporate name, if the local law so provides? The British Treaty of 1 August, 1911, with Bolivia contains no such clause, while the treaty with Japan of 3 April, 1911, does so (Art. 15). On the whole, Great Britain is cautious about such engagements. For an example of a treaty between Great Powers containing no such clause, see the Italo-Russian Treaty of 15-28 June, 1907. (Cf. also the Italo-Guatemalan Treaty, 28 February, 1916.)

nationality as meaning subjection to a single system of law. No one is in fact so subject, because the law of the place where he is, as also the law of his domicile, the law of the place where his business is, and the law of the place where his goods are, are in fact infinitely more important to him in his private relations. But since the tendency on the Continent is to regard the individual as ideally subject to a single system of law, and since the criterion of nationality has been (almost casually) adopted in many countries for this purpose, "nationality" has almost come to mean to them, not political allegiance at all, but subjection in principle to a single system of law.[1] Consequently, a person without a nationality is a monster which must at all costs be avoided, and the weird endeavour is made to seek an allegiance for the United Cotton and Nitrogen Exploration Syndicate. And no doubt if the attempt succeeds, the Sovereign of the Syndicate will "protect" the corporation.

In reality, he is only "protecting" his own ideas: forcing his own ideas, that is, upon other people. Except so far as individuals of his allegiance suffer, he is only demanding that other countries shall recognize the privileges and restrictions which he himself has imposed and conferred on certain traders. International Law must always look to realities: and even if we admit that ideas and societies, regiments and schools are real entities, we cannot deny that they are shadowy ones: much more shadowy than dogs and cats. International Law must pierce through the shadow to the substance, and must examine who are really the people concerned. It was in strict accordance with this view, that the House of Lords, in the *Daimler Case*,[2] refused

[1] Mr. Asser, in a recent communication to the Institute of International Law, demonstrates very forcibly the fallacy of this notion. Nationality is an essentially human and personal conception: in the case of a corporate body it has no meaning. The important thing in their case is simply to know what system of law to apply to their dealings.

[2] *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Gt. Britain*), *Ltd.* (1916), 2 A. C. 307.

to consider a corporation of Germans British because it had been incorporated in England. Examined calmly, it is truly an absurd proposition that fifty Frenchmen, by registering themselves in England, should appear in Amsterdam in the light of Englishmen, with a right to the protection of England as against the Dutch. It may, and often must, be extremely difficult to say exactly who, if anybody, would be injured by the seizure of, or by an injury to, the property allotted to the propagation of ideas, to the relief of the indigent, or to the amusement of a populace. The Sovereign who secures that property shall be so administered is not particularly interested in the results: possibly nobody is: the donors may be dead; the beneficiaries may be uncertain and fluctuating. No country can be expected to respect a destination of property within its borders to charitable uses merely because the destination is made by an alien. And, if property already struck with such destination is brought into the foreign country, there is no greater reason why the donor's desires should be enforced upon it. Again, property belonging to trustees, or held under a mandate, may carry no right to foreign protection merely because the trustee or the mandatary is a stranger. And it goes without saying that every country is at liberty to adopt its own rules of Private International Law, and (for instance) to enact that succession on death shall follow the rules of the locality in the case of foreigners, and shall follow the rules of the nationality in the case of natives.

Suppose that property is devoted by the law of one country to purposes which the law of another regards with horror. Suppose that a charity exists in England to provide beer at Christmas for the indigent. Are the United States bound to respect the "property" of that charity in Pennsylvania? In reality it is not the "property" of anyone. A great many English people may be interested in it: but a great many English people are interested in Francis Kreisler. That does not

give the British government the right to protect Kreisler abroad.

5. Succession. Private International Law. — Again, the succession to property on death opens up an infinite series of ambiguities. Who is to be regarded as the successor is admittedly a question which each State must decide for itself. There is no International Law which demands that the power of testation be recognized. There is no International Law which prescribes that in the absence of a will the State shall not succeed. Yet any admission that "property" is to be secure almost necessarily entails the contention that some principle of succession, agreeable to the state of the deceased's nationality, shall be adopted. In instance, if a brother were admitted to succeed in Turkey to the estate of an American who left children surviving, it is at least possible that the United States would consider that the children had been deprived of their "property." The determination of questions of property demands the application of the Private International Law of the country where it is situate; and to make it an international question is to over-ride this salutary principle and to foist on each country an arbitrary code of Private International Law.

Companies, monopolies, trusts and mandates, charities, questions of succession and alienation, all alike show the dangerous pitfalls that lurk in the plausible *cliché*— "The alien is entitled to security for his property." [1]

[1] On the subject of companies, see *Risdon* v. *Furness* (1906), 1 K. B. 49, and the author's *Nationality and Domicile of Corporations* (*International Law Notes*, Sept. 1917, p. 133). "Let us disabuse our minds of the notion that a corporation is a real, though perhaps a singular sort of, person, with feelings and moral rights, or that as a mode of state activity it is entitled to obsequious respect abroad. Let us pierce through to realities, and remember that it is nothing of the sort—but a mere shorthand phrase implying that unusual powers or privileges have been conferred by the legislature upon particular persons. Then we shall admit that a shorthand phrase has no nationality and no domicile, and we shall discard these perplexing and irrelevant incumbrances from our purview. We shall agree that other nations can adopt these unusual variations or not, precisely as it pleases them" (p. 185). See also the recent reports of Dr. George Streit (dubiously favourable to

What the alien is entitled to is that his own indisputable tangible property in possession shall not be barbarously taken away from him.

It is by a confusion of ideas that the theory is sometimes entertained, that the powers of a Plenipotentiary or of a Chief of State to bind his country or his principal depend upon the municipal law of that country. An agent's powers in municipal law, no doubt, depend on municipal law. But the powers of an international agent depend on international law, and it is only a confusion which would derive them from constitutional or civil law. No doubt, international law may to some extent take account of municipal law in pronouncing its judgment, but that is a wholly different proposition. In the same way, it must be said that the rights of private individuals must be measured, so far as International Law takes account of them, by some kind of rule internationally applicable, and not by any mere municipal law, whether that of their nationality, their domicile, their business, their race, their residence, or any other. Only the germs of such an International Private Law exist. It may perhaps be said that possession is its real criterion—that when treaties and statesmen talk broadly of protecting "property," what they mean is the protection of the highest degree of "possession," coupled with a title which would be valid everywhere. "Property," that is, is used in the non-legal sense of "objects possessed." But even this may be to go too far. All that can be affirmed is that when two States dispute as to the treatment accorded to the subjects of one in the territories of another, the invocation of municipal law to prove the property is out of place. And the invocation of a universally valid International Private Law is very difficult. No field of law offers a more promising ground for investigation. What is the general sense of the world as to what

the idea of a corporate "nationality"), and of Dr. Asser (emphatically against it).

internationally constitute a person's property and personal rights is a subject well worth prolonged and careful study. It is a topic to be carefully distinguished from Private International Law: because Private International Law represents, not what a nation is bound to do, but what it wishes to do, when foreign elements arise in a case. What we have just styled universally valid "International Private Law" would ascertain what is the minimum of private rights which must necessarily be accepted in all countries. Is equality necessarily an element in the determination? Can a State (apart from treaty) decline to consider that a foreigner has property in cases where a native would be held to be invested with it? Would this be so in cases where the foreigner's home country would not consider that the property had passed? It is plain that the subject bristles with difficulties; but its consideration cannot much longer be delayed. The consequence of accepting the principle that there is a certain international standard of treatment for private persons is that there is a certain (if rudimentary) international law of private rights, and it is important to ascertain what it is. We need not affirm that it depends on a direct bond of law between the State and the foreigner, though probably it will become more and more clear that it does. The substantial matter is to know what its prescriptions are.

In making the attempt to plot out the lines of such an International Private Law, not as it should exist but as it does exist, the basic principle of international intercourse must never be forgotten. It can never be held, without putting the interests of trade and finance before those of harmonious national development, that aliens are entitled to intrude themselves into a foreign country and claim to be treated as natives—and much better.

6. Criminal Jurisdiction.—Closely connected with the topic of the protection of subjects abroad is

that of Jurisdiction. If a government must justify its ill treatment of aliens by showing some cause for it, and if the cause alleged be that it was inflicted as a penalty for some offence, then the question is supposed to arise, not only whether the penalty was fair, and the trial just, but whether the State in question was the right party to administer the penalty and conduct the trial. In our view, that is an entirely irrelevant inquiry. If international law is to persist, on a footing of self-determination everywhere, it cannot be barbarous ill treatment if the sovereign puts his local law into force against a person whom he finds to have committed what is, in his view, a crime. This is true, even though the penalty may be generally considered a severe one. For although wanton or personally selfish cruelty may be barbarous, the same acts done with a public object are divested of their barbarous character, unless the cruelty involved is extreme and disproportionate.

No country can complain of another's having a drastic penal law, nor can it be required that it should moderate it as against foreigners. But it is often urged that a country is not justified in inflicting the slightest penalty in respect of acts committed beyond its borders. "Crime," it is said, "is territorial." Although it is admitted that the foreign government may tax the foreigner, exact labour from him, call upon him for services, close his shop to suit its industrial policy, regulate his use of the highways, yet, it is said, it cannot exact a penalty from him to the extent of sixpence for anything he has done abroad.

This notion rests upon an entirely false idea. It assumes it to be universally admitted that the object of imposing penalties is to secure the observance of law. But this in only one among many theories of crime. It is the Deterrent Theory. Besides this, there are the Vindicatory Theory, the Reformatory Theory, the Compensatory Theory, the Retaliatory Theory and the Expiatory Theory, and probably many more. The

true object of penalties is sometimes said to be to reform the wrong-doer; sometimes to redress the disturbed balance of events; sometimes to give satisfaction to the injured; sometimes to give satisfaction to the public; sometimes to give satisfaction to the Deity; sometimes to set the seal of disapproval on the crime. Some of these theories are not very intelligible, but four at least are comprehensible. There is the Deterrent Theory, in which the sole object of the penalty is to prevent the crime; the Retaliatory Theory, in which the sole object is the satisfaction of the public or of some injured individual; the Vindicatory Theory in all its forms, in which "Punishment is the other half of crime": and there is the Reformatory Theory, which is the most reasonable and intelligible of all, if it is understood as representing the object of penalties, not as being to make a saint out of a sinner, but as aiming at the moderation of an excessive evil will by the exhibition of evil in a still more concentrated form, so that the evil-doer will be driven to embrace good as a refuge.

Any of these theories may be consciously or inarticulately at the root of a nation's penal law: only the first, that of Prevention, could justify the doctrine that "Crime is territorial." It may well be argued that if the sole possible aim of penal law is to secure obedience to one's own law, it ought not to be applied in such a way as to secure its observance by aliens outside one's own dominions. Even so, there is much to be said against the proposition. There seems no reason why one nation should not, by acts accomplished in its own territory, endeavour to control the conduct of aliens abroad. By executive means it constantly does so, as any private individual might do within the limits of his powers. Why it should not do so by judicial means is not apparent. If no country can properly penalize acts transpiring in another, it would seem equally improper for it to express any opinion about them: for the expression of its opinion may be a far

more severe penalty than a court could inflict. But it is unnecessary to labour this point. A State may perfectly well justify its exaction of penalties on account of acts done abroad on the ground that it is not attempting to deter the public, but to purge the culprit, or to vindicate right.

The foundation for the strange doctrine that a state can lawfully take no notice of what is done abroad appears to be the strong stand made by the United States against Mexico in the case of *Cutting;* but it has been immensely weakened by the recent, though far from unanimous, decision in the *Lotus* arbitration. In the former case, a journalist who was alleged to have libelled a Mexican in Texas was tried and imprisoned when subsequently in Mexico.[1] In the latter, a French master-mariner who was alleged to have sunk a Turkish vessel with loss of life on the high seas was tried and imprisoned when subsequently in Turkey.[2] It will be noted that in both these cases the *gravamen* of the charge was injury to a subject of the *forum:* and that is, singularly enough, asserted by the aviation law of France as a ground for the assumption of French jurisdiction over a foreigner.[3] Injury to the trial State is very generally asserted as a ground of jurisdiction. In the *Shaw* case, the accused, an Englishman who had been, as was alleged, plotting with Coreans in China against Japan, was arrested in Japan, though not eventually put on trial. It is only exceptionally that

[1] See *For. Rel.* U.S. (1887), 751 *et seq.*

[2] The curious point commended itself to some of the arbitrators in the *Lotus* case that the alleged offence was committed in Turkey, since the *Lotus* entered Turkish territory when she collided with the Turkish ship. Quite admitting, with Cavour, Webster and Lyndhurst, that a ship is territory, being regularly matriculated by the country whose flag she is entitled to fly, and that the use of the emphatic metaphor of territory is the only way in which to secure due respect for her on the high seas, we nevertheless find it difficult to hold that when one piece of floating territory collides with another, the act is accomplished "in" the latter. A considerable literature already exists on this case, see Travers, *u.s.*; Fischer-Williams, *apud R.G.D.I.P.* (1928), Nos. 3, 4; Verziil, *R.D.I.* (1928), Nos. 1, 2.

[3] See Travers on the *Lotus* case, *R.D.I.* (1928), Nos. 4, 5.

a general jurisdiction is assumed in respect of acts committed abroad. Vattel was perfectly prepared to admit it in cases of flagitious crime, and the Austrian law assumed it, as also did the Italian.[1] There seems no real reason against its exercise; and even on the strictest principles of the Deterrent Theory, it can be supported. For it amounts to a law denouncing penalties against persons who enter the territory with the stain upon them of specific acts regarded there as crime.

Why should one country be bound to tolerate the unchastened presence within its borders of persons whom it regards with reason as guilty of criminal offences? There is no serious reason forthcoming: only an epigram—"Crime is territorial."[2]

[1] See Holland, *Jurisprudence* (ed. XIII), p. 427.

[2] The doctrine has a good historical basis in England (and derivatively in America): because the early laws required that the facts should be found by a jury of the vicinage, it was the early theory of the jury that the more (and not the less) they knew about the facts, the better. Consequently there was no possibility of trying acts committed abroad, because a jury of the vicinage could not be had. Every indictment must name an assize county, and Navarre is not an assize county, nor is Trondjhem. But it is a mistake to say that it is a settled English dogma that other countries must imitate them in this respect, though it is said that the British government expressed that view to Brazil in 1875 (see *For. Rel. U.S.* (1887), p. 837).

But the historical basis is now gone, and it would be a mistake to say that Great Britain is committed to the idea that no foreigner can properly be penalized in one country for acts perpetrated in another. On 28 Nov. 1848, the authorities in Ireland declared that "The Lords Justices must observe that . . . persons who are charged in this country with being suspected of treasonable practices may, whether aliens or not, be detained under the Habeas Corpus Suspension Act without trial or bail . . . and the treasonable acts of those parties, if really such, may be charged against them, whether committed within the realms of Her Majesty or without." "Supposing Mr. Berger not to have committed a crime in uttering his opinions on Irish affairs in America, yet, when he proclaims not only his hostility to the British government, but his intentions to act offensively against it in Ireland, and actually arrives in Ireland as soon as possible after the announcement of his intentions, the government would indeed have been unmindful of its duty and indifferent to the public tranquillity, if it had acted upon the assumption that Mr. Berger was merely a braggart . . ." (Somerville to Lewis, 28 Nov. 1848, 53 *S.P.* 634.)

§ 5. The Three-Mile Limit

1. Historical. The Cannon-Range Theory.—It has become a commonplace of writers to assert that the zone of territorial waters extending to three nautical miles from L.W.M. is treated as subject to the sovereignty, or at least control, of the riparian state because of the possibility of controlling it in fact by gun-fire: and Bynkershoek [1] specifically said in a famous phrase that the sea was territorial "*quousque tormenta exploduntur.*"

Recently, the research of Mr. Raestad [2] has brought into prominence quite a different theory. Instead of the limit of three miles being adopted because it was supposed to be the extreme range of cannon-shot, it is suggested, and with great probability, that the element of control from the shore was not the determining factor at all, and that the phrase "a cannon-shot" came gradually into use as a fixed and certain equivalent for another obvious measure, that of visibility from the the beach—roughly three nautical miles.

At first sight, the often-quoted statement of Bynkershoek seems directly in line with Grotius' remark that dominion of the sea can be obtained in two ways, one of which is its control from the shore; [3] and with the observation of the Dutch envoys to England in 1610, that "No prince can challenge further into the sea than he can command with a cannon, except gulfs within their land from one point to another." But Mr. Raestad interprets these statements as meaning that the control is actually exercised; that the cannon are actually there. "Pas de canon, pas d'Empire." For Grotius

[1] *De Dominio Maris* (1703), c. 2.

[2] *La Mer Territoriale* (Paris, 1913).

[3] "Videtur autem imperium in maris portionem eadem ratione acquiri qua imperia alia, id est . . . ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt, qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur" (*D. J. B. ac P.* II, 3, § 13 (2)).

himself elsewhere (*D. J. B. ac P.* II, 3, § 11) says, "Ex eo solo, quod terras populus occuparit, mare occupatum colligi non posse: nec animi actum sufficere, sed actu externo esse opus, unde occupatio possit intelligi." For Grotius control meant control, and not the possibility of acquiring the means of control. It meant having guns in position, not having ground on which guns might conceivably be set. This was not a mere philosophic fancy of the Dutch jurists; it was a practical rule, practically recognized.[1] In 1760, a French prize was released in England, according to Fulton,[2] as having been taken in a port belonging to the King of Spain, "within reach of his cannon." So the treaty of the U.S.A. with Morocco, of 25 May, 1795, determines the limits of protection accorded by a neutral fortress as "la portée des canons des chateaux."

When one comes to reflect on it, it is a somewhat lame notion, that of appropriating the sea by hypothetical gunfire from the land. In point of fact, nobody dreams of planting a series of cannon, or even of forts, round the shore. And a fleet with a good base can control the water far more effectively than can fixed defences.

As the opinion lost ground that large areas of sea could be appropriated to particular nations, the first notion that replaced it seems to have been that the proper limit was one of visibility. One could claim to rule the sea as far as one could see. Certainly this was a rule which was definitely put forward. It was patently an unworkable rule: from the beach one can see about three miles; from a height we can see much more in clear weather. A certain measure was necessary, and it was found in the cannon-shot, which was the measure in popular use which came nearest the conception of

[1] It appears again, curiously, as lately as 1869, in the Russian Prize Law. "The open sea . . . consists of waters which are not under the fire of neutral batteries, or three sea miles from the neutral shores" (*vide For. Rel. U.S.* (1887), 957).

[2] *Sovereignty of the Seas*, 577.

the visible zone (cf. "a bow-shot" and "a stone's-throw," as measures of distance). Mr. Raestad cites numerous instances in which "la portée de cannon" was specificially used at sea as a nautical measure. The Gazetteers ("Routiers") employ it: *e.g.* "Et tu trouveras près de terre bout à bout à un *gist de canon* XX et XXIIII brasses."[1] "Gunshot (*portée de canon*)" again was the distance from a fortress at which ships were expected to salute;[2] and "gunshot" was the distance at which an examining ship must keep away from a prospective prize. In neither case could the distance really depend on the exact force of the guns on board the vessels or mounted by the fortress: "gunshot" was used simply as a measure of distance. For Puffendorf, adds Raestad, the territorial zone was simply the moat of the land—its natural defence. He considered it impossible to give it any uniform limit.[3] Wolff does not even mention cannon-shot, or three miles.[4]

In this view, Bynkershoek's explanation would appear in the light of a mistake. *Ex post facto*, in trying to account, a hundred years later, for the measure, Bynkershoek[5] would appear to have taken the accident for the substance, and invented a plausible theory of capacity of control, which was never entertained by those who first accepted the "gunshot" limit.

However the truth may be, it must be conceded that the idea of such a mistake is permissible; and if so, we must, while maintaining the three-mile limit as an undoubted law, be cautious about laying it down as an equally indisputable rule that as principle the

[1] For a Dutch instance, he refers to *Dit is die Caerte van der Zee*; for a German, to the *Seekarte*; for a Scandinavian, to the Danish *Sökartet*.

[2] Stypmaar, II, 327, 328; cited by Raestad, *u.s.* 101.

[3] Book IIII, c. 5, §§ 7, 8: cit. Raestad.

[4] §§ 120–132; 355–6; 357. Sir L. Jenkins (*Life*, III, 751) mentions that a Brandenburg privateer cut out two Swedish merchantmen in English waters near Yarmouth.

[5] Or possibly, according to Raestad, his predecessor Huber; see his *De jure civitatis* (1673), II, ii, ch. 11, p. 133; though Huber's language does not really seem to go beyond that of Grotius.

varying range of cannon is decisive If the progressive cannon-range theory rests only, or mainly, on a mistake of Bynkershoek, it clearly can have no international value. And it is significant that in the whole progress of artillery the three-mile limit has never in fact been extended. Of course the great development of modern ordnance has been recent; but guns increased in weight of metal and range before the introduction of rifling.

2. The Three-Mile Zone.—In fact, it is not material whether the origin of the three-mile limit was the geographical appropriateness of the sea-mile, or the liability of the sea-mile to control by gunfire. For it is the almost universal consensus of authors, that while a wider limit might have its practical advantages, the limit of three miles is too firmly established to be altered save by universal consent.[1]

Mr. Seward is sometimes represented as having formally proposed a five-mile limit. He did nothing of the kind, so far as appears. In a note of 16 Sept., 1864,[2] addressed to the British *chargé d'affaires*, he criticized keenly a suggestion offered by the British government for the extension of the three-mile limit to five miles. He was not unwilling to consider it, but thought the proposal, as it stood, too vague and general; and apparently the British government dropped it altogether.

It is only as pious opinions that various zones of various breadths have been recommended for fishery, customs, and neutrality purposes, and the result of instituting varying limits could only be to create con-

[1] See on the whole subject, *The North Atlantic Fisheries Arbitration Proceedings;* Raestad, *op. cit.;* Latour, *La Mer Territoriale;* the writer's *Three-Mile Limit, infra;* and especially the *Fur-Seal Arbitration Proceedings.* Also the *Leda* (1860), Swa. 40; the *General Iron Screw Co.* (1861), 1 Johns, & Hemm. 180; the *Whitstable Fishery Case* (1862), 11 C.B.N.S. 387; H.L.C. 192; the *Annapolis* (1864), 1 Lush. 356; *Rex* v. 49 *Casks of Brandy* (1836), 3 Hagg. Adm. 257; *Cammell* v. *Commrs. of Woods and Forests* (1861 ?), 3 McQueen's H.L. 418; *The Eclipse* (1864), 15 Moo. P.C. 267.

[2] Moo., *Int. L.D.* I, 733, § 152.

fusion. Dana [1] observes that "It is safe to infer that judicial as well as political tribunals will insist on one line of maritime territorial jurisdiction for the exercise of force on foreign vessels, in time of peace, for all purposes alike." The "Three-mile limit" has become rooted in the general consciousness, particularly in the minds of unsubtle seafaring men: it has never been successfully resisted: and on few occasions has it been resisted at all, although unilateral declarations inconsistent with it have occasionally been made. It is represented as incapable of alteration, save by general assent, by most English authors, and among Continental writers Bonfils, Desjardins, Latour, Perels, Holtzendorff, Martens, and Pradier-Fodéré appear to be its only conspicuous opponents. In an article published in 1928 [2] the writer collected some ninety instances of the official enunciation of the Three-Mile Limit as authoritative, ranging from the decision in *Benton* v. *Briork*, *The Joana Katherina*,[3] in Scotland in 1761, where a French capture in Danish waters was sustained as having been made "a German mile" from the shore, to *The Fagernes*.[4] On the other hand, some forty more or less dubious cases of official dicta inconsistent with the limit are there noted: but in none of them does the matter appear to have come to the test of actual practice, except in Martens' decision in the *Costa Rica Packet* case [5] (1897).

[1] Wheaton's *International Law*, § 108 (note by Dana). See also the observations of Mr. Magelhaes and Mr. Wickersham on Dr. Schucking's Memorandum for the Société des Nations' Expert Committee (Soc. des N.N. *Questions juridiques* (1926), V, 10. Phillimore, Holland, T. J. Lawrence, Oppenheim, Hall and Westlake are doubtful.

[2] *The Three-Mile Limit*, American Journal of International Law, July, 1928, pp. 503, 517.

[3] Folio Dec. IV, 143; Faculty Collection, No. 49, p. 104.

[4] (1926), P. 185; revd. (1927), 71 Solic. J. 634.

[5] An anonymous government is said by Fulton (*Sovereignty of the Sea*, 678) to have been induced to waive its objections to the assumption by Norway of a boundary off Romsdal extending a little beyond the Three-Mile Limit. Similarly vague statements are current regarding the enforcement of a French Ordinance of 1829 prohibiting trawling within two or three leagues of the shore (see *ibid.*, p. 608). *R.* v. *Keyn*

3. Apparent Exceptions.—There are certain groups of cases in which the three-mile rule appears to be denied, but they will all be found to be readily explicable on one of the following grounds :—

(1) *Prescription.* — This is a dangerous ground, because it does not follow that because the exclusive claim to a wider zone than three miles has been hitherto unchallenged, it is therefore sustainable against all comers. There may have been no occasion for challenge. A departmental decree or notification did not, in former days, penetrate readily to foreign countries and governments. The exclusion can only operate as prescriptive if it was open, enforced and accepted throughout the course of history.

It is on this ground of prescriptive right, existing from antiquity, that Balch [1] supports the British claim to control the Ceylon Pearl Fisheries, twenty miles from any shore.

(2) *Domestic Intention.*—Much departmental, and even parliamentary, legislation is expressed in general terms, and yet is intended to apply to subjects alone.

Thus, the French regulations against trawling within three leagues of the shore in summer and two leagues in winter (1829 and 1862) must have been intended to apply to French subjects alone. If they had applied to British subjects, they would have been inconsistent with the plain words of a treaty made with Great Britain in 1839 ; and they would have stultified the French claim to fish within six miles of the coast of Spain. Various other regulations of a similar kind are to be explained in the same way.[2] So, in *Mortensen's* case,[3] when the Court of

(1876), L. R. 2 E. D. 63, did not, of course, contradict the three-mile limit ; the only question in that case was whether its establishment had *ipso facto* altered the common law of England, and it was held that it had not ; and in 1877 statute law (The Territorial Waters Jurisdiction Act, 41 and 42 Vict. c. 73) effected the municipal alteration.

[1] 6 A.J.I.L. (1912), 409.

[2] See especially *Fur-Seal Arbitration, British Counter-Case* (VIII, 75), and *ibid., British Argument* (X, 38), for a minute analysis of the instances adduced by the U.S.A.

[3] (1906), 14 Sc. L. T. 227. *Vide infra.*

Judiciary in Scotland had held that a particular statutory regulation applied to the whole of the Moray Firth, the British government officially disclaimed any such interpretation, and asserted that the intention of the statute and regulations made under its provisions was only to apply to British subjects, beyond the three-mile limit. And the U.S. slave-trading Act of 1807, authorizing seizure within twelve miles, seems not to have been put in force against foreigners.

(3) *Occupation of the Ocean Bed.*—This is the explanation given in the Fur-Seal Arbitration, by the British side, of the control exercised over the Ceylon Pearl Fisheries, which are not in bays at all, but far out to sea. "Where the sea," said the Lord Chief Justice in *R.* v. *Keyn*,[1] "or the bed on which it rests, can be occupied permanently, it may be made subject to occupation in the same manner as occupied territory." Such claim says Sir C. Russell, in the Fur-Seal Arbitration, may legitimately be made to oyster beds, pearl fisheries, and coral reefs; and in the same way, mines may be worked out under the sea below low-water mark.[2] The French claim to the Bay of Concalé (seventeen miles wide) may be similarly supported; [3] also those to the French and Italian coral banks.

(4) *Comity.*—This is particularly important in relation to revenue and sanitary matters. It seems undisputed that in a few, though certainly very few and old, cases, the British [4] and American [5] "Hovering Acts," permitting search within a twelve-mile zone, have been put in force against foreign vessels, and no complaint was officially made. These cases took place very many years ago.

[1] L. R. 2 Exch. D. 63.

[2] *Fur-Seal Arbitration*, British Argument (X, 52).

[3] It need hardly be said that in such cases no one would assert that a three-mile territorial zone should be created round the invisible limits of such submarine occupation. *Fur-Seal Arbit.*, Brit. Arg. (X, 384).

[4] Statutes of 1736, 1769, 1784, 1836, 1853, 1876: the earliest being 9 Geo. 2, c. 35, § 22.

[5] Stat. of 1799. Cf. *Church* v. *Hubbart*, 2 Cranch, 187.

It is clear that there has been for very many years no regular practice of visiting foreign ships beyond the three-mile limit, off the British coasts. "There is no case," says Sir C. Russell, "within a reasonable limit of time from the present, in which any seizure has been effected under the Hovering Acts by Great Britain which has been in any way challenged or brought in question; and no seizure at all in recent years that I am able to trace, outside the territorial limits." Nor were the similar American acts applied, in practice, so as to give rise to complaint on the part of any foreign government.[1]

Had such a challenge been made, Phillimore, Twiss, and Lawrence in England, Dana in the U.S., and Latour in France are unanimous that the statutes could not have been supported. "Such a judgment," says Phillimore, "could not have been sustained if the Foreign State whose subject's property had been seized had thought proper to interfere." [2] Twiss, approved by T. J. Lawrence, observes: "It is only under the comity of nations in matters of trade and health, that a state can venture to enforce any portion of her civil law against vessels which have not as yet come within the limits of her maritime jurisdiction." [3] Dana, indeed, forcibly suggests that these statutes were only meant to enable proceedings to be taken against vessels, if after infringing their terms (*e.g.* by refusing search) they subsequently entered the three-mile zone.[4] And so the British Quarantine Acts, though they may be *infringed* by foreign vessels at sea, cannot be *enforced* against them unless and until they enter an English port.[5] Latour remarks, "*Les navires*

[1] Fish to Thornton, 22 Jan. 1875. (Cit. *Fur-Seal Arbit.*, U.S. Case, Appx. I, 250.)

[2] *Int. Law*, I, 276, § 198.

[3] *Law of Nations*, I, § 181.

[4] Dana's *Wheaton's Elements of Int. Law* (8th ed.), p. 208 (note 108), § 180. See *Fur-Seal Arbitration: Oral Argument for Great Britain*, p. 381.

[5] *Fur-Seal Arbit.: Brit. Oral Arg.*, p. 322. See 6 Geo. 4, c. 78; 30 & 31 Vict. c. 101, § 56; 38 & 39 Vict. c. 55, § 43.

étrangers ne sont pas obligés de se soumettre à une telle mesure, qui est contraire au droit de gens, et peut leur causer un grand préjudice." [1]

Another instance of general comity was unearthed by the industry of counsel in the Fur-Seal Arbitration, when they adduced the British Statute of 1816,[2] which purported to prohibit foreign vessels from remaining, after warning, within twenty-four miles of Saint Helena. "Whether the statute would have been enforced in any case in which the United States had thought fit to protest against its application, it is difficult to say," observes Sir Erskine Holland.[3] All the states of Europe, including monarchical France, concurred in desiring peace and the removal of the possibility of another "return from Elba." The United States were given to understand that the conclusion of a commercial treaty with Great Britain would be conditional on their acquiescence in the Statute. It was comity, again, when the American authorities complied with the desires of France and brought off the *Alabama-Kearsarge* action some seven or eight miles from the shore, and so Mr. Seward instructs Mr. Dayton, "While informing Mr. Drouyn de L'Huys that I [approve of your instructions] in a spirit of courtesy towards France, to go further and inform him that the U.S. do not admit a right of France to interfere with their ships of war at any distance exceeding three miles." [4] It must be noted, however, that for any damage, alarm or inconvenience caused by shells dropping, and swift motors moving, or the like, within the three-mile zone, the responsible belligerent must be strictly accountable. On this ground, the capture of the *Leipzig* by H.M.S. *Glasgow* in Chilian waters in 1917 was a most reprehensible occurrence, by no means atoned for by the consequent apology. A cruiser similar to the *Leipzig*

[1] *La Mer Territoriale*, 33.
[2] 56 Geo. 3, c. 23.
[3] *International Studies*, 183.
[4] 33rd *Report, International Law Association* (*Assoc. de Droit International*), 1924, pp. 294, 295.

ought to have been placed at the disposal of Chili for the benefit of Germany.

(5) *Bruta Fulmina and Challenged Claims.*—Of this kind are various declarations, notifications and regulations which, though possibly intended to apply to foreigners, have never in fact been successfully put in force against them. The most conspicuous and important is the long-standing claim of Spain and Portugal to a territorial zone of six marine miles for all purposes. This produced in 1905 an actual conflict with Britain and France, which was settled in the case of Portugal by the adoption of a statute in 1909, prohibiting foreigners from fishing within the usual three-mile limit. In the case of Spain the issue appears more doubtful. Judge Böye [1] asserts that Spain was still successfully maintaining the six-mile limit in 1907 and 1909; but the British Foreign Office formally informed the National Sea Fisheries Protection Association that H.M. Government did not recognize the claims of either Spain or Portugal beyond the three-mile limit,[2] and the trawlers seem to have continued to work up to that boundary. Another important case is that of the Scandinavian kingdoms, which from the first appear to have claimed a four-mile limit. As their precipitous coasts (except in the case of Denmark) do not attract trawlers, there has been less occasion for dispute regarding fisheries than in the case of Spain and Portugal. Denmark seems to have abandoned the claim, in favour of the usual three miles; [3] but Sweden definitely asserted the

[1] 33rd *Report, International Law Association* (*Assoc. de Droit International*), 1924, pp. 294, 295.

[2] 24th Annual Report N.S.F.P.A. (1905), p. 7: cit. Fulton, *u.s.*, p. 667. Moo. *Int. L. D.* I, 713, cites a despatch of Fish to Thornton (22 Jan. 1875: *For. Rel. U.S.*, 1875, I, 649), in which the U.S. Government is stated to have "uniformly, under every administration . . . objected to the pretension of Spain, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby." Evarts took up the same line in 1871. Evarts to Fairchild, 3 March, 1881: *For. Rel. U.S.* (1881), 1051.

[3] *Vide* the Dano-British Treaty of 1902, establishing a three-mile fishery limit for Ireland. Fulton, p. 647.

four-mile limit in 1871 and 1877,[1] while Norway had been party to a like declaration early in the century,[2] and the Swedish Gram re-asserted it, *obiter*, as arbitrator in the Behring Sea Case.[3] The claim of Chili (about 1880) to a twelve-mile "police administration" zone was repudiated by Sir C. Russell in the Fur-Seal Arbitration.[4] Austria, Italy and France have at various times put forth extended pretensions, generally based on the idea that the varying range of gunfire constitutes the true rule. But there is no record of their having been put in force against foreigners. The efforts of Russia to control wide areas are well known, and have been protested against from first to last. In 1821 a celebrated Ukase claimed the whole of Behring's Sea for one hundred miles from the continents of Europe and Asia. British and American protests secured a promise that the naval authorities would be instructed in such a sense as to make the Ukase a dead letter, at any rate provisionally; and its entire abandonment was in effect secured by Russo-British and Russo-American Conventions. Only one ship—the *Pearl*—appears to have been seized under the Ukase, and she was released with costs.[5] The recognized limit of three miles was returned to by the Russian authorities in 1842, 1846, 1847, 1853, 1868 and 1886, for various purposes—fishery, prize and customs among them.[6] And in 1902,[7] Dr. T. M. C. Asser, in the *James Hamilton Lewis* and the *C. H. White*, found as arbitrator between Russia and the United States that the seizure of an American sealing-vessel was unjustifiable when it took place at a distance of somewhere between eleven and

[1] Fulton, pp. 674, 676.
[2] *Ibid.*, p. 653.
[3] *Behring Sea Arbitration: Oral Arg.* (*G.B.*), 522.
[4] *Oral Argument* (*G.B.*), p. 362. See also Clunet, 1875, vol. 38.
[5] *Fur-Seal Arbitration, British Case*, 45. This case of the *Pearl* was in 1822.
[6] See Brit. Parliamentary Papers, United States, I (1893), 83, 87; Fulton, *op. cit.*, 565.
[7] See *Revue de Droit International*, 1903, p. 83.

twenty miles from the Russian shore. In 1911 a claim to a twelve-mile limit in the White Sea was resisted by Russia's intimate associate, Great Britain, and was eventually eclipsed by the war of 1914.

(6) "*Hot Pursuit.*"—It is generally admitted that if a merchant vessel infringes the local law within territorial waters, she can be pursued continuously even should she cross the line and reach the high seas : [1] and there can be little doubt that a similar liberty exists if a vessel from a point beyond the three-mile limit attacks the shores. Should such an act ever be negligently committed, the right can hardly be denied ; and if it be wilfully done, it can surely not be denied even in the case of a man-of-war. This suggested principle, however, can extend to open violence alone : lesser injury committed from beyond the three-mile limit, and any such injury which is not reprobated by civilized opinion as a whole, cannot be the cause of interference. It may be asked what is to happen if a vessel outside the zone fouls the water with oil, so that it spreads within the three-mile limit. The answer must probably be that the freedom of the seas must prevail, and redress must be sought by diplomatic means. Firing on the coast is a very different thing. A singular situation is also presented when, in pursuance of an illegal design, some of the ship's company penetrate beyond the three-mile limit and commit violence, or other illegalities. In such a case—but not, one imagines, unless there was violence to persons or property, or something amounting to piracy—it seems probable that control may be taken of the ship. These were the facts in the often-quoted case of *Church* v. *Hubbart ;* [2] American ships, the *Aurora* and the *Four Sisters*, anchored off the Parà, sent boats in to accomplish illegal trade. These fired on a Portuguese vessel,

[1] The American attack on the *I'm Alone* (March, 1928) may be found to be justified on this ground.

[2] (1804) 2 Cranch, 187.

and in consequence the American ships were captured and confiscated. This was sustained in the United States in favour of insurers, as a legitimate act. The *dicta* of Chief Justice Marshall go further than the necessities of the case demand; for here there was an actual invasion of territory constructively made by the ships.

Reference may also be made to the similar case of the *Araunah*, a British sealing-vessel seized by Russia in the Behring Sea, six miles from land, her boats being actually engaged in sealing operations between the vessel and the shore. Lord Salisbury admitted that she was not entitled to protection in such circumstances.[1]

The general rule allowing a vessel which has infringed the local law to be pursued continuously on the high seas does not allow such a vessel to be overhauled or in any way interfered with if found there after pursuit has been discontinued. This was emphatically stated by the Arbitrator (Asser) in the cases of the *James Hamilton Lewis* and the *C. H. White*[2]—" Le système de la partie défenderesse d'après lequel il serait permis aux navires de guerre d'un État de poursuivre, même en dehors de la mer territoriale, un navire dont l'équipage se serait rendu coupable d'un acte illicite dans les eaux territoriales ou sur le territoire de cet État, ne saurait être reconnue comme conforme au droit des gens, puisque la juridiction d'un État ne s'étend pas au délà des limites de la mer territoriale . . . " If this was intended to deny the right of continuous pursuit, it is in conflict with *Church* v. *Hubbart*[3] and much authority of text-writers; but the facts do not seem to require any such interpretation: and too much stress must therefore not be laid on the word " poursuivre "; it may mean " to commence pursuit."

" In the conversation," says Sir R. Monier on a question of this kind, " I had the honour to hold with your

[1] Parliamentary Papers, Russia, No. 1 (1890).
[2] See *R.D.I.* (1903), p. 83.
[3] *Supra.*

Excellency . . . you defended the capture of the sealers by the following argument. Admitting, you said, that the sealers had not actually been caught within the Russian territorial waters, you argued that if a ship was found poaching in the territorial waters and pursued thence into the open sea, it would be a hard case were the pursuing cruiser debarred from the right of capturing her. . . . I believe this to be the correct view, and I have little doubt that it is shared by H.M. Government. But in order that the right of capture on the high seas under these circumstances may be made perfect, *it is necessary that the offence and flight should be continuous, and pursuit begun whilst the offending vessel is still within territorial waters.*"[1]

(7) *Conventional Stipulations.*—These, of course, may be evidence rather that a rule does not exist, than that it does. But by far the greater number of treaties mention the three-mile limit.[2]

4. Islands and Bays. The "Ten-Mile Rule."—In the application of the rule the Canon of Simplicity again requires that the three-mile zone shall be measured from every islet and rock, however small in area. In the *Anna*,[3] Lord Stowell measured it from mud-flats, and, although mere sand-banks would not come within[4] the principle, any land of a more permanent and substantial nature would serve as a centre of territorial

[1] 86 S. P. 206. Monier to Chichkine, 29 Nov. 1892. The whole correspondence is valuable, though prolix.

[2] A few exceptions are to be found in which a wider limit is contracted for. A Portuguese treaty with Britain made cannon-shot the limit in 1845, and Portuguese fishery treaties in 1878 and 1893 with Spain adopted a zone regulation of twelve miles (with an exclusive fishery for six miles, in 1893). A Brito-Mexican treaty fixed a limit of nine miles for Customs purposes in 1888, and a Dano-Mexican one the same in 1910; and a Russo-Roumanian treaty established a ten-mile limit in 1907. A nine-mile limit was desired off the British-American coast in 1783; but the American negotiators steadily refused to concede it; and "If we had not given way in the article of the fishery," says Oswald to Townshend, "we should have had no treaty at all" (Oswald to Townshend, 39 Nov. 1783); *N. Atlantic Fisheries Arbit.*, II, 219).

[3] 5 C. R. 373 (20 Nov. 1805).

[4] The North Sea Fisheries Convention, 1882, included "dependent islands and banks."

waters. The Queen's Advocate, in 1853, gave the opinion that the three miles should be measured from islands, however small; [1] and Fish in 1869 [2] observed that "the maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself, but also to the same distance from the coast-line of the several islets or keys with which Cuba itself is surrounded." Some care must nevertheless be taken in the case of islets and rocks lying outside the three-mile limit as measured from the coast and unoccupied islands. The doctrine adopted by Mr. Huber in the Isla de Palmas arbitration between Holland and the United States,[3] according to which, islands are accessory to the coast off which they lie, though never actually occupied, appears very dubious. On the mainland it need not be denied that it is unnecessary for the occupying power to visit every inch of the area in order to acquire a strict right to the interior and to the lateral coast. But the severance of islands by the fixed and distinct barrier of the sea seems to put them clearly in a different category. The relative size and importance of the islands does not appear to afford any sufficiently definite guide to enable us to lay down any rule annexing them to their larger neighbours.

Jersey, Guernsey and Alderney, for historical reasons, are British islands off the coast of France, and S. Pierre and Miquelon are French islands off the coast of Canada: there is no valid reason why islands off the coast of Australia should not be open to foreign occupation, if in fact unoccupied. It may seem contrary to common sense, that small islands off a large one should not be included in its orbit; but that impression is merely a variant of the rough popular idea that "to every cow belongs its calf," which proved so disastrous in the

[1] Fish to Borie, 18 May, 1869, cit. Moo. *Int. L. D.*, I, 713, § 146.
[2] *Vide* Fulton, *op. cit.*, 616.
[3] *Supra.*

history of Saint Columba. That a whole group of islands should be reduced into possession by the occupation of any of them, even the largest, is really inconsistent with the doctrine of Occupation; which allows a State to annex territory of which it can and does make use, and, incidentally, as much more as cannot readily be separated from it. This extension is accorded solely on account of the practical difficulty of separation, and the mutual dependence of the coast and the hinterland. But there is neither difficulty of demarcation nor mutual dependence in the case of an island.

In the case of the Eddystone lighthouse (eight miles from Rame Head) and the Bell Rock lighthouse (eleven miles from the coasts of Fife and Forfarshire), the British government appear to have expressed the view that their foundations are not in British territorial waters. This is accurate, if the meaning is that the sea between the coasts of Cornwall and Scotland and these lights respectively is not claimed as territorial water. But it seems an unnecessary abandonment of right, if it means that no zone of territorial water at all surrounds these islets.

It is difficult to say what are the limits of the doctrine that smaller islands can be ancillary to larger ones, and on the whole it is better to reject it, except where the principle is applicable *de minimis lex non curat.*

A particularly irritating theory has recently been advanced, departing from the sound and simple principle that every point within three nautical miles of the coast is territorial, and that nothing else is. That is the assumption to treat gulfs as land, and drawing an ideal coast for them at the first " point " where they are just ten miles wide, to reckon the seaward three miles at right angles from that. This is simply an attempt to increase the area of territorial waters wherever possible, and it gives rise to a multitude of difficulties in practice; in fact, it is impossible to work.

It is often forgotten how recent this " ten-mile rule "

is. Lord Granville [1] was still acting, in 1870, on the rule that it is bays which are six miles wide at the mouth which are wholly within territorial waters, and his language does not even appear to contemplate any further seaward limit, but logically deduces the territoriality of the gulf from the fact that the entrance is comprised within territorial waters—three miles from each shore; and the same doctrine was being repeated in 1877 by the U.S. at the Halifax Fisheries Commission,[2] by Mr. Bayard in 1886, and by Canada in 1888.[3] Hall and Pitt-Cobbett speak of France "perhaps" claiming a ten-mile line. The foundation for this appears to be the Franco-British Treaty of 1837; of course, as between themselves, France and Britain could conveniently fix any limits they liked. Similarly, a ten-mile line was fixed in respect of German fisheries by an agreement between Britain and Germany recited in a Board of Trade notification issued in December, 1874,[4] and in this case the zone is very carefully defined: "The tract of the sea which extends to a distance of three nautical miles from the extremest limit which is dry at ebb tide of the German North Sea Coast and the islands or flats lying before them, as well as those bays and incurvations of the coast which are ten nautical miles or less in breadth, reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of the German Empire." It is not stated what is to happen when lines joining headlands

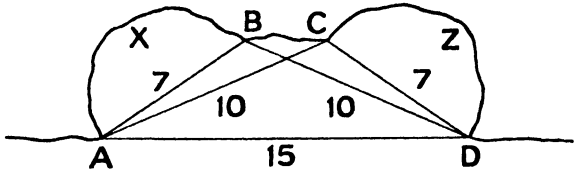
[1] 6 June, 1870. See *N. Atlantic Fisheries Arbitration*, II, 609. The Canadian authorities seem, however, to have instructed their cruisers to claim a seaward extension of three miles from the six-mile line. This is beyond Granville's statement, which is simply that H.M. Government hopes that the U.S. fishermen will not be prevented from fishing except within three miles of land, and in bays which are less than six miles broad at the mouth.

[2] "The jurisdiction . . . is limited to three miles from low-water mark along the sea-coast, and the same rule applies equally to bays and gulfs whose width exceeds six miles from headland to headland."

[3] Bayard to Manning, *cit. infra*, Memorandum by General Cameron, *ibid.*

[4] Hertslet, *Commercial Treaties*, XIV, p. 1058, cited Charteris, *Wide Bays*, *u.s.* See also *ibid.*, p. 1055.

intersect!—a consideration which may render us dubious as to accepting Hall's idea that the Germans "doubtless includes all the water within three miles outwards from the line joining such headlands." [1]



In the above figure, for instance, are AXB and CZD alone "bays"? Or is AXBC a "bay," and BCZD another "bay"? If the latter, it seems odd to have an area of shore and water in two bays at once. A French statute of 1888, prohibiting foreign fishing within three miles of low-water, introduced the ten-mile line, with a three-mile seaward addition, for bays on the coast of Algiers, drawn "at the first point where the opening does not exceed ten miles." From a geometrical point of view, it seems singular to speak of a "point" at which a line has a certain length; and in fact the conception is and must be ambiguous. The object of the statute, Mr. de Lapradelle thinks, was less to exclude foreign fishermen than to force resident fishermen to become naturalized. There was at the time great nervousness in France regarding the presence of undigested masses of foreign workmen, and this legislation seems to have been one of its symptoms: no case, so far as appears, of its application to foreign vessels in practice arose.[2] Meanwhile, the sinuosities rule internationally held the field.

A Memorandum drawn up on behalf of the Canadian government by General Cameron, and transmitted to the Colonial Office in 1888, contented itself with demanding that "all salt water within three miles of the shore,

[1] *International Law* (8th ed.), p. 194.

[2] See 79 *British State Papers*, 232,; Charteris, *Wide Bays*, *ubi supra*.

and in the case of fiords or sinuosities all the waters within the line where first on entering an inlet the distance across from shore to shore measures six miles across, should be considered within the absolute jurisdiction of Canada." [1]

An emphatic repudiation of the ten-mile theory is that of Mr. Bayard.[2]

" We may therefore regard it as settled that so far as concerns the eastern coast of N. America, the position of this Department has uniformly been that the sovereignty of this shore does not, so far as territorial sovereignty is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign." There are previous words of approval of the ten-mile line at the mouth of bays as a " proper limit " placed on the " headland doctrine " by the Brito-French Treaty of 1839. The approval must be restricted to approval of such an imaginary line as a conventional arrangement: for Bayard cites with equal approval the fact that on 14 May, 1870, " the ten-mile headland doctrine having been re-asserted by Mr. Peter Mitchell, provincial minister of marine and fisheries, Lord Granville, British Foreign Secretary, on June 6, 1870, telegraphed as follows: ' H.M. Government hope that the U.S. fishermen will not be, for the present, prevented from fishing, except within three miles from land, or in bays which are less than six miles broad at the mouth.' " So Bayard cannot have thought the

[1] *Alaska Boundary Tribunal: American Counter-Case*, pp. 151, 154, 159, 160, 162.

[2] Bayard to Manning, 28 May, 1886, Moo. *Int. L. D.*, I, 719.

" ten-mile line " the proper one apart from convention.[1] " The position I have stated," he proceeds, " you must remember, was not taken by the Dept. speculatively. It was advanced in periods when the question of peace or war hung on the decision."

Mr. Olney was still speaking in 1896 of six miles as the widest limit that could be claimed for the mouth of bays. " I need scarcely observe to you that an extension of the headland doctrine, by making territorial all bays situated within promontories twelve miles apart instead of six, would effect bodies of water now deemed to be high seas.[2]

When, in *Mortensen* v. *Peters*,[3] the Scottish courts asserted the jurisdiction of the British parliament throughout the whole extent of the Moray Firth, the Foreign Office, through Lord Fitzmaurice, entirely repudiated the idea, and the Crown declined to act upon the decree of the Court. In the House of Lords, Lord Fitzmaurice[4] admitted the benefits which an extended zone would confer on the fishing industry, but he observed that this consideration must be subordinated to the enormous interests " which are to the fisheries as round shot to a grain of sand," and which are inseparable from the principle of the freedom of the seas. " He could certainly say that, according to the views hitherto accepted by all the Departments of the government chiefly concerned—the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade, and the Board of Agriculture and Fisheries— . . . territorial waters were: First, the waters which extended from the coast-line of any part of the territory of a state to three

[1] Mr. Davis, Asst. Sec. of State, wrote on 14 February, 1884, that " bays " (undefined) were not to be taken as part of the high seas: the line must be drawn from headland to headland. This would obviously bring us back to the King's Chambers, if the headlands were duly selected (see Moo. *Int. L. D.*, I, 718, § 749).

[2] Olney to de Weckerlin, 15 February, 1896, cited Moo. *Int. L. D.*, I, 705, § 152, *ad fin.*

[3] (1906), 14 Sc. L. T. 227.

[4] 21 February, 1907.

miles from the low-water mark of such coast-line; secondly, the waters of bays, the entrance to which was not more than six miles in width, and of which the entire land boundary formed part of the territory of a state." Lord Reay supported Lord Fitzmaurice with the great weight of his juristic authority, and in the succeeding year the same doctrine was laid down by Lord Grey of Falloden.[1] Lord Fitzmaurice maintained that the words in the Scottish statute, " all persons," meant " all persons subject to the jurisdiction," and intimated that directions had been given to release the *Sando*, a Norwegian trawler captured in the Moray Firth, beyond the three-mile limit.

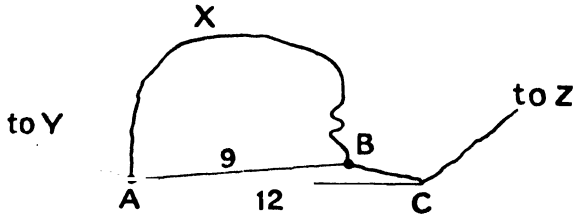
In 1910, the Hague Tribunal found itself " unable to qualify by the application of any new principle its interpretation of the [Anglo-American] Treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule." The short point in that celebrated case was that the United States held that, when the treaty spoke of three miles from the " coast, bays, creeks or harbours " of a certain region, it meant from the coast generally, and in particular from the coast of the bays, creeks or harbours. The British contention was that the treaty meant something more. And the weakness of their argument was that neither they nor the Tribunal could possibly say how much more. The Tribunal expressly admitted that " no principle of international law recognizes any specified relation between the capacity of the bay and the requirements for control by the territorial sovereignty " —so that the ten-mile rule found no acceptance at their hands. Deciding, therefore, as they did, that the American contention was wrong, they allotted bays to Britain on a perfectly arbitrary plan. It seems difficult to believe that the able American negotiators of the 1818 treaty intended such a cloudy interpretation. Although the language may not be well chosen, it seems much

[1] Then Sir E. Grey. Hansard, 170 Parl. Debates, Col. 1383.

more likely that the words " bays, creeks and harbours " were inserted, *ex abundanti cautela*, to make sure that their shores were not to be excluded from the interpretation of the word " coast." Unfortunately, *cautela super-abundans* is a dangerous thing.

The ten-mile rule, superficial as it is, has two quite distinct forms. Sometimes it appears as drawing a line at the hypothetical " first " points between which the water is not more than ten miles across; an instance of this is to be found in the North Sea Conventions of 1882 and 1886. Sometimes it appears as drawing a line between assumed " headlands," and regarding the " bay " as territorial if the line is not more than ten miles long. Both rules are arbitrary. The first allows the line to be drawn at different angles; the second allows it to be drawn between varying headlands. Take a curving shore at one end (B) of which is a bold promontory, succeeded by a low-lying shore. Does the " bay " end with the promontory, or with the succeeding shore? If the latter, then the whole bay may be outside territorial waters. Areas of sea-water are not marked in plain figures " This is a Bay ": everything depends, if we abandon the three-mile zone, on the selection of the headlands.

If, in the diagram, AC=12 miles, and AB=9 miles, is AXB the bay, or is AXC the bay? The question

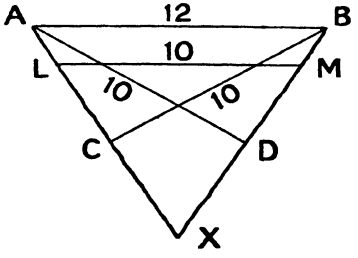


suggests a third possible rule—that the line should be drawn between the first " headlands " which are not more than ten miles apart. But here again we get our

possible alternative pairs of headlands, just as in the case of our possible alternative and even multiple ten-mile lines.[1]

The fact is, the three-mile limit is by far the best rule possible, and it can be extended conventionally to any desired area for the protection of fishing and revenue or for the extension of the responsibilities of neutrality.

The objections to the rule of reckoning three miles out from an artificial line drawn across the "mouth" of a bay are manifold: it is novel and confusing, it is difficult of application, and it is uncertain. Nothing can be simpler than the three-mile rule: it is well rooted in the consciousness of ordinary seafaring persons, and the sole question to be asked and answered in any difficulty is, "Was the *locus* more than three miles from any land?" Islets create no difficulty: they all have their three-mile zone, so long as they are not awash; sinuosities create no difficulty. It may be a curious exercise to lay down the boundary of territorial waters, but it is not necessary; the simple question is, "Was the spot three miles from any land?" But the application of the ten-mile rule requires us to measure our distance from an invisible and national abstraction. Nor is it an ascertained abstraction; it may be entirely uncertain where it is. It is a figment laid down by a pedant with a map, and not by a sailor in a ship. Take the case of a bay with a coast, represented in the simplest terms by the accompanying diagram, with which we have been familiar since the Pons Asinorum:—



[1] Martens, *N.R.G.*, XX, 465.

Which is the ten-mile entrance to the bay—AD, or BC ? or neither of them ? For a simple geometrical figure like this, it is easy to say that the true line of entrance is a line LM drawn parallel to AB, the assumed extreme points of the bays, and equal in length to AD and BC ; but bays are not geometrical, and there will always be an infinity of possible lines crossing the waters at various angles. Lines between conspicuous headlands will always compete with lines drawn mathematically, since the latter will, to the number of two at least, be competing with one another. Enough has been said to show that the imaginary ten-mile limit is not a practical rule. The more practical form which the theory takes, of regarding a bay as territorial if the distance between the headlands is less than ten miles, leaves unanswered the question, which headlands ? A, B, C, and D, in our above figure, may all be headlands. Is AD, or BC to be selected ? The shore is curved, the line is straight ; the ordinary three-mile limit from the shore, and the artificial ten-mile limit from the invisible line (even if the latter could be fixed) will therefore intersect in a perplexing way which will be incapable of ready practical solution. Whether a vessel is within territorial waters or not will not be determined by a glance.[1]

Endless questions, again, arise when there are islands in the mouth of the gulf. Is the line to be drawn from headland to headland, or from headland to island, and if so, which ? Do islands count as a group, or as individuals ? Such complications are absolutely swept away by the three-mile rule, which simply asks, Was the place within three miles of the shore ? Hard cases make bad law. The hard case of the fisheries induces nations to claim these irregular and impossible deviations from a plain and well-established principle. More harm than good will be done in the end.

[1] In point of fact, the bay determined by simply following the three-mile limit will be somewhat wider than six miles at the mouth. For the intersection of the boundaries of the three-mile zones to each side of the bay will be somewhat outside the six-miles chord wherever the latter is drawn across.

The fair conclusion is that the "ten-mile" rule is an ambiguous and impractical attempt to extend by all means the area of territorial waters, and that the simple and accepted method of following the sinuosities of the coast has never been in fact displaced. The recent treaties concluded by many powers with the United States, conceding a right of search within an hour's steaming, or within a twelve-mile limit, in respect of intoxicating liquor, in return for permission for their vessels to bring such liquor under proper safeguards into the ports and harbours of the United States, expressly recognizes the general applicability of the three-mile limit.

5. Intensity of the Right.—The right which a state exercises over the belt of territorial water [1] has been variously represented in all shades of intensity from sovereignty, through jurisdiction, to a mere power of regulation. In the interests of certainty and simplicity, it is submitted that any right less than sovereignty would be the subject of much difficulty and ambiguity. It would be difficult to define, difficult to reconcile with competing rights, and difficult to maintain against powerful contradiction. Indeed, the time-honoured asserted exception of a *jus transitus innoxii* ought not to be allowed to diminish its absolute character. The

[1] It is curious to note a Prussian exploit of the seventeenth century, when a Brandenburg privateer cut out two Swedish merchantmen in English waters near Yarmouth (*Life of Sir Leoline Jenkins*, II, 751, 10 June, 1675). Cases of alleged infringement of neutral territory may be found in the *Topaz* (I T.P.A. [1810-11]), the *N.S. de Carmel*, *ibid.*, [1812-13], fo. 288; the *Walker*, *ibid.* [1815-18], fo. 60; the *William and Mary*, *ibid.*, fo. 139; the *Frederic*, *ibid.* [1814-17], fo. 313; the *Mery*, *ibid.*, fo. 202. In the *General Rush*, a British ship re-named the *Blanche*, attacked by the Federals in Spanish waters, we get a parallel to the well-known case of the *General Armstrong*: the Federals paid damages (*Dip. Corr. U.S.* (1863), p. 617). In the *N.S. de Carmel*, the Bey of Tunis instructed his agent to "claim of the government in your place the restoration of the said vessel captured in violation of the neutrality of my territory; and claim her with vigour, that she may be released, because it is contrary to territorial neutrality." In the *Furioso* (I.T.P.A. [1814-15], fo. 1), the *Crocus* effected the capture in an *allied* port in Sardinia. See also the *Calmar*, *ibid.*, fo. 311; the *Frederic*, fo. 421.

exception, it is probable, was created by Grotius on Scriptural authority—to justify the action of the Israelites in claiming a passage through the country of the Amorites. If, however, we are to justify all the strange proceedings of the conquest of Canaan, we must be prepared to justify some highly unpleasant matters, and it seems better to regard the whole narrative as applicable only to cases of a nation acting under a particularly divine inspiration sufficient to take its acts out of the ordinary category. There is no need for ships to cross the three-mile limit: the right to do so is a very unimportant one, and there seems no reason why its existence should be insisted upon.

§ 6. Enemy Character in Prize

1. Allegiance.—Differing, it would appear, from Lord Justice Scrutton, I am of opinion that Allegiance is still one, and that the primary, criterion of enemy character: it is required by our Canon of Simplicity, and I think it is borne out by the authorities.[1] There seems to be no case reported in which a neutral residence, or even domicile, has overborne the fact of native enemy allegiance. It may be suggested that the cases reported by C. Robinson in which one Peter Peschier was claimant are cases of a Frenchman by nationality claiming as a neutral Dane by domicile. But there is nothing but surmise to show that Peschier was French. He may have been Swiss; or he may have been born in Denmark.[2] On the other hand, Sir Leoline Jenkins says,[3] "Nay, which is more, in the case of Reprisals, if I live in Sweden

[1] "A person living *bonâ fide* in a neutral country is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides, *provided it is not inconsistent with his native allegiance*": per Lord Stowell in the *Emanuel* (April 9, 1799), 1 C. R. 302. See also the *Etrusco* (11 August, 1803), 4 C. R. 262 *n*.

[2] See the *Conqueror* (16 Jan. 1800: 2 C. R. 307). The claimant is referred to in Appendix 4 to that report as "Peter Peschier of Copenhagen, a subject of H.M. the King of Denmark."

[3] See his *Life*, II, 713; cited Phillimore, *Int. Law*, § 325.

a Burgher, Officer, or what you please, and a Dane, for instance, hath Letters of Reprisals against the English Nation, if my goods fall into the Dane's hands, they are lawful prize, though I be never so much habituated in Sweden; unless it proves that I am so transplanted thither *cum pannis*, that I have neither goods nor expect them in England, and have resolved never to return thither; *which is an exception that some learned men allow of, but not all:* these things shew that the quality of a natural-born subject is tied with such indissoluble bonds upon every man that he cannot untie all by any means."

Sir L. Jenkins, indeed,[1] mentions a case of one Du Pié, a born French subject domiciled in Hamburg with his family for 20 years: "which regularly is sufficient in law to excuse him, as I humbly conceive, from being subject to the same Reprisals with the rest of his countrymen." [2] But this was because the formula of Letters of Reprisals ran expressly against "the persons inhabiting" the offending territory, and the opinion simply declares that it means what it says.

Enemy persons who enjoy an express, or tacit, licence to remain undisturbed in the realm, or to carry on trade undisturbed, of course must have the protection of the licence, as when William and Mary promised the Huguenot subjects of Louis XIV protection in England.[3]

Chief Justice Marshall is very emphatic on the point.[4] "The right of the citizens or subjects of one country to remain in another depends on the will of the sovereign of that other; and if that will be not expressed

[1] *Life* of Sir L. Jenkins, II, 730.

[2] The *St. George*, 1666 A.D.

[3] *Wells* v. *Williams* (9 Gul. III), Ld. Raym. 532. This was a very different thing from extending a like liberty to Germans in the late war; when the analogy of *Wells* v. *Williams* was, absurdly enough, extended to them, although they were not encouraged, like the Huguenot subjects of Lewis, but were on the contrary imprisoned, regimented and suspected. *Schaffenius* v. *Goldberg* (1916), 1 K. B. 284. Cf. as to the necessity of licence, *Alciator* v. *Smith* (1812), 3 Camp. 245: *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217.

[4] See the *Venus*, 8 Cranch. 291.

otherwise than by that general hospitality which receives and affords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there." Even registration was not considered to amount to a licence to reside: see the *Gazette*, 20–22 October, 1803, which shows that an express licence had to be obtained (as of course it was, in *Wells* v. *Williams*).[1] In 1804, a lady living peaceably in Quebec Street, and presumably registered as required by Act of Parliament, was found by a commission of escheat to have been born at Brussels, and therefore to be an alien and an enemy.[2] Probate of a will under which she was a devisee was granted to a trustee for her use.[3]

Lord Ellenborough, in *Herman* v. *Kingston*, remarks:[4] "You have given no evidence where these persons were born, nor proved that they were living in a hostile territory at the time of action brought; you have not shown them to be enemies *either by birth* or domicile." So Lord Davey says an alien enemy is "a person owing allegiance to a government at war with the king;" and so Chitty[5]—"An alien enemy is a person under the allegiance of the state at war with us" (Per Eyre, C.J., in *Sparenburgh* v. *Bannatyne*).[6] Westlake seems to urge, in his article in the Journal of the Society of Comparative Legislation (IX, 265), that domicile was anciently the only test in prize of nationality. But in the light of 12 Henry 6, c. 7, where the distinction is between

[1] Cf. also *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217; 24 L. R. Q. B. 19; and *Alciator* v. *Smith* (1812), 3 Camp. 244.

[2] This conclusion seems to have been unjustified. The lady must have been born within the allegiance of the Emperor of Germany (who was not expelled from Brussels until the last decade of the 18th century), and the mere fact that her birthplace had been ceded to France could not of itself alter her nationality.

[3] *Treasury In-Letters*, Record Office (1804), [931], 5167, 5716.

[4] 3 Camp. 152.

[5] *Law of Nations*, p. 80

[6] 1 B. & P. 163.

" liege people " and " aliens," this can hardly be accepted as history. Stowell, again, supports the idea that allegiance is conclusive, in the *Jonge Klassina* [1]—" A breach of native allegiance it could not be, as Mr. Ravie does not appear to be a native subject of this country." And in a Scots case, *Ewart Loyson* v. *Laird of Ludquharn and Captain Wilson*,[2] it was held that Dutchmen—" being Hollanders at the beginning of the war, concurring and contributing to the war, even if they had truly removed *tempore belli*, they continued to be the King's enemies: much less can their taking house elsewhere sufficiently prove that they totally deserted the Hollanders and concurred not with them in the war."

In the *Postillion*,[3] the sole point was that reprisals against persons inhabiting the territories of the French king could not be enforced against Frenchmen who did not inhabit them.

The case of the *Liesbet van der Toll* [4] is frequently quoted to show that enemy allegiance is not enough to condemn: the master was a Dutchman by birth, but had been settled for seven years in neutral Russia. But evidently the case was not pressed. It was a case of—(1) the master's adventure; (2) a fishing vessel: both elements which are uniformly favourably regarded. A memorandum in Treasury Series 1 [5] states that, so far as the Crown is concerned, " There is no objection to liberation if the Captains see fit to relinquish their claims." In the *Elizabeth*,[6] the property of one Richardson, a Danish subject, residing and trading in Calcutta, was condemned, and the condemnation was upheld by the Lords of Appeal.

In a Scots case of the *Sun*,[7] counsel certainly lay

[1] (1809), 5 C. R. 301.
[2] 15 June, 1669.
[3] Hay and Marriott, 245.
[4] 5 C. R. 283 (1804).
[5] Record Office (1804), bundle 926, No. 3575, 25 July.
[6] Inner Temple Folio Prize Appeals (1813–14, thinner volume), fo. 482.
[7] *Anderson* v. *Douglas* (21 Jan. 1623), 2 Stair, 154.

down distinctly that allegiance does not count—"neither is, nor was, there any ground of prize because the seaman is or was by nation a Hollander, unless he was an actual residenter there and contributed to the war, which only makes him an enemy." This is only a *dictum*, and it is submitted as of no authority in the face of principle. The fact that Lord Justice Scrutton, however, observed in *Tingley* v. *Miller* [1] that a friendly character was extended in time to enemies who traded or resided in a neutral country, must make it desirable that minute research should be devoted to the matter.

There are several cases in which the proposition that an enemy can be treated as a neutral if he (1) is domiciled or (2) is resident and trading in a neutral country has been assumed: but in no single case, curiously, has the excuse been in fact upheld. In the *King David* [2] the court held the asserted neutral domicile not established, and it was not therefore necessary for them to consider its effects. The same occurred in the *Soglasie* [3] and the *Johann Christoph*,[4] in which cases the question was moreover complicated with that of indelible allegiance and the power of a Russian to obtain Danish political nationality without going to Denmark. In the *Baltica*,[5] indeed, Lushington, D.C.L., pronounced squarely that a Russian by birth might acquire a neutral character by living in Hamburg and trading in Danish Altona. But the case was reversed by the Privy Council without deciding the point. Again, in the *Flamenco* [6] and the *Hypatia*,[7] while lip-service is done to the proposition that trading residence will confer on an enemy a neutral character, the asserted claim was in both cases negatived. The German who had lived and traded in Chile and had left for Switzerland, and the German who had lived and traded in the Argentine, were also *non sunt inventi*.

It would seem, therefore, that but for the reversed

[1] (1917), 2 C. 173.
[2] *Infra*.
[3] (1854), Spinks, 60.
[4] *Ibid.*, 104.
[5] *Ibid.*, 264.
[6] (1915), 60 Sol. J. 107.
[7] R. (1917), P. 36.

decision in the *Baltica*, and the high authority attaching to any *dictum* of Lord Justice Scrutton, there is no support for the idea that a political enemy can become a friend by settling in a neutral country, and by being there and trading. (*Sutherland* (*Duchess*) v. *Bubra* [1] is not a prize case, nor are *Ingle* v. *Mannheim* [2] and *Porter* v. *Freundenberg*.[3] They turn on entirely different principles, for which the reader may be referred to *War and its Legal Effects*, by the writer and General Morgan).

In spite, therefore, of the momentary popularity of the notion that allegiance—and indeed domicile—is altogether eclipsed by trading residence, under the attractive name of "commercial domicile," it will be seen that it is not unlikely that on more mature consideration future judges may discard the important principle.

The point is not concluded by the mere fact that Englishmen domiciled in a neutral country were regarded as permitted, like their neighbours, to trade with the enemy.[4] That is a matter for municipal regulation.[5] In the *San Jose Indiano*,[6] Mr. Justice Story stated broadly that the national character of a person for prize purposes is decided by his domicile, expressly laying it down that if such be neutral he acquires the neutral character. But the statement was not necessary to the decision, as the enemy English person, though domiciled in neutral Portugal, was held to have subjected his property to enemy treatment by his course of trade. Story's dicta are always to be received with

[1] (1915), 31 T. L. R. 248.
[2] (1915), 1 K. B. 227.
[3] *Ibid.*, 857.
[4] The *Indian Chief* (27 February, 1800), 3 C. R. 22; the *Emanuel* (9 April, 1799), 1 C. R. 296; the *Neptunus* (1807), 6 C. R. at p. 408; the *Danous* (17 March, 1802), 4 C. R. 255 (n.); the *Ann*, 1 Dods. 221; the *Abo* (1854), Spinks, 42.
[5] This permission was not accorded to a French company working in Greece, which shipped silver to England on the instructions of an enemy German purchaser. It was condemned as on a trade by an ally with the enemy: the *Panariellos* (L. M. & R. (1915), 338). Cf. the *Samuel*, 4 C. R. 284*n*.
[6] (1814), 1 Gall. 268, 311.

extreme caution. It is not unimportant to remark that allegiance is accepted as the grand test of national character on the continent of Europe.

2. Domicile.—The next criterion in Anglo-American practice is Domicile.

The Canon of Simplicity demands that we shall not invent for this purpose a novel kind of domicile, subtly differing from that which is the criterion of the personal statute in matters of succession, capacity, and matrimonial affairs.[1] There is no trace of such a distinction in the cases, which treat both kinds of domicile indiscriminately, and apply the rules of the one to the facts of the other, until Professor Westlake, perhaps taking the idea from Lushington,[2] suggested in 1858 that the two were different. So late as the leading case of *Udny* v. *Udny*,[3] Lord Westbury relies on the *Indian Chief* and the *Harmony* [4] (prize-law cases) to show what is domicile in civil law status.[5] The confusion arose from the fact that there exists a third cumulative test of enemy character, namely the possession in the enemy country of a so-called "House of Trade." This led writers, in a confused fashion, to treat domicile as being "trading residence," [6] whereas, in fact, the matter of trading in the enemy country had nothing whatever to do with the reasons which condemned a merchant's goods as hostile on the ground of his hostile domicile.[7] It was

[1] I may be permitted to refer to A.J.I.L. (April, 1921), 198; Journal of Comp. Legis. (1909), XIX, 157, 265; XX, 183; 21 Jurid. Rev. (Edin.), October, 1909, p. 209.

[2] Or possibly Thompson, whose *Laws of War* was published in 1854 (see it, p. 27). See also Webster's opinion (*Works*, VI, 524) in favour of the doctrine of the text.

[3] L. R. (1869), 1 S. & D. App. 441.

[4] 2 C. R. 322 (16 January, 1800).

[5] See also *Forbes* v. *Forbes* (1854), Kay, 341; *Craigie* v. *Lewin* (1843), 3 Curt. 435; *A.-G.* v. *Kent* (1862), 1 H. & C. 12; the *Munro* (1840), 7 Cl. & F. 862; *Maltass* v. *M.* (1844), 1 Robertson 67; The *Frances*, 8 Cranch, 363; the *Johnson*, 3 Peters, 171; Phillimore, *Law of Domicile*, 13.

[6] The so-called "commercial domicile"—a name first given by Chief Justice Marshall—was nothing but ordinary domicile taken up for commercial purposes.

[7] For a discussion of these problems see the *American Journal of*

because by having his principal establishment and connections there, and so supporting the enemy by his expenditure and taxes (see per Stowell in the *Harmony*), he was identified with hostile interests; that he was considered an enemy whose property anywhere and everywhere lay open to confiscation. Just as, in the case of House of Trade,[1] it was the fact of his making money in the enemy's country that was decisive, so in this matter of domicile, it was the fact of his presumably spending his substance in the enemy's country that was decisive. The fact of trading there had nothing to do with it, except that the party was generally a trader, and that he generally did trade where he lived. It is as an enemy producer that he is regarded by the House of Trade principle: the principle of domicile regards him as an enemy consumer. The two are not inconsistent, but complementary.

Wheaton [2] shows domicile as being the place where the party contributes to the national resources. Washington, J., in the *Venus*,[3] speaks of "such evidence of an intention permanently to reside there, as to stamp him with the national character of the state where he resides." Stowell, in the *Embden* [4] and in the *Zong Ruiter*,[5] lays stress on the importance of establishing a family connection, in order to constitute domicile. In *De Luneville* v. *Phillips*,[6] a lady, resident in hostile Paris, was refused the right of entering up judgment on a warrant of attorney. In the *Amado*,[7] the personal domicile of the owner in the United States prevented him from lawfully carrying on trade in neutral South

International Law, April, 1921 (XV, 2, p. 198). Also *Law Quarterly Review* (January, 1927), *Scottish Prize Cases and Modern Heresies;* Baty & Morgan, *War and its Legal Results*, pp. 310 *seq.*

[1] *Infra*

[2] *Captures*, ch. 4, pp. 102-150.

[3] 8 Cranch, 279.

[4] (1898), 1 C. R. 16.

[5] (1809), Acton, 116.

[6] (1806), 2 N. C. 97.

[7] (1847), Newberry, 400.

America with enemy Mexico. Judge Story flatly says that the party "may be retired from all business and yet his domicile will prevail," [1] to condemn his goods.

In *Elbers* v. *Kraft*,[2] the fact of trading in America is referred to by Washington, J., as quite a subordinate element in estimating the fact of domicile. A couple of partners were carrying on business in the Swedish West Indies. One went to the United States, mainly for his health. A cargo was consigned to the firm at S. Bartholomew, where the Swedish house of trade was. A moiety was clearly Swedish, but it was asserted that the other moiety was American. The absence of all proof that such partner ever intended personally to return to S. Bartholomew was held decisive to fix him with an indefinite intention to remain in the United States, and so with having acquired an American domicile.

How do the advocates of the theory that "place of business" is everything in war regard the case of the *Elisia* (Folio Prize Appeals, Inner Temple Library, 472)? The owner of ship and cargo (one Davis) was a subject of the king, and regarded himself as domiciled in Ireland, having his home there, if anywhere. But where was his commercial centre? Certainly nowhere in the United Kingdom. Being at Lisbon early in 1810, he bought an American vessel, got a Papenberg register for her, and christened her the *Elisia:* he went to Waterford in her and loaded glass for America, proceeding thither with the cargo. Subsequently the ship voyaged to Ireland with naval stores, and back with glass and whiskey. She then went again to Ireland, and proceeded to Lisbon and St. Ubes, returning to America; and lastly performed another journey to Ireland and back. War between America and the United Kingdom having then broken out, Davis "determined to quit

[1] *S. P. G.* v. *Wheeler* (1814), 8 Cranch, 132.

[2] (1819), 16 Johnson (Amer.), 128. It is noteworthy that in the English case of the *Ann* (I. T. Fo. Prize App. (1813–14), 418), the partners were stated both to reside at S. Bartholomew, to be single and Swedes.

that country [America]," where he was evidently settled for business purposes. He loaded the *Elisia* with what property he could collect, and she sailed for S. Bartholomew, during which voyage the ship was taken by the *Statiria* and *Aeolus* as American property. There is no evidence that he personally came away, and definite evidence that he was still living at Bath, in America.

Davis deposed that he only went to the United States "for convenience," which must mean business convenience, and the court, if it had held that the place of business was decisive, and that domicile in prize law meant a trading residence, must have told him that his nationality and civil domicile did not matter. But the Lords Commissioners in 1815 restored him his property in spite of its American origin, in spite of the master's and supercargo's deposition that he was still living in Bath, U.S.A., and in spite of the King's Advocate (Sir C. Robinson), who urged that the property belonged to the enemy. His Irish civil domicile must have saved him.

A case to the same effect is the *Trois Frères*,[1] decided by Sir Alex. Cooke. A French subject became naturalized in the United States, and traded there. He left, however, with all his books and papers in a French ship for good, intending to return to France. But, hearing on the voyage of war having broken out between France and Britain, the ship endeavoured to return to the United States, but was captured *en route*. Was the traveller at that moment an enemy or a friend? His nationality was American and neutral: Croke did not inquire where he was trading, but required him to swear absolutely that he had abandoned all intention of going to France—*i.e.* to establish that his ordinary civil law domicile was not French.

On the same principle, in the case of the *Louisa*,[2]

[1] Stewart, *Vice-Admiralty Cases (Nova Scotia)*, 1.

[2] *Lushington Folio Prize Appeals, penes* the Inner Temple (1814–15), 115.

a domiciled Venezuelan, temporarily in the United States, and doing a little business there, was held to be a Spanish friend and not an American enemy, which shows clearly that "trade domicile in war" is not "residence plus trading." The claimant was in America for his health, and his family were still at Caracas; but his residence in America was prolonged by revolutionary conditions at home, and he made three shipments of indigo, hides, chocolate and provisions while in the United States. Lushington and Brougham [1] urged that the claimant was "a neutral Spanish subject, whose national character by birth and domicile is Spanish, and whose temporary residence in the U.S. had no connection with commercial purposes, but, having originated in impaired health, was subsequently prolonged beyond his inclination by a continuance of the same calamity and the prevalence of revolutionary conditions in his own country, which reduced him to great distress and rendered his immediate return impracticable." The Lords restored the cargo as neutral Spanish property. The King's Advocate and Garrow, according to an MS. note on the case, urged that the question was, "Was the claimant (Vicente Rodriguez) so abiding in New York as to have lost his original and native Spanish character, and ought to be considered with reference to this transaction as an American merchant?" They thus squarely place the issue on his civil-law domicile. They then shift their ground to the possession by the claimant of an American house of trade. His occupation had always been that of a merchant. Matters of commiseration are difficult. But the question is not whether an alien going away from home is not an object of pity. He was settled in the U.S., and chartered this *Louisa* for a voyage originating and terminating in America. He was living in the U.S. as a merchant keeping his character open. To this his

[1] Brougham was surely not an Advocate of Doctors' Commons: his retainer is hard to explain.

counsel reply that he had in America "no house of trade": "Two acts of trading will not confer the hostile character." And as to his domicile being American, they point to the fact of his wife and family being left at home, to his state of health—he had lived on chocolate for fifty-four days, and his constitution was ruined—and to the unsettled state of Venezuela.

Sir Leoline Jenkins (*Life*, II, 785) shows also that the fact of financial support to the country of domicile is the decisive reason why it is a criterion of enemy character: "If the war had . . . been against Sweden, . . . his being a sworn burgher at Calmar, and his paying scot and lot there, would, as I take it, have made him good Prize, and that justly too; his being a Hollander born, his having a House at Amsterdam, and his passing a winter there, would not have saved him."

So, in the *Clan Grant*,[1] the place of business of a firm was in Khartûm; but as two of the three partners lived in Hamburg their stores were confiscable as enemy property on board a British ship.

The Scots cases [2] equally show that the domicile of prize law was the domicile of civil law, and not a sort of temporary "trading domicile," such as Westlake imagined. In the *Calmar*,[3] it was stated that a man's "true domicile could be but in one place, and was found to be in Holland, where he lived at home with his mother," although he was a burgess of Calmar, and traded from there. It was his purely personal, non-trading, domicile that was invoked to prove him Dutch. So in the *S. Katharine* v. the *S. Mary* [4]—"At one time a party may have many domiciles, but his residence is estimated by his principal domicile, which is always understood where his wife and family are in his own house,

[1] (1915), 59 Sol. J. 430.

[2] See L. Q. R. (January, 1927), p. 33, *Yale Law Journal* (February, 1918).

[3] (1673), 2 Stair, 178. A parallel case is the *Elsingburgh* (1673), 2 Stair, 182, 216.

[4] *Ibid.*, 191. See also the *Young Tobias* (1773), *Ibid.*, 208.

unless there are evidences of their separation; for a skipper, who is ordinarily at sea, may have a chamber in many towns where he uses to trade; and though he had a part of his stock [there] and bore contribution for it, yet his chief residence must be where his wife and family were." And in the *King David*,[1] the skipper was a sworn burgess of Frederickstadt, in Denmark, in 1671, had a house there, paid scot and lot, and had his wife stopping with him there for some weeks. But the court brushed all this aside, "because he did not transport his family": upon such pretences "the Hollanders might make themselves burgesses of any free place . . . when truly they had not changed their domicile or deserted the enemy; leaving their families there where it is presumed they did bear burden."

It will be seen that the gist of the adoption of domicile as a criterion of enemy character is that it implies the "bearing of burdens"—the contribution of taxes to the enemy resources.[2]

3. House of Trade.[3]—As the conception of personal domicile became more refined and exacting, with the opening of the eighteenth century, there grew up beside it a third criterion of enemy character: viz. that the goods in question were the produce of the land [4] of, or of a house of trade [5] established in, the enemy's country. Wheaton criticizes this rule as one-sided; it condemns the proceeds of an enemy house of trade, but it does not release the produce of a neutral house of trade.[6] As Dana shows, if it did,[7] the result would be to substitute

[1] 2 Stair, 219.

[2] Domicile, in the older cases, is often termed "residence"; *e.g.* the *Citto*, 3 C. R. 38 (1800).

[3] See *Enemy Domicile and House of Trade* in A. J. I. L. (April, 1921), XV (2), p. 198. Baty and Morgan, *War and its Legal Results*, 304.

[4] The *Phœnix* (1803), 5 C. R. 20 (where the rule is said to date from 1783); the *V. Anna Catharina* (1804), *Ibid.*, 161; *Bentzon* v. *Boyle* (1816), 9 Cranch, 191.

[5] The *Vigilantia*, 1 C. R. 1 (1798).

[6] *Elements of International Law*, § 335.

[7] *Wheaton*, ed. Dana, § 335, note.

it for domicile as a criterion of enemy character. It is not meant as a substitute, but as a supplement.

It can hardly be considered a very satisfactory criterion, however; it brings in its train many subtleties as to precisely what is the distinction between trading to a country and trading in it, between trading as an agent and trading by an agent,[1] between visiting a country for trade and residing in a country for trade, between produce by way of manufacture and produce by way of sale, and so forth. We cannot affect to recommend it as a rule, but it is impossible to deny its existence. Wildman (*International Law*, 1850) [2] identifies it expressly with "commercial domicile," and this neatly shows how mistaken Westlake is in identifying the "domicile" of prize law with "commercial domicile," from which Wildman thus markedly distinguishes it. Wildman's tests of enemy character are: (1) domicile; (2) commercial domicile or "national character acquired by trade." The idea (unfortunately adopted in the *Annaberg*) [3] that trading residence in an enemy country for an indefinite period of time confers a "trade domicile" which will condemn all the property of the party, even in connection with a totally different trade, is due to a misreading of the authorities. If the gist of the condemnation of certain goods is that they are involved in trade carried on in the enemy's country, then it is clearly a superfluous consideration that the owner resides there. If the gist of the condemnation is that he resides there, then it does not matter whether he trades there or not.

The *Portland* [4] shows that the operation of this "commercial domicile" (as Wildman calls it) created by the mere produce of a house of trade in the enemy

[1] It appears first to have been suggested that the domicile of agents in an enemy country might be imputed to their principal; but this idea was rejected: see per Lord Stowell in the *Rendsborg* (4 C. R. 139).

[2] II, 45.

[3] 2 B. & C. P. C. 241: see also the *Hypatia* (1917), P. 36; and the *Cheshire*, 4 Wall. 231.

[4] 3 C. R. 41 (1800).

country, with or without residence, is less sweeping than that of civil domicile; it does not involve the goods of a person domiciled civilly in a neutral country further than the produce of his enemy house is concerned. Here we reach the perplexing series of questions which arise out of the principle. How far are the goods his in the quality of an enemy producer and exporter, and how far in that of a neutral buyer?

In the first place, a house, in the sense of a tangible office or establishment, is not necessary to the establishment of a House of Trade. "How much of the great mercantile concerns of the Kingdom," remarks Lord Stowell, in the *Jonge Klassina*, "is done in coffee-houses!" [1] Nor does it imply a partnership. But every commercial transaction, or series of transactions, taking place in an enemy country does not create a House of Trade there. If it did, every export to an enemy country would be an export of enemy goods. "It is to be supposed that a mere purchaser, whose principal establishment is in a neutral country, will not be considered as having a house of trade in the enemy country merely because he or his agent makes purchases there and sends them home." [2] Much seems to depend on whether he has other houses, and on whether he is interested in the production, manufacture, and distribution of the goods. In the *Anna Catharina*,[3] Hamburg neutrals had a resident agent in the hostile country, whose duty was to manage the export and import trade of the claimants, to distribute their goods

[1] 5 C. R. 297 (1804).

[2] Baty and Morgan, *War and its Legal Results*, 319. The *Anna Catharina* (1802), 4 C. R. 107.

[3] (3 August, 1802; 4 C. R. 107.) See also the *Rendsborg* (13 August, 1802, *Ibid.*, 118), where the privileged and monopolistic character of the trade was equally decisive. Where the transaction is "in other respects perfectly neutral," the mere residence of the agents in the enemy country will not turn it into enemy trade. But "where the trade itself cannot claim to be so considered, and is carried on from the enemy's country, by agents representing the principals therein, it should seem that the mere personal residence of the principals elsewhere would hardly protect such a trade, so conducted, from being considered as the trade of an enemy" (per Lord Stowell, 4 C. R. 139, 140).

and to collect return cargoes for them. This did not make the principals enemy merchants. The fact that the trade was a privileged monopoly did so; but the mere fact of trade did not. It is otherwise when the neutral has no substantial neutral house. In the *Adriana* [1] the American claimant carried on no business in America; in the *Dree Gebroeders* [2] he had ceased to have any; in the *Fair American*,[3] the *Hannibal*, and the *Pomona* [4] he had none. In the *Herman* [5] a cargo was sent by a domiciled neutral Prussian, living and trading at Emden, from Amsterdam to London, where he was a partner in a house of trade. This was impeached as an act of trading with the Dutch enemy; but Lord Stowell asserted the claimant's right to trade like any other Prussian by taking or sending goods from Holland to England, "provided it does not originate from his house in London, nor vest an interest in that house." Lord Stowell went even further: "I cannot think that . . . giving orders during his stay here for a shipment in the enemy's country, on account of his house at Emden, would bring his property into jeopardy." Here, it will be observed, the claimant carried on a substantial neutral business. It was urged that any British subject might thus, by taking a neutral partner, manage to trade with the enemy, but the judge held that so long as the two "houses" were entirely separate, there was no objection to the trade. He admitted, however, that such cases turn on many fine considerations: an obvious truth.

In the *Jonge Klassina*,[6] as in the group of *Dutilth* cases, the personal presence of a merchant in the enemy country was considered important. "If he is there himself, and acts as a merchant of the place, it is suffi-

[1] (1799), 1 C. R. 313.
[2] (1802), 4 C. R. 232.
[3] (1796), 3 C. R. 16.
[4] (1800), 3 C. R. 16 (n.).
[5] (1804), 4 C. R. 228.
[6] 5 C. R. 297. The *Fair American, etc., supra* (1800), 3 C. R. 16.

cient." But, though important, it is not necessary—only it is one way of supplying the want of any fixed counting-house or office. In the case in point, a merchant whose civil domicile is not stated, but who evidently moved about Europe a good deal, was a merchant in Birmingham. He obtained a licence [1] to import in that character goods from hostile Holland. It was held that this licence did not cover the export of them by him from Holland in the character of a Dutch merchant. He was personally in Holland superintending the shipment; the charter-party was signed by him as a merchant of Amsterdam, and, according to Stowell, he was "as

[1] In *War and its Legal Results* (Murray, London, 1915), it is observed that claims in prize may be made by enemies if they can allege a licence, cartel or other *commercium belli*, and that Wheaton (*Captures*, 39) goes even further and states that certain illegally captured ships were restored in the English Prize Courts to the French *flagrante bello* (see, however, *Crawford* v. *The William Penn* (1815), Peters (Adm.), p. 106, from which it appears that an enemy could not sue unless licensed. But enemy aliens were allowed to appear in Prize in Scotland, in *The Noord Holland* v. *The Alfred* (1781), fo. Dec. IV, 145; Fac. Col. No. 14, p. 27; Morison's Dict. Dec. XXVIII, No. 11,960). In one case of this sort, however, (*Die Vier Damer*, 5 C. R. 358), Lord Stowell directed the money awarded as compensation to be brought into the Registry, with a view to the enemy claimants obtaining a licence to take it out. This also seems to have been the course followed in the *San Juan Baptista Concepcion* (Treasury In-Letters (1805), bundle 950, No. 4793 (21 August)). The judge decreed £1,400 demurrage (and £100 damage to the crew) of a friendly Spanish ship against the *Regulus* privateer. War with Spain supervened. The King's Advocate advised the King's Proctor to recommend the Treasury to pay the money. "The sum remaining in the Registry having been decreed to the Spanish subjects on whose behalf the Memorial is presented, as a compensation to them for damages arising to them by the misconduct of the Privateer, and that having been prevented from receiving such compensation by accidental delays, they do appear to have a fair claim upon the justice of H.M. government, to be allowed to receive such compensation notwithstanding the intervention of hostilities—and it is therefore humbly recommended to grant the prayer of the Memorial."

In the *Ariadne* (*Ibid.* (1806), [982] 5902 (August 29)), on the other hand, the enemy might fairly have been said to have abandoned that character. Compare also the *Virgia del Carmen* (*Ibid.* (1806), [985] 7147), where the vessel was restored, and there then appeared a deficiency by spoliation. A decree passed against the captors to make it good. War with Spain supervened, and the agent of the Spanish owners applied for the enforcement of the decree. The King's Advocate and Proctor recommended that the Crown should intervene by the latter officer and claim the amount, but queried whether it should then be given up to the Spanish enemies, and concluded that it would be a matter for consideration when all the circumstances should have been investigated.

substantially employed in the trade of Amsterdam as any other mercantile firm of the place." The object of prohibiting trade with the enemy being precisely to prevent such personal communication,[1] it is not surprising that Stowell pronounced the cargo obnoxious to the rule. The licence was to an Englishman to bring away his goods from Holland, not to export goods from Holland, collected by him there as a Dutch merchant, and to act as a Dutch merchant carrying on the Dutch export trade with all comers.

Under modern conditions of commerce business is generally conducted by agents, and in the case of companies it must be, so that the element of personal presence becomes much less important. "Branches," "succursales," and the like are nothing but agents, and it must often be a matter of extreme difficulty to pronounce from the act of agents whether persons are acting as merchants of the country in which their agents are working or as merchants of their own nation. The extent to which an agent is invested with independent powers of initiative is important in this connection.[2] If, by himself or his agents, a neutral's activities in the enemy country go beyond the purchase and export of goods, and include the production, manufacture, or distribution of goods, it would seem that the hostile character would attach.[3]

But the whole matter is so elusive, and so crowded with ambiguities, that it is conceived that the right solution is to adopt boldly the Continental rule, abolish the criteria of Domicile and House of Trade, and revert to that of simple Nationality.[4]

[1] The *Hoop* (1799), 1 C. R. 196.

[2] See Baty and Morgan, *War and its Legal Results*, pp. 325 *sqq.*, 348 *sqq.*

[3] *Ibid.*, p. 319. But see *In re Hilckes, exp. Mutiesa* (1917), 1 K. B. 48, in which it was held by the Court of Appeal that a company trading as rubber producers in an enemy German colony were not an alien enemy. The directors and most shareholders were British, and the company was registered in England. It is almost certain that its rubber would have been seizable in prize. See the *Asturian* (1916), P. 150.

[4] Pitt-Cobbett (*Leading Cases*, ed. Bellot) argues for the applicability

Most of the business of modern times is done by companies: the national character of the shareholders is certainly important, but it plainly no longer depends on their personally taking a part in the trade, still less on their going to any particular country to do so. The bottom is therefore knocked out of the conception of "commercial domicile" as "trading residence." That conception, as I have tried to show, never had any real existence as a criterion of enemy character. Its recent adoption by Westlake and the English courts merely amounts to considering a person to be domiciled in the enemy country on slight and insufficient grounds, if he happens to trade there. But now that few people settle abroad to carry on their own exclusive business, the hybrid conception is useless. Few people settle abroad to trade at all, unless as agents, or as the glorified agents styled directors or managers, of some company. The chief aim must now be to determine the national character of shareholders, and they may, and probably will, each have shares in ten or a dozen concerns. We are thus more and more plainly forced back on the criterion of the personal character of individuals, apart altogether from trading. And whether we ought to seek it in their domicile—the centre of their personal affairs—or in their nationality—the gravitation of their allegiance—might be a question. But as Great Britain, Japan, and America stand against the world in this respect, certainty would seem to dictate the acceptance of nationality as the criterion. Possibly the solution may eventually be found in the determination of nationality by considerations of domicile.[1]

4. **Generally.**—It must always be borne in mind that the criterion of an enemy for purposes of prize is by no means the same as the criterion of an enemy for purposes of contract, and of private law in general.

of the criterion of Domicile in war as in private matters of status. But war is a public matter, and allegiance is a public matter, which makes all the difference.

[1] See *infra, Nationality.*

And, whatever criterion or criteria we adopt, the operation is liable to be affected by events transpiring in the progress of the war. Territory in the occupation of the enemy may be assimilated to enemy territory, and occupied territory may be assimilated to friendly territory.[1] It is unnecessary to dilate on this principle, which is thoroughly well recognized. But it is less often observed that in certain cases the personal inclinations of a private person may entitle him, as of right and not as of grace, to the treatment of a friend. It is impossible for the subject of a recognized hostile state, or a person domiciled, or having a house of trade, in such a state, to claim as of right to be severed from the state on the ground of his personal inclinations and conduct. But in the case in which an insurrection is in progress, although the adherence of local governments to the insurrection may in general include those inhabitants who are settled in their districts, it is not impossible—though very difficult—for an individual who adheres to the established government to claim the benefit of that allegiance. It must always be a difficult matter to determine how far local authorities have the power to commit the inhabitants of their districts to rebellion. It is submitted that the only safe rule is to disregard the influence of such subordinate rulers altogether, except when they rule semi-sovereign states, and to regard no district as rebellious unless the force of the established government is powerless there. For this purpose, the same rules should be applied as prevail in the case of military occupation, *i.e.* the districts should not exceed in size a French canton at the most. The comparative intensity of the force normally exerted by whatever local government exists will of course be important in this connection: an English county could not put all the districts within its area in rebellion, because its government normally has very little power. An Ameri-

[1] As in the cases of Demerara in 1781, and the Cape in 1794: see the *Danckebaar Africaan*, 1 C. R. (1798), 111.

can State, comprising far fewer people, possibly could coerce all the districts within its area into insurrection. But it ought always to be—except where there is a real international personality concerned—a matter of fact, and not of law. No subordinate government ought to have the power to turn subjects into rebels by a stroke of the pen, or by anything short of temporary supreme control.

No doubt, in the case of the United States and Switzerland, where the local authorities are constitutionally, though not internationally, sovereign, there may be some ground for conceding that the authorities of the State may fix all their people with the quality of rebels. But so far as foreign countries are concerned, the imputation of hostility ought to follow only on submission to hostile power.

CHAPTER IV

THE CANON OF OBJECTIVITY

Not only must the law of the heterogeneous masses of the world be simple and certain, it must also be objective. It must leave no scope for opinion and inference; it must deal in plain fact.

We shall treat under this head of various matters in which there is an urgent necessity for maintaining plain objective criteria, viz. :—

§ 1. The Continuity of States.
§ 2. The Recognition of States and Governments.
§ 3. Prohibition of Neutral Trade.
§ 4. Contraband.
§ 5. Occasional Contraband.
§ 6. Continuous Voyages.
§ 7. Visit and Search.
§ 8. Destruction of Neutral Vessels.
§ 9. Miscellaneous Prize Matters.
§ 10. Prize Capture on Land.
§ 11. Blockade.

Certain of these topics might more properly be included under other heads, but they are most conveniently placed in connection with other maritime subjects.

§ 1. Continuity of States

When the head of the State is a single, normal person, there can arise little or no doubt as to the proper person to speak with the authority of the State, or to authorize others to do so. Difficulty, however, arises when the chief executive post is filled by more than one person,

and also where a single chief is subject to some abnormal feature. In the former case, it must always be doubtful whether the sovereign power is joint or several, and in the latter it must equally be dubious whether any and what limitations are entailed by the abnormality. Thus if the Sovereign is a child, or imbecile, or an invalid, spirited away, imprisoned, or absent from the realm, it may become a question whether any asserted guardian or regent has the capacity of acting for all purposes in his place. This is a question as regards which foreign nations are entitled to rely on the word, *first*, of the Sovereign (unless plainly incapable of expressing an opinion), and, in the next place, of the Foreign Minister, or other persons who are carrying on the practical work of government as they did prior to the disability arising. It would not seem that a Consort or Heir Apparent would necessarily have authority to contradict them, in the eyes of foreign nations; nor that the latter are put to the necessity of forming an opinion on the country's constitutional law. It is the objective fact of continued control, the question of right to control, which is important.

A disputed succession on the demise of the Crown, or on the abdication of a Sovereign, will similarly be conclusively settled, so far as foreign nations are concerned, by the authorities with whom they have been accustomed to correspond. Should these simultaneously disappear, and two or more warring factions alone remain, the conclusion must be that the State has ceased to exist, even though each party may proclaim its desire of ruling over the whole. There is in such a case not a rebellion against a common government, but a real division of supreme authority; and, if there is a division of supreme authority, there is (for international purposes) a division of the State into two new communities. In other words, the existence of the State depends on the existence of a common government.

Should the Sovereign become incapacitated, he can

himself authoritatively intimate to foreign nations the limits of his power and that of his temporary substitutes; or if he is physically and mentally incapable of doing that, the persons actually and peaceably carrying on the government can do so.

The actual work of government is in fact carried on by Ministers; and, in such circumstances of absolute incapacity on the part of the Chief of State to give an opinion of his own, the opinion of Ministers as to the powers and limitations of the personage whom they consent to regard as a temporary substitute for the Sovereign must, if they continue their activities, be conclusive.

And if this government, and any regents that it recognizes, are subsequently by internal violence attacked, it is clear that those who attack them are, internationally, rebels, though they may be clothed with every constitutional right. It would seem, moreover, that a prior intimation by the Sovereign of what persons are constitutionally entitled to supply his place or to succeed him could scarcely avail against a definite determination of the persons carrying on the government under him to the contrary. A living dog is better than a dead lion. Moreover, the circumstances might have altered in the meantime, since the now incapacitated sovereign furnished his opinion.

It might be thought, at the first glance, that a country with an incapable sovereign was in the same position as a country with a "ghost" or phantom sovereign—a country whose sovereign, or chief of state, exists only in the desire and hope of the country for a single united government, in which case we have seen [1] that no single state exists. But, in the case of the incapable chief of state, there does exist a single government. International Law, looking, as always, to the substance through the form, sees the actual conduct of affairs remaining in the same hands as before, and so there is no question as

[1] *Supra.*

to the continuity of the State. Even should the ministers all resign or disappear, by some strange chance, coincidentally with the incapacity of the king, it must be held that the nearest associates of the ruler (his consort and family) should be regarded as invested, *vis-à-vis* foreign States, with power to carry on the government in his name. The presumption is in favour of continuity, and as long as the sovereign survives, those nearest to him will naturally be regarded as entitled, internationally, to carry on his government, or, at any rate, to say authoritatively who are entitled to carry it on. In those circumstances, should the sovereign's person be taken possession of by a faction, it would not be they, but the established regents, who would be internationally considered to represent the state.

In the case of a demise of the Crown, or an abdication, with a disputed succession, the same principles hold. It is the claimant who is recognized by the persons actually carrying on the business of government, who is the true Sovereign (whether they are right in accepting his title or not). Great difficulty would be created in case of a dissension between these high officers. So long as they carried on the business of government in concert, they would certainly maintain the unity and existence of the State, though it would probably be necessary to hold that they themselves were its Head for the time being. But if their dissension eventuated in civil war, there is no escape from the conclusion that the State would cease to exist. Neither party could be termed a rebel against the other, and the mere desire of both to rule the whole could not outweigh the fact that each ruled only a part. It will be very seldom, however, that such a state of things can exist. Almost inevitably, the one party would acquire a start of the other, and so obtain a legitimate right to represent the whole country.

On the death of Henry I of England, in 1135, the throne was claimed by Matilda, his daughter, and by Stephen, his nephew. Stephen arrived in England, was

proclaimed king, and accepted by an assembly of notables and the great officers of the realm. This was sufficient, if the above principles are correct, to secure the continuity of the State, to invest Stephen with *de jure* authority internationally (whether he had it constitutionally or not),[1] and to make Matilda's subsequent invasion mere warfare and rebellion against an established monarch. Had Matilda raised her standard at York simultaneously with Stephen's proclamation at London or Winchester, nevertheless, the adhesion to Stephen of the same men as had served Henry would lead to the same result. But if the Lord Justiciar had pronounced for Matilda and the Lord Steward for Stephen, the Lord High Constable for Stephen and the Archbishops for Matilda, and each party had set up a separate government in York and Winchester respectively, it is impossible to suppose that a Kingdom of England would thenceforward have existed, except as a geographical expression. We who, *ex post facto*, know the victory of Stephen, and are aware that Matilda is never reckoned among English queens at all, are prone to look upon the contest as one which did not, and could not, affect the existence of the realm of England. But if we try to envisage the conflict with the eye of a contemporary, and if we imagine that the supporters of Stephen and Matilda were equally early in the field, and equally drawn from the great officers of Henry's realm, we shall find it easier to see that two new governments cannot come simultaneously into existence in one State without splitting it up.

These principles are, *mutatis mutandis*, applicable to the case of republics, which, after all, are only monarchies with an elective head. We may recapitulate them as follows :—

1. The presumption is in favour of the continued existence of the State.

[1] In modern theory Matilda had indisputably the better title. But at that date the Crown was in theory elective.

2. It is, in the last resort, not on the continued existence and capacity of the Head of the State, but on the continuance of the authority of the persons actually administering the government, and their peaceable successors in office, that the continued existence of the State depends.
3. If, therefore, the same government continues to function as before, the unanimous opinion of its members as to the person temporarily or permanently to exercise the powers of the Head of the State will be conclusive, and will also decide the limits of his capacity, whether such opinion is right or wrong in point of Constitutional Law. An exception exists in case the Head of the State is physically and mentally in a situation to express his own view, in which case it ought to override that of his Ministers. The fact of his capacity ought to be established by the envoys of foreign countries themselves, according to their means of judging.
4. If the Head of the State and his government disappear simultaneously, the personages most nearly associated with them—in the case of a Monarch, the Royal Family—are entitled to carry on the government, or to say with authority who shall carry it on, so that any resistance to them or to that authority will be, from the point of view of International Law, rebellion.
5. If, whether in pursuance of this rule (4) or not, some single authority is at once, or with only trivial resistance, accepted throughout the territory, that authority carries on the continuity of the State.
6. But if more than one authority is organised, the State *ipso facto* ceases to exist, and two new States come into being.

It is, for instance, impossible to maintain that the

Soviet government is any more to be regarded as the government of "Russia" than the governments of Latvia, Esthonia or Lithuania are, or that the "Austrian" republic—treaties apart—is any more than Czecho-Slovakia representative of the former Empire of Austria-Hungary.

§ 2. The Obligations of Extinct States

Clearly, if a State splits up into areas ruled by different authorities, none of whom ruled it before, no fraction of the whole has the right to claim continuity with the whole merely because it is a very large fraction. Nor, for the same reason, can it be saddled with the liabilities of the whole. An entirely new thing has arisen; it cannot be liable to discharge the obligations of the old thing. Similarly, the obligations of the vanished State cannot be distributed rateably among the new States which now occupy its areas, except in so far as they clearly represent payments for purely local benefits. Vattel is quite clear on the point.[1] Treaties become void if one party ceases to exist as an independent political society "from any cause whatever."

There is much vague theory to the contrary; but our canon of Simplicity indicates that any other doctrine will be attended by endless difficulties and occasions of dispute. Rateable division is impossible to arrange without an agreement as to the basis on which it shall proceed—area, population, wealth, prospects, part taxation, or what other criterion. A new revolutionary State will rightly resent being held liable to pay for its old fetters and jailers. It is generally admitted that half a dozen States which are formed by revolution from an old one[2] take none of its rights and liabilities, though they may have taken part of its territory. On what principle can half a dozen such new States be

[1] § 203.
[2] As in the case of the Spanish-American colonies.

held to assume them, merely because the old State disappears entirely ? [1] Rivier is constantly mis-represented [2] as saying that a government's power to burden its people extends to those who govern its territory when it has been broken up. Really, Rivier is only speaking of the State's obligations to private persons (*Droit des Nations*, p. 70). He notes that in general its personal obligations—treaties of alliance, commerce, friendship, navigation, extradition, etc.—all disappear with itself. Some "rapports," having a "real" character, continue to subsist. "D'autres rapports, droits et obligations, ont un caractère réel. Ils concernent le territoire. Or, tout en passant en des mains étrangères le territoire subsiste. Ces rapports"—observe the skilful way in which the words "droits et obligations" are dropped—"ne perdent pas leur fondement par le fait de la disparition de l'État; ils peuvent et doivent subsister" (*Ibid.*, pp. 72, 73).

This may very well be if the "rapports" are constituted by the creation of true "real" rights, valid against all the world—as by cession or lease or the grant of a servitude—but if they remain personal "obligations" only, there is no reason why they should any the more persist after a State has disappeared than any of its other undertakings. Why Rivier should saddle the new States with the personal obligations of the extinct one to private persons, while admitting that its public obligations are extinguished with it, it is difficult to see. More thoroughgoing is Phillimore, who thinks that "If a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a different agreement, rateably binding upon the different parts." [3] His citation from Grotius [4] in support of this

[1] See Keith, *State Succession*, *passim*; and the writer's *Division of States: its Effect on Obligations* (Trans. Grotius, Society, IX, 125); and *Obligations of Extinct States* (Yale Law Journal, February, 1926), 434.

[2] *E.g.* by Mr. Sayre, in a learned article in A.J.I.L. (1918).

[3] *International Law*, I, § 137. [4] *De Jure Belli et Pacis*, II, 9, x.

extraordinary position seems only to refer to rights, and not to obligations at all. But Kent [1] goes further, and declares that "If a state should be divided in respect to territory, its rights and obligations are not impaired, and, if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common"; and not "rateably" as Phillimore holds. Story, like Grotius, limits himself to property, and says nothing about obligations—"It has been asserted as a principle of the common [*i.e. universal*] law, that the division of an Empire creates no forfeiture of previously vested rights of property, and this principle is equally consonant with the common sense of mankind and the principles of eternal justice." [2]

Phillimore supports his proposition by saying that the obligations of Holland and Belgium were rateably divided when those kingdoms were finally separated in 1839. But this is not a case of a State being divided into two or more new States, but a mere case of loss of territory There was no reason in law why the obligations of the kingdom of the Netherlands, which existed before 1839, and continued to exist after 1839, should have been affected at all. In taking away the Belgian provinces the Powers felt morally bound to relieve the kingdom of some part of the obligations which they were making it less able to fulfil. The fact has no bearing at all upon principle. So, when the United Kingdom of Sweden and Norway lost Norway, it insisted that the new Norwegian kingdom should assume some of its debt.

Calvo [3] follows Kent, without perhaps quite understanding him. "When a state is divided without any special provisions as to the way in which its obligations are to be borne, they must be borne in equal shares."

[1] *Commentaries*, I, 25.

[2] *Terrett* v. *Taylor*, 9 Cranch, 50 (*b*), citing *Kelly* v. *Harrison*, 2 Johns. 29; *Jackson* v. *Lunn*, 5 *ibid.* 109; and *Calvin's Case*, 7 Coke, 27.

[3] *Droit International*, I, § 106.

That is not what Kent said. Kent's idea is that they are to be borne " in common."

Probably what was in the mind of all these authors was a voluntary partition; and it need not be doubted that a State cannot, by peaceably splitting itself up by common desire into new States, escape its existing obligations. It is a subject which is well worthy of investigation, in what way the obligations of the whole can be affected by such a change. The conjecture may be hazarded that they continue to exist as the obligations of a confederation to the performance of which all its members are in principle bound. But in the case of a violent, revolutionary and entire displacement of an existing government by a series of new governments in different areas of its territory, it is conceived that the dicta of Phillimore, Kent and Calvo were never intended to apply. Their observations regarded, not the extinction of a State, but its division.

More recent writers have been led to consider this case of extinction. Kiatibian [1] holds that " Les conventions internationales, politiques on non-politiques, ayant ètè conclucs en vue de la personne des contractants, s'eteignent par la mort de l'un d'eux." " L'ancien état ayant cessé d'exister, ses conventions internationales cessant également, les nouveaux états, nés de sa division, ne sont obligés que par les conventions qui constateraient une dette." [2] Why he should, like Rivier, show a special tenderness for debts, it is impossible to imagine. Persons who lend money to a State must always contemplate the possibility that it may burst up. Keith logically considers that the whole of the extinct State's obligations go with it. Naturally, this does not affect " real rights " in the nature of property; because they do not rest on contract, and the continued existence of the State which created them is immaterial.

[1] *Consequences Juridiques des Transformations Territoriales des États sur les Traités* (1892, Paris, Giard et Brière), p. 22.

[2] He leaves the properties to be settled by arrangement, but does not indicate on what basis it is to proceed.

It is sometimes considered that, even if, generally speaking, the obligations of an extinct State are extinguished with it, an exception may exist in respect of money which it may have borrowed for specifically local works. It is attractive to exclude such an exception. The motive of the State, in contracting for such works, may not be easy to ascertain. It is perhaps better to rest the claim on the principle of *lucrum sine causa*, "enrichment without return." The new State has the benefit of the works; in so far as they are really beneficial it ought to pay for them. It would not seem that an executory contract for such construction would be binding on [1] it, or that it would be bound to accept and pay for incomplete works which it does not itself desire to have completed.

The only instances which I have been able to find of a dissolution of States, as distinct, *first*, from the dissolution of federations, and *secondly*, from the loss by a continuing State of territory, severed against its desire, though perhaps with its reluctant consent, are in Central and South America. The five republics of Central America, frequently federated, have at times been federated in a unitary state, "The Grand Republic of Central America," which has again dissolved into its constituent atoms. More interesting, but scarcely *apropos*, is the case of the State formerly termed Colombia when its territory was divided into that of the new States of New Granada, Venezuela, and Ecuador. T. J. Lawrence [2] considers this a case of extinction; but it seems clear that the continuity of Colombia was carried on by New Granada. Colombia itself had been formed in 1819 out of the Spanish kingdom of New Granada and the Captain-generalship of Venezuela. Venezuela seceded in 1829, and "the southern part of the former

[1] The view of Mr. A. N. Sack ("Effets des Transformations des États"), that all the engagements of a State are implied hypothecations of its territory, seems to us a financier's view rather than a statesman's or a jurist's.

[2] *Principles of International Law*, § 48.

kingdom of New Granada," joined by other districts (which seem jointly to constitute Ecuador) in 1830. But the old rulers at Bogotà, the common capital, did not acknowledge these steps as valid, and continued to assert the unity of the whole Republic : nor did foreign nations recognize the new governments.[1] It would seem, therefore, that in spite of Lawrence's opinion we have here simply a case of loss of territory. The case is remarkable for the uncompromising declaration of Lord Aberdeen that " His Majesty's Government cannot exercise any authoritative interference with the Government of [Venezuela] on behalf of the bondholders," [2] and that their claims " arise out of speculations of a purely private nature, for the success of which H.M. Government are in no way responsible, and upon which they cannot, as a matter of right, claim to exercise any authoritative interference with foreign states." [3]

Persuasion was, however, brought into play ; but each State, the old and the two new, were only asked to pay their " share " of the foreign debt.[4] New Granada and Venezuela had on 23 December, 1834, agreed to share the Colombian debt in the proportion of 50 : 28½, 21½ being left to be paid by Ecuador.[5] And by this time the three States had amicably united in a close alliance, guaranteeing each other's territory, and binding themselves not to alienate it and to refer all disputes *inter se* to arbitration ; engaging themselves, moreover, " to observe faithfully the public treaties concluded between Colombia and foreign nations." [6] It could hardly be

[1] See *British State Papers*, vol. 28, pp. 983, 997 *seq. et passim* ; and Mr. Livingstone's Report (*Ibid.*, vol. 24, 372) to the U.S. Government.

[2] Turner to Pereira, 20 January, 1832, *Ibid.*, p. 983.

[3] Backhouse to Ewing (8 April, 1829), *Ibid.*, vol. 28, p. 981.

[4] Cope to Gonzales (6 May, 1835), *Ibid.*, 999.

[5] *Ibid.*, vol. 23, p. 1343.

[6] *British State Papers* (XIX, 1352 *et passim*) ; Treaty (New Granada and Ecuador, 8 December, 1832), (*ibid.*, XX, 1207) ; Message of President, New Granada (*ibid.*, XX, 1212) ; ditto, 1834 (*ibid.*, XXII, 1434).

supposed that Britain could desire to continue to be bound by a treaty when three states, instead of one, claimed the benefit of it, and an entirely new treaty, recognizing no binding force over Venezuela in the old one with Colombia, was made between Britain and Venezuela in 1834.[1]

It would seem, therefore, that to tack the name "Russia" or "Austria" to the Soviet Union or the Austrian Republic is not sufficient in order to fix the latter countries with the obligations of the Empires which formerly governed quite distinct territories. In the case of Austria, the Treaty of Versailles quite arbitrarily imposed on the new States which seized on power at Vienna and Pesth obligations which it did not impose on those which seized on power at Prague. That is a matter of warlike conventional arrangement which they were free to settle as they could. Mr. Sibley's contention[2] that the scheme of the Treaties of S. Germain and Trianon established the principle of succession amounts to founding a wide proposition on slender evidence. The Allies who broke up the Austrian Empire—which was the sole unit presented to the outside world by the territories comprised in the lands of Francis Joseph—doubtless did not want to dissolve its debts, and they naturally made sure that somebody should pay them. But that has nothing in the world to do with principle. It was lawful and natural, and may have been moral, but it did not pretend to be juridical.

§ 3. The Recognition of States and Governments

1. Principle of *De Facto* Control.—The principles governing the law of Recognition of new States and new Governments have been thrown into a highly unsatis-

[1] *Ibid.*, p. 121.

[2] *The Story of the Manilla Ransom* (Journal Soc. Comp. Leg., February, 1925, p. 17).

factory condition by the recent invention of what is called " de jure " recognition.[1]

Nothing was better settled as a principle of the Law of Nations than this, that there was and could be no question of " jus " in the matter. Every government (except a rebel government) which was *de facto* a government was *de jure* a government as well. The *jus* followed from the *factum*. No State was bound to learn, or pronounce an opinion upon, the constitutional law of another. Nothing is more easy for a foreigner to mistake and misinterpret than the constitutional law of another country. Nor are natives themselves prone to be in agreement about it. The test of the existence of a new State or Government was a purely objective one, therefore. It turned on a simple matter of fact which any one could establish ; was there in a given territory a person or body of persons who were supreme thoughout its extent ? [2] If there was, then there existed a State and a Government—provided only, that if another state or government had previously ruled the territory in question, that state or government should have practically given up the effort to retain it by force. The legitimacy of the supremacy of the *de facto* government was immaterial; it was sufficient that it was there, and undisputed in the field.[3]

Much misconception prevails concerning " Recognition." As its name implies, it is only evidence of the

[1] The terms " de fait " and " de droit " are used by Rougier in 1903, in *Les Guerres Civiles*, p. 484. He boldly identifies legitimacy with " ratification by the national will through a constitution voted by a representative assembly." Great Britain, therefore, having no such " constitution " has not a " legitimate " government, but is only a *de facto* state ! Rougier admits, however, that foreign nations ought to treat a *de facto* government as fully representing the State whether " legitimized " by formal vote or assembly or not. " Tout engagement pris par un gouvernement général, de fait ou de droit, oblige le gouvernement qui le succède " (*Ibid.*, p. 490).

[2] See the admirable Note of W. Pinkney to Count di Circello, 26 August, 1816 (5 *British State Papers*, 206 : *Yale Law Journal*, March, 1922, p. 480).

[3] See generally the writer's *So-Called " De Facto " Recognition : Yale Law Journal* (March, 1922), p. 469 ; and Larnaude, *Revue General de D. I. P.* (1921), p. 457.

existence of the state or government. It does not create it. Extraordinary confusion would arise if it did. It would become necessary to inquire whether "recognition" by a single country could confer the boon of international existence on another. Does a new state spring into existence because Costa Rica "recognizes" it? If we say that it exists *quoad* the recognizing State, we introduce an infinite series of metaphysical puzzles, and we commit a gross solecism. Either a State exists or it does not; the opinions of other people on the subject do not alter the fact. Possibly, in a given case, some may hold a correct opinion, and some an incorrect one, but the fact itself is independent of their will. To make the existence of a State dependent on the desire of another that it should exist is to deny the very basis of International Law. If one State could dispense itself from all the obligations of International Law to another simply by saying that it does not exist, the Law of Nations would be a mockery and a harlequinade. Sir Wm. Gilbert was always wanting Sir Arthur Sullivan to collaborate in an opera of which the main feature was that by consuming a magic lozenge any one could become anybody else. Sullivan very sensibly refused to have anything whatever to do with the "lozenge opera"—no audience could take any interest in the fate of a personality which did not persist. So, the personality of a state is a thing independent of the desire of other states. It exists in spite of them, in the conscience of mankind. "Recognition" is only evidence of its existence. It is immensely valuable, and valuable in proportion to the power, and still more in proportion to the intelligence, of the "recognizing" State. That it should be bargained for is another matter, which we shall examine below.

We have, then, a simple and objective system. The existence of a State or Government depends in principle, not on the varying and fluctuating desires and impulses of its neighbours, but on a fixed and ascertainable fact.

It is a State if it has a supreme government, and that government is not in active rebellion against a government up to then supreme. It is the Government of an existing state if it is supreme in the territory of that state, and has entirely overcome the efforts of any anterior government to maintain itself.

Mr. Noel-Henry says with great justice in an illuminating article,[1] that the expressions "government *de jure*" and "*de facto*" are essentially subjective: they involve an expression of opinion which makes them totally out of place in a system which must deal with matters of fact. He recalls that the idea that foreign states cannot examine more or less dubious questions of law, and must take their stand on proved facts, was expressed as long ago as 1601 by the ambassador of Henry IV, Cardinal d'Ossat.[2]

There are naturally two quite separate problems relating to Recognition. There is the Recognition of a new Government in an existing state, and there is the Recognition of a new State. Both depend on precisely the same principle, but the application is different. The new Government must entirely subvert the old one in order to be the government of the same State. But the new State needs only to exclude the old Government from some definite area beyond reasonable hope of return. In neither case do the desires or intentions of either party, or of their neighbours, or of their peoples, matter.

Its prior existence gives the old Government a title to continue to exist. If it is entirely supplanted throughout its territory by a new one, that new Government is its *de jure* successor, and carries on the identity of the

[1] *Reconnaissance de Gouvernements Étrangers* (R.G.D.I.P. (1928), p. 247 (n.)).

[2] "Lorsqu'un prince voit une puissance considerable bien établie, il ne doit pas examiner si le souverain qui lui envoie un ambassadeur est légitime ou non, . . .; il ne doit s'arrêter qu'à le puissance et à la possession" (D'Ossat to Villeroy, 25 July, 1601). When Charles of Sudermania was crowned King of Sweden, in defiance of Sigismund, he despatched an ambassador to France to renew ancient treaties of alliance. Villeroy recommended that he should be received (Villeroy to Jeannin, 8 April, 1608; cit. Vattel, *Droit des Nations*, IV, v, § 68).

State. So long as the old Government maintains itself in any [1] part of its territory, it alone carries on that continuity; and until there is no reasonable likelihood of its ever putting down the new Government, it remains the *de jure* ruler of the whole. The rebels may constitute, by their temporary assumption of control of a part of the territory, a *de facto* government, with which other countries may have necessary, but most stringently restricted and unofficial, relations. But the government controlling the *whole* of its territory must necessarily be a *de jure* government: its *jus* flows from the fact of its complete supremacy. A merely *de facto* government is therefore, in International Law, always an imperfectly successful insurrectionary government. And it does not matter whether its members are aiming at displacing the existing government altogether, or whether they are only endeavouring to assert a local independence. If successful, they may in the one case become the Government of the whole country, or they may only succeed in permanently maintaining themselves in a part of it, forming thus a new State; in the other case they form the new State which is their sole objective. But, in all cases, *de jure* sovereignty attends upon *de facto* sovereignty, except when a sovereign already *de jure* exists and is making serious efforts to recover complete control.[2] So long as an established

[1] Perhaps we ought to say, "in any considerable part." When Maria of Portugal was evicted by the Regent from all parts of Portugal except Terceira, it would have been pedantic, if that position had been stabilized, and if Maria's efforts to recover Portugal with the help of Brazil had been evidently hopeless, to decline to consider Miguel as King of Portugal, and as carrying on the continuity of the Portuguese state. Indeed, as Miguel held the whole of continental Portugal from 1828 to 1832 without serious dispute, and only fell eventually in 1835 after an unexpected Spanish invasion, it is difficult to say that the position was not stabilized. Even the rest of the Azores were Miguelites.

[2] Curious questions arise when the attempt to recover control is made from without the *de jure* sovereign's territory: especially in the case of a Personal Union, as when James II, evicted from England, endeavoured to maintain himself with Ireland as a base. The case of Queen Maria of Portugal, evicted from continental Portugal by the Regent Miguel, but maintaining herself by Brazilian help in Terceira, is again interesting in this connection.

perhaps slightly but utterly indefinitely ameliorated, States will often be tempted to take that course to serve their own ends. Where they could not decently decline to treat with a Government of a State they would be able, under the cover of a *de facto* recognition, to play fast and loose, and to consider that Government as invested with rights or not precisely so long as, and in the measure that, they choose.

This enables them to have the advantages of intercourse with the country in question, and at the same time to retain a hold over it by denying at any moment its competence to exercise the rights of a State. This should be an impossible position of affairs. It has frequently of late been dictated by the desire of states to maintain on foot states which have in fact ceased to exist. On the break-up of Russia, of the Austro-Hungarian Empire and of China, there were cogent reasons why several Powers should desire to maintain their continuity. The continuity of the Austro-Hungarian Empire was (unjuridically) secured by the dictation of the conquerors: the entirely new republic at Vienna and the revolted Kingdom of Hungary were saddled with many of the obligations of "the former Austro-Hungarian Monarchy." But in the case of Russia and China the Powers could only give effect to their desire by treating the governments which actually arose on the ruins of the old Republics as in the position of rebels against a ghost—the assumed everlasting Russian or Chinese State. Such a State was a superstition: it has simply ceased to exist, except in the prejudices and desires of individuals. Assuming that something which they called "Russia" or "China" by some law of nature necessarily continued to be, they treated the Governments which did in fact ("*de facto*") exist as in some way imperfect, and in the position of belligerent communities endeavouring to throw off the yoke of a superior.[1]

[1] The case of Spain from 1808 to 1814 presents similarities with these modern instances. But it is distinguished from them by the salient

So long as the sharp alternative existed, of either denying the existence of a state, or of accepting it as an equal member of the family of nations, an established

fact that the rule of Joseph Bonaparte was imposed on Spain by foreign force, and was never entirely effective throughout the country. In fact, the government of the deposed King Charles was really immediately and substantially continued by the Spanish Junta. On the 6th of May, King Ferdinand, under duress, abdicated in favour of Napoleon, and by the 4th of June George III proclaimed the discontinuance of hostilities against Spain in favour of the Junta of Seville (though he refused to receive from it the Golden Fleece, on the plea that no British king had accepted a foreign decoration since Edward VI.—Satow, *Dip. Practice*). The United States, in these very obscure and abnormal circumstances, hesitated to recognize either King Joseph or the Junta, while admitting the continued existence of "Spain," by the continued recognition of Spanish Consuls. It must sometimes happen that the continuity of the established government is doubtful, especially when communications are slow and difficult; but in our opinion every presumption ought to be made in favour of a native government against a foreign invader. A foreign invader cannot, by putting duress on the sovereign, do indirectly what he cannot do directly, namely, annex the country, or alter its dynasty. The cession of Spain to Joseph being consequently null, the power of the sovereign passed to whoever was willing to uphold it for the existing régime; just as it is probable that the existence of Russia may have flickered for a moment before extinction in the armies of Wrangel and Koltchak, and in the war-ships of Vladivostock. American observers might well be excused for experiencing some uncertainty in the matter, but the important point is that it is a pure question of International Law whether Joseph or the Junta really succeeded Ferdinand. If Joseph's claim be ruled out as an illegitimate exercise of duress, the Junta, as the only other Spanish authority, was properly entitled to carry on the continuity of the State. The alternative would be that Spain had ceased to exist. So, in Mexico, in 1861, the Vice-President of the Government which had been expelled from the capital had a clear title to continue its desperate existence, and the intrusion of Maximilian and the French was comparable to the intrusion of King Joseph.

In neither case was there a mere contest between rival Spanish or Mexican factions. Maximilian entered as a supplanter of an established, though distressed, government. In the Spanish case, the difficulty was not created by a dispute between rival Spanish factions; it turned on a purely international question, namely, whether or not Napoleon had acquired his alleged rights by means which International Law will not recognize. If he had, then it was open to any one who could immediately do so to continue the Spanish state against him on Ferdinand's behalf; and the Junta were the legitimate rulers of all Spain, *de facto* and *de jure* exercising in Seville the sovereignty which had been wrenched from Ferdinand in France. If, on the contrary, that transaction was internationally valid, Joseph was *de facto* and *de jure* King of Spain, and the Junta were patriotic rebels. In either case Spain subsisted, for the question was a simple one of International Law. It was not a case of rival powers springing up in Spain basing their claims on constitutional law or morals. One or other, Joseph or the Junta, was *internationally* right. It is a totally different matter when the claims of rival rulers cannot be settled by International Law.

state had not much scope for exacting a price in return for "recognition." Any official dealings with the new government were tantamount to recognition, for "recognition" simply means treating them as the rulers of a state. Such dealings were, in the long run, almost inevitable, and they could not well be made the subject of bargain. But if a foreign state can get all the benefits of intercourse without committing itself, it will be facile in according such limited recognition, and it will be tempted to withhold true recognition except at its own price. But recognition is not a favour to be bargained for: it is the admission of a fact.

Similarly, recognition cannot be made conditional [1] or withdrawn. Either a State exists or not; and if another "recognizes" it, *i.e.* admits it to exist, it cannot stultify itself by purporting to attach conditions to the fact, or by declaring that it does not choose to admit to-day what it admitted last week.[2]

2. Principle of Republican Legitimacy. — The government of the United States appears to identify non-intercourse with non-recognition. It is clear that they recognize the Soviet Union as a State. By providing for its invitation to adhere to the Kellogg Treaty, they have put this beyond dispute: how can one make a treaty with a State that does not exist? Their "non-recognition" of the Soviet only means an inconsistent desire to deny them the normal rights of a State. And this merely, or mainly, because the Soviet refuse to assume the obligations of Imperial Russia. It is nothing but a variety of reprisals.

Jefferson, in a celebrated despatch to the United States Minister in France in 1792,[3] used language which has sometimes been distorted to imply the possibility of an intermediate State. The occasion was the revolution which abolished the constitutional King—a

[1] In spite of the opinion of Rivier and others to the contrary.

[2] Of course, we exclude here the case in which the recognized government has lost its actual supremacy.

[3] Jefferson to Morris, November, 1792: *Jefferson's Works*, III. 489.

revolution which was completely and immediately accepted by the acquiescence of the nation. Jefferson instructed Morris that "It accords with our principles to acknowledge any government to be rightful which accords with the will of the nation, substantially declared; . . . with such a government every kind of business may be done. But there are some matters which I conceive might be transacted with a government *de facto*, such for instance as reforming the unfriendly relations on our commerce and navigation, such as you will readily distinguish as they occur."

Jefferson thus seems to distinguish between a government clothed with full powers and a government *de facto*, which is only capable of transacting certain business, it is left unexplained what. But the class of business which he particularizes as competent to such a *de facto* government is business of the highest importance, and implies the most perfect title to represent the State: namely, the reformation of treaties. Only a *de jure* Government exercising full international rights could take such a step. In fact, it is apparent from a subsequent despatch[1] that, by "a government *de facto*," Jefferson meant "a government which is constitutionally a *de facto* one." With such a government there are some kinds of business which cannot be transacted, not because it is not internationally competent, but because it is not constitutionally competent, to deal with the matter. In the given case, the United States, being indebted to France, had instalments of debt to pay to its Government. There is nothing to suggest that Jefferson would not have been perfectly satisfied with the *de facto* Government's receipt, as internationally competent *de jure* because existing *de facto*. But the French Government asserted that it had no constitutional authority to give a discharge; and in the face of its assertion Jefferson's observation that it is not possible to transact every kind of business with a *de facto*

[1] Same to same, 12 April, 1793.

government is obvious common sense, because if the government disclaims its own authority to do a particular kind of business, it is plainly impossible to do that business with it.

Jefferson can by no means have intended to lay down that Republicanism is part of the law of nations, and that a government is not fully sovereign unless it has been confirmed by a plebiscite or a convention. "The will of the nation, substantially declared," may be evinced by its acquiescence in the rule of a dictator. And, in fact, "the Pope, the Emperor of Russia and President Jackson were the only authorities on earth which ever recognized Don Miguel [1] as King of Portugal" [2]; while Mr. Cushing and President Grant were willing in 1874 to accredit a full diplomatic representative to the government of Marshal Serrano, which had displaced by force the infant Spanish Republic. And, "So far as we are concerned," wrote President Van Buren in 1826, "that which is the government *de facto* is equally so *de jure*." [3] He was only repeating Henry Clay—"For us, the sovereign *de facto* is the sovereign *de jure*." [4]

And President Pierce, in his Message of 15 May, 1856, observes, "It is the established policy of the United States to recognize all governments, without question of their source, or organization, *or of the means by which the governing persons attain their power* [*Italics ours*], provided there be a government *de facto* accepted by the people of the country . . .; their determination, whether

[1] This recognition proceeded on the footing of Miguel's having obtained control of every part of Portugal. It seems, however, that in fact he never exercised independent authority in Terceira in the Azores, which immediately formed the base of Queen Maria's operations. It is a nice question whether recognition was properly extended to Miguel, therefore. It may be said that Terceira was insignificant, and that *de minimis non curat lex*. See above.

[2] Buchanan to Rush, 31 March, 1848; cit. Moo. *Int. L. D.*, I, 137, § 49. As to the forcible government of Serrano in Spain, as recognized by the United States, and Cushing's despatch of 14 August, 1874, see *For. Rel. U.S.* (1874), 904, cited by Moore as sustaining the beneficial influence of the rule of recognizing *de facto* governments as *de jure* sovereign.

[3] See Moo. *Int. L. D.*, I, 137, § 49.

[4] Mallory, *Life and Speeches of H. Clay*, I, 391.

it be by positive action or by ascertained acquiescence, is to us a sufficient warrant of the legitimacy of the new government. Imperial governments, such as those of Iturbite in Mexico and the Emperor Peter I in Brazil, were freely recognized, in accordance with this principle of non-intervention."

As Mr. Livingstone put it succinctly in 1833: "It has been the principle and the invariable practice of the United States to recognize that as the legal government of another nation which by its establishment in the actual exercise of political power might be supposed to have received the express or implied assent of the people." [1]

The exaction of legitimate dynastic rule by the Holy Alliance as a condition of legitimate statehood is no more improper an interference with national liberty than is the pretension to exact the observance of some political shibboleth.[2] It is as improper to exact a plebiscite, an election, or the vote of a convention as it is to exact obedience to a hereditary ruler. Plebiscites are notoriously liable to be engineered; parliaments and conventions can readily be packed; a few active and rich politicians in a capital can render nugatory the inarticulate voice of the multitude. If a nation be the embodiment of an idea, it is its best elements which are representative of the idea; it is not its election-riggers. The only safe course for foreign governments to adopt is to take as representative of the country whatever government the country will in fact tolerate, and to treat it as continuously subsisting until the country in fact ceases to tolerate it.

The Germans exacted in 1871 the summons of a national Convention in France, to confirm the authority of the Government to make peace. But, being in military occupation, they could impose what terms

[1] Livingstone to Vaughan, 30 April, 1833; cit. Moo. *Int. L. D.*, I, 129.

[2] Cf. Noël-Henry, R.G.D.I.P., 1928, p. 257. "C'est M. Seward . . . qui est, bien avant le Dr. Tobar et le Président Wilson, le défenseur d'une forme nouvelle de légitimité, la légitimité republicaine."

they liked. And the very fact of their occupation prevented the application of the normal test: one could not say that the authority of the Government was accepted throughout France, when the authority which was in fact supreme was that of German bayonets. No plebiscitory or constitutional approval was exacted by the United States as a condition of her recognizing Napoleon I in 1802, Louis XVIII in 1814, Louis Philippe in 1830, or the Republics in 1848 and 1870. Nor was there any popular vote in favour of Miguel in 1829 as King of Portugal. When Napoleon III altered the constitution in 1854, there really was no need of recognition: there was no new government, any more than when he inaugurated the Empire in 1852.[1]

As Fish, in 1870,[2] expressed it, "We have always accepted the general acquiescence of the people in a political change of government as a conclusive evidence of the will of the nation."

But Mr. Seward, in 1862, laid down a definite doctrine of Republicanism as an axiom of the Law of Nations; and this has been the parent of great trouble and confusion. Departing from the plain objective standard of actual control, he declined to recognize the government of General Paez in Nicaragua, although it was not denied that that government had been successfully established. It was simply denied that evidence was forthcoming to show that the establishment of the Paez *régime* was "the act of the Venezuelan State." Seward was no doubt impressed by the disastrous frequency of American revolutions, carried out often by military adventurers, and not directly involving the populace at all. But his course was to endeavour to suppress a less evil by a greater. To discourage revolutions—in which the South American countries had a perfect right to indulge—he gravely endangered a

[1] The U.S., however, on the former occasion, suspended relations until the coup d'état had been approved by the solemn farce of a plebiscite.

[2] Fish to Sickles, 16 December, 1870: *For. Rel. U.S.* (1871), 792.

salutary principle, and endeavoured to substitute subjective opinion for objective certainty. Encouraged by the outcome of the Civil War, Seward proceeded to apply his new principles elsewhere. In 1866 [1] he demanded in the case of Bolivia that a government, to be recognized as such, should be accepted by the free will and the constitutionally expressed voice of the nation. In the case of Peru (where, indeed, four or five established governments succeeded one another in the space of a year), he stated that it was not the policy of the U.S. to recognize revolutions in republican countries until the interested populations had accepted them by a fundamental law, and with formalities guaranteeing their stability and permanence.[2]

The Seward doctrine of legitimate republicanism, however, faded away. His successors speak, it is true, of popular approval as a condition of recognition, but they no longer speak of plebiscites, assemblies, or votes as the necessary evidence of such acceptance, and they infer approval from acquiescence.[3]

Diaz, in Mexico, could point to an election, but Evarts instructed the United States Minister to wait and see whether the result of the election was really accepted by the Mexican people, thus rightly laying stress on the substantial fact of acquiescence. He repeated this instruction with regard to the revolutionary administration of General Blanco in Venezuela in 1879; and in this case he added that it was thought best to defer formal intercourse until assurance could be had not only that such a step would rest on the popular will of Venezuela, but that it would be beneficial to the relations

[1] See Goebel, *The Recognition Policy of the United States*, p. 198, citing despatch of 21 April, 1866, and see Seward to Hall, 28 September, 1865, and *Dip. Corr. U.S.* (1866), II, 327, 599.

[2] *Ibid.*, Noël-Henry notes the vast difference between this procedure and that followed ten years earlier with regard to Mexico, where five governments were recognized by the U.S.A. within a few months (*op. cit.*, p. 239). Cf. Pierce's Message of 15 May, 1856, and Moo. *Int. L. D.*, I, 146.

[3] See, *e.g.*, Evarts to Foster, 27 March, 1877 (Mexico): Evarts to Baker, 8 April, 1879 (Venezuela), cited, Moo. *Int. L. D.*, I, 138, 150.

between Venezuela and the United States. This confusion of intercourse with recognition has been the parent of much subsequent confusion. A State is perfectly able to refrain from expressing its opinions about the existence or government of another State for as long as it likes—it is not obliged to make the valuable gesture of recognition until it chooses ; but it is perfectly possible for it to avoid intercourse with that State while at the same time recognizing that it exists. Therefore a government which expresses its distrust or dislike of another, and its consequent desire of avoiding all relations with it, is not refusing to recognize it, but is really recognizing it in the completest manner. It is conceived that it is an entire mistake to suppose that some formal or informal act on the part of the government is necessary in order to enable the courts and people of one country to consider another state or government as existing, or to enable other states to deal with itself on that footing. The existence of a state and its government is a fact. The opinion of a foreign government as to the existence of that fact is extremely important, and perhaps may be binding on its own courts and people. But its opinion is not necessary to the existence. And if, nominally purporting to refuse the recognition of the fact, it makes it clear that it does recognize it, but that it does not desire to have relations with the State in question, and that it does not desire that it should enjoy the normal rights of a State, it is attempting the impossible.[1] It is attempting to lay down the rule that a State must be an honest state, or a capitalist state, or a democratic state, or to dictate some other fancy

[1] Cf. Lord Russell in 1859 : " That Austria, Russia, and Prussia should refuse to recognize any sovereign of Tuscany other than the Archduke Ferdinand is to be expected, but that refusal could not prevent a settlement. Austria and Russia for a long time refused to recognize Queen Isabella of Spain, but she reigned, nevertheless, and subdued the rebels who questioned her title. Spain for a century refused to recognize the Republic of the United Provinces, but that Republic was nevertheless one of the most powerful of the European States " (Russell to Cowley, 17 September, 1859 : 49 S.P. 214).

of its own. Recognition is not a favour: it is a fact, and it necessarily follows when one state does any act whatever which shows that it regards persons as exercising supreme power in a given territory—provided that they are not wholly anarchical or piratical. We shall return to this point: meanwhile we only note the confusion between recognition and intercourse, and the impossible desire of some States to admit the statehood of others while repudiating the consequences and the name of "Recognition."

Evarts cannot therefore be claimed as applying the novel ideas of Seward. His intention was merely to defer, on the ground of policy, the public acknowledgment which events might at any moment have obliged him to make.[1]

Blaine was more unorthodox. Indeed, in one case he out-Sewarded Seward, and laid down an attractive principle of aristocratic legitimacy, which would have appealed to the Congress of Vienna. "You may recognize the Calderon government," he told the Minister in Lima in 1881,[2] "if it is supported by the character and intelligence of Peru."

In 1889, he instructed the Minister in Rio, on 17 November, to maintain diplomatic relations with the Brazilian revolutionary government. This was as clear a recognition as could possibly be; yet we find him, a fortnight later, on the 30th, telling the Minister that the Republic was to be given "a formal and cordial recognition" "so soon as the majority of the people of Brazil should have signified their assent to it." If it be true that any formal dealings with a government show that

[1] In 1880, the same statesman, in receiving the representative of President Pierola from Peru, remarked that the irregularity of the new government was occasioned by the necessities of external pressure, and did not arise from factious insurrection. Here, again, we only have an objection stated to intercourse with governments which are the product of "factious insurrection." There is no denial that they are legitimate governments, and that they do carry on the identity of the state.

[2] *For. Rel. of the U.S.* (1881), 947, 953: Blaine to Christiancy, 9 May, 1881.

it is acknowledged to be such, he had already recognized the new *régime*, and the subsequent formal expression was only a polite compliment. Nor could it possibly be made dependent on the assent of "the majority" of the people: no doctrine of the omnipotence of a majority is known to International Law. The whole instruction was a complimentary gesture, and meant really nothing. The crucial act was performed on the 17th.

Fortunately, the flamboyance of Mr. Blaine and the ambiguity of Mr. Evarts were succeeded by a return to simple objective tests; and in fact Mr. Seward had not hesitated on more than one occasion to apply them himself. For instance, in Bolivia, in 1866, without waiting for any representative assembly or vote, he precipitately, under the pressure of extraneous events, dropped the demand for a "constitutional" expression of the free voice of the nation,[1] and unconditionally instructed the Mission "to recognize the actual government now in power."[2] So in Colombia, in 1861 and in 1868, "there appearing to be a general consent of the Colombian people," or "a universal acquiescence of the Colombian people," Seward, without reference to constitutional pedantry, recommended recognition.[3]

This simple and straightforward practice was reverted to at the close of the century. Mr. Bridgman was instructed by Mr. Adee, on the establishment of a revolutionary government in Bolivia in 1899, to enter into relations with it if it afforded reasonable guarantees of stability and responsibility and encountered no organized resistance.[4] And in October, Adee's superior, Hay, instructed the Minister to San Domingo to enter into full relations with a revolutionary government there "on being satisfied that the new government is in

[1] *Supra.*
[2] Seward to Hall, 21 April and 10 July, 1866.
[3] See Moo. *Int. L. D.*, I, 138, § 49 and MS. there cited.
[4] Adee to Bridgman, 22 August, 1899. *For. Rel. U.S.* (1899), 107; Moo. *Int. L. D.*, I, 155, § 53.

possession of the executive forces of the nation and administering the public affairs with due regard for the obligations of international law and of treaties," without any question of constitutional forms.[1] So in Venezuela, Castro's government was to be recognized " if effectively administering the government of the nation and in a position to fulfil international obligations." [2] This is notable, because the recognition was defined by Hay as " entering into *de facto* relations," without any hint that this fell in any way short of the fullest *de jure* recognition : and it was referred to in the same unqualified way as " entering into diplomatic relations " in McKinlay's Message of 5 December, 1899. Hay therefore demonstrated his statesmanlike grasp of the correct doctrine.

Unfortunately, Mr. Woodrow Wilson, impressed like Mr. Seward by the evils of chronic insurrection, declined to recognize the completely victorious *régime* of Huerta in Mexico ; declared to San Domingo that he would not recognize a revolutionary government, even when they succeeded in completely overthrowing a constitutional and legitimate government ; and drew a fatal distinction, when recognizing Carranza in Mexico, between the governments *de jure* and *de facto*, considering Carranza's régime as existing *de facto* but not *de jure*. Chief Justice Taft evidently did not agree with Wilson : in the Arbitration between Great Britain and Costa Rica he held that the *de facto* government of Tinoco in Costa Rica had all the powers of a government, whether " recognized " or not. In Peru, Wilson would not recognize the Leguia government.

All these are conspicuous instances of deference to the principle of Self-determination. Naturally, if they were intended as mere declarations of intention to have no intercourse with objectionable governments, they

[1] Hay to Powell, 19 October, 1899. *For. Rel. U.S.*, 248, 249 ; Moo. *Int. L. D.*, I, 164, § 58.

[2] Hay to Loomis, 8 November, 1899. *For. Rel. U.S.* 809 ; Moo. *Int. L. D.*, I, 153, § 52.

were perfectly within the powers of the President. If they meant to declare that the revolutionists in each case had not in fact established themselves supreme, they were equally proper. But if they meant that they had indeed attained supreme power but that they would only be accorded such rights of an independent government as the arbitrary discretion of the President thought fit, they were clearly unlawful and impossible.

Yet they have been imitated by Mr. Hughes and by Mr. Kellogg. The former is cited by Mr. Noël-Henry [1] as expressing approval (30 June, 1923) of the Central America treaty, binding the Central American Powers "not to recognize" governments arising out of insurrections; and the latter as having declined on these grounds to recognize the government of Nicaragua, on 25 June, 1926. This constituted a real intervention, as the United States, declining to recognize the government of Chomarro, or the alternative government of the Liberal Leaders, insisted on imposing on the country the government of Diaz. Noël-Henry observes that Mr. Coolidge thus contrived to combine the theories of Wilson with the policies of Roosevelt. Pedantic constitutionalism and loud imperialism kissed each other over the body of Nicaragua—as fundamentalists and biologists have been said to kiss over the bodies of vivisected victims.

The Tobar doctrine, elaborated by an ex-Minister of Ecuador in a letter of 15 March, 1907, to the Bolivian consul at Brussels,[2] recommends all the Latin-American states to refuse recognition to revolutionary governments. It is exactly in the vein of the Holy Alliance, and leads naturally to the much more juridical practice of general intervention in support of established governments, now generally frowned upon. A successful revolutionary need not trouble unduly about whether he is "recog-

[1] *Op. cit.*, 262. Woolsey in A.J.I.L. (1926), 545.
[2] Noël-Henry, *op. cit.*, 263.

nized" or not: the force of circumstances will bring about his "recognition." [1]

The inverse wrong, corresponding to the refusal of recognition to an established *régime*, consists in the according of recognition to an insurrectionary movement which has not yet displaced the established government. To follow up such recognition by active support of the favoured rebels is nothing more or less than war. When the British, French, and Spaniards invaded Mexico in 1858, because they were unable to get satisfaction for certain claims from the established government, they resorted to the policy of affording assistance to an insurgent leader, on the avowed condition that, if successful, he would assume liability for the sins of his enemies. The United States imitated that indefensible policy in 1910, recognizing the insurgent Estrada as the legitimate ruler of Nicaragua, he being prepared to assume liability for the death of two subjects of the United States at the hands of President Zelaya's troops. This was flat war on Nicaragua—a war which has not yet terminated. I think it would have been condemned by Washington; I am sure it would have been approved by Andrew Jackson.

Mr. Fish's pronouncement of 1875 [2] remains unassailable. "The practice of the U.S. in recognizing that government of a people which is the *de facto* one, is founded upon the only true and wise principle and policy."

3. Uncertainties. Judicial Rôle.—We have seen that difficulties in fact arise in cases where the old *régime* is purported to be carried on by different persons, as where the head has been killed (*e.g.* the Emperor Nicolas II in Russia), or captured (Napoleon III in France), or deported (Charles VI and Ferdinand of Spain). It will generally be correct, especially where

[1] *Vide* Anderson, A.J.I.L. (1927), 306. The Tobar doctrine has been repudiated by the American Society of International Law.

[2] Fish to Cushing, 12 April, 1875 (*For. Rel. U.S.* (1878), 1115).

the only alternative is a ruler imposed by foreign force, to treat such persons as exercising the sovereign power, so long as they are unitedly in the field with an armed force. But another practical difficulty arises in the case of compound states and colonial states. If the original sovereign holds out in a single part of a compound state, or in a colony, does his right continue over the whole congeries and the mother-country, until he has lost all reasonable hope of ever regaining them? While King James II was in the field in Ireland, were William and Mary internationally sovereign in England? While Maria was in the field in Terceira, could Miguel be properly regarded as King of Continental Portugal? If King Albert's authority had been restricted to the Congo Free State in 1916, could it be supposed that there had been a complete *debellatio* of Belgium? [1] It appears to us that the only safe rule is to disregard all such complications, and to ask in each case the simple question as regards any portion of territory—"Has the sovereign any reasonable prospect of recovering his authority there, or not?" James II, so long as he remained in Ireland had a reasonable, if far from a hopeful, prospect of recovering England.[2] Maria, with Brazil behind her, had a reasonable prospect of recovering Continental Portugal. Albert, with strong Allies, had a reasonable prospect of turning the invaders out of Belgium. The question of the succession of the State is a different and a more difficult problem.

It may be convenient to add once more that the term "*de facto*" can perfectly well be employed in International Law, but not as applied to States. Insurgents who in fact control a certain territory in a

[1] That an expelled monarch may find foreign rulers ready and willing to help him back cannot affect the question of whether he has been completely expelled or not. Had King Albert been completely evicted from Belgium *and* the Congo, there seems no reason why a *debellatio* should not have supervened. Cf. The Case of the expulsion of the Elector Charles Theodore from Bavaria, *infra*.

[2] That it was constitutionally, and perhaps internationally, a separate kingdom does not, I think, affect the principle.

prolonged fashion must needs be dealt with by various existing Powers; as "*de facto* governments," the persons in control can unofficially be treated with for necessary purposes. Thus, General Grant wrote on 13 June, 1870, concerning Cuba: "To justify a recognition of belligerency there must be, above all, a *de facto* political organization of the insurgents, sufficient in character and resources to constitute it, if left to itself, a state." So Earl Russell's note (20 November, 1861), to Mr. Adams, speaks of a "*de facto* government" as equivalent to a "belligerent insurgent government." And the Earl of Kimberley, writing to the Earl of Belmore on 3 November, 1871, seems to use the term in the same sense. (See Moo. *Int. L. D.*, I, 235).[1]

There is a tendency at the moment, in England and America alike, to proclaim that a governmental certificate in these difficult matters, and also in questions of the status of nations, is conclusive, and binding on the courts. While great weight must naturally attach to the attitude of the Executive, it would be a mistake to set it above the Judiciary. Its desires and prejudices may sway it unconsciously. It may, as in the case of the Malay States, desire to regard as foreign, communities which in truth and in fact it completely controls, because "it would be very inconvenient if all these people were to have the rights of British subjects." [2] At any rate, the inquiries of the judiciary ought not to be couched in general terms, but should be such that the answers will reveal whether the executive is really exercising supreme authority in the territory or not. Lord Stowell was as little likely as any one to undervalue the respect to be paid to the executive; but in the *Juffrow M. Schroder* [3] we find him declining to accept a Government certificate of the existence of a blockade. "I cannot shut my eyes to the fact that the blockade *has not been* duly carried

[1] Cf. *Williams* v. *Bruffy* (1877), 96 U.S. Reports, 176; *Thorington* v. *Smith* (1868), 8 Wall. 1.

[2] *Vide infra.*

[3] 3 C. R. 150.

into effect." [1] An American or a British court ought not to hold that Governments are above justice, or, as in the *Kelantan case*,[2] meekly to accept a Foreign Office certificate that a Sultan is independent when it is notorious that His Highness is the mouthpiece of the British Colonial Office.

In the *Charkieh*,[3] Phillimore, D.C.L., examined carefully the status of the Egyptian government; and it is submitted that, whether fashionable or not, this is the correct practice.

4. Conclusions.—It will be clear from what has been said that there are three problems involved—those of Existence, Recognition, and Intercourse.

The Existence of a State or Government is independent of the action and attitude of other states: it is a fact, and a state which challenges it commits an unfriendly act, or possibly a *casus belli* or an act of war. The recognition of a State or Government is invaluable evidence of its existence, but it is not essential to it and it does not create it; though the courts of a particular State may conceivably be bound by an express denial of its existence by their own Government. The issue of a formal instrument of recognition is by no means the only means of recognition: any act which shows that the government is regarded as an authority actually in supreme control is, and has always been, considered as its recognition as the government of a state. Intercourse with such a government is a totally different thing, and is entirely at the option of other states, each for itself. But to confuse the refusal of intercourse with a denial of the State's or the Government's existence as such is a gross and flagrant error; and usually covers

[1] Cases in which the question of the neutrality of the Spanish-American colonies was raised will be found in the *Mary* (Folio Prize Appeals, I.T. [1814–17], 202: Venezuela), and the *Walker* (*ibid.* [1815–18], 60). See as to Cadiz when freed from the French, the *William and Mary* (*ibid.* [1815–18], 139). Cf. *ibid.* [1812–13], 35 (Buenos Ayres), and 267 (Banda Neira).

[2] *Kelantan* v. *Duff Development Syndicate*, *infra*.

[3] (1873), 37 L. R. 4 Ad. & Ec. 77.

an attempt to deprive an admitted State of the rights which normally belong to it.

It is to be noted that the increasing frequency and closeness of international communications will render it impossible for a nation to avoid indefinitely, as in the past was a common occurrence, making up its mind as to the recognition of a State or Government. It will be called upon to enter into multilateral engagements to which the latter is a party; and there is no doubt that, on established principles, to enter into an engagement with a state through a particular channel implies that the state exists and has a government competent for all international purposes. "Recognition may properly be accomplished by the mere resumption or continuance of diplomatic relations." [1] The effect of such an act cannot be avoided by unilateral declarations affecting to limit the powers of the Government or the existence of the State. And the idea that a State is a kind of corporation [2] which can survive its Government must also be steadily discouraged. It is hard enough, as it is, for a population to be visited with the burden of the obligations incurred by an expelled Government. If it is to be saddled with them, under the name of the old State which has ceased to have any common government at all, because a variety of possibly conflicting governments have sprung up within its borders, the position will be intolerable. In truth and in fact, the new governments and the populations severally ruled by them are new entities, and, except for reimbursements for strictly local improvements, the obligations of the defunct State are entirely gone.[3] If a State continues to exist, independently of the fall of its Government without

[1] Hay to Powell, 5 January, 1900 (*For. Rel. U.S.*, 1899, p. 253).

[2] It is, however, to be noted that the gradual elaboration of councils and organizations on which seats are reserved on a regular plan for the representatives of fixed states is tending to impart to those states a fixed existence, independently of their being true states or not, and of their having a single government or not.

[3] See *The Obligations of Extinct States*, 85; *Yale Law Journal*, 434.

replacement, then all Europe up to the Eider is properly part of the Empire of Rome.

It has been observed that recognition cannot be conditioned or withdrawn. If a state or government exists, it exists, and the recognition of its existence cannot be made conditional on its good behaviour, or on its support for the policies of the recognizing state. In the same way, the recognition once given cannot be withdrawn without self-stultification. Either the state or government existed or it did not. If it did, the recognition of the fact can never be recalled. A state may wish that the recognition had never been made; but it cannot be allowed to contradict itself: it must stand by its acts.

Lastly, it ought not to be bargained for. If a Government is in fact supreme, there is no necessity for other states to say so; but it is unworthy for them to take a price for saying so. It is occasionally said that a government, to be the government of a recognizable state, must not only be supreme, but must be prepared to accept the obligations of international law. This is perfectly true; but it must be taken in a general sense. It must not be made the excuse for imposing on a state particular obligations which might or might not otherwise attach to it; or for ensuring that it shall behave with justice and propriety. A state which dispenses itself—like the Barbary pirates—from all law is one thing; a state which disputes or evades a particular liability is another. It is freely asserted—and Mr. Hughes has declared [1]—that the refusal of the United States to recognize the Union of Soviet Socialist Republics is largely due to the fact that they have repudiated all responsibility for the debts of Russia. Their liability is a legal question on which they may or may not be right. It is illegitimate to pre-judge it by declining to treat them as a State unless they consent to have the point decided against them in advance. In our opinion,

[1] *Charles Evan Hughes*, by C. Cheyney Hyde, p. 285.

the Soviet chiefs are in no sense the rulers of "Russia" simply because they are in possession of the largest part of it. Esthonia, Lithuania, Poland, Finland, and Latvia are each no more and no less "Russia." Russia dissolved into fragments, and its general rights and obligations disappeared. There is no reason why any of the fragments should be saddled with the obligations of an entity which has ceased entirely to exist; and no reason why the contrary opinion of Washington should prevent it from considering the Soviet to constitute a State. In fact, Washington does admit it, and really means only to refuse direct intercourse with, and to deny the normal capacity of, the Soviet Union.

5. Fugitive Governments.—In countries of unstable political equilibrium, in which the usual mode of effecting a change of government is by armed revolution, it is sometimes tempting to disregard the salutary rule that an established government is entitled to be considered the sole legitimate government unless and until it has been completely subverted. A revolutionary leader evicts the Government from the capital, and has the apparent support of the majority of the inhabitants throughout the country. Yet the old Government is not without a respectable following in a remote region. In such circumstances, the United States have occasionally been led to regard the old Government as mere rebels, and the usurpers as the legitimate rulers of the entire country. This is to disregard (1) the possibility of a recovery of power by the established rulers; (2) the possibility of their permanently retaining control of a sufficiently large territory to preserve the continuity of the State; (3) the possibility of their permanently retaining control of a certain small territory and thereby becoming the rulers of a small new State. We see in Cass's action in 1859 in Mexico, an instance of the superstition that a State must always remain one and indivisible, although divided in fact—a superstition which we may term the sovereignty of the map. A

revolutionary Junta was to be regarded as the legitimate rulers of the entire country if it was "obeyed over a large majority of the country and people." This would give a successful English communist the right to be regarded abroad as the legitimate ruler of Scotland although King George himself should be unassailable for the time being in Edinburgh.[1]

Mr. Seward, in 1864, took similar action in San Salvador. A revolution had broken out, attended by great, but not complete, success. Seward broke off relations with the established but distressed government, and entered into relations which he chose to style "unofficial" with the agents of the revolutionaries.

If the sovereign, though hopelessly expelled from the major part of his territory, nevertheless is not without some hope of maintaining his authority in a portion of it, it goes without saying that he cannot be treated as a rebel; the sole doubt is as to whether he carries on the continuity of the state, whether his supplanter does so, or whether it is divided. Once or twice, the United States have appeared to hold that the party which controls the capital is entitled to recognition as the Government. Although Cass distinctly repudiated such an idea in 1859, and although the opposite doctrine is the very basis of the American constant support of Juarez from 1861, Gresham in 1893[2] directed the Minister in Nicaragua to maintain formal relations with the persons who had seized control at the capital, while inconsistently leaving open the question of "formal recognition": the relations of the U.S. to Nicaragua would thus, he thought, have "a provisional and *de facto* character." In reality this approached very nearly a Recognition of Belligerency in favour of the revolutionary government, only that such a recognition sedulously avoids "formal" relations with the belligerent. It can readily be seen that a doctrine, which substitutes for the difficult problem of

[1] Cass to McLane, 7 March, 1859; cit. Moo. *Int. L. D.*, I. 147.
[2] *For. Rel. U.S.* (1893), 212.

deciding whether a government has been completely subverted the impossible problem of deciding when the scale has sufficiently turned against it, would lead to varying and contradictory results, and bring about inextricable confusion. Gresham's confused theory would involve the consequence that, whenever there should be an émeute in the capital, the State for practical purposes ceases to exist, and only two knots of partizans remain, each entitled to nothing but the precarious privileges of *de facto* belligerents. A government remains a government until it is reduced to impotence.[1] His instructions are nevertheless interesting historically, as employing for the first time the conception of an independent state without any but a truncated government.

§ 4. Prohibition of Enemy's Trade

It has always been the aim and ideal of belligerents to interdict all trade with the enemy. There is no magic in the word "Trade," and it will be well to inquire what is the object of cutting it off. That has sometimes been considered so important an object as to be represented as the foundation of the well-known rule against subjects trading with the enemy.[2] As trade is necessarily two-

[1] Gresham's attitude is explicable—though not justifiable—on the assumption that in some countries a revolution is the equivalent of a general election.

[2] An interesting report is extant (see Treasury In-Letters (Record Office), 1803 (907), 3310, 16 July), written by Spencer Perceval when Attorney-General, on an application by Vaughan & Son, who in 1802 were successfully sued for half the value of the American brig *Susan's* cargo by one Certo of Mauritius. Before the money, which amounted to £5918 10*s.* 5*d.* was paid, the war of 1803 made Certo an enemy: and Vaughans then prayed a commission to ascertain what property he had in the United Kingdom, and to confiscate it for their benefit. "The debt now belongs to His Majesty," say they, and they petition the Treasury that "After it shall have been found by inquisition that the said debt of £5918 10*s.* 5*d.* belongs to and shall be vested in His Majesty, as the property of his enemies, your Lordships may recommend His Majesty to make a grant thereof to the petitioners, or otherwise reward them for discovering such property." Perceval, in a holograph letter, says, "It must be acknowledged that there is no doubt of the legal competency of the proceedings in question. H.M. prerogative

sided, such an explanation savours of " cutting off one's nose to spite one's face " ; and the true reason for the rule is, no doubt, that laid down as the only one by Lord Stowell, viz. the opportunities for treasonable communication to which such a traffic gives rise (Cf. *Robson* v. *Premier Oil Co.*, Law Reports, 1915, 2 Ch. 124). But the unanimity with which such an obviously irrational explanation was received, as that a nation forbade its people to have commerce with the enemy

exists undoubtedly to the extent of entitling himself by inquisition to the debts due to an alien enemy. But I believe that it has rarely, if ever, been used to lay hold of the private property of an enemy, unless for the purpose of enforcing the payment of a debt. Cases of that nature have occurred where foreign property has been seized into the King's hands, and the parties claiming an interest in it have been required to refer their claims to arbitration ; and the Crown has given the property as the award has shown to be just." The memorandum is endorsed " Nil." As Certo had already litigated the right, Perceval remarks that he could hardly be asked to arbitrate it again. This shows clearly that even alien enemies were allowed to come in and ask for their property to be restored as a matter of grace : and it is remarkable that neither Spencer Perceval, nor the King's Proctor, nor any of the keen intellects engaged on the case, think of objecting that the whole transaction was criminal in its origin ; it in fact arose out of a payment by Vaughans at the request of Americans to the Hamburg agent of a French enemy. The agent seems to have retained the cash, and on the signature of peace in 1802 the French principal, Certo, sued Vaughans again for it. In a subsequent opinion of the A.-G., S.-G., and Adv.-G., they advert to a French confiscatory decree, as possibly affording moral justification for " a step of similar violence " ; but they add, " The propriety of doing so is a question of policy and not of law, and appears to us to be at variance with that policy which would encourage or permit any mercantile intercourse with the enemy." Clearly, therefore, at the crisis of the struggle with Napoleon I, mercantile intercourse with the enemy, if sufficiently indirect to afford no scope for treason, was not frowned upon ; but much the reverse (Treasury In-Letters, 1803 (911), 4394, 4493 (27 September)). The packet service with France proceeded regularly. In the case of *De la Motte* (Howard's *State Trials*, 770) nothing is said as to the criminality of any but contraband trade with the enemy, and even that is represented as venial. The supplying of certain articles to the enemy has sometimes been made treasonable by statute, but they have been such as are calculated in themselves to assist his operations and have been carefully particularized. Until 1914 the mere fact of trade seems never to have been regarded as a matter for a criminal prosecution. Sir Home Popham, in 1793, lived and traded at Ostend without incurring any suspicion of illegality or crime. He was part owner of the *Etrusco* (see Treasury In-Letters, 1804 (923), 2346), which gave her name as an enemy vessel to a leading case. British subjects in enemy Turkey sending goods to Britain were directed by the Privy Council in 1808 to have restitution (Privy Council Register, 1808). Wheat went freely to Madrid (Treasury In-Letters [950], 4794 ; 21 August).

because it was a blow at the enemy's trade as well as its own, shows how natural and all-important it seems in war to damage trade.[1] But why? Lord Stowell asks in the *Twende Brodre*,[2] "If a cargo of timber is carried to Rouen, or to Havre for the purpose of being sent to Paris for house-building, how is Great Britain injured by that?"[3]

Clearly it is well to prevent the enemy from getting arms and ammunition.[4] It may also be convenient to prevent him from getting the necessaries of vigorous life—corn, vitamins, oils, fuel, and so forth. Cash, raw materials for manufacture, dye-stuffs, etc., are valuable as providing the means of procuring arms and necessities. But everyday luxuries and the means of procuring luxuries seem to be in a different category. Yet they have been presented—notably by Mr. T. G. Bowles[5]—as a powerful means of pressure upon the influential classes. Such at least is the inference which must be drawn from his comparisons of the prices during the

[1] See for a recent and acute criticism of this view, Jacques Dumas, *Les Aspects Economiques du Droit de Prise* (Sirey, Paris, 1926).

[2] (17 July, 1801), 4 C. R. 33.

[3] The *Edinburgh Review* (1812), asserted that the British government endeavoured to deprive enemy hospitals of medicinal plants!

[4] It is a trade, he adds, beneficial to the one belligerent and innoxious to the other. As a matter of fact, "We know that Lord St. Vincent in this war has been supplied with fresh provisions from the Spanish coasts, and it is well known in history that when Louis XIV was marching against Holland he was supplied with provisions by Dutch merchants, not from enmity or disaffection to their own country, but from the mere natural affection for gain (The *Dordrecht*, 2 C. R. 72). In fact, when in 1638 the Prince of Orange was besieging Antwerp, he heard that an Amsterdam merchant was selling powder to the enemy. He sent the trader for trial at Amsterdam, where the latter avowed that he would trade with whom he liked, and that freedom of trade was a sacred matter. If, he added, he could make money by a voyage to the infernal regions, he would risk singeing his sails! "You see," said the Prince, "what I have to put up with from these brutes of merchants" (*Lettres et Négotiations de d'Éstrades*, I, 27, 29).

[5] "It was not Trafalgar that turned the scale, but . . . that England used that mastery to make the Frenchman pay six shillings a pound for his coffee and his sugar while the Englishman was only paying sixpence" (The *Declaration of Paris of* 1856, p. 115). "That was what, in its unceasing daily stress upon the daily life of every man in the enemy's country, made every such man, as Lafite said, 'secretly against us, and in his heart with England.'"

French wars of West India produce in Paris and London respectively. Coffee, sugar, spices, rum, tobacco—no one can say that these are absolutely essentials of human existence. And yet the trade in these and other luxuries and in raw materials was always the object of jealousy and attack. Whatever view we take as to the propriety of exercising direct violence on the civil population, it seems that this kind of direct belligerent pressure upon them, consisting in the confiscation of their floating goods and the diminution of their luxuries, has always been considered a legitimate object. Whether it is an effective and useful object may be questionable. In spite of Mr. Fowles' argument, one would doubt whether the rationing and scarcity which prevailed in the United Kingdom in 1917 had the effect of making the English "all secretly Germans at heart." [1] Until the starvation pitch is reached—and this raises a different question—it does not appear that patriotic resistance is really much enfeebled by the price of tea.[2]

Presumably the real motive of the desire to attack trade is that it makes the enemy richer and more able to obtain from abroad the necessities of war—arms, transport, and military provision. It might be questioned why there should be any objection to the enemy's becoming richer, so long as the supply of arms, transport, and munitions was cut off; but the answer is that his wealth enables him to procure these necessities overland —or perhaps to procure alliances. Possibly, also, some dull analogy with rich individuals lurked in the minds of statesmen. They knew that a rich man had an advantage in his quarrels, and they may have equated his position to that of a rich nation, without too closely inquiring into the respective means of the one and the other to turn riches to account. At all events, to anni-

[1] Can we suppose that every Frenchman, in 1809, was "in his heart with England"?

[2] It has indeed been argued that it is better for a belligerent to encourage his enemy to waste his substance on luxuries such as tea rather than to spend it on munitions.

hilate the enemy's trade was an ideal with belligerents. It remained at most times an ideal only; the Middle Ages recognized the law of the Consolato del Mare, which allowed a belligerent to seize an enemy's goods and contraband goods, but recognized no right to interfere otherwise with neutrals. It was in the course of the embittered Spanish-Dutch Wars of Religion that attempts, to which reference need not be made in detail, were made to interdict all trade with a belligerent.[1] The pretension abated, and left only the institutions of Contraband and Blockade.[2] Specially dangerous objects might be stopped on their way to a belligerent; and no communication might be held with a besieged place. When, at the end of the seventeenth century, the Dutch and English (in 1689) tried to prevent all trade with France, the remonstrances of Denmark and Sweden speedily induced them to abandon their pretensions.

It is strange to notice how history repeats itself. In the course of the interminable Swedo-Danish wars of the seventeenth century, we find Sweden and England in conflict about the right to cut off the enemy's trade under the pretexts of fourteen years ago; only that the two nations changed places. In 1714 it was Sweden (under Charles XII) that was the overweening belligerent and England that was the restive neutral. We do not seem to have progressed a yard further since those earlier days.

The belligerent is perpetually anxious to cut off all trade; the neutral is always concerned to restrict the interruption with the narrowest limits. The result is, with occasional extreme tugs in one or the other direction, a general agreement over long stretches of time in

[1] See Phillimore, *Int. Law*, III, 387; Grotius, *History, Lib.* VIII; *Treaty of Whitehall*, 2 August, 1689.

[2] See The *Wilhelmina*, 2 C. R. 102 (n.)—"The Dane has a perfect right, in time of proposed peace, to trade between Holland and France to the utmost advantage he can make of such a navigation; and there is no ground upon which any of its advantages can be withheld from him in time of war." This had been equally clearly stated in 1704 by Lord Liverpool (*Conduct of Great Britain in respect of Neutral Nations*, 56).

favour of freedom of trade, coupled with liberty to the belligerent to institute really effective blockades and to stop as contraband objects with a pronounced military flavour. It may fairly be predicted that (upheavals in the shape of wars in which there are no powerful neutrals excepted) future developments will, on the whole, follow these lines. The absolute freedom of trade, contraband included, which was proposed by Great Britain at the Hague in 1907, is probably an ideal which will in time be reached; but the most likely proximate step seems to be the institution of some official guarantee of innocence given to the goods on export. Such a certificate was elaborately provided for by the Swedo-English Treaties of 1661 and 1664.[1] Unfortunately, the English immediately and persistently bent all their endeavours towards making the Treaties a dead letter by a restrictive interpretation of their terms. The example of these Treaties might be followed with more success in these days, when an authoritative interpreter might be found at Geneva or at the Hague: and it really seems the most hopeful means of reconciling the interests of both neutrals and belligerents. It has hitherto been impossible to find an authority who is neutral as between neutrals and belligerents; one must be one or the other. But the gradual evolution of a juristic class whose first concern is the integrity of the law, and who are only secondarily members of some belligerent or neutral state, is calculated to provide us with the impartial authority which is necessary in case of such disputes. A system of certificates resembling the Swedo-English one might have a better chance of survival than it had in the closing years of the seventeenth century.

[1] In 1804, the King's Proctor advised the release of the *Louisa Alberta* and *Aurora*, laden with pitch for L'Orient. This seems likely to have been a consequence of these treaties with Sweden (Treasury In-Letters (1804) [920], 1501; 29 March; [924] 3127, 2 July). A similar Treaty was made by Sweden with the United States as lately as 1826 (*British State Papers*, XV, 750 (Art. xi)). Certificates of the nature of the cargo are to be made out by the authorities of the port of lading, and these are to be conclusive.

Charles XII, in the course of his ruinous enterprises, fell foul simultaneously of Denmark, Poland and Muscovy, and was wandering about East Central Europe while Britain was simultaneously at grips with Louis XIV and Spain. Looking for allies everywhere, Great Britain could only find satisfaction—and not too much of that—in the Dutch; but she was anxious, if possible, to secure Charles. In spite of their mutual need of each other, the relations of the two went from bad to worse; and this simply because of the Swedish pertinacity in refusing liberty to the British to trade peaceably with Russian ports. Dr. Robinson (one of the last of the clerical envoys) having left Sweden in 1709, his successor, Robt. Jackson, was furnished with instructions (11 May, 1710), which, observing that during "the present warr in the north the trade of Our subjects to the Baltick is likely to be exposed to many inconveniencys," directed him "to obtain from Sweden that British ships laden with goods not contraband may be permtted to pass to any place or port in the Baltick Sea, though the same may be in the possession of their enemys, provided the same be not actually besieged." [1] At the same time, Jeffereyes, who was sent direct to Charles XII at Bender, was instructed to urge the British desires for "a free commerce of goods not contraband to all or any of the ports in the Baltic," and "such regulations that Our merchantmen may not be stopp'd or molested in their passage by His ships of war."

The answer to these representations was unfavourable. "If," writes St. John,[2] "those towns were actually besieged, or blockaded, it would be allowed to be a just reason for prohibiting a trade with them, but the case is not the same in respect to a few ships of war ordered to cruize before the ports, and her Majesty does insist to have a free trade thither for her subjects. And as she understands the sense of the States-General to be the

[1] J. F. Chance, *Dip. Instructions*, Vol. I (Sweden), pp. 43–49.
[2] St. John to Jeffereyes and Jackson.

same in this point, she hopes we shall not be obliged to send convoys sufficient to protect our merchant ships, since the trade is so necessary and so justly demanded, that if we cannot have it by permission we must have it by force." He adds that the Swedes are allowed to communicate freely with France. These threats came to nothing. Bromley, writing to Jackson two years later, says [1] it is surprising that Charles should continue to alienate Britain and Holland, " his best friends," by seizing their ships " for no other reason but that they would trade with the towns that have lately been taken from him." And on 23 April, 1714, he laments that the Regency under positive orders from the King, persist in that course.[2] On the 18th of June, 1714, H.M.S. *Woolwich* of fifty guns and H.M.S. *Dolphin* of thirty-six [3] were at last appointed as a convoy ; but were to convoy no vessels except such as were provided with proper passes, under the sign manual and privy seal, granted upon a Customs certificate that they were not laden with contraband goods, and upon security exacted that they would return home to Great Britain.[4] Unfortunately for the expedition, the Dutch were not ready to join it, and, the Swedes being in force, it had to retreat prudently (Mr. Chance says ingloriously) to the Thames. It was not until 6 May, 1715, that Sir John Norris was sent to sea to co-operate with the Dutch in seizing the ships of Sweden as reprisals.[5] This step lent itself to adroit use by the French, and the Swedes observed that " it looked like a declaration of war," so that the King of Sweden ordered his fleet to attack the convoy. Also, the Dutch again " were not to be hoisted "—they did not co-operate ; and Norris, with fourteen sail, could make no reprisals, though he seems, in company with the Dutch,

[1] Bromley to Jackson, 17 November, 1713 ; *Ibid.*, p. 64.
[2] *Ibid.*, p. 65.
[3] And two other vessels, see *Ibid.*, p. 69.
[4] *Ibid.*, p. 67, where the full instructions for the commander of the convoy are set out.
[5] Instructions under sign-manual, *Ibid.*, p. 74.

to have eluded the Swedes with the convoy.[1] Great Britain then decided that eight ships should join the belligerent Danes.[2] From this point the trading grievance becomes lost sight of in the more exciting history of the Spanish-Swedish Alberoni Jacobite plot.

The question of convoy comes up, just as it did in 1799, and we find British cruisers unable to carry out convoy duties on account of the superiority of the Swedish fleet in the Baltic. In fact, Sweden in the early years of the eighteenth century taught Britain the lessons of naval *aplomb* which the latter power applied towards its close.

In May, 1716, King George became apprehensive that Charles XII's campaign against Norway would give him facilities for the invasion of uneasy Scotland, and instructed Sir John Norris not to join the Danes just yet,[3] being apparently most anxious to restrain the latter, and to keep King Charles quiet, if possible. But by July he had screwed up his courage again to the point of definitely ordering Norris to execute reprisals, in union with the Danish fleet.[4] By September [5] he was being alarmed by Russian designs on Denmark and the Empire, and about the same time the English Secretary of State was admitting in private that ten or twelve Swedish men-of-war might with ease land forces in the heart of England and destroy the docks and stores without hindrance.[6] Sir G. Byng (Lord Torrington) was sent with definite but futile instructions, on 11 March following, to blockade Gothenburg and seize all Swedish vessels; what is more remarkable, he was to seize and detain all vessels desiring to go to *any other port of Sweden*. He was then to join the Danes and attack the Swedish fleet. In 1718, fresh instructions

[1] *Ibid.*, p. 81.
[2] Townsend to Norris, 2 August, 1715.
[3] Instructions for Norris, 10 May, 1716, *Ibid.*, pp. 82, 92.
[4] Ditto, 13–24 July, *Ibid.*, p. 87.
[5] Stanhope to Norris, 26 September, 1716.
[6] *Ibid.*, p. 93.

for Norris show how ineffectual the convoys were: Swedish ships (probably privateers) actually infested the British coasts and seized "all ships whatsoever belonging to Our subjects when they can come up with them." [1] Reprisals were again ordered, in conjunction with the Dutch and the Danes. Private instructions [2]—"private so that the contents may never be known, but may be buried in silence, as if it had not been given to you"—told Norris what to do in case the Swedes and Muscovites combined.

The death of Charles XII spoilt an interesting game. Lord Carteret was sent as Ambassador to Queen Ulrica, peace was made with Russia, and the seizures were discontinued, "Against the Czar," wrote Stanhope,[3] "(the Swedes) will ever be secure in us of an active and vigorous ally."

It will be remarked how strongly the British ministers put the case for freedom of trade. Contraband apart—and the list of contraband had been severely restricted by the Treaty of Utrecht—the only case in which trade may be stopped is represented to be that of a place or port "actually besieged or blockaded," and it is not a sufficient blockade to have a few ships of war cruizing before the port. The doctrines of the Armed Neutralities at the end of the eighteenth century are thus plainly and forcibly asserted at its beginning, and only the folly of Charles and the naval strength of Sweden prevented their fuller enforcement.

But the pretension to stop trade is always breaking out in a fresh place. In the war of 1756, it took the form of branding the close coasting and colonial [4] trade of a

[1] Instructions, 14 April, 1718, *Ibid.*, p. 100.
[2] 19 August, 1718, *Ibid.*, 103.
[3] Stanhope to Carteret, 10 July, 1719, *Ibid.*, 112.
[4] The term "colonial" trade is ambiguous. It may mean trade between the metropolis and the colony, or trade between other countries and the colony. Story was inclined to think the former one which neutrals could not properly carry on, whilst from the latter they could not be excluded. But the true distinction surely rests on whether the trade is a close one or not. See *Life and Letters of Joseph Story*, I, 287.

belligerent as essentially belligerent trade, identifying a neutral who carried it on with the belligerent. An exclusive trade in peace-time, it had to remain an exclusive trade in war. The neutral who was admitted to take it up was interposing in the contest. It is not easy to appreciate the force of this necessity: all trade is an advantage to the enemy, and a close trade no more advantageous than any other. The true reason for the "Rule of the War of 1756" was the perennial desire to hinder the enemy, by any plausible means, from enjoying the benefits of trade. Possibly, also, the British treaty with Holland, admitting French goods to be free on Dutch ships, while British goods had no corresponding freedom from French cruisers, may have had something to do with it. The Rule is said to have been dormant [1] during the War of the American Revolution and in 1778 when Great Britain was not strong at sea, in face of the Franco-Spanish coalition: whether it was due to the difficulties of putting it in force, to an increasing leniency of theory, or to an impression that France had really

[1] An *ex parte* justification of the Rule "very incorrectly called 'the rule of war of 1756'" appears as an Appendix to C. Robinson's Reports, Vol. VI. It is there stated to have been fitfully put in force at various times against France, because it was by means of her colonial produce that she was enabled to buy her northern purchases (*scilicet*, naval stores). It rests, therefore, by the confession of its apologists, on no firmer foundation than the desire to cripple an enemy's trade. The author of the Note does not admit that the Rule was suspended or abandoned in the war of 1778: he thinks "evidently" the Vice-Admiralty Courts continued to apply it, but his reasons are feeble in the extreme. In the High Court, in that war, up to 1781, "the rule had not presented itself"—that is the best evidence that the Crown was refraining from making such captures. In the *Catharina*, the Scottish Prize Court applied the Rule, and was reversed by the House of Lords in 1783 (5 Bro. P. C. p. 328) (appx. p. 113). The author of the Appendix places this decision and a corresponding decision by the Lords of Appeal in Prize, in the case of the *Tiger* (1782), on the ground that by that time the French colonial trade had ceased to be an exclusive one. Cf. 20 Geo. 3, c. 29 (1780). Dr. Briggs (*Continuous Voyages*, p. 12), quotes earlier cases in which the same principle of treating as enemies those who participated in an enemy close trade was applied, viz. when Venetians took Spanish licences for tropical trade in 1604, and lay open to capture by the Dutch, at war with Spain; and when England captured the property of neutral merchants engaged in the coasting trade of Spain in 1630. He cites Marsden, 25 *Eng. Hist. Rev.* (1910), 244.

thrown the colonial trade open in peace-time may be an interesting subject of inquiry.[1]

At any rate, it revived in the French revolutionary wars (though at first the cargo was restored and the neutral colonial trader was only denied his freight[2]), and remains to this day in force,[3] only with its importance diminished by the general admission of foreigners to the colonial trade.[4]

More sweeping was the virtual interdiction of each other's ports to trade embodied in the French and British Decrees and Orders in Council in the course of the Napoleonic Wars, viz. the Berlin and Milan decrees of 1806 and 1807 and the Orders in Council of January and November, 1806. These went far beyond treating trade with the enemy by a neutral as a ground of prize.

[1] The Admiralty Judge in 1756 was less indulgent than was, in 1776, the good-natured Sir George Hay. But the Court of Appeals in Prize Cases no doubt determined the line to be taken by the Prize Court of First Instance in these matters of leading importance: note the difference between Sir W. Scott's dicta in *The Polly* (Lasky) and Sir W. Grant's judgment in the Court of Appeal in *The William* (2 C. R. 361; 5 *Ibid.*, 385). Probably Scott was right; but he loyally followed the appellate tribunal's decision. Sir E. Satow (*Frederic II and the Silesian Loan*, 221) speaks of "a commission" being "signed by H.M. for adding the Judges to the number of the Commissioners for trying Prize Causes . . . most of the Judges preparing to go their circuits" (Bedford to Legge, 24 June, 1748).

[2] The *Rebecca* (Moore) (12 July, 1799), 2 C. R. 101. Cf. The *Immanuel* (7 November, 1799), *ibid.*, 186.

[3] See the cases of the *Montara*, *Law Magazine and Review*, February, 1906, p. 220; *Times*, 22 December, 1905; Takahashi, *International Law in the Russo-Japanese War*, p. 633. This was an American ship admitted after the outbreak of war to trade with the normally closed Kommandorski Islands. Dr. T. A. Walker's suggestion that in "some forgotten corners of the earth" close trade still lingered and might give rise to applications of the Rule of the War of 1756 thus found a justification in fact.

[4] It has sometimes been argued that the colonial trade with the metropolis is itself "coasting trade": on the meaning of the latter expression see the cases of *Steamboat Co.* v. *Livingstone* (1825), 3 Cowen, 713, 747; *The James Morrison* (1846), 1 Newberry, 241, 259; *The Queen* (1910), 184 Federal Rep. 537; 186 *Ibid.*, 725; *Murray* v. *Clerk*, 58 N. Y. 684; *The Agricola* (1843), 2 W. Robinson, 10; *Davison* v. *McKibben*, 6 Moo. 387; *Battersby* v. *Kirk* (1835), 2 Bi. N. C. 584; *Shepherd* v. *Hill* (1855), Exch. 55. These cases show that a voyage from England to Ireland, Jersey or India is not a coasting voyage, whilst a voyage from Alaska to Victoria and S. Francisco is so. Cf. the writer's article on *The Panama Canal Tolls* in Niemeyer's *Jahrbuch des Volkerrechts* (1913), p. 453.

The Berlin Decree (21 November, 1806) instituted a paper blockade of the British Isles, declared all "English" property good prize, as well as all the manufactures of "England" and the colonies, and excluded ships coming from "England" from French and French-controlled ports. The British Order of 1807 (7 January) announced the prohibition of trade *between* ports with which British vessels could not freely trade on account of French control or possession or even French influence. The Milan Decree (17 December, 1807) proclaimed that any ship which sustained visit and search from an "English" vessel, or made a voyage to "England," or paid an "English" tax, would be treated as denationalized and as having become English property.

The British Order of 1807 (11 November) affected to impose a total blockade upon ports at which British vessels could not freely trade as above.

This was obviously to go beyond anything *primâ facie* competent to belligerents, and the authors of the Decrees and Orders attempted to justify them on the ground of Reprisals. The world has not concurred with them in this; the Orders and Decrees have been relegated to the realm of lawless usurpation. Reprisals for the wrongful acts of enemies are objectionable enough; unless severely limited, they are prone to pass into an unrestrained regime of savagery. But reprisals against neutrals for the faults of belligerents are not only brutal but unjust. Phillimore criticizes on this ground Scott's celebrated case of the *Fox*,[1] in which that eminent judge, abandoning his own decision in *The Maria* (*Paulsen*),[2] decided the case on the ground of the impropriety of the Court's questioning the Crown's decision that a proper case for reprisals had arisen, and that reprisals could fairly be executed against neutrals for belligerent

[1] (1811) Edw. 3, 12. The writer was in hopes that the *Fox* was ultimately restored by the Crown (see 170 Privy Council Records, p. 419 (20 June)). Unfortunately, that entry was in 1806, and must refer to another occasion.

[2] 1 C. R., 365.

improprieties. It is plain that if such a doctrine were admitted the status of Prize Courts as international tribunals would be gone. All that a belligerent would have to do would simply be to point to some illegality on the part of the opposite belligerent, and style his own illegalities, "reprisals." Sir W. Scott's unimpeachable doctrine [1] that Prize Courts are true International Courts, and bound to decide according to International Law, and to disregard municipal law when it is contrary to the Law of Nations, could not stand for a day under such circumstances. Phillimore, more truly and scientifically, points out that to make reprisals upon neutrals for the acts of belligerents is an unsustainable wrong.[2] It may be urged that the reprisals are really directed against neutrals for their un-neutral conduct in failing to secure the due observance of law from the other belligerent. But this argument is too thin to be accepted. Reprisals are properly limited to the taking of definite security for liquidated damages; they cannot extend to cover a pretension to regulate the entire course of trade. The remedy of a state which is aggrieved by neutral compliance is remonstrance and war. It is not entitled to avoid the inconveniences and risks of war by assuming the rôle of a maritime dictator. The admission of a right in one belligerent to counter the illegalities of another by forcible invasion of neutral immunities would plunge the world in immediate anarchy and would put it in the power of any belligerent to make the world a party to his war. Neutrals would be in the situation of Lover's *Handy Andy*, who received a box on the ear from his mother—"which would have knocked him down had it not been followed by an equally well-applied box from Oona on the other."

It is often urged that a Prize Court, though dealing with international affairs, is a national court and bound

[1] The *Maria* (*supra*); the *Recovery*, 6 C. R. 348–9.

[2] "Shall America violate rights of neutrality because another nation has done it?" ask the Court in 2 Dallison (p. 18).

to follow the directions of the national authorities It would be as reasonable to say that an English Arbitrator sitting in an International Arbitration between States is bound to conform his decision to an Act of Parliament. An Arbitrator, and a Prize Judge, is not appointed to say what the Law of England or of any other country is, but what the Law of Nations is. Just so, an English International Arbitrator would be false to his trust if he decided between Nations, contrary to his own judgment, in obedience to such an Act. It is admitted that an English Court of Prize ought not to give effect to an Order in Council which is not in accordance with the Law of Nations ; [1] and it is only the superstition of the universal omnipotence of Parliament which makes English lawyers hesitate to accept the same doctrine with regard to statutes. Yet, if we are to avoid the undoubted dangers inherent in a miscellaneous and heterogeneous International Court of Prize, we must candidly accept the principle laid down in the *Maria*, that the King of Great Britain's Judge, sitting in London, must apply exactly the same principles as if he were appointed by the King of Sweden and sitting in Stockholm. Prize judges are the nationally appointed divisional courts of a true International Court. Germany, with her naturally bureaucratic tradition, may fail to live up to this standard, and may accept the rulings of a Prussian government department ; [2] but Britain

[1] The *Zamora*, L. R. (1916), A. C. 77. Wheaton on *Captures* (really the work of Joseph Story) observes (p. 50) that " Though such instructions may bind the judges of the Prize Courts . . . where they relax the law of nations in favour of neutrals, yet if they attempt to extend that law to the prejudice of neutrals, they are not conclusive on the judges, whose decisions must in that case be regulated by the paramount authority of the law of nations." If the law of nations is paramount, it must be as much paramount over the King in Parliament as over the King in Council. An instance of relaxation is afforded by the *Elise* (Spinks, 88), in which captors who acted in apparent ignorance of a relaxation of the blockade of Archangel, by which 14 days were allowed for exit, were mulcted in costs and damages. See also per Sir J. Mackintosh in the *Erin* (Phillimore, *Int. Law*, III, 656 ; *Life of Mackintosh*, I, 317, 319).

[2] The *Elida* and the *Zaanström*, Fauchille, *Jurisp. Allegem.* 8, 97.

ought to find it easier to maintain the ideal of judicial independence.[1]

The *Edinburgh Review*, in February, 1812, dealing with the case of the *Fox*, observed that " The Edicts of one state, in questions between that state and the subjects of foreign powers, . . . much more nearly resemble the acts of a party to the cause than the enactments of the law by which both parties are bound to abide. Mark the consequences of such loose doctrines, such feeble analogies. They resolve themselves into a denial that any such thing as the Law of Nations exists, or that contending parties have any common court to which th ·y can resort for justice. . . . For the American neutral claimant there is no law by which he may be redressed, no court to which he may resort. He is a prey to the orders of each belligerent in succession. Even under the old and pure system of 1798–9, the neutral was forced to receive his sentence in . . . the court of the captor's country. But how is it now, when the court has made so large a stride in its allegiance as to profess an implicit obedience to the orders of the belligerent government within whose dominions it acts ? " And Reddie,[2] Deputy-judge of the Scottish Admiralty Court, says that " If the power of deviation from the Law of Nations is recognized as vested in the government of *any* state, it must be recognized as vested in the governments of all other independent states, to the prevention

See Bellot's strictures *apud* Pitt-Cobbett, *Leading Cases in Internat. Law*, II, 291.

[1] The admittedly universal decisiveness of a Prize decree is inevitably bound up with the perfect independence of a Prize Court. See *Hughes* v. *Cornelius*, Raym. 473 ; 2 Shower, 232 ; 2 Smith L. C. 434. Sir L. Jenkins (*Life*, II, 776) much reprobates an action of trover commenced in the Town Court at Dover against the purchasers of a prize by the former English owner, and (*Ibid.*, 763), argues strongly for the acceptance of foreign decrees in prize. *Hughes* v. *Cornelius*, Raym. 473, *Bolton* v. *Gladstone* (1804), 5 East, at p. 155, and *Maisonnaire* v. *Keating*, simply sustain this principle, and show that, however wrong a court may have been, its prize decrees must be accepted for the sake of the assurance of titles. The remedy lies elsewhere than in repudiating their authority.

[2] *Researches*, II, 33 (Edinburgh, 1845).

or destruction of any uniform, consistent system of principles."

In these days, when it is so easy for a government to obtain the emergency legislation which it desires, it is obvious that the fixed security of principles is just as dependent on their being put beyond the competence of Parliament as it is on their being put beyond the power of Orders in Council.

" If captors suppose," says Croke, LL.D., in *La Reine des Anges*,[1] " that a Court of Admiralty is merely an appendix to a fleet, to hold up the tail of a capture, and just to give it that last seal of formality; and that it is under their control or direction, and subject to their caprices, they have formed a very erroneous opinion on the subject. As between Great Britain and other countries, whether enemies or neutral powers, they are established under the general conventional Law of Nations, and of particular treaties, and are bound to execute the same impartiality as if they were composed of persons entirely independent of and unconnected with either party, and were situated in an indifferent country."

In the *Minerva*,[2] Sir Jas. Mackintosh declared that the doctrine that Courts of Prize were bound by illegal instructions of the Crown [3] was based on no groundwork of fact. " In such an imaginary case (of illegal Crown instructions) it would be the duty of the Judge to disregard the Instructions, and to consult only that universal law to which all civilized Princes and States acknowledge themselves to be subject, and over which none of them can claim any authority." And Lord Mansfield, in *Heathfield* v. *Chilton*,[4] solemnly asserted that an Act of Parliament could not alter the Law of Nations, and that all the world were parties to a sentence in a Court of Admiralty, that is a Prize Court.[5] This

[1] Stewart, *Vice-Adm. Cases* (*Nova Scotia*), 10.
[2] *Life of the Rt. Hon. Sir Jas. Mackintosh*, I, 317 *seq.*
[3] " Illegal " under the Law of Nations, *vide Ibid., supra.*
[4] Burrows 2016.
[5] *Bernardi* v. *Motteux*, Doug. 581.

disposes of the German Oppenheim's argument against the international nature of a Prize Court, namely, that it is bound in England by an Act of Parliament. That is the very question in dispute: it has never been so decided, and never should be.

§ 5. Contraband

It was long held as a theory that a "commercial blockade" is unlawful. The United States were very favourably inclined to this view as lately as 1800, when Marshall, Secretary of State, wrote to King, the U.S. Minister in London:[1] "The blockade of a coast or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, from its very nature the trade of peaceable and friendly powers, . . . is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times." Blockade, in essence, is a siege measure: if a fortified place is being besieged, it is admittedly improper for a neutral to relieve it. But this does not justify the blockade of unbesieged places. The doctrine of blockade was, nevertheless, extended to cover the stoppage of goods in areas where military operations were in progress, and it thereafter became impossible to prevent commercial blockades. For it is impossible to say that a "commercial" blockade, say of California, could have no influence on the course of a war the theatre of which was the Atlantic seaboard of the United States; nor even that a blockade of Australian ports could have no possible influence on the military progress of a war in Europe. The "commercial" blockade became firmly established; and the United States themselves instituted in 1861 an enormous one, reaching from the Rio Grande to the Potomac. And in our day, the increasing contraction of space has gradually assimilated the position of a whole country to that of

[1] See Moo. *Int. L. D.*, III, § 1266, p. 78.

a beleaguered city, and has correspondingly weakened the argument against the recognition of "commercial" blockades.

We had, then, the well-marked institutions of Contraband and Blockade (including Commercial Blockade), by means of which a belligerent might still endeavour to attack trade with his enemy. The principal controversies raged round Paper Blockade and Occasional Contraband. But by the end of the eighteenth century they were fairly well settled. "Paper blockades"—that is, the mere interdiction of trade at the *ipse dixit* of a belligerent—were reprehended, as we have seen, by England in 1711, and by the Armed Neutralities of 1780 and 1800, when Great Britain fully accepted the proposition that blockades, to be binding, must be effective. The Federal blockade of Confederate ports in the middle of the century was at first a "paper blockade," and the natural complaisance of the European powers in favour of an established government led them to treat it as regular. The "paper blockades" fulminated against one another in 1806 and 1807 by Britain and France were not really blockades, but special measures of reprisal—quite illegal, and quite valueless as guides to principle.[1] "Paper blockades" were definitely repudiated on all hands; and in fact they never had a lawful sanction anywhere. As to Occasional Contraband, that was a specially English contrivance, by which provisions and naval stores could be treated as contraband in special circumstances evincing objectively their military end; though a frequent practice was not to seize them but to buy them. The principle concurrently became established, that the contraband carrier could not generally be confiscated, but would, on the contrary, receive her freight, at any rate in cases of "occasional" contraband. It will be seen that there was never any general principle permitting nations to declare anything they pleased contraband. The list of absolute contra-

[1] Cf. Walker, *Science of International Law*, 420.

band was strictly limited to things which of themselves suggested war—guns, shot, saltpetre, horses, helmets—and although published lists varied, they varied within narrow limits.[1] It might be a question whether a particular article was sufficiently military in character or not; but the principle was clear, that it must be *ejusdem generis* with arms and armour. As a typical list, we may quote that cited from J. Andrew in Burrell's Reports (p. 378)—"Arms, great guns, bombs with their fuzes and other things belonging to them, fire-balls, gunpowder, match, cannon ball, pikes, swords, lances, spears, halberds, mortars, petards, grenadoes, saltpetre, muskets, musket ball, head-pieces, breast-plates, coats-of-mail, and like kinds of arms proper for arming soldiers, musket rests, belts, horses with their furniture, and all other warlike instruments whatever." It is noteworthy that Andrew (who wrote in 1741) proceeds—"But ropes, sails, anchors, masts, planks, boards, and all other materials for building and repairing ships are reputed free goods; and all wares and merchandises except as above mentioned may be carried by neutral ships into the enemy's country, except to places blocked and invested." [2]

There is no doubt that the topic of contraband is attended by much ambiguity; but on an attentive examination of the subject certain fixed principles will be found to emerge. The well-worn three categories of Grotius have always been dismissed as useless: gunpowder is susceptible of civil use in sport, while bows and arrows are not of much use in anything else, and clarionets are capable of military use in the regimental band. The real distinction is between articles which in themselves

[1] See for many such lists, Atherley-Jones, *Commerce in War*, ch. I.

[2] "Tobacco," says Bynkershoek (Q. J. P., I 10), "was so much insisted on by the Spaniards as contraband that the English made reprisals on them for it. I am unaware whether this controversy concerning tobacco went off in smoke or not. I only know that I should not concede to the Spaniards that tobacco was of any use to beat the enemy with." Nor we may add, the *Medea's* oranges (see R. G. D. I. P. (1917), (Docts. 90)), or the *Joannina's* soap (*Ibid.*, 40 j).

suggest war and those which do not. The former are always contraband. The great controversy is as to whether any of the latter may in special circumstances become so too. We may take the following positions as representing acknowledged law.

1. In the first place, it may safely be said—as it has been said by every authority from Bynkershoek to Kleen—that contraband must not be given such an extension as to enable a belligerent to cut off all commerce with the enemy and to establish a virtual paper blockade. This is the reason given by Bynkershoek for not allowing the raw materials of munitions to be treated as contraband. Iron, lead, and the like are undoubtedly essential for War. But they are capable of such enormous civil use that to permit them to be stopped would amount to an interdiction of commerce. And this, *ex hypothesi*, we have agreed cannot be done. Contraband must not be made a cloak for Blockade.

2. In the next place, a belligerent cannot make anything which he thinks specially useful to his enemy contraband at his pleasure. The reverse rule would, again, enable the institution of paper blockades and the virtual interdiction of commerce. The best proof of the existence of our principle, besides its inherent necessity, if contraband is not to degenerate into prohibition of all trade with the enemy, is that unusual categories of contraband are not to be met with in practice prior to the twentieth century. Lord Granville, in 1885, emphatically observed that "H.M. Government feel themselves bound at once to reserve their rights by protesting against the doctrine that it is for the belligerent to decide what is and what is not contraband of war regardless of the well-established rights of neutrals."

Or, as it is put a century earlier, in the report of the French Commission on the Silesian Loan: "Si chaque nation prétendoit décider par une volonté arbitraire de ce que doit s'entendre par Marchandise de contrebande, et s'arroger le jugement de tout ce que peut fournir

à l'ennemy de quoy poursuivre la guerre, on pourroit enveloper sous ce vaste prétexte presque toutes sortes de Marchandises et d'effets." [1]

3. Lastly, in order to obtain a practical idea of what may be considered a sufficiently military character to be contraband, the best, and indeed the only, method is to collate the many catalogues of contraband which have been adopted by treaty.[2] The usual objection to taking treaties and proclamations as evidences of law, namely, that if their stipulations were already law the treaties would not have been made, does not apply here. The lists are in each case drawn up, not as additions to, or exceptions from, the law, but as a complete statement of the law, possibly varying it slightly by convention, but in the main stating it as existing. If we find a hundred such lists, differing in some particulars, but substantially the same in all, it may be concluded that the few varying particulars are conventional additions or detractions, and that, apart from convention, the common bulk represents the common law. Especially is this the case when the common element can be seen to be inspired by a common principle. Judge Atherley Jones (*Commerce in War*, 54) [3] analyses some ninety such instruments, and finds horses to be included in thirty-seven, money in eight, naval stores in thirteen [4] (and expressly exempted in six), and provisions in eight (expressly exempted in fifteen). It seems a fair deduction that if horses are allowed to be contraband, naval stores and provisions can only be so considered as an aberration. Even British treaties with Holland (1670) and France (1677) exclude naval stores, and so do the Treaty of Utrecht in 1713 and the Peace of Paris in 1786. Neither horses, provisions, nor naval stores carry with them the

[1] Cited Satow, *Frederic II and the Silesian Loan*, 344.

[2] The "Most-Favoured-Nation" clause was said in the *James and William* (37 Ct. of Claims Rep. 307) not to be applicable to lists of contraband.

[3] Atherley-Jones, *Commerce in War*, 45.

[4] Two in each case are qualified inclusions only.

immediate suggestion of battle; and if we allow that inveterate usage, dating from the days of chivalry, when the horse perhaps had that connotation along with drums and trumpets,[1] has secured the permanent inclusion of the first, we cannot suppose, from the meagre list of public instruments which expressly include them, that any such usage has comprehended the others. Their inclusion as contraband remains an illogical and unwarranted pretension, which may have been submitted to, but has never been accepted.

Had naval stores and provisions been generally treated as contraband they would have remained anomalous exceptions to the scientific rule that it is objects which call up the idea of war that are contraband. Not being generally so treated, they can only be regarded as unwarrantable attempts to denaturalize and evade the principle. It cannot fail to strike the inquirer that these various lists of contraband are not indiscriminate lists of anything and everything likely to be useful to the enemy. They are, on the contrary, limited to objects which suggest war. The only question is whether, in the case of a very few particular things, they do suggest war; whether provisions, going straight to an enemy's fleet, may not suggest war; whether sailcloth, shiptimber, sheath-copper, pitch, hemp and tar, in a prolonged war of privateering, may not suggest war. These are all questions which are interesting but unimportant in face of the great fact that no attempt was ever made to include things which are of preponderant importance in civil life—lead, iron, crude copper, ordinary timber, leather, cloth, boots, medicines and so forth. Jefferson was justified when he said that the list of objects which could properly be treated as contraband had been so often agreed as to "leave little doubt at the present day" (1794) what they were.

[1] Freeman uses the phrase "drum and trumpet history" to signify "military history." It is well known that Russia, previous to 1904, consistently refused to admit that horses were contraband. Horses were treated as contraband by the American Courts in 1901: the *Atlantic* (Howe), 37 Court of Claims Reports, 17.

Such statements as that of Pitt-Cobbett,[1] that as regards other articles than arms and munitions of war there was a "great lack of uniformity," and that treaties show "a complete absence of that uniformity which is necessary to the formation of custom," are therefore entirely beside the mark.

It was not enough that an object should be useful, or even essential, in war. For instance, charcoal, though as essential an ingredient of gunpowder as sulphur or saltpetre, was never contraband, while saltpetre always was. Sulphur was on the border-line. Carts were essential to transport; but they were not generally contraband, though military wagons and horses normally were. Iron, lead, and copper in an unmanufactured state were never contraband,[2] though all-important in the manufacture of weapons and ammunition.

The proclamation by Lincoln, making cotton contraband in the Civil War, has really no bearing on Prize Law. It was a purely military measure of international policy. The South did not want cotton, and there is no such thing as an inverted contraband, a kind of goods which cannot lawfully be exported to neutrals.

§ 6. Occasional Contraband

Iron, lead, and copper, as above, were never even treated as "occasional" contraband. The subjects of that treatment were practically only Provisions and Naval Stores. And the former, at any rate, were intercepted only in the most unusual circumstances, namely, when in direct transit to a naval or military port. The whole doctrine of Occasional Contraband was strongly condemned everywhere but in Great Britain, and in particular it was bitterly complained

[1] *Leading Cases*, Ed. Bellot, II, p. 572.

[2] Cf. the *Ringende Jacob* (11 December, 1798; 1 C. R. 89), *infra*. Lübeck and Sweden, at the time of the Crimean War, included lead. See Atherley-Jones, *Commerce in War*, 38, citing British State Papers, XLVI, 833, LXVIII, 489, XLV, 1271.

of by the United States. At one moment during the French Revolution [1] Great Britain attempted to seize provisions bound for any French port, broadly on the ground—so popular in the late war—that France was virtually an armed camp, which its enemy must be allowed, in Vattel's words, to "reduce by famine" like a besieged city. Count Bernstorff in Denmark and Thomas Jefferson in the United States firmly opposed the pretension. Bernstorff's memorandum,[2] showing that Great Britain had refused to admit the very same argument when advanced by Sweden a hundred years before, was applauded by Lord Lansdowne, who observed that it was one of the most honourable, boldest, and wisest replies he had ever heard.[3] Jefferson wrote to Pinckney, "Such a stoppage (of vessels going with grain) to an unblockaded port would be so unequivocal an infringement of neutral rights, that we cannot conceive it will be attempted." "One restriction in their national rights has been submitted to by nations at peace, *i.e.* that of not furnishing to either party implements merely of war for the annoyance of the other, nor anything whatever to a place blockaded by its enemy. *What these implements of war are has been so often agreed, and is so well understood, as to leave little question about them at this day.* . . . A culture which, like that of the soil, gives employment to such a proportion of mankind, could never be suspended by the whole earth, or interrupted for them, whenever any two nations should think proper to go to war." [5] And by "Jay's Treaty" (1794) an arbitration was accepted; it being in the end decided that Great Britain was wrong, and must indemnify the American owners for any losses they had sustained by expropriation of their cargoes of

[1] See Order of 8 June, 1793.

[2] De Martens, *Causes Célèbres*, II, 55, 57.

[3] 17 February, 1794.

[4] Jefferson to Pinckney, 7 May, 1793 (Randolph's *Life of Jefferson*, III, 232.

[5] Same to same, 7 September, 1793 (Randolph's *Jefferson*, III, 293; Washington's *Jefferson*, IV, 58).

corn for English instead of French use. The tribunal refused to admit the excuse of necessity—that these cargoes were required for Great Britain's own sustenance. And they held that Vattel's statement concerning reduction by famine applied only to regularly besieged or blockaded places.[1] If the creation of famine had been an operation of war, then the entire stoppage of trade must have been so too, and everything destined for the enemy must have been contraband. But before that, Britain had withdrawn the obnoxious order: "We, not judging it expedient to continue for the present the purchase of the said cargoes on behalf of Our Government, are pleased to revoke the said article until our further order therein, and to declare that the same shall no longer remain in force."[2] Thereafter, provisions and (with some exception) naval stores were only seized when on their immediate way to a naval or military port of the enemy. This was a test of their military destination adopted by Lord Stowell in 1799 in the *Jonge Margaretha*,[3] following the *Vriendschap*, decided six months previously. Stowell, with his usual clear sense, admitted that it is "impossible to ascertain the final use of an article *ancipitis usus*"; *i.e.* such cases can never be fairly decided on supposed intentions or ultimate destinations. Some objective test there must be: and "It is not an injurious rule which deduces both ways the final use from the immediate destination" to a port of naval or military equipment.[4] In this case, of destination to a naval port, pre-emption was not con-

[1] It is not superfluous to declare that provisions may be contraband if going to a blockaded place; for, according to the Continental doctrine, articles may be seized as contraband at any stage of their voyage, whilst articles proceeding to a blockaded port can only be seized at the end of it.

[2] See De Martens, *Causes Célèbres*, III, 97.

[3] 1 C. R. 189 (5 February, 1799).

[4] This "not injurious rule" has been struck out by Hübner: "Les marchandises de seconde classe ne peuvent être detenues que lorsqu'elles sont destinées à un port de guerre ennemi" (*Saisie de Bâtiments*, I, ii, 1, § 5). It is a rule which is well criticized by Hautefeuille, *Droit des Nations Neutres*, II, 370).

ceded ; the provisions were confiscated.[1] With regard to naval stores the position is by no means so clear. It is complicated by the concession of pre-emption in the case of the raw produce of the neutral owner exported in his own country's or other neutral vessel.[2] Usually, no doubt, neutrals took advantage of this possibility, and apparently, in such a case, shipments of raw material as naval stores were on a parity with shipments of provisions, their fate depending on their destination to a commercial or to a military port. In many cases reported in Marriott's Reports articles *ancipitis usus* were released when bound for commercial ports ; and during the eighteenth century the British attitude seems to have been more lenient towards naval stores than towards provisions.

In 1798 Lord Stowell laid down in the *Endraught* [3] the same principle with regard to naval stores that he afterwards enunciated with more particularity and with special reference to provisions in the *Jonge Margaretha* —namely, that they must be bound to a port of naval equipment, to be contraband. "The cargo . . . is asserted to be ship timber going to an enemy's port of naval equipment, and under this description to come under the category of contraband. This I consider to be the correct law of nations, notwithstanding some relaxations which may occasionally have been allowed." This makes a military port of consignment [4] part of the

[1] The provisions were cheeses specially prepared for naval use. In the *Zelden Rust*, cheeses were again condemned, as being bound for Corunna, which is virtually one with Ferrol, a naval port (26 July, 1805, 6 C. R. 93). In the *Frau Margaretha* (25 July) they were released, being bound for Quimper, which is thirty miles away from Brest. So, sea-biscuit for Cadiz (a naval port) was condemned in 1805 (The *Ranger*, 6 C. R. 125). Wine going to Brest was confiscated in The *Edward*, 4 C. R. 68 (1801). In the *Haabet* (August, 1800 : 2 C. R. 182), Stowell was still vaguely upholding the idea that provisions could in principle be pre-empted when going to any port of the enemy ; they were, however, in that case actually going to a military port, Cadiz.

[2] The *Apollo* (Böttcher), 4 C. R. 158 (15 January, 1802).

[3] 1 C. R. 21 (19 November, 1798).

[4] The port in the case was Dordrecht. Either it must have been considered a port of naval equipment, or else the fact that the ship's

essential definition of contraband naval stores; and the particularity of Stowell's language, coupled with that employed in the *Jonge Margaretha* (and not then limited to provisions), makes it possible to discount the wide and vague terms in which he sometimes speaks of articles as "generally" contraband, "universally contraband" and so forth. Ship-timber was a particularly suspicious article—at least, as much so as hemp or tar; so that it cannot be said that the insistence on a military port of consignment was due to the extreme innocence of its nature. The same emphatic reliance on the fact of the shipment being for a port of naval equipment is expressed in the *Staadt Embden*.[1] In argument it is urged that the cargo (masts and deals) "consists of naval stores, bound to an enemy's port of naval equipment, and comes therefore under the character of contraband," while in judgment it is said that "considering that this is a shipment of naval stores to a port of naval equipment . . . I shall condemn this cargo as contraband."

It would appear, however, that certain naval stores, and those the most important, were soon taken out of the category of occasional contraband altogether, and treated as absolute contraband, whatever the port of destination and without reference to any test of military destination, subjective or objective. It was expressly declared so in the case of sailcloth, in 1800,[2] and pitch and tar were similarly treated, if not from the first, at any rate in 1802,[3] when these articles were condemned *en route* for so commercial a port as Dieppe. Two years later, in the case of the *Richmond*,[4] the two subjects of the doctrine of Occasional Contraband, provisions and naval stores, were sharply distinguished. Provisions "are certainly innocent," but "pitch and tar are con-

pass was for Amsterdam (which was treated as a military port) was taken to outweigh the actual port of destination.

[1] (19 November, 1798), 1 C. R. p. 28.

[2] The *Neptunus* (13 June, 1800), 3 C. R. 108.

[3] The *Twee Juffrowen*, 4 C. R. 242 (26 March, 1802).

[4] 5 C. R. 325 (7 December, 1804).

traband articles." It might be thought that it was the dissimulation held to exist regarding the pitch and tar in the case of the *Richmond*, which turned them into contraband, but three weeks previously, in the *Charlotte* [1] (Kottzenburg), Stowell had definitely ceased to apply to certain naval stores his test regarding their contraband character, and held masts contraband, irrespective of the nature of the port. " The nature of the port is not material; since masts, if they are to be considered as contraband, which they will be if not protected by treaty, are so without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of naval and military equipment.[2] Stowell's reasoning in this case is indeed extraordinary. He observes that the nature of the port is not material, because masts might be sent round, say from Nantes to Brest, " and thus become subservient to every purpose to which they could have been applied if going directly to a port of military equipment." [3] But this is exactly the argument to which he refused to give effect in the *Frau Margaretha* when he declined to condemn cheeses going to Quimper, because Brest was thirty miles away. It is obvious that it is an argument which destroys all the force of the test, and it is extraordinary to find it put forward, except on the view, which the *Richmond* confirms, that certain naval stores were by this time considered as absolute contraband. Lord Stowell made use of another argument equally inconsistent with his original test—that masts might be used at a mercantile port to fit out privateers. It would seem, therefore, that the position had undergone a total change, and that masts and tar were now treated as absolute contraband.

It is no longer as " occasional " contraband, that is,

[1] (16 November, 1804), 5 C. R. 305.

[2] It is to be inferred, however, that the masts were in fact going to what was considered a naval port, Cadiz.

[3] Dordrecht, it appears, as well as Amsterdam and Cadiz, was treated as a naval port.

innocent articles becoming contraband in special circumstances, but as "absolute" contraband, that sailcloth, masts, pitch and tar are now regarded. The reason would appear to be the prevalence of privateers. Every sea-going vessel was a potential, almost a probable, privateer; consequently the special materials of shipbuilding—masts, sailcloth, spars, hemp, pitch and tar—had acquired that direct suggestion of war which already clung to saltpetre and horses and perhaps to sulphur. It may well be thought that such a view was an erroneous, and perhaps an unpardonable one; but it probably was what really actuated Stowell at the time. It would be incorrect, therefore, to say that he dropped his objective test of immediate destination to a military port for occasional contraband; he only removed these articles from the category of occasional to that of absolute contraband, and treated them as being as much earmarked for war as saltpetre. He still maintained his objective test with regard to such a thing as rosin. "Are there any cases in which this article has been held to be contraband on a destination to a port merely mercantile? If it had been going to a military port of the enemy, I should have had no hesitation. Going to a port merely mercantile, it is not, I think, so decidedly of a warlike nature as to be excluded from favourable treatment." [1] We may here enumerate the various articles attacked as naval stores, mentioning the treatment accorded to each.

1. *Pitch and Tar.*—In the *Med Gud's Hielpe*[2] (1750), pitch and tar had been condemned when going to Port Louis; while Stowell in 1799 declared them "contraband in their own nature," and condemned them when going to Cherbourg [3] (which of course was a naval port). Tar was condemned in 1801 when going to Dordrecht

[1] The *Nostra Sigñora de Begona* (31 January, 1804), 5 C. R. 97; citing the *Santa Bona Ventura* (12 December, 1747). Cf. the *Ringende Jacob* (*supra*).

[2] (30 June, 1750), 1 C. R. 29 (n.).

[3] The *Sarah Christina* (March, 1799), 1 C. R. 237, 242.

(seemingly a naval port),[1] and again when going to the Isle of France, as we have seen, in 1804.[2] In the *Twee Juffrowen* (1802), 4 C. R. 242, it was said that "Pitch and tar are universally contraband," and they were condemned when going to a commercial port, Dieppe, and not shown to be native produce.

2. *Hemp.*—In 1723, in the *Jonge Pieter*,[3] hemp for Bordeaux had been restored, though only as a relaxation "under the modern practice, which has relaxed the ancient law, and allowed merchants to traffic with the produce of their own country, although serving for purposes of war."[4] In 1802, Stowell laid it down that "certainly" hemp was "generally" contraband,[5] though in the particular circumstances the cargo was released[6] in the same way as raw produce of the exporter, although going to what was in other cases considered a military port—Amsterdam: "If it had belonged to merchants of any other country, it would be contraband."

3. *Other Naval Stores* (*raw material*).—The inconsistency with which hemp, pitch, and tar were specially pursued is thrown into relief by the treatment of *copper* for Amsterdam, which was not confiscated;[7] nor was *tallow*;[8] and *rosin*, "an article much used in military preparations," was released in 1804, when going to Nantes.[9] Ship-timber was apparently condemned only when going to a port of naval equipment.[10]

[1] The *Neutralitet* (Danish tar in a Danish ship, but *contrary to treaty*), 3 C. R. 295.

[2] The *Richmond* (7 December, 1804), 5 C. R. 325.

[3] (24 April, 1783), 1 C. R. 27 (n.); 4 C. R. 159.

[4] Hemp had been released in 1783 when going to Bordeaux (being Prussian produce and Prussian owned). Of course, hemp unfit for cordage stands in a different category, and was released in the *Gute Gesellschaft* (*Michael*) (19 January, 1801), 3 C. R. 94.

[5] The *Apollo* (15 January, 1802), 4 C. R. 158.

[6] Per Arnold, LL.D., *arguendo*.

[7] The *Charlotte* (7 September, 1804), 5 C. R. 275.

[8] The *Neptunus* (13 June, 1800), 3 C. R. 108.

[9] The *N. Signora de Begona* (31 January), 5 C. R. 97.

[10] The *Endraught* (19 November, 1798), 1 C. R. 21; The *Staadt Embden* (*Ibid.*, p. 26).

Iron is of such important civil use that, like copper, it was released even when destined for a naval port. Lord Stowell, in the *Ringende Jacob* (11 December, 1798, 1 C. R. 89) remarked: "There is perhaps no article in nature that comes more exactly under the description of an article of promiscuous use than iron; it is a commodity subservient to the most infinite variety of business uses. As the cargo is going to a port of naval equipment, it could very probably be applied as a naval store; but it may be too much to decide merely on this inference, that it is an article absolutely hostile." So that masts and tar were condemned, going to a commercial port, while iron (unless specialized for ship-building) was released, going to a military port! But, inconsistently enough, Stowell calls timber (not specially adapted by its form for use in ship-building), "as much a thing of ambiguous use as anything can be," and yet makes the criterion of its contraband character the nature of the port to which it is going (the *Twende Brodre*, 17 July, 1801, 4 C. R. 36). *Tin, iron, steel, alum,* and *vitriol,* going from Gothenburg to Boston, were restored by the court at Bermuda, except the tin, as that might be useful for cases for carronades, grape, and case-shot. The Lords did not think such use comparable to the civil uses of tin, and restored the tin also.[1] *Copper ore* was attacked when going to Boston (then the chief American naval port) in the *Euphemia*,[2] but it was not necessary to decide the point, as the ore was condemned as enemy property—and there seems to be little foundation for the attempt.

4. *Manufactured Naval Stores.*—Here the relaxation in favour of the exporter's native produce did not so generally apply. But in two cases it perplexingly did: *masts* made in, and sent by, Sweden were released in 1745 and 1751, when actually destined to Cadiz,[3] though

[1] The *Freden* (Folio Prize Appeals I. T., 1814–17, p. 217); Grant, Scott and Russell.

[2] I.T.P.A. (1814–15), 26.

[3] The *Vierge Marie* (1745); the *Swart Kat* (1751), 3 C. R. 296 (n.).

condemned under the same circumstances in 1804,[1] not as going to a military port, but as absolute contraband. *Copper in sheets*, fit for sheeting ships (Swedish-owned produce of Sweden), was condemned when going to Amsterdam, supposed to be a naval port: [2] here as in the *Neutralitet* [3] there was a treaty determining the character of the material. *Sailcloth* was confiscated in 1800 [4] when going to Amsterdam, but was expressly stated to be "universally contraband, even on a destination to ports of mere mercantile naval equipment"; *i.e.* it was absolute contraband.

It will not have escaped the reader's notice that, except for the emphatic way in which the principle was laid down by Lord Stowell in the *Jonge Margaretha*, the celebrated test of destination to a naval or military port figures little in the discussions of his time. Except for three cases concerning cheese, one of wine and one of rosin, there appears to have been no occasion for the judge to deal with articles *ancipitis usus* (most naval stores being regarded as absolute contraband). The vast range of articles between provisions on the one hand and naval stores on the other—comprising as it does all raw metals (except gold and silver), rough timber, fuel, oil, machinery, and textiles—appears never to have been attacked. This strongly suggests that in point of fact articles *ancipitis usus* were seldom regarded very seriously by a belligerent: if they were regarded seriously, the attempt was made to treat them as absolute contraband, and to endeavour to placate neutrals by releasing or buying them if they fulfilled the condition of being home-grown raw produce. Nothing can be more clearly *ancipitis usus* than hemp, pitch, and tar; they were not even, like spars and sailcloth, manufactured articles. But just as horses "sentaient la guerre" on land, so anything that had to do specially with ships "sentaient

[1] The *Charlotte* (Koltzenberg) (16 November, 1804), 5 C. R. 305.
[2] The *Charlotte* (Focks) (7 September, 1804), 5 C. R. 275.
[3] *Supra.*
[4] The *Neptunus*, 3 C. R. 108.

la guerre " at sea when any ship might at any moment turn into a privateer. It cannot, I think, be doubted that this was an illegitimate and illogical extension of the notion of contraband, and it was introduced in a half-hearted and piecemeal way. Copper in ingots was allowed to pass, while sheet-copper and sailcloth were stopped; but pitch and tar, though equally unmanufactured articles, were stopped likewise. It may be said that, although unmanufactured, pitch and tar were ready for immediate use: but what about hemp? The whole thing constituted a departure from sound doctrine: the mere fact that a war was largely a naval war was invoked as a fact turning articles of naval use into contraband.[1] It was as if the fact that a war was a land war had been allowed to turn all wagons, leather, and canvas into contraband.

Lead, indispensable for bullets; iron, indispensable for ordnance; wood, indispensable for fuel and furnaces; canvas, indispensable for tents; charcoal, indispensable for powder;—all these things were not only not challenged seriously, but not challenged at all.[2] Lead, the most noxious material of offence, was not hindered,[3] while bugles were reckoned contraband. The reason was, that bugles are specialized for military use—they have " Army " invisibly stamped on them.

It is not goods which are indispensable for making war or which are very useful in making war, they are contraband; still less is it goods that a belligerent chooses to call contraband: it is goods whose very nature suggests that they are warlike objects. It is illuminating to notice the difference in the treatment of

[1] It is worthy of note that a ship must have been specially fitted for naval use to be contraband (The *Brutus* (5 C.R. 331 n., (1804)), while masts, pitch, and cordage which might have been used to build her were contraband anyhow!

[2] This is not a novel observation. The Swedes told Cromwell in 1655, that as cloth was necessary in war, the English staple might be classed as contraband, if mere necessity were the sole factor to be considered. (*Whitelock's Memorials*, 635, cit. Phillimore, III, 421, § 242).

[3] The Swedish-Lübeck exception of 1854 came much later.

sulphur and saltpetre. It was said in the *Carpenter* [1] that saltpetre was used for gunpowder "almost exclusively," when only about one-twentieth of the imported sulphur was so used. Saltpetre was always contraband; few attempts were made to make sulphur such. It is impossible to deny that if pitch and tar and hemp were contraband, so must iron and leather and lead have been. It is an explanation, but not an excuse, that in Stowell's time privateers and merchantmen were almost interchangeable: the merchant sailor was impressed or captured as a potential man-of-war's man. The idea of tar and pitch suggested the sea and naval battles,[2] just as the idea of a horse had suggested the chevalier and cavalry battles. Therefore, the item of naval stores, if we admit it at all to the list of contraband, must be admitted as an anomalous exception, not to be extended without peril to the admitted principle that articles of non-military significance are not in general contraband, and only because so under special circumstances. The only instance of such speciality, given by Vattel, is when provisions are destined to a blockaded place: of course the Law of Blockade would countenance their capture on arrival, but they are, according to him, contraband from the first. Cf. *Die Vier Gebroeders* (Burrell, 159), 2 July, 1759. "Dunkirk being blocked up at the time of the capture, the cargo thereby by its nature became contraband." Such a case is very special indeed, and in excluding innocent goods such as provisions from naval and military ports, Stowell was pressing the analogy to the limit. Still, his rule did furnish a clear, objective and not unreasonable test, but certainly not one to be relaxed in favour of belligerents.

Stowell's test for ordinary innocent articles, *e.g.* provisions, viz. the nature of the immediate port of destination, was taken up by the American courts. Judge

[1] The *Carpenter*, 2 Acton, II (1810).
[2] See *University of Philadelphia Law Review* (February, 1916), 336.

Story was a great student of Stowell's decisions,[1] and the objective test furnished by the naval or military character of the port of destination became firmly rooted in Anglo-American law as the proper criterion by which to determine the contraband character of goods not suggesting military use on the face of them. Wheat, going straight to a port where lay an enemy fleet, was condemned on this ground in the *Commercen*.[2] America, more logical than Great Britain, and more devoted to the interest of neutral nations, avoided the mistake of singling out naval stores for any more unfavourable treatment. Simultaneously, the Continent of Europe was abandoning entirely the idea of "occasional" contraband. At various periods France as well as England had treated pitch and other materials for shipbuilding as a contraband article, but during the nineteenth century opinion in Continental Europe was almost unanimous in favour of limiting the category of contraband to arms and ammunition and articles *ejusdem generis*, worked up and specialized for purposes of war. Hautefeuille's elaborate work [3] represents in this particular a general consensus. Unfortunately, nothing was done at the time of the Declaration of Paris of 1856 to crystallize this general conviction, or to compromise between the Anglo-American and the Continental points of view. The Declaration, giving freedom to enemy goods on neutral vessels, therefore became a dead letter, so far as direct imports with the enemy country were concerned, by its exception of "contraband of war": for the way remained open for a belligerent to treat anything as contraband, in reliance on the treatment by England of pitch, tar and hemp as contraband in the French wars; and we shall see in a moment how it became a dead letter altogether.

But, at the time, no one perceived the tremendous

[1] See the *Life and Letters of Joseph Story, passim.*
[2] 1 Wheaton, 382.
[3] *Les Droits et Devoirs des Nations Neutres.*

implications of this reservation. The tide was setting strongly against belligerents; and contraband was conceived of as consisting solely of dangerous articles like rifles and gunpowder, to which might be added articles going to a dangerous place—a military port of the enemy; and probably it was supposed that the like test would in future be applied, as logically it should have been, and as Stowell in the *Endraught*, the *Staadt Embden* and the *N.S. de Begona* hinted that it should be, to naval stores. At all events, it was felt that in any doubtful case, the decision would naturally be in favour of the neutral. The Great Exhibition of 1851 had told the nations that War was a discredited anomaly, and the belligerent was regarded as an antiquated nuisance. So far did this view prevail, that in the wars of 1854, 1859, 1866 and 1870 the doctrine of Contraband was applied in the mildest possible way, although naval force was a conspicuous feature of at least the first. A strong propaganda was even made for the entire abolition of the right of capture of private property at sea, and in America this propaganda made much headway. When the United States were invited to accede to the Declaration of Paris, it was only because they desired this entire immunity that they refused. So matters stood through the second half of the nineteenth century. There was a plain objective test for absolute contraband: were the goods such as suggested war as plainly as guns and villainous saltpetre (with a possible anomalous exception for naval stores in the days when the sea swarmed with privateers); and a plain objective test for innocent things which might be of service in the war—were they going direct to a port where they could immediately be put to such use? The only doubt was as to whether *primâ facie* innocent goods could ever be captured at all.

The ideas current at the end of the nineteenth century are reflected in the work of Kleen,[1] whose conception

[1] *La Contrebande de Guerre.*

Mr. Kasson proceeds: "Although the Franco-Chinese war is ended, there is always danger that this precedent will be again adopted in the heat of another war, unless resisted by energetic protests in the interests of neutral trade and of humanity itself. Its adoption, indeed, would practically nullify the advantages of neutrals intended to be secured by the Paris Declarations of 1856." And Wharton, the eminent publicist, added: "I concur in the reasoning and conclusion of Mr. Kasson."

Russia, in the Turkish war of 1877, had added to a tolerably restricted list of contraband—"En general, tous les objets *destinés* aux troupes de terre ou de mer." This attracted little attention. "Destinés" might be used to include things *ejusdem generis* with the very military articles specifically enumerated, *i.e.* as meaning "whose appropriate use is military," just as pianos are "destinés" for musical use.[1] More probably, it might mean as Story used "destined" in the *Commercen*,[2] "proceeding direct to" the armed forces of the enemy. No one supposed that it meant "intended for."

Then came the startling events of the Russo-Japanese War of 1904, in the course of which flour and cotton were treated as contraband by Russia. A raw material like cotton was obviously no more warlike in character than iron and lead had been. The same may be said of fuel "of all kinds," boilers and every kind of naval machinery, and materials for telegraphy, telephony and railroad construction, which were all made absolute contraband.[3] By an omnibus article everything "*intended* for warfare," and "rice, provisions, horses, beasts of burden and" anything else "which *might* be

[1] Cf. the Argentine-Peruvian Treaty (1874). "Artillery . . . powder . . . torpedo . . . rockets and other things destined for artillery and musketry" (Art. 21: see Brit. State Papers, LXIX, 701).

[2] *Supra.*

[3] Circular of 27 February, 1904.

[4] Takahashi, *International Law in the Russo-Japanese War*; Clunet (1904), p. 476; Baty, *Britain and Sea Law*, pp. 38 *seq.*

used for warlike purposes," if "destined for the enemy,"[1] were included: thus creating a class of occasional contraband without any objective test whatever.[2]

As Mr. Hay remarked in a Note of 10 June, 1904: "The principle under consideration might be extended so as to apply to every article of human use, which might be declared contraband of war simply because it might ultimately become in any degree useful to a belligerent for military purposes.' But he and Lord Lansdowne gave away the whole case when the latter observed that "The test appeared to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use"[3] This was to abandon all objective certainty, and to leave the field open to endless diplomatic wrangles; in point of fact it was pretty much what the Russians themselves had proclaimed (except as regards fuel and railway and telegraphic plant). Mr. Hay,[4] on his part, though pointing out the ambiguity of the Russian proclamation, and protesting against the condemnation of flour carried for a Japanese commercial port in the *Arabia*, appeared as well as Lord Lansdowne to hesitate to suggest adherence to the objective test laid down by Lord Stowell a hundred years before. He admitted that it was enough to condemn innocent goods if it could be "shown by evidence" that they were "actually destined for the naval or military forces of the enemy." This is exactly what Lord Stowell, a hundred years earlier, in the *Jonge Margaretha*, had declared it impossible to do. In any event it means a long and complicated lawsuit, conducted under great difficulties and unfavourable circumstances created by distance, unfamiliar languages, interrupted communications, the

[1] It was subsequently explained that this meant "the Government or the armed forces of the enemy."

[2] Rules of 16 February, 1906: see Takahashi, *International Law in the Russo-Japanese War*, p. 496.

[3] Lord Lansdowne to Choate, 29 July, 1904.

[4] Hay to McCormick, 30 August, 1904.

overwhelming governmental resources at the disposition of captors, and the like ; and totally inconsistent with the simplicity of prize procedure. The determination of the truth must generally be left, moreover, to a partizan belligerent court, which will never be slow to infer destination from slight indications. Diplomatic reclamations can never be a satisfactory remedy.[1] The whole object of prize procedure—to secure that the belligerent shall not be prosecutor, witness and judge at once—is defeated, and instead of the ship being condemned " out of her own mouth," as the established principle was, the owners have to fight an ordinary and expensive lawsuit with the scales weighted against them.[2]

The Hay and Lansdowne protests therefore fell flat. They wished to maintain intact the neutral trade with the belligerent in innocent articles, but they failed to realize that it could not be done by presenting the neutral merchants with lawsuits. What was needed was a plain objective test, and nothing better than Stowell's had been put forward. It should have been sustained, or some evidently better criterion substituted. It could have been sustained, for the whole theory of Occasional Contraband in modern times depended on British example, and, if that example was relied upon, its qualifications must have been accepted with it. Hay's despatches, objecting to the Russian pretensions, were admissible as indications of the neutral right to trade, but they failed in the essential point : they left the test to depend on subjective intention, and they threw the Law of Contraband into chaos accordingly.

In particular, Lansdowne went out of his way to change the whole sense of Granville's protest to France made on the occasion of the pretension advanced by

[1] See I.L. Association (Association de Droit International), 1910, in *Report of the Third London Conference of the International Law*.

[2] " It is but seldom, I fear," says Prof. Mountague Bernard, " that a neutral improperly captured obtains any adequate compensation for the loss which has been unjustly inflicted on her" (*British Neutrality*, 316).

Jules Ferry to treat rice as contraband. Granville had said [1] in 1885:

"H.M. Government cannot admit that, consistently with the law and practice of nations and with the rights of neutrals, provisions in general can be treated as Contraband of War. H.M. Government do not contest that under particular circumstances provisions may acquire that character, as, for instance, if they should be consigned direct to the fleet of a belligerent or to a port where such fleet may be lying, and (*sic*) facts should exist raising the presumption that they were about to be employed in victualling the fleet of the enemy." Lansdowne repeats this, but gratuitously alters "and" into "or," thus setting up beside the strict objective test a general permission to treat anything as contraband if any circumstances exist on which to found a presumption of intended hostile use.

In the course of the war, Japan adhered steadily to the established test of destination to a naval or military port, thus proving that it was not out of date. Cardiff steam coal, rice and salt beef were condemned by Japan, when going directly to the naval port of Vladivostock. This is quite in accordance with Stowell's orthodox treatment of cheeses, wine and biscuit for Brest. The destination was stated in the log of the *Aphrodite* [2] and the *Vegga*,[3] in the charter-party in the case of the *Scotsman*,[4] and in the letter of instructions to the master in that of the *Tacoma*.[5] The judgments in these three cases are admirable expositions of sound doctrine. In the *Bawtry*,[6] the destination appeared as Vladivostock in the charter-party: in the *M.S. Dollar* [7] the master admitted that such was the true destination. In the

[1] Granville to Waddington, 27 February, 1885; 76 Brit. State Papers, 436.
[2] Takahashi, *Int. Law in the Russo-Japanese War*, 651.
[3] *Ibid.*, p. 703.
[4] *Ibid.*, p. 682.
[5] *Ibid.*, p. 694.
[6] *Ibid.*, p. 661.
[7] *Ibid.*, p. 664.

Severus [1] the papers were for Manilla, but the ship was taken near the Strait of Yetorup, with coal for Vladivostock. The *Henry Bolckow* [2] proceeded on the same principles, Korsakoff (S. Saghalien) being held to be a military port, being practically denuded of civil population; the cargo was only flour, but the destination was dissimulated; it was stated to be Hong Kong, but the vessel was taken far beyond that point, and standing in for Yetorup Strait. Had it not been for this dissimulation, the case would appear to be on the borderline. The *Lydia* [3] is a similar case, the military port being Nicolaievsk, "an important coast fortress," and the manifest and bill of lading bore that the intention was to go to Nicolaievsk. The case is noteworthy, as the *Lydia* was taken actually in Japanese territory (in the Loo-choo Islands, at Naha), where she had put in, in distress. Sometimes special indulgence is allowed in such circumstances. It was alleged that the voyage had been abandoned,[4] but this could not stand in face of the master's admission to the contrary.

The Russian Government on 30 September, 1904, put forward a new objective test of its own—belated, but valuable as accepting the principle that some known objective test there must be. According to this, innocent goods could be treated as contraband if they were consigned to an enemy Government, its departments, its army or its contractors. To such tests no one could object, except a belligerent, for in point of fact no neutral would be so misguided as to address his goods to enemy Governments, or to established army agents or contractors. The only objection to it was that it did not sufficiently specify what constituted a government contractor. A purely commercial firm may, as in the *Saint Kilda*.[5] describe themselves in an advertisement as

[1] *Ibid.*, p. 692.
[2] *Ibid.*, p. 671.
[3] *Ibid.*, p. 674.
[4] As in the *Imina Baumann*, *supra*.
[5] Takahashi, *Int. Law in the Russo-Japanese War*.

"Contractors to the Imperial Army and Navy" without meaning very much by it. Otherwise the test was far more favourable than any neutral could have desired; and the effect of its adoption was to put an end for the meantime to all seizures of "occasional contraband." As Count Lamsdorff[1] said, "Neutrals would see that in future there would be no ground of complaint." In the following summer two cargoes were impeached and in fact sunk—those of the *Saint Kilda* and *Ikhona*. Count Lamsdorff explained these cases as "probably due to misunderstanding and the disorganization of Russian naval forces in the Far East." Compensation was paid by Russia, as the violent act of destruction had been accomplished contrary to pledges given a year previously.

The net result was to reveal a tendency to discard the old objective tests without discovering anything definite to substitute for it; and to show a certain tendency to be content with subjective and unpractical formulæ.

The Declaration of London set the seal on this. It declared that most raw materials could never be contraband (§ 28)—a principle which, except for pitch, tar and hemp (now no longer important), had never been contradicted. It allowed distinctively military things to be captured on allegations of ulterior destination (§ 22), and it allowed food, clothing, fuel, money, vehicles, railway etc. *materiél*, harness, flying machines, and vessels to be captured if bound for enemy territory (§ 35); thus abolishing the distinction between military and commercial ports. The Declaration thus swept away the freedom of trade with the belligerents in all but certain raw materials, and enabled a belligerent to declare a paper blockade by forcing every vessel sailing to an enemy port to defend herself on a charge of intending her innocent cargo to reach the enemy's armed forces.[2]

[1] McCormick to Hay, 21 September, 1904: *For. Rel. U.S.* (1904), 767; *Ibid.* (1905), 748.

[2] It may be added—though it is the echo of a forgotten controversy—that a semi-official commentary on the Declaration took away

With this general theory of intended " destination " we shall deal immediately. For the moment we lay stress on one thing only: namely, that opinion had veered sharply round. Half a century earlier, only arms and ammunition were typical contraband: other things must satisfy a definite and difficult test to be treated as such. Now, anything was contraband that a belligerent liked to put to the proof of a dubious lawsuit.[1]

Great Britain recognized the unsatisfactory state into which the subject had drifted, and at the Hague Conference of 1907 she proposed the entire abolition of contraband capture. For some reason, this proposal met with little support: but for an island power it is obviously a step dictated by the most cogent considerations of self-interest.

Professor von Bar and Professor Westlake were of opinion that the whole idea of contraband was a mistaken one;[2] and an acute Scottish Q.C., Mr. Macqueen,[3] expressed the same opinion in cogent terms: " Is it not a fair question for consideration, whether an act performed in the ordinary legitimate course of commerce can reasonably be regarded as a breach of neutrality? The merchant pursues his lawful avocation. Regardless of the war, he looks only to his profits. The belligerents, in his eyes, are customers, and he hopes they are solvent. He deals indifferently with A, or with B, or with both, in the systematic prosecution of his honourable calling.

the security afforded by § 35 of the Declaration, which makes the ship's papers conclusive (as was always the law in Prize proceedings), observing that the article " must not be taken too literally ": *i.e.*, that the captor was only bound by § 35 so long as it suited him. And this commentary was officially adopted at the outbreak of the war of 1914, when the Declaration of London was temporarily adopted by the Allies.

[1] See *The Recrudescence of Belligerent Pretensions*, Report of Int. Law Assoc. Conf. (Christiana, 1905); *Litigation as a Weapon against Cruisers* (*Ibid.*, London, 1910). Even in the eighteenth century, Lampredi wrote (p. 71) that—" Because a description of merchandise is susceptible of direct employment for purposes of war, it does not necessarily result that it can be called contraband."

[2] See R. D. I., Vol. 26, p. 407: cited at length in the writer's *Int. Law in S. Africa*, p. 31.

[3] *War and Neutrality* (Chambers, 1862).

If one belligerent derives more benefit from commerce than another, it is because his resources are greater, and not because neutrality has been violated. His superiority in this respect is a source of strength and an element of success which the other belligerent ought to have considered before entering on the quarrel." Just so von Bar considers that a quarrel will never be finally settled if one party is artificially prevented from getting the full benefit of his resources and credit. Whether we agree with this reasoning or not the solid argument remains, that for an island Kingdom the free maintenance of ocean transit is vital, while for her the liberty to interrupt that transit can never be so paramount.

But, at all events, if contraband be retained, the principle that contraband means those articles which are too military to be allowed to reach the enemy's shores ought never to be replaced by the loose notion that contraband means whatever may be particularly useful to his cause. The former conception rests on a basis of fact; the latter on a matter of opinion. The first is clear and definite: the latter is vague and uncertain. The first admits of plain tests: the other opens a wide door to surmise and inference. In short, one is objective, the other subjective.

Unfortunately, all objective certainty has of late been improperly and illegally discarded.

That there was anything essentially different in the position of the Central Powers in the War of 1914 from that of France a hundred and thirty years ago, is negatived by the arguments offered by Great Britain and combated by America and Denmark, urging that corn going to France was in effect going to a huge barracks: and by such statements as that ascribed to Barrère that the Republic was an immense besieged town [1] and France one vast camp. Yet the pretension to seize provisions for France was given up, and the

[1] *Cambridge Modern History*, VIII, 432.

normal course of blockade and anti-contraband resumed.

In the War of 1914, successive Orders in Council added to the list of contraband articles until little remained outside it. No special fitness for war was exacted. The test was not even that illusory test of a final military use, which Stowell had declared to be an impossible one. It was merely that the goods would be serviceable to the enemy. We are not concerned at the moment to argue the case for the neutral on the ground that this constitutes as flagrant a " paper " blockade as any that history has reprobated. We are content to say that it is irreconcilable with the necessary Canon of Objectivity. Objective certainty is essential to institutions of International Law. If, for all objective tests of military use, we substitute the subjective tests of intention and design, we abolish all neutral security, and erect into law the arbitrary assumptions of belligerents.

The test of predominant military character is not only historical, but is dictated by reason. Contraband, so defined, is limited, certain and tolerable.

(1) It is limited. Interference by open violence with the ships of a friendly and sovereign state is a drastic proceeding which ought to be limited to the fewest possible cases. (2) It is certain. "Necessary for war" may mean anything, from rifles to potatoes. "Adapted for purposes of war" is almost more elastic. Detailed enumeration is insufficient to include new discoveries. The nearest approach to certainty is found in " specialization for direct military use." (3) It is tolerable. The gross interference with a neutral vessel, which seizure for contraband trading involves is readily seen to be natural and inevitable when a ship is actually carrying the obvious completed deadly weapon. It is not natural, nor tolerable, when the cargo may in fact be capable of ordinary peaceful use. So long as it is not the accepted theory that all trade with a belligerent is an illegitimate assistance to him, so long it will be felt that the con-

fiscation of a cargo harmless in itself, on grounds satisfactory to the enemy but to nobody else, is an outrage on the security of the neutral flag, whilst the confiscation of arms and the like may be tolerated and commended.

It may happen, as Phillimore pleads, that a cargo of grain may be of more real injury to the belligerent than a case of ammunition. But the dangerous character of ammunition is obvious and certain: the dangerous character of grain must be a matter of opinion and circumstances. Nobody can deny the noxious character of weapons of war; the noxious character of unwarlike cargoes will never be obvious to neutrals and must always be a matter of argument and uncertainty.[1]

It is not considered necessary to analyse the cases decided in British, French, German, and Italian prize courts during the late war, as this work is directed to the establishment of principles, and they avowedly set principles aside. In the *Hakan*,[2] salt fish for Lübeck was considered contraband simply because the German Government had taken over the distribution of food. In the *Alfred Hage*,[3] and *Correntina*, Hull and Liverpool were held to be fortified ports within § 35 of the Declaration of London. *Contrà*, as to Delagoa Bay,[4]—in fact Germany seems steadily to have adhered to the rejection of the doctrine of Continuous Voyage; which, it may be noted, C. C. Hyde thinks was much extended in the late war beyond its application in the war of 1861 in the United States.

Sometimes it is hinted that the whole discussion of these topics is obsolete, because it is questioned whether and how far the ordinary rules of neutrality apply in cases where the Council of the Société des Nations has sanctioned warlike measures to be taken against a recalcitrant state. The opinion has been put forward that the coercion by the general force of the world of an

[1] See Thonier, *Contrebande de Guerre* (1904).
[2] B. & C. P. C. 210, 479.
[3] Fauchille, *Jurisp. Allem.*, 19, 85.
[4] The *Brilliant*, *Ibid.*, 95.

aggressive state will leave no true neutrals existing—none, at any rate, who need be regarded. But this is surely a naïve view. No single Power is likely to defy the world as an international outlaw. A state which goes to war will first make certain of adequate support. The very question at issue will be whether the measures recommended by the Council of the Société des Nations are to be taken or not—whether the state is an oppressor or not—whether the compact of the Société is to be interpreted in one sense or another—whether the powers of the Council are independent of the Assembly—whether the right of self-defence is involved or not. It will not be a question of general coercion of an outlaw. It will be an ordinary dispute between certain nations desirous of exercising active force, certain nations desirous of offering active resistance to it, and other nations whose only desire is to be left undisturbed.

§ 7. Continuous Voyage

It is apparent that by the end of the nineteenth century neutral freedom to trade with the enemy was still very slightly impaired. The attempt to treat provisions as contraband had been defeated: and although the United States acknowledged the theoretical possibility that they might become contraband, that could evidently only happen in certain stated cases. The attempt had been made to add naval stores to the list of absolute contraband: it cannot be said to have either succeeded or failed: it had simply been eclipsed by the violent reprisals which marked the later stages of the Napoleonic Wars. Modern writers, especially the great French writers, in accordance with the tendencies of the pacific humanitarianism of the nineteenth century, had done their best to restrict the list of absolute contraband to things which were directly useful in battle. If the list was to be extended, it was only naval stores which were thought fit for inclusion—and that only by

a few English writers who felt that they could not contradict Lord Stowell.

But, above all, and far more important than all, the principle was firmly maintained that contraband can only be seized *in flagrante delicto:* in the actual prosecution of a voyage to an enemy's port. Traffic with neutral ports, and consequently with the enemy through neutral ports, was wholly withdrawn from the belligerent's self-interested supervision. This principle was laid down for England in the *Imina Baumann,*[1] where the vessel was carrying ship-timber to a neutral Prussian

[1] Usually and inaccurately called the *Imina*, 3 C. R. (5 March, 1800). Dr. Briggs seems mistaken in taking the *Imina Baumann* to be contradicted by the *Twende Brodre* (1801, 22 July), 4 C. R. 33, where Stowell had by no means "changed his mind" from what it was in the *Imina Baumann*; as Dr. Briggs following Mr. Woolsey thinks. In the *Imina Baumann*, Stowell said that the contraband must be captured in the actual prosecution of a voyage to an enemy port, and in the *Twende Brodre* he says nothing to contradict it. The latter case is simply one of deciding on the contraband quality of ship-timber, in which case the primary test is that of destination to a naval port. "If there had been a clear and determined destination to Brest, . . . it would subject every part of the cargo (except the fir planks) to confiscation; for it could never be permitted to be *averred* [italics ours] that a cargo of this sort might go on an innocent destination to St. Malo, and then be sent on to Brest or Rochfort." This does not seem an ultimate concealed destination to Brest, but a destination apparent on the primary evidence. In fact, a destination for Brest was so apparent: there was a letter to the master telling him to go to Brest if the cargo would sell better there. If, says Stowell, that had been a clear and determined destination it would have condemned everything (except fir planks). The owner of a dangerous cargo in a ship bound for Brest could never be heard to say that the cargo was meant to stop at St. Malo. (In fact, it was held that the destination to Brest had never become effective.)

The *Jesus*, the *Maria* and the *Joseph* (1761: Burrell ed. Marsden, 164) give us a case of a little more difficulty: a Spanish coaster with saltpetre, taken on a voyage from Corunna to San Sebastian, was found to be carrying the saltpetre as contraband to France. But then the master and crew admitted that the saltpetre was on its way to France: and if the master and crew of the *Imina Baumann* had sworn that they were taking their cargo to Amsterdam *viâ* Embden, the case would have been entirely different. Similarly, if the master and crew of the *Peterhoff* had sworn that her cargo was going straight into the Confederacy. In any event, the *Jesus* is an isolated old case, inconsistent, unless thus explained, with every case and every writer. Whether in fact such admissions can be acted on when the destination of the ship is neutral, may be a question. It is the ground on which such cases as the *Maria*, the *Lisette* and the *Charlotte Sophia* (6 C. R. 204 (*n*)) (all blockade cases) can be justified (see the writer's *International Law in S. Africa*, pp. 21–23), and it is conceived is valid enough.

port, Embden. She had set out for Holland, at war with England, and had only turned aside to Embden because it was not safe to go on, Amsterdam being blockaded. She went as near Holland as she could get: in fact, she practically went to Holland, because the Dutch coast is only five miles away, across a shallow estuary, which obviously cannot be very well controlled by an enemy's vessels of war. As I have elsewhere suggested,[1] it was like the case of a neutral bringing goods for belligerent England in perfect safety to neutral Annan on the Solway. Stowell was regularly condemning British goods for Embden on the ground that they were meant to go on to Holland.[2] But he did not venture to interfere with the trade of the port by assuming to inquire into the ultimate destination of neutral goods on their way thither. Exactly in the same way when he was asked in the *Stert* [3] to condemn goods for breach of blockade, when they were coming from Holland *viâ* the same neutral Prussian port, Embden, adjacent to the blockaded Dutch coast, and was told by counsel that to hold otherwise would be to render the blockade nugatory, he firmly replied that if such were to be the consequence, it would nevertheless be an unavoidable consequence; and that he could not wrest the law in order to rectify the inconveniences of geography. In the *Luna* [4] also, the same great authority declared—"I cannot admit that, because the port of San Sebastian borders on ports which are blockaded, therefore it is less accessible than any other open port; the introduction of such a principle would have the effect of stretching out the limits of every blockade to an indefinite extent." No clearer

[1] *International Law in S. Africa*, ch. i.

[2] See the *Jonge Pieter* (*Musterdt*) (13 November, 1801), 4 C. R. 79. Cf. *Jecker* v. *Montgomery*, 18 Howard, 114, where the U.S. courts condemned U.S. shipments to Mexico, in spite of the interposition of a neutral port.

[3] 4 C. R. 65 (1801). Cf. the *Ocean* (3 C. R. 297 (1801), where goods which had come straight from a blockaded port (Amsterdam) by canal, were permitted to be freely exported from an unblockaded port (Rotterdam).

[4] Edw. 191 (1809).

terms could be employed to show that belligerents cannot be allowed to interfere with neutral ports, when they find it difficult to deal with belligerent ones. And the *Luna* was decided at the very fiercest crisis of the Napoleonic War, when Britain was straining every nerve and exercising every fibre. It is difficult to imagine Sir S. Evans imitating Stowell's firmness: the latter would certainly not have allowed the stoppage of cargoes for Swedish ports because it was geographically impossible to blockade the German ports in the Baltic.

Such was the inflexible English rule. It was the rule of all Europe, because no other would have been consistent with the accepted procedure in Prize cases. In Prize cases the belligerent is both prosecutor and judge: it would be intolerable if he were to be witness as well. The principle was therefore universally recognized that the captured ship should be condemned "out of her own mouth." "*Ex ore tuo judicaberis*," quotes Sir James Marriott, from Scripture.[1] This is no distorted fancy: it is distinctly laid down by Marriott, who had been King's Advocate, and was to be Judge, in the Prize Court. It had been as emphatically laid down, before him, in the celebrated Memorial [2] drawn up by Mansfield in 1748, which is one of the first classics of the Law of Nations, and which Europe had acknowledged as a "*réponse sans replique*" to the complaints of Frederic the Great. It is again insisted on by Stowell in the cases of the *Haabet* and the *Glierktigheit*.[3] The ship was to be tried on her own evidence—captors' evidence was rigidly excluded. That evidence consisted in the statements of her people made in answer to fixed interrogations,

[1] *Memoire Justificatif*. See Appendix 1. Marriott was a keen advocate of belligerent rights, and was the author of *War in Disguise*, a violent and anti-neutral pamphlet.

[2] Reprinted with Evart's *Brief in the Springbok Case* in *Prize Law and Continuous Voyage*, by the present writer (London, 1914). The Memorial was signed by Lee (Judge of the Prize Court), Paul (King's Advocate) and Ryder (Attorney-General) as well as by Murray (Solicitor General).

[3] 6 C. R. 58 (n.) (25 July, 1805).

and the contents of all papers found on board.[1] "Any other mode of trial," say the distinguished jurists who signed the Murray Memorial, "would be manifestly unjust, absurd and impracticable."

If goods, bound for a neutral port, were to be taken as contraband it could only be on account of an intention to take them on to the enemy. To prove this intention, evidence is necessary beyond that which comes from the ship, *i.e.*, inadmissible evidence. Or else the court must act on equally inadmissible surmise. If captor's evidence were admitted, counter-evidence would have to be admitted: the simplicity and inexpensiveness of prize proceedings would be destroyed, and the Court would find itself in "a most unpleasant difficulty in the exercise of its judicial functions." "Which side," asks Stowell, "would the Court have to believe? Can it be maintained that preference should be given to the captors? and *that* in opposition to the general rule of law which has given the preference the other way, and which directs that the property of the neutral claimant shall not be condemned except on evidence coming out of his own mouth, or arising out of the clear circumstances of the transaction?"[2] "It is my duty," he proceeded, "to take care that the rules of law are observed, and that the rights of war are not exceeded; and certainly in no cases more than in this particular branch of the Law of Nations, which must in its nature operate with severe restraint upon neutral commerce; and if, in discharging this duty, dissatisfactions are created, as has

[1] (20 June, 1805), 6 C. R. 54. If there is a discrepancy or incompleteness in the primary evidence, raising a doubt as to its genuineness, then of course the captor's evidence may be let in. "The general rule of law is that on all points the evidence of the claimants alone shall be received in the first instance . . . The rule is, I believe, conformable to the general practice of all the nations of Europe . . . If this rule is unsatisfactory to captors, it is nevertheless the rule which the law prescribes."

[2] The *Haabet* (Giertsen) *ut sup.*, p. 58. See also the *Dos Hermanos* (1817), 2 Wheaton, 81 (Story); and Lushington's remark in 1855 that "The admission [of captor's evidence] would occasion delay, expense and doubt.

been insinuated, I must endeavour to supply fortitude, to treat with proper disregard the unfavourable, but unjust, opinions, that any person may be disposed to entertain . . . The affidavits of the captors cannot be admitted." Again in the *Glierktigheit*,[1] affidavits had been admitted (possibly by the Registrar) to the effect that the ship had a pilot flag for Ostend flying—which the master denied was the case. "That," says Stowell, "is the dilemma to which the Court is reduced, and it will, I hope, put it on its guard against the admission of such affidavits in future cases." [2]

"It cannot too often be repeated," says Marriott, "that if, contrary to the rule, evidence is admitted from all quarters, cases, perjuries and frauds will never cease." If a new principle, supposed to be conformable to modern circumstances of trade, can only be expressed by the encouragement of litigation, perjury and fraud, it can hardly expect to be unquestioningly accepted at the hands of a belligerent.

The evidence of the ship's papers and people as to her destination, if not contradicted by her situation, being thus conclusive, it was impossible to enter into further allegations as to the ultimate destination of herself or her cargo. It will be recalled that Stowell emphatically declared that the ultimate hostile use of

[1] 6 C. R. 60.

[2] Of course there are many cases in which the alleged port of immediate destination of the ship was held to be a simulated one; but that was only when the papers were ambiguous or where they were contradicted by the statements of the master and crew, or otherwise inconsistent with the primary evidence. Such cases are the *America* (3 C. R. 36 (1800)); the *Carolina* (*ibid.*, 75); the *Margaretha Charlotte* (*ibid.*, 78*n.* (1801)); the *Nancy* (*Joy*) (*ibid.*, 82 (1800)); the *Phœnix* (*ibid.*, 186); the *Franklin* (4 C. R. 147 (1801)); the *Edward* (*ibid.*, 68); the *Convenientia* (*ibid.*, 201 (1802)); the *Exchange* (Edw. 39 (1808)); the *Mentor* (*ibid.*, 207 (1810)); the *James Cook* (*ibid.*, 261); the *Snipe* (*ibid.*, 381 (1812)); the *Patapsco* (1 Acton, 270); the *Two Brothers* (2 Acton, 38 (1810)); the *Santissima Curaçao* (*ibid.*, 91); the *Hurtige Hane* (2 C. R. 124 (1799)); the *Calypso* (*ibid.*, 154); the *Richmond* (5 C. R. 325 (1804)); the *Susa* (2 C. R. 251 (1799)); the *Johanna Tholen* (6 C. R. 72 (1805)); the *Mars* (6 C. R. 79 (1865)); the *Maria* (*Monses*) (*ibid.*, 201 (1805)); the *Charlotte Sophia* (1 Acton, 56; 6 C. R. 204 n.), and the *Gertrude* (5 Wall. 8 (1868)).

goods was impossible to establish, at any rate by evidence admissible in a Prize Court.

The American case of the *Commercen* [1] is entirely in accordance with the principle of immediate enemy destination.[2] She was going straight to an enemy British fleet, under a British licence, with provisions from Limerick for the use of the British forces in Spain. But Judge Story, who, for all his virtues, was somewhat addicted to making observations in a general form which really were only intended to apply to the circumstances of the case before him,[3] happened to make a remark which was afterwards seized on to revolutionize the law :

" If destined for the army or navy of the enemy, or for his ports of naval or military equipment [provisions] are deemed contraband."

" Destined for " has at least two meanings. It may mean " ultimately intended for," or it may mean " in immediate transit to." A ship is " destined for Riga " when she sails for Riga. And this second meaning was doubtless Story's idea. He was a student of Stowell's judgments, and he limits his judgment to cases of " direct and averred " intention,[4] *i.e.* such intention as is apparent on the proper evidence furnished by the ship's papers and people.

At the outset of the American Civil War the orthodox doctrine was laid down very elegantly by Marvin, J., in the Prize Court of Key West : [5]

[1] 1 Wheaton, 382 (1816) : *Britain and Sea Law*, pp. 47, 49.

[2] There is an interesting detail or two about what is apparently the same ship, in the case of the *Commercen*, captured by the British on 29 May, 1812 (*I.T. Prize Appeals* [1814–17], fo. 17). This was a brigantine of 185 tons, and really British, though " covered as Swedish." The identity may be a possible one : it was as a Swedish ship that the *Commercen* was chartered to carry flour to the British fleet, when her capture by the United States gave rise to the celebrated process.

[3] As when he asserts in *Maisonnaire* v. *Keating* (2 Gall. 324) that the orders of his own Government are everywhere a justification to captors : clearly he means a justification against suits in tort by aliens ; not a licence to make captures which are invalid by the law of nations.

[4] 1 Wheaton, 387.

[5] *Parliamentary Papers* (*N. Amer.*), 1863, No. 12, p. 10.

"*U.S.* v. *Will o' the Wisp and Cargo.*

"This vessel and cargo were owned at the time of their capture by persons residing in Halifax, U.S., or by persons residing in Matamoras in Mexico, and so were neutral property. The vessel sailed from Halifax for Matamoras with a miscellaneous cargo, and while lying off the mouth of the R. Grande, in the act of discharging her cargo into lighters coming from the Mexican side of the river, she was captured by the U.S. Gunboat *Montgomery* (Ch. Hunter commanding), on the ground of having powder and percussion caps on board. That fact does not appear to warrant the capture and condemnation of the vessel or cargo, or any part thereof, inasmuch as in a trade carried on between neutral nations or ports there can be no such thing as contraband of war, but the trade of the neutrals between themselves is unaffected by the war, nor does the U.S. assume to intercept or interfere with the trade of Mexico, or of any of her ports, with neutrals. The vessel and cargo must be restored to the master and claimant. . . .

"(*Signed*) WM. MARVIN,
Judge."

[Costs and damages were refused, because the powder was labelled "codfish."]

In the Supreme Court, however, Chief Justice Chase, unfortunately carrying with him four of the members of the Supreme Court, though four were against him, including an experienced judge versed in International Law in the person of Justice Nelson,[1] departed altogether from these elementary principles of the law of prize.

[1] Nelson, in a private letter quoted by Twiss (*Law Magazine and Review, ut infra*, 141) wrote: "The truth is that the feeling of the country was deep and strong against England, and the judges as individual citizens were no exceptions to that feeling. Besides, the Court was not then familiar with the law of blockade." Hall (3rd. ed., 695) remarks that the judgments are thus admitted to be founded on passion and ignorance: "a dictum," says Judge Atherley-Jones, "erased by his editor, but not unjustified by the facts."

He laid it down that ultimate hostile military destination was the criterion of contraband. He laid it down that captors' evidence was admissible to prove this. He laid it down that any goods, for any port, could be seized as contraband, if shown to have an ultimate hostile military destination in this way. He thus exploded the whole simplicity and fairness of prize proceedings, and he presented the neutral trader to a neutral port with an expensive lawsuit before a hostile judge instead of the entire immunity which was his due.[1]

But his doctrine was not taken seriously. These cases were four in number, and they were generally made the subject of reprobation by authors. Those who approved of them limited them to contraband of the most noxious description—things actually used for fighting in battle. Twiss demonstrated in a masterly article [2] the revolutionary dangers of the new principle, which would carry belligerent control of commerce into every sea: *Dat veniam corvis, vexat censura columbas.*

Professor Mountague Bernard [3] declared that "If England or France should hereafter be at war with Mexico, a vessel bound from New York to Mobile or Galveston might be carried into an English or French port on the ground that she had on board muskets or saddles, coats or boots, destined for the Mexican army; and she would be at the mercy of any inference which an English or French court might draw from the form of her papers or the character of her cargo." And in fact, Mr. Seward's own instructions, as reported by the Solicitor-General in Parliament,[4] declared that "If it shall appear that [the vessel] is actually bound and

[1] The *Peterhoff*, 5 Wallace, 47. Cf. the *Bermuda*, 3 *Ibid.*, 515; the *Stephen Hart*, *Ibid.*, 559; the *Springbok*, 5 *Ibid.*, 1. See the writer's *Litigation as a Protection against Cruisers, supra;* also Rémy, *La Théorie de la Continuité des Voyages.*

[2] *Law Magazine and Review*, 1877, p. 1, reprinted in *Prize Law and Continuous Voyage, supra.* See also *The Law of Ulterior Destination*, L. M. & R., September, 1870, p. 82.

[3] *British Neutrality*, p. 316.

[4] 170 Hansard, 596.

passing from one friendly or so-called neutral port to another, and not bound to or proceeding to or from a port in the possession of the insurgents, *she cannot lawfully be seized.*"

W. E. Hall to the end of his life maintained the position that "The American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country"; and called the American decisions "acts of unfortunate violence." [1] The British Government formally protested against them,[2] claiming damages for the injured merchants and shipowners. Unfortunately the claims were smothered in the *omnibus* arbitration set up by the Treaty of Washington to decide reciprocal claims between America and Great Britain arising out of the Civil War. They were most ably urged by Mr. Evarts [3] and others, but were rejected by the Commissioners without a hearing and without reasons assigned.[4] It was impossible to do more; and clearly nothing had so far been done to stamp the novel principle, repudiated by Hall and Twiss, as a "British doctrine." Mountague Bernard [5] condemns the modern theory of Continuous Voyage, and definitely treats *Hobbs* v. *Hemming* as an authority against it.

The British case of *Hobbs* v. *Hemming* [6] contradicts it entirely, and expressly adheres to the old rule: "The liability of these goods to lawful seizure . . . depended on their destination, and they were not liable unless it distinctly appeared that the voyage was to an enemy's port." Consequently, indemnification was given as against insurers of the cargo, it being decided that the

[1] *International Law* (6th ed.), 668.

[2] See *e.g.* Russell to Lyons, 18 July, 1863: the hopes that the U.S. interference would be relaxed had been disappointed; Lord Lyons was instructed to address fresh remonstrances to that government.

[3] See *Brief in the Springbok Case, supra.*

[4] It is freely asserted that the findings of the Commissioners were to a large extent based on a general compromise.

[5] *British Neutrality*, 317 n.

[6] (1864), 17 C. B. N. S. 791.

voyage was not within the exception of contraband from the policy.

The British Government took precisely the same correct attitude.

Earl Grey, on 23 April, 1863, declared that " British owners trading to a really neutral port, as long as their destination is that port, are at perfect liberty to carry contraband of war." Lord Wodehouse (afterwards the Foreign Minister Lord Kimberley), having observed that " He rather thought that there was an expression in the speech of the noble Earl (Russell), the Secretary for Foreign Affairs, which intimated that there might be a question as to whether a neutral vessel might not lawfully be captured, if the ultimate destination of goods conveyed to a neutral port after they had been landed was for a belligerent consumer," Earl Russell emphatically replied : " No, nothing of the kind." [1] And on 12 February, 1864, Mr. Cavendish Bentinck observed that " The Foreign Secretary had stated that a vessel going to Nassau, intending afterward to make another voyage, could not legally be captured on her way thither, and that statement was immediately confirmed by a great legal authority, Lord Cranworth " ; whereupon the Attorney-General (Palmer (Lord Selborne)) said he quite concurred in that opinion.[2]

The Earl of Derby (Hansard, 3 Ser., Vol. 170, c. 1833) inquired in the Lords if Lord Russell meant to assert that on account of suspicion as to the destination of her cargo an American cruiser would be justified in doing more than ascertaining the immediate destination of a vessel. " If," he continued " a vessel were proceeding *bonâ fide* from this country to Nassau, whatever might be the nature of her cargo, no American cruiser has a right to interfere with her ; and no matter what may be the ultimate intentions of her owners, even though it were meant that she should herself subsequently proceed

[1] 170 Hansard (3rd Ser.), c. 571.
[2] 173 *Ibid.*, c. 522.

from Nassau to the Confederate States and endeavour to break the blockade, that would afford no justification for her seizure by an American cruiser previously to her entering the harbour of Nassau. I hope the noble Earl has not conceded to the American Government anything like an acknowledgment that under these circumstances they are justified in interfering with a vessel sailing from one neutral port to another, whatever grounds of doubt there may be as to her future course. I am sure that it will be a satisfaction to your Lordships and to the country, if the noble Earl is able to clear away any misconception on this point."

Earl Russell said: "The noble Earl certainly misunderstood me when he supposed I meant to say that a vessel going to Nassau, intending afterwards to make another voyage, might be captured on her way thither. What I alluded to was a case of simulated destination; that of a vessel pretending that she is going to Nassau when she is in reality bound for another port."

Mr. Seward himself declared, as reported by the English Attorney-General in the Commons on 23 April, 1863,[1] that "When a visit is made, the vessel is not to be seized without a search carefully made so far as to render it reasonable to believe that she is engaged in carrying contraband of war to the insurgents and to their ports, or otherwise violating the blockade; and if it shall appear that she is actually bound and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, she cannot lawfully be seized."

These citations ought to dispose of the persistent misstatement that the British Government viewed the American proceedings with favour. Earl Russell wrote on 2 October, 1862, to Mr. Stewart, with reference to one of these cases: "There are circumstances of suspicion, but they are quite rebutted by the fact that the

[1] Hansard, Vol. 170, col. 596.

articles in question were actually in course of transmission to the neutral purchaser . . . it is clear, too, that the vessel was seized upon a most erroneous notion of the international law applicable to the case, namely, that he had a right to look beyond the actual and immediate destination of the articles to a neutral port, and to consider what would probably become of them after they had reached their lawful destination, in some further and future transaction." [1]

In failing to threaten the Federal Government with extreme measures on account of these few cases, it does not appear that the British Government were actuated by any far-sighted and Machiavellian design to turn the new Chase doctrine to their own profit.[2] Lord Russell,[3] then Foreign Minister, admits that the Government "were far from pressing hard on the United States, . . . and put no impediment in the way of the capture of British merchant ships"; but only because they "placed full reliance on the courts of America for redress."

It has often been pointed out that the analogy with continuous colonial voyages fails completely. In the continuous colonial voyage cases the shipment was only attacked in the second stage of the journey, when it was a matter of objective fact on the face of the ship's papers where it started and where it was going to end. Invariably the ship was the same throughout: [4] the

[1] *Parliamentary Papers* (N. Amer., 1863, No. 12), p. 13.

[2] Gessner suggests this in his *Juridical Review of the Springbok Case* (p. 19)—a very valuable juridical analysis.

[3] *Recollections and Suggestions*, 276.

[4] See the *Monte Christi Cases*, cited in the *Providentia* (1799), 2 C. R. 142); the *Mercury* (5 C. R. 400 (1802)); the *Eagle* (*ibid.*, 401 (1803)); the *Freeport* (*ibid.*, 402 (1803)); the *Richmond* (*ibid.*, 325 (1804)); the *Essex* (*ibid.*, 369, 402 (1805)); the *Enoch* (*ibid.*, 370 (1805)); the *Rowena* (*ibid.*,); the *Maria* (*ibid.*, 365 (1805)); the *Eliza and Katy* (6 C. R. 185 (1805)); the *Maria* (*Monses*) (*ibid.*, 201 (1805)); the *Charlotte Sophia* (*ibid.*, 204 (n.) (1806)); the *Ebenezer* (*ibid.*, 250 (1806)); the *Schoone Sophie* (*ibid.*, 251 (n.) (1805)). In the *Thomyris*, 1 Edw. 17 (1808)), the ship was not the same, but the cargo was attacked in the ultimate stage of its voyage, and the case turned on the words of a British Order in Council of a special and strict kind. This may not have been so in some obscure early cases: see the *Yong Vrow Adriana*, Burrell, 178 (1764); Briggs, *Doctrine of Continuous Voyage*, 14 *seq.*; Woolsey, *Early Cases*

only question was whether the continuity of the voyage had been decisively interrupted by the landing of the colonial produce, with payment of duties, at a neutral port. Stowell thought it had: with his invariable keen attachment to clear objective tests, he thought in the *Polly* (*Lasky*) that it would be difficult to say, when goods were landed and duties paid, that the voyage remained unbroken. "If these criteria are not resorted to, I should be at a loss to know what should be the test." I have shown in the *Law Quarterly Review* [1] that the Government acted upon this opinion, and used it to satisfy the American Government, which was subsequently complaining of the opposite doctrine's being followed by the Vice-Admiralty Courts in the colonies. In the *Mercury* (January, 1802) [2] it came out that the goods had never been landed at all, so that there was no question as to the continuity of the transit. But in the *William*,[3] the Lords of Appeal in Prize Cases, under the impulsion of Sir W. Grant, M.R., held that the importation into the intermediate neutral country had not been sufficiently proved by the mere proof of the facts which had satisfied Lord Stowell. There was some reason for this, for it was proved that the Salem custom-house was in the obliging habit of giving a debenture for the amount [4] to persons who paid duties in such a situation. That is, there had been only an apparent, and no real, payment of duties. In such circumstances, the Court, acting on the evidence coming from the ship (for the

on the Doctrine of Continuous Voyage (A.J.I.L. (1910) 823). The American case of *King of Spain* v. *Oliver* shows how neutrals practically carried on the Spanish colonial close trade. Oliver, the ostensible trader, was really a blind for Ouvrard, the Bordeaux merchant. So that the supposed difficulties of to-day, which are put forward as an excuse for curtailing neutral liberty, represent nothing new.

[1] *The Portland Ministry and Continuous Voyage*, L. Q. R. (1922), 355.

[2] Cited in the *William*, 5 C. R. 400.

[3] (11 March, 1806), 5 C. R. 385. Cf. *Kohne* v. *Insce. Co. of N. America*, 1 Wash. C. C. 123.

[4] In fact, a small amount of duty was left uncovered by the debenture. Sir W. Grant seems to attach no importance to this. It may here be observed that captors pay duty, as on an importation: *Howell* v. *Hall* (38 Eliz., *Scace.*), cited Hale, p. 224.

form of the Customs receipt revealed the debenture), found that the importation was not sufficiently proved.[1]

Chase's doctrine, it will at once be seen, is entirely different from this. The English courts joined an existing voyage to a prior voyage: they joined two facts. The American courts joined a real voyage to a supposed one: they joined a reality to a hypothesis.

[1] In the *Eliza and Katy* (1805), 6 C. R. 185, the ship and cargo, attacked in the second stage of the voyage of the goods, when proceeding from Philadelphia to Rotterdam, were released, though it is possible that, if it had been proved that the goods had originally been shipped in a French colony, they might have been condemned, see per Lord Stowell, at p. 193—though seized in a different ship. In the *John* (1809), 1 Acton, 39, a vessel which was carrying on to a belligerent colony (Havana) goods which had come in other ships to New Providence from enemy-controlled ports (Amsterdam and Trieste) was released. In the *Jonge Charlotte*, salt which had come to Lisbon in the same neutral ship from a French colony (S. Martins) was condemned under the Order in Council of 7 January, 1807, on its way from Lisbon to Holland, though it had been actually sold in Lisbon to a Portuguese ally; the ship being also condemned as on a prohibited colonial voyage from a French colony to a French ally (1 Acton, 171 (1809)). It may be observed that an asserted neutral ulterior destination was generally disregarded and an immediate belligerent destination was sufficient to condemn. This is of course intelligible, as otherwise every contraband cargo would be legitimatized by an asserted destination beyond the belligerent port. Yet in the *Patapsco* (1 Acton, 270 (1810)), the assertion was allowed by Sir W. Grant to prevail, though it was otherwise in the *Two Brothers* (2 Acton, 38 (1816)), the *Richmond* (*supra*), and the *Flora*, 6 C. R. 9 (1805); and see per Stowell in the *Trende Sostre* (1807), 6 C. R. 390 (n.)—"If the port had continued Dutch, a person could not, I think, have been at liberty to carry thither articles of a contraband nature, under an intention of . . . proceeding with the contraband articles to a port of ulterior destination." In the *Spazamheid*, also, an ulterior neutral destination was disregarded (1800: 3 C. R. 42, 46); and so in the *Vriendschap* (18 November, 1801: 4 C. R. 96), where barilla was going from London in company with licensed goods for Havre, but with an alleged ulterior destination to Oporto, Lord Stowell observed that barilla was much needed in France, "but considering the great flux and reflux of different articles in commerce, the Court would be unwilling to decide on the mere ground of probability alone." However, it certainly was going, physically, to Havre; it certainly was a staple Spanish product, and it might have been expected to find its way to Oporto without going round by London and Havre: condemnation accordingly passed. Inversely, a previous neutral *provenance*, being an established fact, was allowed to save the cargo in the *Immanuel* (1800), 2 C. R. 186, 197. As Dr. Briggs points out, some of the goods in that case came originally in the *Immanuel* from neutral Hamburg to Bordeaux, and were perfectly entitled to go on from that French port to a French colony (San Domingo). In the *John* (1809), 1 Acton, 39, the goods had gone in neutral ships to the enemy country with a *bonâ fide* intention of sale; but, being perishable, they were then shipped to an enemy colony: in these circumstances they were released.

The facts in the English cases were proved by the ship's own evidence.[1] The facts in the American cases had to be proved *dehors*, and made the subject of a trial resembling a common-law action. Yet Phillimore said that "The principles of prize procedure have nothing in common with those of the common law;" while Story [2] declares that "It is a great mistake to admit the common-law notions in respect to evidence to prevail in proceedings which have no analogy to those of common law." [3] Had the English courts assumed to capture chocolate going from La Guayra to Salem on the allegation that it was meant to go on to Cadiz there would have been some sort of analogy with the American cases. As it is, there is none. Only Chase's ignorance of International Law could have led him to pronounce that "The conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles can always be seized during transit by sea." A certain body of Continental opinion, always somewhat prone to take a theoretical view, and to disregard the importance of evidence and expense, had been moving in the same direction as the American Civil War decisions, and tending to represent the ulterior intention that the goods should be put to military use as decisive. This view had found acceptance in the *Frau Houwina*.[4] She was a Hanoverian ship, carrying saltpetre from Lisbon to Hamburg, and the French *Conseil des Prises* pronounced

[1] And so they were in the *Jesus*, *Maria* and *Joseph*, which Mr. L. Woolsey treats (A.J.I.L. (1910) *ut supra*) as establishing that the British court applied the doctrine of "prospective" destination to contraband long before the U.S. Supreme Court did so. But in the *Jesus*, *Maria* and *Joseph*, the ultimate hostile destination was clearly established by the evidence of the master and crew. If the master and crew say that contraband goods had come from a French colony and were going on to France, there is no reason why the captor should not act on their admissions. So in the *Twende Brodre* (1801), 4 C. R. 33.

[2] See the Note to 1 Wheaton's Reports.

[3] Twiss also observes that "It will be by no means a light task for judges trained up in the exclusive study of the principles of English municipal law to accommodate themselves to a new standpoint of law . . . as judges in maritime cases" (*Black Book of the Admiralty*, III, 132).

[4] Calvo, *Droit International*, § 2767.

it confiscable in the Crimean War, as intended for Russia. The grounds on which such a destination was inferred were weak in the extreme—imports of saltpetre to Hamburg had increased since the Crimean War broke out; a brisk trade in saltpetre was in fact being done overland between Hamburg and Riga; this cargo had originally been taken to Lisbon under a guarantee that it was for home consumption and not for re-export—*ergo*, this particular cargo was going to Russia.[1]

The Continental complaisance was not, however, a dangerous threat to commerce; because the Continental writers were almost unanimous in severely restricting the category of contraband to obviously warlike articles. On the whole, mercantile circles were not seriously disturbed by these few cases. The general and growing disposition to regard belligerent rights as a decaying incumbrance on the trade of the world bulked far more largely in the public eye. "The modern jurist," says Atherley-Jones[2] in 1907, "finding a rule of practice laid down by a continuous *catena* of authority from Stowell to Hall upheld by the Court of Common Pleas in a formal decision, approving itself to common sense in the cogent and exhaustive arguments of Twiss and Evarts, treated as supplying a conclusive test in the British Admiralty Manual of Naval Prize Law during thirty-four years, and invoked with success in 1900 by the German Government, must continue to believe it to be in full force, notwithstanding . . . those on the Continent who have advanced the contrary opinion. It is impossible to regard without the gravest apprehension the concession of a licence to belligerents to condemn goods all over the world on suspicions, satisfactory to themselves, that their enemies are ultimately

[1] Compare the very different attitude of Lord Stowell in the *Vriendschap* (4 C. R. 96), although batilla was much needed in France: "Considering the great flux and reflux of different articles in commerce, the court would be unwilling to decide on the mere ground of improbability alone."

[2] *Commerce in War*, 257.

to have the benefit of them." "A Continental jurist," he adds, "who regards contraband as strictly limited to weapons of warfare may feel fewer scruples about admitting such an extension."

At the very close of the nineteenth century there occurred a small but disturbing incident. Italy captured a Dutch steamer *en route* for a French African port, Djiboutil, and confiscated its cargo of arms on the ground that they were going to hostile Abyssinia.[1] Such a cargo was of the most noxious kind; and, again, there was no opportunity of testing the right of Italy, as the ship was shortly restored, on the conclusion of peace. And two years afterwards, when the doctrine was adopted wholesale by Great Britain, and German ships for Delagoa Bay, in Portuguese territory, were overhauled on suspicion of carrying goods intended for the Transvaal forces, Germany made a spirited protest, and succeeded in obtaining compensation for the long detention of the three suspected vessels,[2] on board of which no contraband was actually discovered. She also secured a discontinuance of such seizures.[3] Now, however, Great Britain had at last committed herself to the approval of the American cases, and had deprived herself, as a neutral, of security everywhere for her trade, and, as a belligerent, of a prime safeguard of her indispensable food supplies.

Nothing more remained but to induce a not unwilling France also to apply the new doctrine of "intention" indiscriminately. And this was done in the War of 1914, when the principles of Prize procedure, stated by the highest English authorities in 1743 to be the only possible just and rational ones, were thrown aside, and a new system of trial on evidence[4] forced upon neutrals,

[1] *Revue de Droit Maritime*, XII, 602; *Times*, 4 January, 1900; Disna, *Jugement du Conseil des Prises d'Italie dans l'affaire du Doekwyck*, R.G.D.I.P. (1897), 297.

[2] The *General*, the *Hertzog* and the *Bundesrath*.

[3] See the writer's *International Law in South Africa*, p. 42.

[4] The *Haabet*, *supra*.

entirely without warrant (except such as may be found in the practice of the French Jacobin Directorate). Neutrals were now forced to come to England and prove their innocence; and high English officials could be found who expected neutrals to be content with the self-satisfied assurance of English committees that "They generally know pretty well where cargoes were going in the end." What a change from Stowell's attitude, when he declared that he could not decide on a conflict of evidence between captors and neutrals in favour of captors, when the presumption of law was precisely the other way!

It has often been remarked that this total disappearance of the established rule that the tests of contraband trade must be clear and objective and such as can be satisfied by the ship's own evidence arose directly from the exemption of private property from capture on board neutral vessels proclaimed in 1856 by the Declaration of Paris. The Declaration was philanthropic and humane; but it came before its time, and it excepted contraband. The consequence was, that belligerents began to take as contraband what they formerly would have taken as enemy's property. By throwing over the objective tests, and defining contraband as anything that was ultimately intended to reach the enemy, they arrived at a conclusion which put them in a far more commanding position than before. For previously they could take the enemy's goods; now they could take the neutral's. Not only that, but they could condemn his ship for carrying contraband, instead of paying him freight for carrying useful commodities which they themselves appreciated. Not only that, but they could cut off the neutral's trade from his own ports. The last state of the neutral is infinitely worse than the first.

As Twiss observes, "It is not too much to say that if the novel interpretation given to the term 'contraband of war' by the Supreme Court of the United States should be adopted by the Prize Courts of half the Powers

who have acceded to the Declaration of Paris, the Declaration will be little else than diplomatic waste-paper, or it will aggravate the difficulties and conflicts between belligerents and neutrals which it was intended to mitigate. . . . It will be idle for the future historian of the Law of Nations to cite, in favour of the greater mildness of modern maritime warfare towards ocean commerce, the concessions which have been made under the Declaration of Paris in favour of *enemy's* property laden on board of a neutral ship bound to a neutral port, if *neutral* property laden on board the same ship is to be liable to confiscation under the general law, upon the *suspicion* of its ulterior destination to enemy uses." [1] " There can be no doubt," he adds, " that the doctrine of ' prospective continuity ' applied to the transport of merchandise on the high seas opens wide the flood-gates of visitation and search, which it was one object of the Declaration of Paris to close partially, and that, instead of tending to localize the future operations of maritime warfare, it is calculated to extend them to every sea."

All this scientific reasoning of Evarts, Gessner, Twiss, and Hall was thrown away on the Allies of 1914. Even the Declaration of London was jettisoned after two or three months of war. In fact, it was a watery document. Its free list was almost contemptible. Its list of absolute contraband was generous. Its permission to seize absolute contraband anywhere was dangerous. Its exemption of conditional contraband from capture except in course of direct transit to an enemy port or fleet was illusory. Although the ship's papers were apparently made conclusive, Mr. Renault's commentary was accepted as justifying their contradiction by the belligerent.

Of course, matters cannot stop there. Dr. Van Houten [2]

[1] *Law Magazine and Review* (1877), 9, 271.

[2] See *Organisation pour une Paix Durable*, 3 *Recueil des Rapports*, p. 59 (La Haye).

has well remarked that no great naval power will in future allow a minor power to interfere as a belligerent with neutral trade in the fashion which was followed from 1914 to 1918, and to force upon the vessels of great neutral Powers an expensive trial to prove their innocence of all ulterior transits or intended hostile use. But that is flat anarchy: if the Law of Nations is not applicable to all nations alike, it is not law at all.[1] Consequently, some general subsidence of belligerent claims, such as followed the wars of the Napoleonic age, is to be expected. And it is confidently urged that the new subjective principle of "intention," repudiated by Lord Stowell, must be given up, and definite objective tests reinstated. These may be stated as follows:—

1. Contraband can only consist of articles which in their own nature suggest war.
2. Contraband can only be captured in direct transit to the port, army, or fleet of the enemy.
3. The evidence in the cause must be taken from the ship's papers and people; only if these are discrepant or incomplete in material particulars can further evidence be admitted.

It is often urged that the objective rules of Stowell's day are inapplicable to the conditions of modern commerce. If that were so, it would be a reason for establishing equally objective tests more suitable to the present occasion, but surely not for depriving neutral trade of all efficient protection. But, in fact, writers who tell us with glib assurance that everything is altered, and the old rules are consequently no longer applicable, entirely fail to tell us precisely how and why. No fraction of

[1] Cf. Dr. H. W. Briggs, in his exhaustive and masterly study of the subject (*The Doctrine of Continuous Voyage*, at p. 218): "The real problem raised by the doctrine of continuous voyage is whether it can continue to exist without gravely imperilling international maritime law." Unless a general sentiment should arise against trading at all with belligerents, "It will play havoc with neutral rights when the belligerents are the big Powers, and it will remain quiescent when the belligerents are the smaller nations."

investigation, so far as I can see, has been even attempted, with a view of ascertaining to what extent changed conditions have rendered the old tests obsolete, or of establishing a fair equivalent for them. Authors simply utter the magic words " railways and telegraphs," and assume that neutrals must be content to see all the walls of their security fall at the sound of that trumpet.

Whatever was in the minds of Chief Justice Chase and his friends at the time of the Civil War cases, it certainly was not railways and telegraphs. No hint of the need to supervise the trade of the Rio Grande because Metamoras was in such swift and easy communication with the Southern States by rail is given in the judgments. It was simply because the Rio Grande could not be blockaded, that the results of a blockade were sought in this other way. As we have already seen, it is illegitimate to use the law of contraband to impose a virtual blockade of neutral ports when the belligerent for one reason or another cannot get at the ports of its enemy.

But let us examine the railway and communications argument.

It is said that the great change in modern commerce as compared with that of the Napoleonic period is the use of rapid communications. They enable goods to pass with much greater rapidity and ease from one place to another, and they enable an easy change to be made in their destination. Consequently, rules which depend on locality are rendered obsolete. The goods which are in a mercantile port to-day can be in a military port to-morrow. The goods which are in a neutral country to-day can be in a belligerent country to-morrow. The evidence of the ship's papers is negligible ; for it is no longer a *sine quâ non* to the master, who can deliver them according to cable. Consequently, the tests of belligerent or of military ports of destination are no longer fair to the belligerent.

Two observations are to be made upon this. And it

is to be remembered that it is really the sole argument in the mouths of those who deny the applicability of the established rules. They fall back simply and solely on telegraphs and railways. In dealing with the situation created by telegraphs and railways, we have to notice, first, that Lord Stowell rated the maintenance of established principles above belligerent convenience. As we have seen, in the *Luna*, he refused to allow a blockade to affect an adjoining neutral port, even though the effect should be to render the blockade nugatory. In the *Ocean*, he refused to consider that exit by canal from the blockaded port was a breach of the blockade. Canals are to-day serious rivals of railways: if they are not so fast, they are not so congested, nor by any means so expensive. Can we suppose that Stowell would have departed from his tests of contraband merely on account of railways? The security and respect due to neutral ports and neutral trade may well be thought to outweigh the lessening in effectiveness which the existence of more easy communications may bring to belligerent methods.

But, secondly, it is a great mistake to confine one's attention to communications alone, when surveying the accomplishments of engineering in the past century. If railways have operated against the belligerent in facilitating land transport, naval architecture has accomplished miracles in his favour in another direction. The sailing frigate and the merchantman met on equal terms; neither could outsail the other. But the modern cruiser, with her speed of thirty knots, can catch anything; and the ordinary run of merchantmen are content with about ten.[1] A single vessel can maintain a blockade, and, from quite a long distance, can effectively interdict entrance to a port and keep the seas, whereas in the old days such a blockade would have required a fleet, and would have been subject to frequent interruption by weather. If contraband can now be

[1] See the writer's *Prize Law and Continuous Voyage, proem.*

readily carried forward to the enemy when it reaches the neutral, it is much less likely to get through when shipped to the belligerent.[1] After all, railways are but human inventions: they are not magic carpets: goods must wait for railway transit, and must pay heavily for railway transit. Similarly, telegraphic instructions can never supersede the ship's papers so far as her destination is concerned. Her log is not a thing which can be telegraphically tampered with. One does not find that these considerations are adverted to, let alone worked out in detail, by writers who consider that because contraband is somewhat facilitated in one way neutrals must submit to their whole trade being placed under the supervision of belligerents. In the long run, objective tests will be insisted on. The absolute freedom of trade with neutral ports: the absolute interdiction of anything like requiring a ship, whose papers and declarations are in order, to prove her innocence or that of her cargo: the absolute exclusion from the list of contraband of everything which has not a marked military connotation —these are principles which are perennial and eternal, whatever may be thought of the test residing in the distinction between naval and mercantile ports in respect of less military articles.

The aberrations of a world-war cannot destroy these principles; and unless the League of Nations is a super-state, it is improbable that there will be no belligerents and neutrals in the future. Some test of protection for neutral commerce there must be, and it has been suggested that a system of certification by the neutral authorities that there is no contraband on board might be commendable. Such a system was introduced by the Treaties between England and Sweden of 1661,

[1] Lord Kingsdown, an admitted authority, said in Parliament (Hansard, 26 May, 1861)—"With respect to blockade, that again has been very much altered by the introduction of steam"—but Lord Kingsdown took it to have been altered in favour of belligerents—"as two or three steam-vessels might now be as effective as twenty sailing vessels had formerly been."

1664 and 1665 (which it is conceived, are still binding between the parties in a European war): and it might well furnish a model for practice at the present day.[1]

If neutrals cannot secure this, or the observance of the established rules, they will find that practically trade with the enemy will be interdicted in the future. Already, the combined use of extensive lists of contraband, presumption of hostile destination, and the admission of captor's evidence has been popularly regarded as a "blockade,"[2] and ministers have even claimed for the combination the application of the rules of blockade.

Mr. Borchard has well drawn attention to the fact that--"Unhappily, this elaborate structure of the law of neutrality which protected non-combatants against starvation and protected neutrals in their right to trade in non-military goods even with belligerents, was seriously impaired by the belligerents during the late war. Goods destined to neutral ports were freely captured on the allegation that they would or might ultimately reach enemy territory; neutral ships were compelled to stop in British or Allied ports; neutral countries were rationed; 'measures of blockade' without legal support were enforced; a newly created doctrine of 'retaliation' on neutrals was invented; the so-called

[1] These Treaties, together with that of 1720, appear to have been regarded as "scraps of paper" in the war of 1914. That of 1661 is given in Hertslet, *Treaties, II*, 324, and that of 1720 in Dumont VIII, ii, 20. Those of 1664 and 1665 do not seem to have been published in the usual compilations. Wheaton (*Elements*, § 482) derives his information from Schlegel (*Visit of Neutral Vessels under Convoy*, London, 1801). Schlegel gives the Latin text in notes, and dates the treaties, 21 October (? 1 October), 1664, London, and 1 March, 1665, Stockholm. Ward (*Treaties*, 205) argues that the enumeration of contraband in the Treaty of 1661 is not intended to be exhaustive, and that "*specialiter*" means, not "in detail," but "for example." But the Treaties of 1664 and 1665, which were apparently unknown to him and to Lord Stowell, show that exhaustiveness was aimed at. They give liberty to carry "All the merchandizes which are not specially excepted by the 2nd Art. of the Treaty concluded at London in 1661, and by virtue of this same Article expressly declared prohibited contraband . . ." All these treaties were affirmed in 1812 (Hertslet, *op. cit.*, p. 335: original Latin in Dumont, VI, ii, 384).

[2] See, *e.g.*, British Note to the U.S., accompanying Order in Council, 11 March, 1915.

doctrine of continuous voyage was extended beyond recognition; nearly every useful commodity was made contraband; the important category of goods 'conditionally contraband' was in 1916 wiped out, resulting finally in the practical abrogation of the elementary and time-honoured distinction between combatants and non-combatants." [1] He might have added that the time-honoured rules of procedure had been revolutionized so that instead of a ship's having to "prove herself guilty," it was much more true to say that she had to prove herself innocent.[2]

When the Lords of the Privy Council, in the *Baron Stjernblad*,[3] airily throw aside the rule excluding captor's evidence, because "It was framed before the doctrine of continuous voyage was applied to contraband or blockade," they lay themselves open to the obvious retort that the proper conclusion from that fact is, not that captor's evidence must be admitted, but that the doctrine of continuous voyage is unsound. In that case, and in the *Falk*,[4] they unblushingly discarded the established rules, and dispensed Great Britain from their observance, on the allegation that modern conditions of commerce had made them inapplicable. The British Government argued that they were obsolete, and represented them as rules of British municipal law, which they were not: [5]—the Lee-Murray Memorandum speaks of them as the practice of all the nations of Europe. It is easy to see what would be the value of rules, if, on the simple allegation of their inapplicability, a Power could dispense itself of its own hand from their observance. If a well-established principle does not suit its notions

[1] A.J.I.L., July, 1928, p. 616.

[2] In fact, it was so declared by a British Court! In the *Louisiana* (5 *Lloyd's*, 252), cited by Briggs (*Doctrine of Continuous Voyage*, 160), Lord Parker declared of the neutral trader: "He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure, or to displace such reasonable suspicion as in fact exists."

[3] (1918), A. C. 173, cited Briggs, *ubi sup.*, p. 155, 89, 102.

[4] (1921), 1 A. C. 787.

[5] See Spring-Rice to Lancing, cited *apud* Briggs, *ubi sup.*, p. 156 (n.).

of modern convenience, the proper course for a Power is to get it altered: it cannot airily alter it to suit its convenience. But there had been a clear opportunity of getting these supposed obsolete rules altered no longer than four years before, when the Naval Conference of London devoted months to their study in the light of modern conditions. If it is of such moment to control trade with the enemy that all neutral security must be swept away, why was the matter not brought forward then? The rules of the Declaration may have been wrong—but at any rate they were arguable. It was not an obviously absurd Declaration, and it was strongly supported by half England. Why, again, was contraband proposed to be abolished in 1907? It may have been a mistaken policy, but, at any rate, it was a policy: it was not ridiculous. Why did Great Britain protest against and secure the prompt discontinuance of the Russian actions in 1904–5? How was it that Japan, scrupulously adhering to the old rules, found them good enough? It is impossible to argue that conditions were so hopelessly different from those of a century ago, that the Allies were justified in doing in 1915 what nobody had thought it possible to sustain in 1905 or in 1910. Even if their contention might ultimately be found sustainable, it could not justify them in forcing on neutrals a *régime* whose only justification was that the whole world was mad five years previously. It was a *régime*, moreover, which did not pretend to imitate the objective simplicity of the accepted law and to mould it to the requirements of the present day: it abolished its underlying principles. It threw over the principle that captors must not be witnesses as well as judge: it threw over the security of a neutral voyage to a neutral port. And this on the merest allegations of changes in the circumstances. Railways are countered by fast cruisers: telegraphic instructions to shipmasters are countered by telegraphic orders to Government agents and spies. How can it be pronounced *ex*

parte, that a belligerent can now blockade neutral ports at his own hand ?

Mr. Chandler Anderson, than whom no more competent authority exists, has written :—[1]

"The Order in Council [of 29 October, 1914] attempted to impose upon neutral shippers the burden of disproving a fact the existence of which had not been established and the burden of proving which rested with the Crown [as captor], and this shifting of the burden of proof clearly affected a substantial right of the claimants. The condemnation of these shipments [in the *Kim* case] because of this shifting of the burden of proof shows how seriously their substantial rights were affected . . . Neither the British Government nor a British Prize Court is at liberty to impose upon neutral commerce, which is not voluntarily within their jurisdiction, a regulation restricting a substantial right to which neutrals are entitled under International Law."

It might be suggested that it would be a more useful employment for the *élite* of the juristic world to investigate the new conditions of maritime conflict, and to ascertain how, if at all, the rules affecting neutrals ought to be altered in order to preserve their substantive rights, than to attempt the thankless task of codifying the infinite Law of Nations.

There is a Nemesis in history : and as a Sea Power, Great Britain may have cause to regret, whether as a belligerent faced by a great Coalition, or as a neutral, that she laid down that a neutral has no rights but such as approve themselves to a belligerent as fit for the moment to be conceded.[2]

Mr. E. S. Roscoe [3] has observed that the present

[1] 11 A.J.I.L., 258.

[2] On the whole subject of the Allied Courts in the War of 1914, no better or fairer commentary could be desired than Dr. Brigg's chapters in his work on *The Doctrine of Continuous Voyage*. Partly on account of the fact that the work could not be better done than in his book, and partly on account of the scale of the present treatise, it is unnecessary to go into greater detail here.

[3] *Brit. Year Book of Int. Law* (1921–2), 92.

writer " is obliged to admit " that captor's evidence is necessary if the doctrine of continuous voyage is to be effective. I do not " admit " it, I proclaim it. And I say that if that doctrine can only be made effective through a means of trial which is " impracticable, absurd and unjust," the conclusion is not that we must allow belligerents to adopt an impracticable, absurd and unjust mode of trial, but that we must reject the doctrine of continuous voyage. It is clearly irreconcilable with any measure of neutral liberty.

An old rule may become inapplicable to new conditions. But if an asserted new rule can only be applied by resorting to a mode of trial which the very highest belligerent authorities have consistently stigmatized as " absurd, impracticable and unjust," and leading to inevitable fraud and oppression, the proper conclusion is that it is an untenable rule :—not that Prize trials must become the instruments of fraud and oppression and the engines of an absurd, unjust and impracticable law.

APPENDIX I

Extracts from the *Mémoire justificatif de la conduite de la Grande Bretagne en arrêtant les navires étrangers et les munitions de guerre destinées aux insurgens d'Amérique* — (*Londres*, 1779). *By the Advocate-General.* " *Ex ore tuo te judicabo.*"

" Dans le cas de l'Hendric et Alida, Milord Mulgrave, ayant trouvé à bord des pavillons anglais, demanda au maître d'où venaient ces pavillons, et pourquoi il les avait. Klok répondit que ces pavillons étaient dans le dit vaisseau lorsque les propriétaires en firent l'acquisition. Nous n'avons cependant pas permis l'examen personnel de Milord Mulgrave. Le témoignage des capteurs n'est admis dans ces procédures que dans les cas singuliers, tels que seraient le défaut de témoignage de la part de l'équipage du vaisseau saisi, leur

suite, ou le réfus obstiné de subir un examen légal. Les art. 24, 5 de l'Ordonnance de la Marine Française, 1681, portent la même exception . . .

" Si les saisis confessent que le navire appartient aux ennemis, l'affaire est décidée. Mais s'ils laissent entrevoir des prévarications ou qu'ils se contredisent—si le témoignage des papiers est en opposition aux témoignages venus de vive voix ; si les documents ont été spoliés, submergés, brulés, declinés ou détruites de quelque manière que ce soit ; —si ces documents ne sont pas parfaitement clairs, ou portent l'empreinte de l'équivoque que l'on ne doit pas attendre d'un voyage de bonne foi : voilà des soupçons graves : et ces défauts prenant leur source originale dans le réclamateur même, négligeant ou prévaricateur, tout plus que suffisants en justice pour qu'il soit condamné aus frais de procédure qu'il a occasionné, quand même on lui rendroit le vaisseau et sa cargaison.

" Les procédures s'accordent sans doute avec celles de la cour d'amirauté de Leurs Hautes Puissances . . . "

" Les capteurs qui ne seraient pas justifiés par le témoignage même des saisis seraient condamnés aux frais et aux dédommagements, et même à des punitions graves."

Marriott adds, " The judges would not even permit the owners of the privateer *Hero* to adduce sworn declarations and documents proving beyond doubt that the *Pandora* really belonged to [British subjects trading to Virginia in revolt] who had insured her at twenty per cent. and the tobacco on board at eleven per cent., when the rate for the undoubted Dutchman was only four per cent. The evidence of tobacco experts, showing that the tobacco was American-grown, was likewise rejected."

After a spirited protest against reflections on the British procedure, he proceeds :

" It cannot be too often repeated that if, contrary to the rule, evidence is admitted from all quarters, cases, perjuries and frauds will never cease. *Ex ore tuo te judicabo.*"

The Memorandum is signed by Sir J. Marriott, who was certainly not inclined to abate belligerent pretensions.

§ 8. Visit and Search

It seems necessary here to interpose a protest against the habit, general in the last war, of bringing ships into

harbour on suspicion, and detaining them for long periods while the captors are trying to make out a case against them. This is a practice which is closely connected with the illegal abandonment of the principle which required ships and cargoes to be condemned "out of the ship's own mouth,"—an energetic expression used both by Marriott and Stowell.[1] If captor's evidence is to be introduced, the simplicity of prize proceedings is departed from, and every mariner and merchant is faced with a costly lawsuit before a hostile tribunal. It is a great concession to belligerents, that they may appoint their own judge—they surely need not complain, when they are asked to abide by the rule which requires them to condemn only on the clear evidence furnished by the ship.[2] It is said that the complexity of modern commerce makes the rule inapplicable—but it really only makes discrepancies more probable in cases of attempted fraud. "By the common law of nations, false documents, or no documents, make prize." [3]

Given this, the only accepted and legal method of trial, it is apparent that prize cases proceed swiftly, cheaply and smoothly. There is generally and normally no occasion to bring ships in for examination. The ship's papers, if regular and complete, are sufficient to decide the case, and they can be examined in an hour or two at sea. It is often urged that the old ships of a

[1] *Vide supra.*

[2] In the *Osiris* (Fo. Prize App., I.T., 1807–9, p. 449), where a captor's affidavit had been admitted, the property was released on appeal from the Vice-Admiralty Court. And in the *Dispatch* (*Ibid.*, p. 278), the expenses of captor's affidavits were disallowed.

[3] The *Prince of East Friesland* v. *Capt. Binning* (1673), 2 Stair, 177, 179. An unimportant variance in the documents does not necessarily condemn or even call for explanation by "further proof": the *Concordia* (1 C. R. 119), 20 December, 1798: the *St. Andrew* (1673) 2 Stair, 187, 216; the *Rostock*, *ibid.*, 179. In the *Margaretha Charlotte* (3 C. R. 78 n.) the master's clear contradiction of the papers was held fatal. In the *Merchant*, *Folio Prize Appeals*, *Inner Temple*, (1807–9), p. 143, the attestation of the mate, "which was made in open court," was allowed to account for erasures in the log. And simulated papers prepared to deceive the enemy may be forgiven: see 170 Privy Council Records, where the Council restored to one Firmin de Tastet his goods condemned by the court in such a case.

few hundred tons could be rummaged at sea, whilst the large vessels of the present day must be brought into harbour to be effectively examined. But it cannot be too often repeated that ships never were rummaged at sea. The very first principle of prize law forbids the breaking of bulk by captors.[1] "Captors have no right to convert property until it has been brought to legal adjudication; they are not even to break bulk."

In the *Gerona* (Inner Temple Prize Appeals, 1813–14; 78), costs and damages seem to have been awarded against captors who broke bulk at sea. And in a case where captors appropriated specie on board the prize, and paid troops with it, the Gibraltar Vice-Admiralty Court, regarding the proceedings as in the nature of a contempt, declined to take Treasury bills in substitution for it.—(Treasury In-Letters (1812), [1284], 13850 (30 October).)

In no case does it appear that a ship was rummaged to ascertain the nature of the cargo. Had this been permissible, it must have been necessary to bring the ship into port for the purpose on very many occasions of bad weather or deep stowage. Ships of 1800 were not cock-boats. Not a single case appears.

"Although there was the strongest reason to think," says Sir J. Marriott, in the Mémoire Justificatif above referred to, "that by unloading there might be found the real ship's papers of the *Hendrick and Alida*, and more contraband in boxes and barrels, not set down in the bills of lading and papers produced, yet Lord Mulgrave's

[1] See the *L'Eole* (1805), 6 C. R. 220, 225; the *Princessa* (1799), 2 C. R. 39; the *Amiable Isabella* (6 Wheat. 77); the *Washington* (1806), 6 C. R. 277, "Captors are not to meddle with the cargo in any manner without the authority of the Court." The *Concordia* (1799), 2 C. R. 102; the *San João Baptista* (Inner Temple Folio Prize Appeals (1800–5), p. 453). In *La Rosine* (2 C. R. 372), an officer of the Fife Dragoons ordered certain boxes to be opened which were being loaded on a cartel ship and they were found to contain tin. But this was all done within the realm: it has no relation to what can be done on the high seas. See also the Instructions to Prize Commissioners, especially enjoining them to examine whether bulk broken, *Executive Documents* (*U.S.*), 1863–4, Vol. 14, p. 545: cf. pp. 199, 307, 336.

[the captor's] counsel did not advise him to search the vessel to the keel. That can only be done in special cases,[1] in the presence of public officials, and in others by an express decree of the judge, who is bound to hear both sides on the point."

All that was necessary at sea was, and all that is necessary at sea [2] still is, the examination of papers.[3] The reason why ships are now brought in, quite improperly, when all appears regular on board, is in order that they may be detained while the captor makes out a case of suspicion regarding the ultimate destination of their cargo. Under the old rational and fair practice a captor could indeed bring in at his own risk a ship whose papers were apparently regular.[4] But the most that he could do was to sue out a commission of unlivery,[5] by virtue of which the cargo could be unloaded and examined, not by himself, but by a judicial officer.[6] In that way, a discre-

[1] These "special cases" are evidently those referred to by himself, when he speaks of captor's evidence being admitted when the primary evidence is imperfect (*e.g.* by the refusal of the master and crew to give evidence). See Appendix I, *supra*.

[2] The Court of Claims in the *Nancy* (*Ward*) (1902), 37 Ct. of Cl. 401) say distinctly that "Upon the capture of the American vessel, it was the duty of the officer in charge of the French privateer, immediately to close and seal her hatches, and with reasonable despatch to take her into port and institute judicial proceedings to determine the lawfulness of the capture, affording the captain and crew every facility to defend their vessel in such proceeding. Incident to that obligation, it was the duty of the officers and crew of the French vessel to preserve intact the American vessel and its cargo . . ." In the *San João Baptista* (*infra*), H.M.S. *Euphrosyne* took specie and jewels out of the ship, and carried them to the Cape, where they were condemned. The Lords of Appeal released them with costs and damages, and would listen to no explanation by the captors.

[3] Besides being innocent, they must be complete. A consignment in blank was not "complete"; see the *Abo*, 24 L. T. (o.s.) 5; the *Jonge Pieter*, 4 C. R. 79; the *Atlas*, 3 C. R. 299.

[4] All papers on board, even the private letters of passengers, are subject to examination, and rigorous search may be made for them.

[5] N.B., this could not be done until the ship has been brought into port and a suit commenced: the *Anna Maria* (1817), 2 Wheaton, 327, 334; the *Wilhelmsberg* (1804), 5 C. R. 143.

[6] The Anglo-Swedish Treaty of 1803 (Art. 3) allows detention on suspicion that the real destination of the ship is an enemy port; but in such a case the ship is either to be released with full indemnity, or to have her cargo bought at the price current at the neutral port (with an indemnity). Copper is expressly agreed to be neither confiscable

pancy between the cargo and papers might be revealed, but if none existed, the captor was liable in damages. Under the late unlawful procedure, a captor could detain the ships while he prosecuted miscellaneous inquiries throughout the globe to support his suspicions. The claimants had to make costly counter-moves, and in the end comparatively slender grounds of suspicion, even if unsubstantiated, would deprive the claimants of all claim to costs and damages.

The detention of whole crews was stigmatized as improper by Lord Lyons in 1863.

Neutrals are very much in the hands of the Prize Court officials, and it ought only to be in the clearest cases that they should be placed forcibly in that position. It cannot be expected of subordinate officers that they should always proceed with entire impartiality and propriety. Some light is let into the inner history of prize sales and appraisements in Vol. XIV of the Executive Documents of the United States [2]; and the eagerness of one Crickett in the United Kingdom in the early nineteenth century to secure the conduct of proceedings is little more creditable. The reader will also recall Stowell's scathing rebuke to his staff in the *Madonna del Burso*.[3]

The whole process has been denaturalized; and neutrals would be well advised to replace the method of prize trials on something more nearly resembling the old foundations. Under the old practice, unless there was some irregularity in the ship's papers, she must be released. If there was cause for suspicion, the captor

nor pre-emptable. See Wildman, *Int. Law*, II, 232–3; Martens, *Recueil*, Vol. 10, p. 520. Provisions and naval stores as there specified may be pre-empted. It is singular that this treaty was not invoked by Sweden in the late war. For in 1814 all the Anglo-Swedish treaties were re-established in full force.

[1] *Dip. Corr., U.S.* (1863), 598.

[2] See especially the evidence of E. D. Smith, District Attorney (p. 307), E. H. Owen, Prize Commissioner (p. 199), and F. H. Upton, Counsel (p. 336). Note the *Instructions*, and the particularity with which they refer to the breaking of bulk.

[3] 4 C. R. 169.

could bring her in at his own risk for trial; the trial was limited to the papers and the answers of the master and crew to a fixed set of interrogatories, and obviously occasioned no delay of any consequence.[1] Not unless there was some contradiction or admission on this "examination in *præparatorio*" or "preliminary examination" could condemnation pass. If there was any contradiction or admission, there was an end of the case.[2] Only by indulgence[3] would the court admit "further proof" to explain it away—when usually the captors would also be allowed to adduce rebutting evidence to support the capture.[4]

Twiss has suggested that even "in cases of some discrepancy in the primary evidence" claimants ought to be allowed to adduce "further proof" to establish

[1] It had to be *finished* within five days, according to the former English Prize Act, § 23; see the *Speculation*, 2 C. R. 295. This case is very instructive on the proper mode of taking evidence. The master's evidence was entirely rejected, as it was apparently given under the influence of captors. "As far as the court has any discretion, they shall have no favour: the attempt to introduce evidence irregularly taken, and liable to the suspicion of being unduly obtained, will always work that consequence at least." In the Scottish case of the *Bounder* (1673), Gosford M.S., p. 334, it is said to be the general custom of all nations to grant summary process, and to condemn or absolve within three tides of ebbing and flowing of the sea, "because that the goods and lading may suffer great prejudice by delay, and the skippers and sailors be at a great loss, being interrupted in their voyages." The *Seal Fish* (1673), 2 Stair, 281, asserts that the Admiral is obliged by the general custom of nations to judge between two tides. It was made one of the charges against Buckingham in 1626, that as Lord High Admiral he had ordered the seizure of a Spanish ship (the *St. Peter*) in the river, after she had been restored by the Court of Admiralty. He excused it as done on the discovery of fresh facts, after consultation with Judge and Civilians (Rushworth, *Hist. Coll.*, I, 382).

[2] This must not be pushed to extreme lengths. In the *Triton* (28 October, 1801: 4 C. R. 78), everything else being regular, the captors "had picked up a Jew passenger," who threw doubt upon the case. Stowell disregarded his evidence, and gave costs and damages against the captors. Cf. also the *St. Andrew* (1673), 2 Stair, 187.

[3] Such indulgence was anciently never admitted in French prize practice, except in the case of *vis major*. The Spanish rule appears to have been otherwise. Cf. Valin *Traité des Prises*, ch. 15, n. 7; De Habreu, pt. 2, ch. 15—cited in the *Friendschaft*, 3 Wheaton, 50 (n.).

[4] See for such a case the *Frederick* (I.T. Folio Prize Appeals [1814–17], 313. But it was by no means of course. The introduction of evidence on further proof was refused to the captors in the *Adriana* (23 April, 1799), 1 C. R. 313.

their innocence (subject, of course, as usual to contradiction by captor's evidence) as a matter of right. Under the old-established practice—which in our view is the only lawful practice—such "further proof" is a matter of grace alone. But it is possible that such a rule would encourage merchants in lax behaviour on the chance of being able to explain it away.

As long ago as 1668, it was apparent to the Scots court that "a roving commission to seize ships where the cause of offence was not sensible to the eye," would be destructive of all neutral freedom.[1]

As Lord Lyons said in diplomatic language when the United States ventured on the new practice in 1862—"The habit of the United States cruisers of seizing vessels on the chance that something may possibly be discovered *ex post facto* which will prevent the captors being condemned to pay damages renders the practical fulfilment of the obligations of a neutral state to respect the rights of belligerents a matter of daily increasing difficulty."[2] The boarding officer must make up his mind at once whether to capture or not. If he sends the vessel in for examination, he captures her. If he chooses to do so, he may take the risk; but he cannot avoid it, and send the ship in for examination at her own expense. This is enforced in the *Wilhelmsberg*.[3] Captors there had, indeed, commenced prize proceedings: but they wished to abandon them when it became clear that the suit would fail. "I cannot think," said Lord Stowell, "that the neutral master acted in any way improperly, in declining such an offer [of release], being only told to go about his business, and that he would hear no more of the matter. To release a vessel in this summary manner, without her consent, after she was once brought in, would be contrary to the directions of the Prize Act."

[1] *Parkman* v. *Capt. Allen*, 1 Stair, 502, 529, 559; *Gosford M.S.*, No. 27, p. 10; *Dirleton*, No. 132, p. 55; No. 153, p. 61.

[2] Lyons to Seward, 22 April, 1863; *Dip. Corr. U.S.* (1863), 511.

[3] (1804), 5 C. R. 143. See also the *Susanna* (6 C. R. 50), and the *Amor Parentum* (13 April, 1799, 1 C. R. 303).

And so in America—" Before the captain of the *Nonsuch* left the *Anna Maria*, in pursuit of other objects, he ought to have decided either to seize her as a prize or to restore her." [1] So in the *Gertruyda* (2 C. R. 211), the captors attempted a provisional detention, and wrote a letter saying that " The goods are not to be considered as seized " ; but " It is impossible," said Lord Stowell, " to suffer the mere expressions and style of the letter to alter the real consequences." Capture consists, not in any subjective intention, but in the assumption of control.

It must be the work of jurists, and possibly of Armed Neutralities, to restore the simple, objective character which up to the twentieth century, with the fatal exception of the American Civil War, and perhaps of the French Revolutionary tribunals, has universally characterized proceedings in Prize. The substitution of a neutral tribunal for national Prize Courts would not be sufficient. The objection would always remain, that the innocent neutral vessel would obtain, not security, but a lawsuit. The essence of Prize is the condemnation of active assistance to the enemy in a clear case. It is not the detection of doubtful ventures.

It must be added that perhaps the best step, for the moment, would be to rescind the Declaration of Paris. The United States have never accepted that instrument ; and although Mr. T. G. Bowles may have been incorrect in holding that it was signed by Plenipotentiaries appointed for another purpose, and was never ratified, and that therefore it is devoid of any but provisional validity,[2] it ought to be possible to secure its rescission by consent. As against the resumption of power to capture enemy goods wherever found, would be set the severe limitation of contraband articles, the restoration of the rule excluding captor's evidence [3] and the recognition of com-

[1] (1817), 2 Wheaton, 327, 334.

[2] *Vide The Declaration of Paris*, 1856.

[3] Evarts (afterwards Secretary of State) remarks in his Brief on the *Springbok* case : " The moment you depart from this vital principle

plete freedom of trade with neutral ports. Then we should at least know where we stood, and—reprisals apart—the neutral merchant would be capable of appraising his risks.[1]

It may probably be a subject for regret that the ancient system has been abandoned according to which the proceeds of prize were granted by the Crown [2] to the captors. It made captors careful, as in such circumstances the Crown was not inclined to indemnify them if they exceeded their rights. The opinion of the Advocate-General and Attorney-General, adopted by the Government in 1802, was to the effect that "It is essential to the protection of neutrals that captors should know that they act at their own peril. . . . No relief can be expected from government on account of the irregularity of the capture itself. . . . To indemnify for loss in such cases would be to encourage illegal captures." Losses arising from irregularity or mistake of the Tribunal of First Instance "fall with sufficient justice on the captors." [3] Cf. the *Santa Clara*,[4] where costs and damages were given against the captors of a Spanish licensed vessel which had carried duplicate papers to

. . . you subject neutral commerce to the unchecked and speculative cupidity of captors, and to the delays and miscarriages of *visitation and search in Court* for suspicion; and of remote and crippled litigation to establish guilt or innocence by imported or extraneous evidence: which neutrals never have submitted to, and never can tolerate. . . . The practical maintenance of this great safeguard of neutral commerce against speculative capture . . . is secured by the firm and undeviating rule of the prize courts never to admit 'further proof' as part of the original inquiry . . . but always to introduce it, if at all, for a resolution of the difficulties which the primary evidence itself raises."

Captors' evidence was also excluded by Lord Stowell in the *Adriana*, 1 C. R. 314; I.T.P.A. (1807–9), fo. 469. In the *Merchant* (*ibid.*, fo. 143), the mate was allowed to testify in order to account for erasures in the log: this was done "in open court." See also the *Dispatch* (I.T.P.A. [1807–9], fo. 278), where the expenses of captors' evidence were disallowed. A captor's affidavit having been put in, in the *Osiris*, the ship was released on appeal, and it may have been on that ground.

[1] Again the reader may be referred to Dr. Brigg's invaluable treatise on *The Doctrine of Continuous Voyage*, *passim*.

[2] See Rothery, *Prize Droits*, *passim*, for instances of the grants.

[3] Treasury In-Letters (1804), [923] 2578 (enclosure): 7 August, 1802.

[4] *Ibid.* (1805), [939], 1359: 15 March.

deceive the Spanish cruisers. The King's Advocate and Proctor here recommended indemnification to the captors, because it was public policy that had led to the awkward situation and misled the captain of the *Retribution*, which effected the seizure.

In the *Freya*[1] the King's Advocate and Proctor declined to say whether a gratuity to the captors, the ships being released before adjudication for reasons of State, would or would not be proper. In the *Hector*,[2] where the Crown released the ship, though she carried a licence intended for a much smaller vessel, all reward to the captors was refused. "This ship and cargo have been released by the undoubted prerogative of the Crown, under circumstances that were deemed sufficient to warrant the reliance under which the owners and proprietors left Holland to put themselves under H.M. protection. Such persons are to be considered as virtually excepted out of the condition of enemies, by the recognition which H.R.H. the Prince Regent has been pleased to give to their claims. The release, therefore, is not an injury to the captors. It has at most been a disappointment of expectations."

Lastly, we may well bear in mind the wise words of Lord Stowell:[3] "It is high time that this abuse should be corrected. I mean no imputation on any individual: everybody knows how abuses insinuate themselves at first, and creep on by degrees; they begin usually in some act of accommodation and kindness, which we can hardly disapprove in the particular instance; the same facility is practised in a second instance, on little other ground than the precedent of the first; an irregularity which was hardly censurable ripens into settled abuse; new men come into office, and they find it become an ancient established practice, with all the sanction of grey hairs upon it; one abuse

[1] Treasury In-Letters, 1804 [929], 4724.
[2] *Ibid.* (1812), [1288], No. 14852: 18 November.
[3] The *Princessa* and *La Reine Elizabeth*, 2 C. R., at p. 48 (2 July, 1799).

begets another (for it is a prolific family), till at last attention is awakened, and those who have authority are loudly called upon by duty to correct them. They are memorable words of Lord Bacon upon such subjects: 'Time is the greatest innovator; and if time always alters things for the worse, and wisdom and counsel do not sometimes alter them for the better, what shall be the end thereof?'"

§ 9. Destruction of Neutral Vessels

It does not appear that the Law of Nations ever authorized a belligerent to destroy a neutral ship, or that, lawful or unlawful, such an act was ever accomplished before the twentieth century—that acme of progressive humanity. So long as a ship was regarded as territory, such an act was clearly out of the question: the decay of that conception is closely bound up with the decreased immunity of neutral vessels. The subject has more than one aspect, for a neutral vessel may be interfered with either as a prize or as a nuisance. She may be a prize which it is inconvenient for some reason to bring in, or, again, she may be obnoxious in some way as interfering with the operations of a belligerent's forces.

In neither case should she be interfered with. In the latter case, she had as good a right as the belligerent to keep the seas; and, like duellists who select the high-road as the scene of their encounter, belligerents have no right to interfere with ordinary passers-by. In the crisis of Napoleon's naval fortunes which preceded Trafalgar, it was all-important that the whereabouts of Vice-Admiral Allemand's fleet should not be known. Allemand was a rough seaman, and he sank ruthlessly the coasters of French-controlled nations. But when he fell in with neutral Swedes and Americans, there was no help for it—he had to let them go.[1]

[1] See Desbrièves, *Projets et Tentatifs*; Baty, *Britain and Sea-Law*, 2. Count Z. Allemand's authority has been invoked in favour of the

No mention is made of any destruction of American vessels in Jefferson's catalogue of complaints against France,[1] or in the reclamations of the Armed Neutralities. The *York*, destroyed by the Federals in the Civil War, was on shore and within their jurisdiction,[2] and yet a sum of $11,935 was awarded to her owners. Lord Clarendon's strong declaration, made 20 December, 1865, in a despatch to Sir J. Crampton, against the idea that neutral ships can in any circumstances be sunk, will be found in 61 British State Papers, p. 853; cf. p. 841.

In the Doggerbank case, it was recognized that no paramount considerations of safety could justify a fleet in destroying suspected vessels if in fact they were neutral.

In the case of prizes, also, history is quite emphatic. Never was a neutral prize destroyed by the cruisers of any Power. Licensed enemy ships have been on a few occasions destroyed—an entirely different thing. Where the ship is neutral, such a thing has never been attempted on the high seas. When within enemy territory, neutral ships of course cannot expect to be exempted from operations of war: thus in the Franco-Prussian War, the Germans scuttled six British ships in the Seine and no question has ever been raised as to their right to do so without making compensation. The *York*[3] was

practice of destruction by those who fail to notice that he did not venture to sink real neutrals such as Americans and Swedes. His biographer, Hennequin, in Michaud's *Biographie Universelle* cautions us against accepting all his statements literally: even in his epitaph, "On pense bien qu'il avait apprécié ses exploits au moins à leur valeur." Hennequin adds: "Altier, frondeur, et méconnaissant toute autorité supérieure, il abusait constamment de celle que lui était confiée." An episode in his career, when in 1803 he was found guilty of grossly improper conduct towards the people and personages on board his own ship, does not raise our respect for him as an exponent of international law.

[1] 1 American State Papers, 497.

[2] *Dip. Corr., U.S.* (1863), 635. Cf. the case of the *Oldhamia* in the Russo-Japanese War.

[3] See *British Report on Geneva Claims*, 148. Probably the destruction was considered wanton. Cf. *Dip. Corr., U.S.* (1863), p. 635. See above.

destroyed in the American Civil War when stranded on the blockaded coast. But, on the high seas, as Lord Stowell emphatically laid it down, "Where it is neutral, the act of destruction cannot be justified to the neutral by the gravest importance of such an act to the public service of the captor's own state." No hint of destruction is contained in Wheaton's elaborate *Treatise on Captures* (1815), nor in De Martens' full instructions on *Privateering* (1795): the privateersman may be forced to abandon his prize, but he is not told that in that case he may sink it. Nor does De Cussy (1856) or Reddie (1845) say a word about it. Nor do the French *Instructions* of 1854 (*Annuaire Historique Universel*, 1854, Appx. 44).

Our canon of Certainty, therefore, dictates that this settled practice shall not be disturbed. It is really extraordinary that no single case of the sinking of a neutral prize can be pointed to. It was not only that the thing was reprobated and apologised for: it simply was not done. Towards the end of the nineteenth century assertions of a right to do it began to appear in Naval Codes. At first such claims were unintentional. Nations were not at first particular as to the exact conditions under which an enemy prize might be destroyed. When they began to lay these conditions down, they did so in general terms, without expressly excluding neutral prizes—because nobody even imagined that a neutral prize could be destroyed at all In the same way the Institut de Droit International adopted a Prize Code at Turin in 1882 and Munich in 1883, which spoke of destruction of prizes in general terms; but when it was suggested that this might be imagined to apply to neutral prizes, the word "enemy" was expressly inserted (at the Heidelberg Congress of 1887). It is plain that the destruction of a possibly innocent vessel, subject to a mere liability for costs and damages in a lawsuit, with the subject-matter at the bottom of the sea, is a serious menace to neutrals and to the safety

of the seas. Compensation in damages is never adequate,[1] is always delayed, and always troublesome to secure. Compensation for unique objects, for objects which have a speculative or sentimental value, such as an author's MS. or a treasured souvenir, is never forthcoming at all. The people on board a destroyed neutral must be taken on board the enemy vessel and exposed to all the dangers and horrors of hostilities. The whole practice is detestable, and is rested merely on one or two mistaken Naval Codes. In the Russo-Japanese War, however, Russia strongly asserted it, and on various occasions sank British and other neutral ships: [2] the *Knight Commander*, *Thea*, *Tartos*, *Ikona*, *Hipsang*, *Oldhamia*, and *Saint Kilda*. Forced by protests, Count Lamsdorff promised that such events should not recur, and he subsequently asserted their sporadic recurrence on a single occasion was due to the disorganization of the Russian forces in the Far East.

In the face of this, the insistence of Russia, France, and Germany on the right to destroy can only be regarded as an unfounded attempt on the part of these nations to legislate for the world, and to impose their desires upon others. It is to be regretted that the pretension was treated seriously, and to some extent submitted to, by the terms of the unfortunate Declaration of London in 1910. Paper safeguards are no safeguards: they are only loopholes for chicanery and vexation. The firm upholding of the clear principle that neutral vessels must be preserved with the utmost care until judicially condemned is demanded by all our canons of Simplicity, Certainty, and Objectivity. The captor is not even entitled to fly his own flag on the captured ship; [3] and we can only regard the events of

[1] Professor Mountague Bernard observes: "It is but seldom, I fear, that a neutral improperly captured obtains any adequate compensation for the loss which has been unjustly inflicted on her" (*British Neutrality*, 318).

[2] See the writer's *Britain and Sea-Law*, Chapter 1.

[3] See 86 Brit. State Papers, 202, 370. "A neutral vessel is to wear the flag of her own country until condemned." So also in America, see

1904–5 as the illegal acts of an extinct Power in whose bureaucratic ideas the private merchantman must necessarily humbly submit to the foreign man-of-war.

§ 10. Miscellaneous Prize Matters

1. Neutral Trade between Belligerent Ports.— It is worth noting that, so long as the neutral merchant is not identified with a belligerent country by having his house of trade, being domiciled, or (as we think) owning allegiance, there, he is at liberty to trade between the ports of the opposing belligerents. "The principles of war relative to a trade between two belligerent countries declare that a direct commerce for the benefit of the subjects of either is illegal; but if the goods be truly the property of a neutral merchant, although they may have been shipped for his behoof in one of the belligerent states, with the intention of being carried directly into the other belligerent country, but still for his behoof, they are not legal prizes, but, if seized, must be restored to the neutral merchant." [1] This is perfectly in accordance with our canons of Certainty and Simplicity. The neutral is free to trade with each party, therefore with both. At the same time, "It is not the practice of countries which are at war, to permit even neutral ships to clear out for the ports of each other" (per Lord Stowell in the *Sansom* (12 and 17 August, 1807), 6 C. R. at p. 414). "The intercourse is carried on in a dissembled manner by clearances that purport the destination to be to other countries." (See also the

Moo. *Int. L. D.*, II, 280; Bayard to Phelps, 6 November, 1886, *For. Rel. U.S.* (1886), 362, 370. See also U.S.A. Naval Instructions (2 Halleck, 397, c. 31, § 4, note) of 7 August, 1876. By Art. 14—"A neutral vessel seized is to wear the flag of her own country until she is adjudged a prize by a competent authority. The flag of the United States may, however, be exhibited at the fore, to indicate that she is for the time in the possession of officers of the United States." So in the case of certain captures by Russian cruisers of British sealers in the Eastern seas, "The British flag was not replaced by the Russian until the ships had been declared to be confiscated (86 S.P. 202, *Official Gazette*, St. Petersburg, $\frac{9}{21}$ October, 1892).

[1] *O'Neal* v. *Cordes and Grossmeyer*, *infra*.

Vrouw Hermina.)[1] In *O'Neal* v. *Cordes and Grossmeyer* (1805 Fac. Coll. No. 221, p. 498; No. 2, p. 7), however, the *Stettin* had sailed from enemy Rotterdam for Leith: there is no suggestion that it was with a simulated clearance.

2. Joint Ownership with Belligerents. Liens and Mortgages.—The connection of neutrals with belligerents is always open to grave suspicion, and in the *Golden Falcon*[2] a ship was confiscated as being owned as to six sixty-fourths in Amsterdam. It does not follow that pledges, mortgages and charterparties of vessels come under the same principle. Here, again, simplicity requires that subtle questions of property and value shall not be raised, but that neutrals must at their peril cut loose from such close association with enemies; on the other hand, in the case of pledge, mortgage and charterparties, the neutral and belligerent are more at arm's length, and cannot easily sever the relation. Besides, to unravel the intricacies of such dealings is inconsistent with the despatch and inexpensiveness of prize proceedings.

In the *Tobago*,[3] Lord Stowell laid it down that neutral liens which were "private" (by which he seems to have meant non-apparent), such as bottomry bonds, could not be recognized on an enemy ship. Conversely, in the *Ariel* (*infra*), the Privy Council declined to take any notice of an enemy's lien on a neutral ship. The former principle was rightly applied to cargo in the *Odessa*,[4] and it is now understood to cover even mortgages apparent on the ship's papers.[5] Captors "lay their

[1] 27 January, 1799, 1 C. R. 164.

[2] (1673), 2 Stair, 215; cf. the *S. Katharine* v. the *S. Mary*. But in other and more recent cases, the ship has been sold and the neutral shares paid out. And this is the rule invariably applied to cases of joint ownership of cargo.

[3] 5 C. R. 218, followed in the *Mary* (9 Cranch, 126).

[4] [1916] 1 A. C. 45. See Baty and Morgan, *War*, pp. 333 *seqq*. Cf. the *Ida* (1854), Spinks, 26; the *Frances*, 8 Cranch, 418; the *Hampton* (1866), 5 Wall. 372.

[5] This seems to dispose of Halleck's suggestion (*Int. Law*, II, 115) that rights *in rem* cannot be ignored by captors, whilst rights in *personam* may.

hands on the gross, tangible property," [1] and might disregard a neutral vendor's lien.

The King's Proctor's report on the *Tobago* is in Treasury In-Letters (Record Office) (1804 (929), 4729, 3 October). The ship was from Dunkirk to Tobago; she struck on leaving port, had bad weather, and put into Plymouth 13 December, 1802. There a bottomry bond (ship and freight) was given to James Gordon (claimant) and Rucker for £1,433 1*s.* 6*d.* The ship proceeded to Tobago, and was captured on its surrender. Its sale produced £684 4*s.* 7*d.* The King's Proctor observes: "The Court of Admiralty has at all times held that bottomry bonds upon enemy's ships, though in favour of neutral and British subjects, were not entitled to payment in a court of prize, and one of the leading principles that gave rise to this rule has been the extreme danger of fraudulent claims of that sort being set up. In the present case, though there is no reason to doubt that the claim is a fair one, yet if acted upon by H.M. Government, a precedent would be made for a number of applications of the same sort, in which great difficulty might arise in ascertaining the fairness; and there seems the less reason in the present case to grant the application, as the parties were at the time *established as a mercantile house in Dunkirk*, and were expressly described in the bond itself as '*merchants of Dunkirk.*'" (Italics ours.) Accordingly, restitution as an act of grace was refused.[2]

[1] Lord Stowell in the *Marianna* (1805).

[2] Sometimes compensation to British merchants was accorded wholesale by Order in Council. A proclamation made on the outbreak of war with Prussia (May, 1806), provided that, where goods had been seized under the Prussian embargo of 15 April, the value of the advances of British merchants, consignees of the same, should be restored to them. Advances by consignees might well be "secret"; the consignment would be made to the British merchant as agent or factor, so that it would not raise any suggestion that he was the actual owner, or had lent money on the security of the goods. Another proclamation, on the outbreak of war with Denmark (Embargo, 2 September, 1807), extended the indulgence to all cases of advances by British merchants on Danish property, even when not named as consignees. No similar Order in Council was made when war broke out with Russia in 1807 or with the United States in

In the *Hoopende Zeeman* (*Ibid.*, 1806 (983), 6308, 16 September) a neutral Prussian ship and cargo had been captured, and the cargo abandoned to British underwriters as on a total loss. It was, however, released, but war with Prussia supervened, and the Customs seized it. The King's Advocate advised that "Although the goods were pronounced Prussian by the Court, yet, it now appearing they had been abandoned to underwriters, they may be fairly and equitably considered as property belonging to other persons, and it is submitted they ought to be delivered up to their agents."

See also the *Fama*,[1] where a Mauritius firm had repaired this Spanish frigate, and on coming into the position of quasi-British subjects by capitulation set up their claim. "It is impossible," says the King's Proctor, "to admit this plea without encouraging claims of a similar kind . . . It is a decided principle that captors are not responsible for any such indemnification to those who may have demands on the prizes. In the present instance, the petitioners were enemies for many years after the capture, and would on that account have been precluded from making any claim . . . in any event. The indemnification [which had been]

1812. Nor was it imitated in 1854. These Orders in Council tend to show that the *Tobago* decision (in May, 1804) came as rather a surprise. In 1807, indeed, an Order in Council of 18 December had enacted that vessels and cargoes brought from Russia to the United Kingdom before 1 January, 1808, were to be released altogether if the cargo was for import into the United Kingdom (see 175 Privy Council Register, 131); although three days previously an affidavit that such cargo was not Russian property had been required (*ibid.* p. 62). In 1812, an extensive system of licensing had already been conceded to American vessels, and it was regarded as improper to take advantage of the war to capture licensed vessels and cargoes. In September, 1812, American ships (*e.g.* the *Hercules*: see Treasury In-Letters (1812), No. 14450, 12 November) were still continuing to load. At the same time, a licence is strictly avoided by the outbreak of hostilities between licensor and licensee: Treasury In-Letters, 1803 (905), 2807, 18 June. In 1854, the relaxations of the right of capture were so extensive that no concession to British shippers was needed. In the *Zalema* (2 Acton, 14) a neutral share of joint property was condemned, but this was because of a fraudulent attempt to cover the enemy share.

[1] Treasury In-Letters, 21 October, 1812.

afforded to certain British merchants was granted on special circumstances."

In the *Elizabeth* (Folio Prize Appeals, Inner Temple, Vol. 1813–14,[1] fo. 390), the same question as came up incidentally in *R.* v. *Sorensen* (the *Ariel*),[2] was discussed: viz. the effect of an unpaid vendor's lien (in the *Elizabeth*, an actual mortgage) on an enemy vessel. The British owners, Fairlie, Gilmore & Co., Calcutta, agreed (November, 1806) to sell her to P. Rierson, a Danish subject. They retained the ship's papers and policies of insurance, also the bill of sale, as a security for the entire purchase-money. In fact the purchaser was still more deeply indebted to the vendors in other ways, and an effort was made to sell the ship, in October, 1807—but unsuccessfully. She was then formally mortgaged (but not by bill of sale) to the vendors, for 50,000 Rs. and they took possession.

Gilmore and Wilson (another firm) had a lien on her for 16,092 Rs. as materialmen for stores, rigging and sails supplied. The *Modeste*, on 28 January, 1808, seized the ship, as a Danish vessel, in the Hooghly.

The judge at Calcutta rejected the claims of the mortgagee-vendors and materialmen, and condemned the ship (although apparently seized in port) to the *Modeste*; and the Lords of Appeal (the Earl of Harrowby, Sir W. Grant and Sir J. Nicholl) affirmed the decree, but allowed the King in his Office of Admiralty expenses.

Lushington, D.C.L., and Spankie claimed for Fairlie and Gilmore, that "Supposing the legal title to the vessel to be in Peter Rierson, yet his title was subject to the payment of the purchase money to Messrs. Fairlie & Co., and to that extent the claimants are entitled

[1] There are two volumes so numbered: this is the thinner. Also found in *Ibid.* (1810–12), p. 257.

[2] (1856), 11 Moo. P. C. 119. Cf. the *Marie Glaeser* (1 B. & C. P. C. 38). It has been said (per Lushington, D.C.L., in the *Ariel*) that, conversely, an enemy mortgage on a neutral ship will not be taken into account, any more than a neutral mortgage on an enemy ship. See the various British and foreign cases collected in Pitt-Cobbett, *Leading Cases*, II, 307.

to restitution under the Order in Council of 11 November, 1807." The mortgage was, however, made *flagrante bello, i.e.* 28 January, 1808, in contemplation of war, although the fact of war was unknown (fo. 395).

Arnold, LL.D., and Jarvis asked for condemnation to the Admiralty, "Because the ship was Danish property, and was not subject to any such rights or demands on the part of the several British claimants as are held to affect the title of property in courts of prize: because the ship was seized and taken in the River Hooghly and port of Calcutta."

But the successive courts seem to have held that the seizure was not "in port," and condemned the vessel to the captors.

The hardship enuring to British and neutral parties in such cases is readily mitigated by the action of the Crown (except in cases where captors have an inseparable interest). There are many cases in the Records of such mitigation: thus in the Privy Council Records (Vol. 170, Record Office), under date 2 June, 1806, in the cases of the *Enigkeid* and the *S. Sylvester*, where bonds were given by British merchants for the safe return of these Pappenberg ships, which were embargoed, it is ordered that the embargo be raised in their regard (p. 195).

There are certain liens, however, which are allowed in prize. Besides the ordinary maritime liens which attach after the capture, certain liens attaching previously seem also to have been allowed. In Vol. 22 of the Admiralty Court Records,[1] under date 19 August, 1807, Adams as proctor for Bryan Bentham of Sheerness, merchant, alleged he had made advances on the credit of the ship *prior to*, and in consequence of, the seizure; that an order of court (19 June, 1799) had directed that such expenses as had been furnished by Government or British merchants for the maintenance of the master and crew whilst in England should be paid out of the proceeds in court, but that the reference to the Regis-

[1] The *Drei Köningen, loc. cit.*, p. 402.

trar and merchants in that behalf had been found insufficiently extensive in its terms to embrace the whole of the advances; wherefore the judge decreed [all ?] the advances . . . to be paid out of the proceeds remaining in the Registry. And at p. 406, in the same case, a bottomry claim was allowed for necessaries, and at p. 410, in the *Endraught*, a claim was allowed for wages.[1] It will be noted that these cases are not those of asserted neutral liens, but a claim by a British merchant to be reimbursed for his advances made to a foreign ship in port before seizure. Such claims by merchants of the country where the ship is, and where the services were rendered, are favourably regarded,[2] and it is submitted that patent liens, such as those arising out of collision, may be equally admitted to take precedence of captor's rights.[3] They can hardly be the basis of frauds, as the circumstances are open and notorious. The question, however, still remains open of what Lord Stowell meant by liens which are not "private." Registered mortgages have been, as we have seen, held to be "private," and negligible. It is hard to say what there is left.

Conversely, a hostile lien (or presumably mortgage) on a neutral ship or cargo will work no prejudice to it. Lushington's dictum to that effect in the *Ariel* [4] is borne out by Lord Stowell's declaration in the *Tobago*,[4] that if neutral bottomry claims were allowed, "a captor

[1] In the *Leipsic* (22 Adm. Court Records, p. 375; 18 August, 1807) a British merchant's (C. A. Cornwall's) claims to be reimbursed advances not only to the *Leipsic*, but to the *Boyton* and the *Brunswick*, other vessels of the same owners, were allowed to the amount of £900.

[2] The *Belvidere*, 1 Dodson, 353. Expenses of outfit are here mentioned; in the *Leipsic*, insurance was included as well. Cf. the *Nigretia*, Takahashi, 552, and the *Russia*, *Ibid.*, 557.

[3] It is unusual to find (as we do in the *Elizabeth* (I.T.P.A. [1813-14]), that the lien of British materialmen is disregarded. The ship was sold to Danes, but not paid for. She was mortgaged to the vendors, and materialmen had a lien on her. These claims were disregarded by the Bengal Court of Vice-Admiralty, affirmed on appeal by Lord Harrowby, Sir W. Grant and Dr. Nicholl, "because the ship was Danish property, and was not subject to any such rights or demands on the part of the several British claimants as are held to affect the title of property in courts of prize."

[4] *Supra.*

would be subject to the disadvantage of having neutral liens set up to defeat his claims on hostile property, *whilst he could never entitle himself to any advantage from hostile liens on neutral property.*"

3. Non-Commissioned Captors.—Here, again, the true principle is the simple one, that any member of the one belligerent community can in principle make an internationally valid capture of the property of any member of the other. Privateering, doubtless, is abolished if the Declaration of Paris is really valid: but privateering means the commissioning of privateers who cruise for private gain. That is a much narrower conception.

"It is the duty," said Lord Stowell in the *Helen*,[1] "of every subject of the King to assist his fellow-subjects in war and to retake their property in the possession of the enemy." All international difficulties and complexities as to the due commissioning and official character of capturing vessels are thus avoided. Certainly a merchantman may defend herself, and an attack is often the best defence. In the case of the *Cape of Good Hope*,[2] Lord Stowell again admits that non-commissioned vessels may make prize, speaking of "that active assistance which the law requires, to entitle non-commissioned vessels to be considered as joint captors." In various cases reported in the *Melomane*,[3] a capture by a non-commissioned ship is referred to as valid; and indeed, the fact that the Lord High Admiral has, by an ancient grant, the benefit of all captures made by non-commissioned persons[4] would be sufficient to show it. There are very many cases of the kind in Rothery's *Prize*

[1] 3 C. R. 226.

[2] 2 C. R., p. 283 (1799).

[3] (8 December, 1803), 5 C. R. 42. See also the *Amor Parentum* (13 April, 1799, 1 C. R. 303), where a fishing-boat effected a capture of French property on board a Hamburg vessel in distress.

[4] Cf. the resolution of the Prize Council in 1665 (Marriott, *Mémoire Justificatif*, 51; 1 C. R. 231). "That all enemies' ships and goods casually met at sea, and seized by any ship not commissionated, do belong in the Lord High Admiral."

Droits.[1] In 1803, Lord Hobart actually issued an official circular to colonial governors urging them to incite British subjects to capture French ships, and promising the captors the proceeds: an undertaking by which it was held the Crown and the Navy were bound.[2] In the *Urania* [3] salvage was awarded to non-commissioned re-captors, while the Scottish Prize Court, in *Yelton* v. *Smith*,[4] regarded the interest of the non-commissioned *Diana* in the recaptured *Lady Bruce* as an insurable one: counsel remarking that "The right of making captures extends to all vessels under His Majesty's protection and obedience." The decision of the Judge-Admiral, to this effect, reversed by the Lord Ordinary (Armadale) was restored by the Court of Session.

4. Sales and Requisitions before Adjudication.—These can, of course, be carried out where the property is perishable. Otherwise they are an abuse of the right of capture, and cannot be justified by the right of angary, which only applies to ships and other vehicles, and even then only to such as are voluntarily within the jurisdiction.[5]

In the American Civil War, the notorious Judge Betts,[6] in the *Memphis*,[7] and the *Ella Warley*,[8] asserted the power of the court to deliver up vessels to the government before condemnation. He could adduce

[1] The *El Conde de Galbez* (1796), 43: the *Lady Jane* (1786), 37: the *Haase*, 108: the *Le Franc* (1793), 34: the *Diligence* (1800), 43: the *Graff Bernstorff* (1795), 43: the *Le Sartine* (1778), 107: the *Oprecht* (1811), 107: the *Vengeur* (1797), 108.

[2] Treasury In-Letters (1803), [940], 1999: 15 April. See also the *Melomane* (5 C. R. 41).

[3] 5 C. R. 148.

[4] (1801), Fac. Coll., No. 3, p. 7. Dict. Decisions (Mor.) 11962. In the case of the *Laird of Balwhitty* (1 Stair, 481, 483, 484, 534), a capture by a non-commissioned person was again held valid.

[5] See the *Zamora* (1916), A. C. 77: the *Curlew* and the *Magnet* (Vice-Adm. Cases, N. Scotia, 312), explaining the *dicta* in the *Copenhagen*, 3 C. R. 178 (1800).

[6] See Grotius Society Trans., Vol. XI, p. 21, *Judge Betts and Prize Law*.

[7] Blatchford, *Prize Cases*, 202.

[8] *Ibid.*, 207.

no authority, beyond his own idea of what the court "preferred," and he was constrained to admit that the court in Pennsylvania had declined to allow anything of the sort. And so little did the Government rely on his decisions, that they forthwith proceeded to pass a piece of emergency legislation, empowering Prize Courts, at the demand of the government, to effect such requisitions.

Lord Lyons, the British Minister, at once protested against this [2] as "a novelty for which no warrant is to be found in accredited authorities, in usage, or in the principles of international law." The U.S. Government referred the matter to the investigation of the Attorney-General (Bates). While not considering that the Act was unconstitutional, the Attorney-General thought it fortunate that its terms were not imperative. And he plainly judged it wise to abstain from putting it into force, for, he observes [3]—"I am not aware of any settled doctrine of the Law of Nations to the effect that the belligerent nation, whose cruiser has taken a vessel as prize of war, has the right, at its own pleasure and convenience, to appropriate the prize to its own use before condemnation."

Finally, with regard to the specific case of the *Emma* [4] Seward wrote that the requisition under discussion, made while the right to appropriate neutral captured vessels was under consideration, was regretted. The vessel would not be put into service, but held to abide the result of the legal proceedings. "No captured neutral vessel will hereafter be appropriated by the government before condemnation."

[1] Prize Act, 3 March, 1863.

[2] Lyons to Seward, 6 June, 1863, *Dip. Corr. U.S.* (1863), 564. See also same to same, 15 July, 1863 (*ibid.*, 598).

[3] 10 Op. of Attys.-Gen. (U.S.A.), 519.

[4] Seward to Stuart, 26 September, 1863, *Dip. Corr. U.S.* (1863), 627. (Cf. also pp. 609, 623.) See also the *Granite City*, *Ibid.*, 509, 510, 518, 522, 538, 598: the *Tampico*, *Ibid.*, 598: and the *Antona*, 521. At first (Seward to Lyons, 23 July, 1863) Seward had maintained that the appropriation before condemnation, in some cases, was "a well-settled principle of admiralty law, practiced upon by all nations" (*Ibid.*, 609).

In the *Turandot*,[1] a German ship captured by the *Segond*, was sold at Saigon, in the Franco-Prussian War of 1870. The cargo was not perishable, and no condemnation ever passed,[2] nor were the circumstances desperate. But this was the case of an enemy ship, not a neutral: and the property in such a case passes on capture, not on condemnation.

By the Law of Nations, as universally recognized and practised in all civilized countries, before captures can be condemned as prize, they must undergo a sentence of condemnation, after a regular judicial proceeding in which all parties claiming an interest may be heard. Till a capture becomes thus invested with the character of prize, the right of property is in abeyance, and the possession of it by the country which has made the seizure is "a sacred trust." So Croke, LL.D., declares in the *Curlew* and the *Magnet*. "Neither the government of the country or the captors can apply it to their own use, or employ it in their own service; nor can it be discharged from that custody either by sale, or upon security, without the consent of all parties" (or in the case of perishable goods, or of extremely prolonged litigation). Croke allows that in a case of extreme necessity cargo may be requisitioned, and in the case of Nova Scotia, suddenly attacked on all sides by the Americans, he allowed small arms, oak timber and a vessel desired for use as a prison-ship to be given up to the Government, on payment into court. But what nation at war would not desire to impound serviceable materials! Croke's compliances go far to eat up his principles. It is clear that, as Lord Lyons wrote to Mr. Seward in 1863,[3]—"The sale of a vessel of a neutral owner before any sentence of condemnation has been

[1] 65 S.P. 932. The cash was remitted to Germany under Art. 14 of the Treaty of Peace (62 S.P. 77): but meanwhile the owner had been indemnified by the insurers, who claimed repayment out of the cash remitted. The German government refused it, and the British government declined to interfere.

[2] *Ibid.* 939, Harper to Bismarck, 9 September, 1873.

[3] 7 May, *Dip. Corr. U.S.* (1863), 529.

passed on it . . . is an act which cannot fairly be justified by reference to necessities of a belligerent, or necessities other than those incident to the state of the neutral vessel itself. . . . It appears to H.M. government that if the neutral vessel be sold for the good of the captor or the captor's government before trial, the obligation of the belligerent and the corresponding right of the neutral are much impaired, because compensation in money, however fairly assessed, on the abstract value of the property, may afford no practical protection to an innocent owner from considerable loss in the particular circumstances of his case."

5. Freight pro rata itineris.—When, previously to the Declaration of Paris, an enemy's cargo was captured on board a neutral vessel, the carrier was, as we know, entitled to freight, and she was entitled to her full freight, though she might have performed only a small portion of the voyage. Capture was treated as equivalent to delivery. She had, at any rate, lost her voyage, and the court would not embark on an inquiry as to her prospects of obtaining another on equally favourable terms. The captors had secured a windfall, and they might well be generous, and pay the agreed freight.[1] An inquiry into the actual amount which would be a fair compensation *pro rata itineris* would, as Lord Stowell said, be "an inquiry difficult in execution and uncertain in result." [2]

But the case is different if the voyage is not thus abruptly determined by the capture of the goods, but becomes illegal through the outbreak of war. If a ship is *en route* to her enemy's port, she must discontinue her voyage, but it does not follow that she will have full freight for the cargo. If it be enemy property, it will, if the vessel makes for a home or an allied port, be seized and detained, or confiscated. If it be other

[1] But not an "inflamed" rate, occasioned by the hazards of the war: the *Twilling Riget* (11 January, 1804), 5 C. R. 82.

[2] The *Fortuna* (1809), Edw. 56.

property, it will be subject to the usual rights of cargo-owners attaching when a voyage becomes impossible. In the former case there seems no valid reason why the ordinary rule of capture should not prevail, why capture should not be treated as delivery, nor why the shipowner should not have full freight. This was refused in the *Juno*, the President being undeterred by the difficulties and uncertainties incident to the allowance of freight *pro rata*. In some cases, of course, *pro rata* freight must be allowed, in order to do justice, and Lord Stowell himself allowed it in the *Copenhagen*,[1] where a vessel was forcibly detained [2] and her cargo sent on. This was not a case of delivery, or anything equivalent to delivery. Capture, on the contrary, is so.

If the records in the *Thames* and the *Venus* are examined it will probably appear that full freight was awarded.[3] The President's remark in the *Juno*, that shipowners, like other British subjects, must be prepared to put up in wartime with inconvenience and loss, is no reason why the Crown should profit at their expense. Still less is it proper that the Crown should profit (as in the *Sorfareren* [4]) at the expense of neutrals. He hints that the loss of full freight was in the nature of salvage, as the Admiralty's timely warning had enabled the *Juno* to discontinue her voyage to Germany. But it is improper to do thus indirectly what could not be done directly on a claim for salvage.[5]

Pro rata freight was originally (Malyne, 98) introduced to meet the case of a ship which meets difficulties in the course of a legal and possible transit, which it becomes more cheap and convenient to complete in another ship. If, in such circumstances, the ship makes

[1] (1799), 1 C. R. 289.

[2] Partly by stress of weather, and repairs, and partly by her dubious character. See the cases considered in the *Curlew* and the *Magnet*, *supra*.

[3] See Treasury In-Letters (1805), [956], 6661 and *Ibid.* (1806), [979], 4269. Cf. L. Q. R., *Prize Droits* (January, 1916).

[4] 114 L. T. 46.

[5] Cf. the *Franklin*, 4 C. R. 147.

no effort to forward the goods, she is entitled to no freight. If the shipper declines to facilitate the necessary transshipment, he must pay the full freight, although delayed. But if the parties behave reasonably, and tacitly agree to consider the voyage as at an end in the intermediate port, then the ship is entitled to a *quantum meruit* in the shape of *pro rata* freight. This reasoning does not apply where the goods, as in the *Juno*, can by no means be carried on. Full freight should have been awarded, and the captor should have reimbursed the ship in full before he proceeded to indulge himself with the proceeds. It is to be regretted that the point was not brought before the appellate tribunal.

All canons of Certainty, Simplicity, and Objectivity concur in recommending the exclusion of the difficult inquiry into *pro rata* freight in cases of capture.

In the *Roland*,[1] inversely, captors asked for *pro rata* freight for neutral goods which happened to be on board enemy ships, which were intercepted and taken to unintended ports. It was properly refused, because the goods had not been taken to the place where the owner wanted them.

It is not a little singular that so little authority exists on the subject of charterparties. Is the enemy interest confiscable in the case of a neutral ship chartered to enemies? Is the enemy ship confiscable in spite of a charter to neutrals? and does it matter whether the charter is by demise? It is extraordinary that there is so little authority—but it may probably be taken as indisputable that the charterer, whether by demise or not, who has hired a ship, takes it with all its liabilities to warlike capture by a present or possible future enemy. The converse case is one of greater difficulty: but it would seem that even in the case of a charter by demise, the decisive matter is the flag, and that an enemy hiring can, no more than an enemy lien, adversely affect it.

There are one or two cases that suggest that, in the

[1] (1915) 84 L. J., p. 127. See also the *Lolo* (1916) p. 206.

case of joint property between neutrals and enemies, the ship may be captured and sold, the neutral interests being paid out. But this is an extreme and disputable measure, and ought to represent the limit of belligerent rights. When the enemy's interest is anything less than a share in the actual ownership, it ought to be disregarded in prize.

§ 11. Prize Capture on Land

This anomaly has been effected on one or two recent occasions; but it is inconsistent with established and correct practice. Sir S. Evans' researches in the capacity of Prize Judge led him to discover only a scanty scraping of cases which in any way resembled such a thing. We shall deal with them in a moment: but it must first be noted how entirely the statements of the authorities are against any such thing, and how extraordinary a weapon it puts into the hands of the Crown. If it is correct that prize proceedings are competent in regard to property seized on land, on the allegation that it was once at sea, the true owner is deprived of the due process of the common law and of the right to a jury. Any English subject may find his property challenged as prize, and dealt with in the summary fashion of prize law, merely because it was once on board a vessel.

"Whatever is the property of the enemy," says the celebrated Memorandum of 18 January, 1753,[1] "may be acquired by capture *at sea*." "I know," says Stowell, "no other definition of prize-goods than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy." [2] In the case of *Genoa* (2 Dods. 446), he says still more distinctly, "[Prize] evidently means maritime capture effected by maritime force only—ships and cargoes taken by ships." And the prize jurisdiction

[1] Reprinted in the author's *Prize Law and Continuous Voyage*.

[2] This is incomplete, because goods taken in port are clearly prize, though droits of the Admiralty and not the property of captors. Further, the prize may be of neutral goods.

was upheld, because the goods had been so taken, though presently on shore.[1] So Wheaton says—"The private property of the enemy taken at sea, or afloat in port, is indiscriminately liable to capture and confiscation": [2] and this principle is extended to captures effected abroad by naval force (since no other appropriate tribunal is available).[3] If afloat, it does not matter that the property is within the body of a city,[4] or not on board a vessel.[5]

The *Ooster Ems* [6] is the leading authority for the proposition that goods captured on land cannot be prize. The ship was stranded on the English coast: the cargo was landed, seized and condemned as prize: a sentence which was reversed by Thurlow and the other Lords Delegate. In the *Hornung* [7] and the *Charlotte*,[8] the landed goods were not available *in specie*. They had in the former case been sold to satisfy a claim of the ship, and an unsuccessful attempt was made to seize the ship in their place. In the latter case, they had been sold and other goods bought with the proceeds, and an unsuccessful attempt was made to seize the substituted goods. So that neither case is very important. But the *Ooster Ems* is clear, and Wheaton (*i.e.* Story), Stowell, and Mansfield are all unanimous on the point.

In the *Roumanian*,[9] petroleum which had been landed

[1] The *Two Friends* (1799), 1 C. R. 271.

[2] *Elements*, § 335.

[3] Wheaton, *Captures*, 278: *Brown & Burton* v. *Franklyn*: the *Francis* (10 Will. 111), Carthew, 474: *Lindo* v. *Rodney* (1781–2), 2 Douglas, 614.

[4] *Key & Hubbard* v. *Pearse*: the *Canary Merchant* (1742), Douglas, 606; see Baty and Morgan, *War and its Legal Results*, 338, for fuller details.

[5] 78 *Bales of Cotton*, 1 Lowell 11: (1865).

[6] 1 C. R. 284 n. (1799). See also 1 Roll. Abr. 533: 6 Vin. 526–7: 2 Mod. 294: 3 D. & E. 335: 1 Com. Dig. 278: 4 Inst. 140: Carth. 399: the *Diana*, 2 Gall. 93. In the *Rebekah*, 1 C. R. 235 (26 February, 1799), Scott enumerates various cases of capture by naval forces which would be mere droits of Admiralty: but he never refers to the case of capture on land at home.

[7] See *Law Magazine and Review*, February, 1915, p. 221.

[8] *Ibid.*

[9] (1916), 1 A. C. 124.

in England (but still under the control of the Customs) was libelled as prize and condemned. This is really the first case of landed goods being treated as prize. Much irrelevant learning was expended on the question of what is a "port"[1]—apparently on the assumption that all enemy's property within the limits of a "port" are droits of Admiralty. It is true that the distinction between prize (which went to captors) and droits of Admiralty (which went to the Lord High Admiral) is, broadly, that prize is taken at sea and droits in ports and harbours. But to come within the Admiralty jurisdiction at all, under either denomination, property must, according to established principle, be found afloat (or else captured abroad by naval force). In the Japanese case of the *Thalia*,[2] the captured thing was actually a ship, and she may have been considered as assimilated to a floating object, though actually in dry dock.

In the *George Washington*,[3] an American vessel was captured by a French privateer and carried to San Domingo. Two-thirds of the cargo was there unloaded, and in that state attacked and recaptured by H.M.S. *Mediator* and *Bacchante*. Part of the landed cargo (1890 bags of coffee) was re-shipped; the rest was put on board the *Mediator*, taken to Jamaica, and re-shipped there. The capture on shore was in foreign enemy territory, and effected by naval force. But the Lords of Appeal restored the ship and all the cargo to the original proprietors on payment of one-eighth salvage.[4] In the *Nostra Señora de Conceiçao*,[5] the ship sailed under licence from Cadiz for Mexico and Cuba. On her return voyage she ran ashore, and was salved by men from

[1] See the writer's *What is a Port?* L. Q. R.
[2] Takahashi, p. 605.
[3] I.T.P.A. (1810–11, p. 373): see also *Ibid.* (1805–10, p. 84).
[4] In the case of *St. Paul's, Bourbon, Ibid.* [1810–12], 272, 458, 464, the re-captors were held absolutely entitled. Goods landed by the French from their prizes *Europa* and *Streatham* were re-captured by a British naval and military force and taken to the Cape. The goods not being sufficiently identified, the re-captors retained them.
[5] I.T.P.A. (1810–11, p. 82).

H.M.S. *Bermuda*,[1] whose captain insisted on taking her to Nassau, where he prosecuted a suit for salvage, obtaining £100. On the day after the decree, the Vice-Admiralty Marshal seized ship and cargo at a store in town at Nassau, kept by the Bermuda's agents, where it had been stored after being landed, apparently by the Marshal's direction. Here the ship was still afloat, and the cargo in *custodia legis*; moreover, the local court, affirmed by the Court of Appeal, restored ship and cargo.

In the *Calypso* [2] we have a case, however, in which the property was landed, and seized by the Customs. "From the Isle of France she brought out brandy, wine and specie, of which the wine, and part of the porter shipped in London, was landed at Colombo, and is seized and lodged in the Custom House" (Supercargo's statement). But ship and cargo were released on appeal; and it may well have been because the seizure was effected on land.

In the *Hercules* [3] the King's Proctor reported that goods landed from a wrecked American ship were not within the embargo on American goods because "they do not appear to have been 'found on board an American vessel.'" The wreck was in May, in Orkney, and the order for embargo passed in June.[4] The King's Proctor

[1] She was in fact got off by her own crew; when she was taken possession of by the commander and some of the officers and crew of the *Bermuda* (which was herself stranded).

[2] I.T.P.A. (1806–10), p. 221.

[3] I.T.P.A. (1805–10), p. 84. Various other captures on land by naval forces in enemy territory are to be found mentioned in *Ibid.* (1814–1817), pp. 412, 449 (Isle of France); p. 425 (St. Joaquin); p. 440 (Frankfort, U.S.A.); p. 538 (Moose Island): *Ibid.* (1815–18), p. 21 (Guadaloupe); p. 271 (Moose Island); p. 341 (Chesapeake Bay); and p. 471 (Naples): *Ibid.* (1801–11), p. 295 (Oporto: the *Progress*): p. 325 (Thorshaven—capture by H.M.S. *Salamine* in the Faroes): *Ibid.* (1810–11), p. 315 (St. Croix): *Ibid.* (1811–12), p. 81 (Middleburgh); p. 367 (Buenos Ayres). In the *Deux Frères*, *Ibid.* (1814–17), p. 482, the Lords of Appeal (Grant, Scott, Nicholl, Russell) returned a French fishing-boat and her catch of fish (which had been landed on the Newfoundland "French shore"). In the *Diana*, seized on the surrender of Berbice (I.T.P.A., 1802–7, p. 36), nothing is said as to any proceedings regarding the landed cargo.

[4] Treasury In-Letters, Record Office (1812), No. 14, 450: 12 Nov.

added that "In a case like the present, where the goods had been brought into the country as a place of refuge from damage, indulgence would in any event be proper."

In *Brown* v. *U.S.*,[1] the captured timber was afloat. The judge in the *Roumanian* (Sir S. Evans) quoted some MS. cases vouched for by Mr. Rothery.[2] One, the *Marie Anne*, was the case of a ship in dry-dock and its *temporarily* landed cargo, as to which objects, as in the *Thalia*, the Admiralty jurisdiction might be supposed to have special appropriateness—a ship once launched may well be thought to be constructively afloat. A stranded vessel is certainly not "afloat"; and yet there is no doubt that she is the object of prize. A vessel in dry-dock, with her lading temporarily landed, is in the position of a stranded vessel with its cargo, or may well be so regarded. In the other, the *Berlin* (*Johannes Toort, master*), the learned judge admitted that it was not stated whether the portion of the cargo which had been landed was condemned at all. From the Inner Temple Folio Prize Appeals,[3] it is as certain as anything can be, that it was not. The judge, following a mistake of Mr. Rothery, calls the ship the "*Bexlin Johannes*"[4]—an impossible name. As in the case of the *Imina Baumann*, the names of ship and master have been mixed up in transcription. She was really the British ship *Advice*, and was taken with eight others by the French in a heavy engagement, and condemned at Rotterdam. She was then colourably sold to Prussians, named the *Berlin*, and sailed for Newcastle light, and then for Schiedam with coals; next she went to Rotterdam, and proceeded boldly with "Geneva, Brandy, Madder, Flax, Provisions, etc." to London. She delivered all her cargo safely except twenty-four puncheons of Geneva, and then was seized by the Marshal. None of the other cargo was seized; the

[1] 8 Cranch, 144.
[2] *Prize Droits*, pp. 125, 126.
[3] I.T.P.A.(1802–4), 225.
[4] P. 233.

gin on board was the only haul.[1] So that the President's authorities dwindle to two cases of a ship in dry dock. That is not enough. Scott, Wheaton, and Mansfield cannot be so defeated. And the entire absence of cases of seizure of ordinary goods ashore in home territory is too strong a corroboration to be disregarded.

The *Venus*,[2] relied on together with the *Berlin* [3] and the *Marie Anne* in the case of the *Roumanian*,[4] was one in which Sir S. Evans admitted that the goods might not have been landed at all, and from the master's narrative it is clear that they were not.

It is true that in numerous subsequent cases the decision in the *Roumanian* has been imitated.[5] But much happened in the war of 1914 which will not stand the test of an impartial review.

It may frequently be the case, however, that the true seizure takes place afloat: if the cargo is put ashore by naval directions, it may be considered seized.[6] And, naturally, the point has no bearing on the question of

[1] The cargo realized £504 9*s*. 7*d*.: not an excessive price for twenty-four puncheons.

[2] Rothery, *Prize Droits*, 129.

[3] In this case, note that the Marshal in fact laid no finger on the landed goods. We get full details of the case from the King's Proctor's Report (Treasury In-Letters, Record Office (1804), 929 (No. 4726), October 31) and from the Inner Temple Folio Prize Appeals (1802–4), fo. 225. See the master's answer to the 25th interrogatory. At the hearing on 13 December, 1799, Gostling brought in as proctor a schedule of the goods *on board the ship* at the time of seizure, and, no claim having been made for the same, the judge pronounced the goods so scheduled to have belonged at the time of the seizure thereof to enemies of the Crown of Great Britain.

[4] Law Rep. (1916), 1 A. C. 124. See the case of *Genoa*, 2 Dods. 444; and the case of the capture of *Thorshaven* (Edw. 113), where Lord Stowell says of capture on land, "That is a right which is not granted even to the King's ships."

[5] See the *Eden Hall* (Pitt-Cobbett, *Leading Cases in Int. Law*, II, 528); the *Achaia*, 1 P. C. 635; *Ten Bales of Silk* (Pitt-Cobbett, *ut sup.*); the *Dandolo* (*ibid.*); the *Bawean* (*ibid.*, 529) (in which Evans, P., held that enemy goods were not protected under the neutral flag when they had been transhipped to it); the *Anatolia et Autres* (Fauchille, *Jurisp. Français*, 390, 425, 456 (where the seizure was actually on neutral land). It is really painful to cite cases like the two last, and to compare them with the respect shown to neutral territory a century ago, and with the good intentions of the statesmen who framed the Declaration of Paris.

[6] The *Edward and Mary*, 3 C. R. 305.

whether private property on land may be confiscated at all. It is all a question of procedure; and it seems that the proper procedure in case of capture on land is the issue of a writ of *devenerunt*, the return to which will be tried by a jury in the King's Bench.

"It has not been much the practice," remarks Stowell in the *Charlotte*,[1] "in modern times, to proceed against the property of enemies found in this country, but it is nowhere laid down as law that an Inquest of Office might not now be had, and the property confiscated. I remember a proceeding to that effect in the American War; and there can be no doubt that the law remains precisely the same as it was at that time."

§ 12. Blockade

Although various blockades were proclaimed in the late war of 1914, they were of relatively minor importance. The grand object of putting pressure on a country by depriving it so far as possible of articles not contraband of war, which is properly the function of Blockade, was secured by an unblushing inclusion of almost all commodities in the list of Contraband, and an equally unblushing claim to intercept them on their way to neutral ports. So closely had contraband capture been assimilated to blockade that it was popularly referred to by that name. Because it was impossible to blockade the Baltic ports of Germany, a virtual blockade was proclaimed against the ports of Scandinavia. It is imperative that Blockade should be restored to its proper place as a known and substantive institution of the Law of Nations. Its objective character has never been seriously affected, except in one particular. Arising, as it did, out of the fact of siege, which it is evidently an un-neutral act for an outsider to relieve, blockade cannot exist if the place is relieved by the absence of the blockading force. Attempts have been made in the past

[1] 1 Acton, 201.

to prohibit access to ports which were not in fact beset by a hostile force. The Armed Neutralities of 1780 and 1800 were a protest against this, and their protest was successful.

Other cases in which illegal interference with neutral ports in order to overcome geographical difficulties was reprobated are readily to be found. The U.S brig *Pioneer*, suspected by Brazilian officers of an intention to violate the blockade of Buenos Ayres, was allowed to pass, as there was nothing to show that she was not going on her duly documented voyage to Montevideo: the result of this correct attitude was gravely to embarrass the blockade.[1] So in 1828, when Russia blockaded the Dardanelles, she began to interfere with the trade of the northern shores of the Greek Archipelago, on the ground that goods could easily find their way from thence to Constantinople. Lord Aberdeen [2] speedily prevented this: "It becomes my duty to point out to Prince Lieven the irregularity of this conduct, which, under the plea of enforcing the blockade of the Dardanelles, had imposed a new and extensive blockade, and had prohibited all access to ports formerly open to the commerce of neutrals. It is sufficiently intelligible that the Russian Admiral, looking to the blockade of the Dardanelles as the means of preventing the arrival of provisions at Constantinople, should endeavour to increase the privations of that city, and should desire to render his measure more efficacious by its application to the several points along the coast from whence such provisions could be conveyed overland to the Turkish capital. But he should recollect that the traders of neutral states have no such intent; that in directing their commerce to ports not actually under blockade, they violate no law and are guilty of no offence . . ."

Nevertheless, the United States Supreme Court, in the Civil War Cases,[3] held that shipments to neutral

[1] Atherley-Jones, *Commerce in War*, 272.
[2] Aberdeen to Heytesbury, 22 May, 1828, 17 S.P., 390.
[3] *Supra*.

ports, from whence cargoes might be supposed to be intended to be sent to blockaded ports, could be interrupted *en route*, although all the ship's papers might be regular and in order for a voyage to the neutral destination. We have already discussed the problem of continuous transport with regard to Contraband, and it need only be said here that Chase's decisions have been still more severely reprobated in this regard. It is greatly to be regretted that Russell and Palmerston did not repeat to Seward what Aberdeen was not afraid to say to Alexander. The maintenance of the objective test of proved destination, instead of the admission of surmises, however well founded, is essential in those cases of prize where the prosecutor is also judge.

In this connection, Mr. Nielsen's words are well worth quoting, spoken by him as United States Commissioner on the American-Mexican Claims Commission,[1] in dealing with a case [2] in which the Mexican Government had purported to 'close' a port in the possession of insurgents, and then to turn vessels forcibly away from it as though it were blockaded. The majority of the Commission in a confused and somewhat hesitating opinion advanced the view that—

"The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the mem-

[1] See A.J.I.L., 1929 (award of 3 October, 1928), pp. 434–454.

[2] The *Gaston*. This case and Mr. Nielson's opinion are very valuable on the question of closure of ports, blockade of belligerent insurgent ports, recognition of belligerency, and effective blockade. It was urged that the port in question (Frontera) could not be said to be "in the possession" of the insurgents, belligerent or not, since a government vessel (whose speed was temporarily two miles per hour) was lying off the harbour! But in that case no port could ever be blockaded, for it would *ipso facto* be "under the control" of the blockading squadron.

bers of the League, under certain circumstances, to carry on economic war against an enemy of the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rule of the Paris Declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

"If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation."

In his dissenting opinion, Mr. Nielsen comments, "Of course custom, practice, and changed conditions have their effect on International Law as well as on domestic law. However, it need not be observed that a violation of law is not equivalent to a modification or abolition of law. The fact that new instrumentalities of warfare make it inconvenient for a belligerent in control of the sea in a given locality to act in conformity with established rules of law does not *ipso facto* result in a change of the law or justify disregard of the law. And if we indulge in speculation, it would not be a rash conjecture, in the light of experience, that the same belligerent, should his position be changed by a loss of control of the sea, would insist strongly on the observance of established rules and principles. It seems to be probable that among those who have given serious thought to the breakdown of the system of International Law with regard to the exercise of belligerent rights on the seas and to the possibility of formulating rules that will be respected, there may be some who would not complacently vision a system of promiscuous seizure of, and interference with, neutral merchant vessels, or the promulgation of edicts with regard to forbidden mine-planted zones in the high seas in which the nations have a common right. Indeed, it may be suggested that some might find it a more proper solution of the problem that the high seas should be maintained as the common highways in time of war, as in times of peace, and that to that end, interference with neutrals might be restricted to belligerent waters only.

"A rule of law is put to a test whether it means something when honourable respect for it involves inconvenience or material sacrifice, or whether it is to become farcical by being flouted under some theory of plasticity or changed conditions,

theories similar to the somewhat dangerous doctrine of *rebus sic stantibus* with respect to treaties. It is an elementary principle that the propriety of an act is governed by the law in force at the time the act is committed. International Law is a law for the conduct of nations grounded on the general assent of the nations. It can be modified only by the same processes by which it is formulated. A belligerent cannot make law to suit his convenience. An international tribunal cannot undertake to formulate rules with respect to the exercise of belligerent rights, or to decide a case in the light of speculations with regard to future developments of the law, thought to be foreshadowed by derogations of International Law which unhappily occur in times of war. Members of the League of Nations doubtless have entered into certain obligations under Article 16 of the Covenant of the League, but it must not necessarily be presumed that they must carry out their contractual obligations in violation of International Law. It should rather be assumed that any action taken in fulfilment of such obligations will be executed in a manner consistent with that law. In the agony of great international conflict, resort may be had to expedients to circumvent law, but the law remains. As was said by Acting Chief Justice Sir Henry Berkeley in the case of the *Prometheus*:

> "'A law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law, such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it (Supreme Court of Hong Kong, 2 Hong Kong Law Reports, 207, 225).'"

The curious question of the right of neutral men-of-war to communicate with blockaded ports is touched

upon by Atherley-Jones (*Commerce in War*, pp. 134, 143). When Turkey blockaded the Albanian coast in 1835, the entry of ships of war was expressly forbidden,[1] but in 1827 [2] the United States Commodore, Elliott, wrote to a Brazilian Admiral, blockading Buenos Ayres, that "Blockades have never been deemed to extend to public ships. Great Britain, almost perpetually at war, and numerically superior at sea to any other nation, never for a moment pretended that neutral ships of war could be affected by blockades. . . . In 1811, in the U.S. sloop the *Hornet*, I myself went into Cherbourg, then blockaded by a British squadron." Later he notes: [3] "The usage of nations is not to apply a blockade to ships of war; and this usage is conformable to reason, since the legitimate and only object of a blockade is to exclude supplies. . . . I beg leave to state that in 1811, while in command of the U.S. sloop-of-war *Ontario*, I entered the port of Valparaiso, then blockaded by a Spanish squadron. The Spanish commander notified to me the blockade, and requested I would acknowledge the notification of it, which I did in writing. In 1819 the U.S. frigate *Macedonian* entered the port of Callao, then blockaded by the Chili squadron commanded by Lord Cochrane, who boarded the *Macedonian* as she came in. In 1802, I was a junior officer in the American squadron then blockading the port of Tripoli. A Danish frigate came off the port, which our squadron boarded and permitted to enter." Raguet, the U.S. Minister at Rio, took up the same position, and declared with respect to the exclusion of warships that, "Had any serious intention existed at any time on the part of the Brazilian ministry to attempt a measure so clearly at variance with the established law of nations . . . I should not have failed to resist the doctrine as wholly inadmissible by the U.S., and at the same time to have given notice that any

[1] Brit. State Papers, Vol. 23, p. 791.
[2] *Ibid.*, Vol. 15, p. 1120.
[3] *Ibid.* p. 1123.

attempt to impede the entry into a blockaded port of an American ship of war would be resisted by force." [1] But by 1863 the United States were less enamoured of this theory, and the British Admiral, Milne, issued a circular declaring that "Even communication by neutral ships of war with a blockaded port is permissive only"; [2] and this seems to be the convenient and modern doctrine.[3] So, in 1864, the British Minister at Buenos Ayres agreed with the Argentine Government that the right to exclude men-of-war was one which, strictly speaking, a blockading force possessed; and as a matter of courtesy and humanity, the *Dotterel* was permitted to proceed.[4]

[1] *Ibid.*, Vol. 14, p. 1169. Raguet to Elliott, 18 March, 1826.
[2] *Ibid.*, p. 474.
[3] H.M.S. *Vesuvius* took specie from Mobile during the Civil War, as British property—presumably by permission (*Ibid.*).
[4] 66 Brit. St. P., 1266. Thornton to Russell, 24 April, 1865.

CHAPTER V

ELASTICITY

"E PUR si muove." The entire body of civilized thought does move; but in most cases slowly and with difficulty. Such a vast and varied thing as the total thoughts and ideas of the world's myriads cannot, in the nature of things, move readily and swiftly in concert. We cannot be too cautious in ascribing to the opinions of a few thinkers or a good many newspapers the quality of reflecting the real convictions of the populations of the globe.

We can sometimes, however, be fully justified in concluding that there has occurred a change in the Law of Nations. Parenthetically, it may be observed, that Codification would probably put an end to the possibility, and would fossilize the law. Some of these changes, and some asserted changes, we shall now deal with, under the heads of—

§ 1. Nationality.
§ 2. Regional Understandings.
§ 3. Modern Protectorates.
§ 4. Leases and Pledges of Sovereignty.
§ 5. The Signature and Force of Treaties.
§ 6. Neutral Duties.
§ 7. War Rules.
§ 8. Exemption of Private Property from Maritime Capture.
§ 9. Modes of Pacific Settlement.

§ 1. Nationality

1. Jus Soli and Jus Sanguinis.—It is sometimes said that nations arose out of the débris of feudalism. Yet there can be no doubt that the conception of Nationality existed already in feudal times. It was not only the Lord, but the Land—and the Land conceived of with its people and cities—that was the object of devotion in mediæval times. "Saint George for England!" "Saint Denis for France!" were cries of the Crusaders. The Aragonese had no exclusive feudal devotion in mind when they told their king that, as they had chosen him, so they would depose him if he infringed their liberties. Yet they were conscious of Aragon. There was a strong national feeling in Scotland centuries before the period when we are told that England and France led the way in attaining a consciousness of national unity. This is not the place for historical disquisitions, but the opinion may respectfully be advanced (and, indeed, it scarcely requires proof) that national feeling, and consequently nationality, long ante-dated the decay and downfall of the feudal period.

At the same time, the conception of nationality was necessarily tinctured by the prevalent feudal ideas. It would be absurd to say that the feudal system "subordinated the individual to the land": no system was ever so absurd as to make human beings of less account than fluorine and silicon. But in the feudal scheme of polity, as in the modern scheme of international relations, the land was a criterion of prime importance. It was a system based on neighbourliness: the people who lived and worked together and knew each other were managed by the lord, the lords were led by the earls, and the earls controlled by the kings—while at the apex of the whole system was the Emperor. Nor were the lords, except by abuse, despots. They had their courts; they were controlled by acknowledged and immutable law, and they could be called to account by their earls and kings.

The feudal system had no serious inherent defect: only the infinite schism of thought and opinion caused by the decay of Rome transcended its categories.

Based as it was on the tendency of men who work and live together to hold together, it necessarily rested on a territorial organization. Even if humanity developed wings, frequent and distant flight would remain the exception. The association of human beings with definite portions of land, to which they can return to find their friends, if not their food, must persist until we are independent of material conditions. In the feudal system, this was frankly recognized. The people who inhabited a particular territory lived and worked together in a fashion expressed by saying that they owed a common allegiance to the same lord. It was inevitable that a person who was born "within that allegiance," *i.e.* in the midst of a community living and working together in a common scheme of daily life, should be regarded as a member of that community and included in that allegiance. When the lords became negligible, and power came to be vested uniquely in the Crown, the allegiance became wider, but the principle remained unchanged. Hence we may say that throughout Europe, the conception of Nationality was everywhere based upon the fact of birth within the allegiance of the monarch. Günther (*Europaisches Völkerrecht*), writing in 1787, lays down the rule without qualification. In republics such as those of Venice and the Italian cities, although there may have been no such conception of allegiance, the same idea of attachment to the territory of birth subsisted—a Pisan was necessarily born in the territories of Pisa, and a Florentine in Florence.

The notion that territorial nationality did not exist until modern times can only be termed grotesque. However historians may talk about "the attainment of national self-consciousness" in quite recent times, first by England and then by France (or *vice versâ*, according to the taste of the historian), it is quite plain

that kingdoms of Scotland, and England, and France and Castile, existed from at any rate the tenth century and that their populations, through whatever intermediate dukes, earls, mayors, bishops and vavasours, looked up to their respective kings as holding supreme authority; which is the essence of nationality. The distinction between the subject and the alien was perfectly familiar.

In fact, when we come to inquire what the modern conception of Nationality is, we shall discover it to be a decidedly thin and elusive thing. The important matter for every one to consider, in determining his conduct, is, not whose he is, but where he is—and incidentally where his friends and his goods are. It is the local sovereign who has the transcendent power over him, his friends and his goods. It is the sovereign of whatever place they respectively happen to be, that can dispose of them. All that the national sovereign can do is to complain if they are not treated in foreign countries with a certain [1] degree of decent behaviour, or if they are molested on the high seas, and to secure their freedom from military service. He cannot recall them from foreign countries,[2] nor can he dictate to the latter what system of private law shall be applied to them in their territories.

The tie between sovereign and subject, when the latter is "forth the realm," is therefore exiguous. Both can ignore it. The importance of the matter rests solely on the increasing pretension of States to require a certain standard of good treatment for their subjects abroad. The tie of nationality is in itself no stronger now than it was a thousand years ago. As we have seen, it depended then on allegiance, which in turn depended on birth within the power of the local lord. The disappearance of intermediate allegiances has left the subject owing allegiance directly to the King, or to

[1] Which, in this connection, means "uncertain."
[2] *Kossuth's Case.* See Piggott, *Extraterritoriality, passim.*

whatever body represents him in the modern "democratic" state. But the foundation of the tie is still birth within the state.[1] For what can be supposed to have altered it? We are familiar with the fact that many modern states claim as their subjects all whose agnatic descent is to be traced to subjects of theirs (questions of voluntary naturalization apart). But the origin of this practice was clearly a municipal affair. It was a common thing to refuse various important civil law rights to aliens—thus, they could not hold land in England, or transmit their goods to successors in France; and the sovereign or the legislature frequently found it just and convenient to relieve whole classes of them from such liabilities by conferring on them the rights of subjects. Thus, as early as 25 E. III, st. 2, the children born abroad of English fathers were declared capable of inheriting land within the realm; and in the reigns of Anne and George II, the first and second agnatic generation of the descendants born abroad of British parents were successively declared to be "to all intents and purposes" British subjects. It is almost certain that the intention of these statutes was to have no extraterritorial application; that no claim was meant to be asserted against foreign states; that no right was put forward to protect such persons abroad, and that the only intention was to relieve such persons from the disabilities of aliens. The best proof of this is that no attempt to give those statutes an international interpretation was made. They intended no new departure. This was admitted in 1842, when Great Britain fully recognized that her concession of British nationality to the descendants of British subjects born in Montevideo was for use in British territory only, and was not intended to prejudice the rights of Uruguay (Cogordan, *Nationalité*, 45); and again in 1858, when Lords Claren-

[1] See as to the various rules of the respective countries of the world, as to nationality, Burge, *Foreign and Colonial Law* (new ed.), II, pp. 100–130 (ed. Wood-Renton and Phillimore).

don and Malmesbury freely admitted that the scope of the statutes of Anne and George was limited to the King's dominions, and that Great Britain made no claim to protect the descendants of British subjects in France, the country of their birth.[1]

A striking new departure was, however, made in France at the time of the framing of the Napoleonic Civil Code in 1804. It was made almost by accident. The established international rule, that French people were those persons who were born in France, was about to be laid down, when a perfervid publicist suggested that this was too feudal a conception and that the French character ought really to be derived from the French character of the parents, wherever the child was born. And this amendment was carried, with apparently very little discussion or consideration.[2] It proved the starting-point of an extensive development. The Francophile revolutionists in Belgium adopted the principle in 1830; German theorists of the 1848 period took it up in Bavaria and Saxony, and it proved particularly grateful to Italian nationalist theory at a somewhat later period. About 1850 it was accepted by Spain, Prussia and the Netherlands. In fact, under the name of the rule of the *jus sanguinis*, it is the dominant rule in Europe, the only conspicuous exceptions being Denmark, Holland, and the United Kingdom.

It is to be noted, however, that—

(1) It does not prevail in America. Countries of immigration cannot afford to admit that children born in their precincts do not possess their nationality.[3]

[1] Cogordan and Weiss twist this admission into the inverted statement that Britain makes no claim to protect persons born in Britain against the country of their descent. No such statement was ever made, or could have been made.

[2] It is true that some little time previously, towards the close of the Monarchy, the French lawyers, according to Cogordan, were inclined to hold that the descendants of Frenchmen, born abroad, were French, as well as persons born in France. This is obviously impossible as an international rule: municipally it may have been quite sound.

[3] Mexico appears to be, or to have been, an exception: Moo. *Int. L. D.*, II, 530, § 437.

(2) It has never, in any conspicuous instance, been asserted *in invitum*.

(3) It is admittedly an innovation.

(4) It is everywhere subjected to serious and increasing exceptions.

(5) The recent French statute of 1927 [1] goes so far in according French nationality to new categories of persons, whether at birth or by way of naturalization, as to revolutionize the French law on the subject, and to introduce many occasions for dispute.

Nobody asserts that this *jus sanguinis* is the sole rule for ascertaining the nationality of an individual. What is asserted is that the Elasticity of International Law, responding to a really universal conviction, has by this time established it as an alternative rule, which may rightly be adopted by a state in declaring who are its subjects. It is immediately obvious that such a rule of international law leads immediately to conflicts—it allows that the same person may be claimed by two states at once. This in itself raises a strong presumption against it. It is sometimes, indeed, laid down by authors in general terms, that a state has a right to say who are its subjects; but it is hardly necessary to demonstrate the absurdity of such a proposition. The common sense of nations obviously limits the power of a nation to seize at pleasure the subjects of other states as its own. But the rule of the *jus sanguinis* has in the course of a century and a quarter conquered for itself so secure a position, that it is necessary to deal with it seriously. It is an innovation, an awkward, dangerous and crumbling innovation; but does our Canon of Elasticity require us to accept it as a recognized alternative to the *jus soli*?

It would scarcely appear to do so. The desire of the many does not make the law for all. This was clearly exemplified in the fact that the exemption from belligerent capture of private property at sea was universally acclaimed in the course of the nineteenth century on the

[1] 10 August, 1927. Cf. J. Valéry, *La Nationalité Française* (1927).

Continent of Europe, and it had great support in the United States of America. French, German and Americans, Gessner no less than Hautefeuille, proclaimed that the new principle ought to be accepted as law. Their unanimity was wonderful. But because the majority of English writers and statesmen firmly opposed the innovation, it could never be represented as enjoying universal support. In the same way, the correlative opposition of the United States to the abolition of privateering prevented the disappearance of the privateer, though universally disowned and condemned by Europe. The mere imposition by municipal legislation of the quality of subjects upon various classes of foreigners has not in itself much international bearing. It may simply be intended to confer on certain aliens fuller civil and municipal rights than they would otherwise have within the territory. It is when it is insisted on and enforced abroad that it becomes important. And the cases are few indeed in which the new *jus sanguinis* has been enforced against an unwilling opponent. The *Melecka* case is the only one which has received much publicity, and it was far from conclusive. There, the daughter, born in the United Kingdom, of Russian parents was imprisoned in Russia on a political charge, and Viscount Grey was unable to secure her immediate release. But, to begin with, if she had been a British subject of English descent, he could scarcely have interposed on her behalf merely because she had been proceeded against for mixing herself up with Russian politics.[1] In the next place, she was in fact released after a short time [2]—probably in as short a time as any British subject would have been. The only feature for which the case can be quoted is Viscount Grey's express

[1] Cf. the case of Wilcox and Gresham in the Sandwich Islands, Willis to Gresham, 7 March, 1895, 2 *For. Rel. U.S.*, 850.

[2] She was detained some four months. The civil judicial statistics show that in England over a hundred persons were detained in the course of a single year for a like period, awaiting trial. Half of them were eventually acquitted.

admission that Russia had as full a right to claim that she was a Russian subject as he had to claim her as a Briton.

At the time of this case, Viscount Grey (then Sir Edward Grey) was busily engaged in weaving the web of intrigue which culminated (in Lord Loreburn's phrase) in Britain's being "tied to France in a Russian quarrel in the dark." Persia was being sacrificed to Russia, and the principle of *jus soli* might appear equally suitable as an object of abnegation. The case is altogether too weak to sustain an argument that descent has been internationally accepted as a possible criterion of nationality.[1] The United States Attorney-General in 1869 (Hoar) is quoted as saying: "If by the laws of the country of their birth children of American citizens, born in that country, are subjects of its government, I do not think that it is competent to the U.S. by any legislation to interfere with that relation, or by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist." [2] So, Mr. Seward in 1867, Mr. Hunter in 1868, and Mr. Frelinghuysen in 1883 declined to afford any assurance of protection against Chili and France to the sons of Americans, born in those countries.[3] Mr. Bayard in 1886 expressly generalized the principle that the children of Americans, though treated as Americans in the United States, will not be protected against the country of their birth.

This implicitly recognizes that the United States'

[1] Reference may be made to "La double nationalité—est-elle possible?" (R. D. I., 1927), and to "Nationality and Domicile" (*Wigmore Celebration Essays*, 187), by the present writer.

[2] 13 Opinions of Attorneys-General, 89, 91. Doubted by Wharton, *apud* Moore, *Int. D.*, § 426, II, 522, but seemingly only on the ground that Hoar meant to deny the possibility of a change in the criterion of private law (which, as Moore agrees, was evidently not in question).

[3] Moo. *Int. L. D.*, § 427, II, p. 526, 899.

legislation conceding citizenship to the children of certain Americans born abroad has no international validity.

Inversely, Mr. Evarts, than whose there is no name greater in the list of American Foreign Ministers, declared in 1879, " It is quite clear that the two young Boisseli, being native-born citizens of the U.S., cannot be held under any law, municipal or public, to owe military service to the German Government." [1]

So Mr. Hay declared, in 1899, in the case of R. J. J. Pinto, that a person born at San Francisco of Costa Rican parents was entitled to the protection of the United States in Costa Rica; and, in the case of Michot, he wrote, " The only question is, was the applicant born in the United States? If he was, he is a citizen by right and is, under our practice, entitled to our protection during his minority wherever he may be " ; [2] while in the case of Elise and Emma Bernot,[3] whose parents were German, and who lived with their natural grandfather, a Swiss, in Switzerland, he said, " No principle is better settled than that birth in the United States, irrespective of the nationality of the parents, confers American citizenship. Upon the facts stated, therefore, these girls are citizens of the United States, and as such are entitled to passports and the protection of this government." Mr. Moore says that these cases have not been followed, but they have not been repudiated, and Mr. Hay's authority is very high. In 1901,[4] Dr. D. J. Hill, Acting Secretary of State, remarked in the cases of Seemann and Hermann that, as they " were born in the U.S., and had not forfeited their allegiance, they should not have been required to make the statements or produce the proof which the Consul (at Hamburg) required (viz. the father's naturalization certificate), their citizenship being derived, not from their parents' naturalization, but from the fact of their American birth."

[1] Moo. *Int. L. D.*, § 430. Evarts to White, 6 June, 1870.
[2] *For. Rel. U.S.* (1899), 760.
[3] *Ibid.*, 761.
[4] *Ibid.* (1901), 178.

It is true that Mr. Bayard, in 1886, declined to give a U.S. passport to a Mr. de Bowery, born in New York of Austrian parents.[1] But the United States have a peculiar and sensible doctrine according to which they decline the protection of subjects who have *de facto* expatriated themselves, and Mr. de Bowery seemed to Mr. Bayard to have elected to remain in Austria, his parents' country, to which he had been taken at the age of five. Comparable with this case is one in which Mr. Frelinghuysen, in 1883, approved the refusal of an U.S. passport for a child of four, born in the United States, but taken home at two years of age; it is not quite on all-fours, because Mr. de Bowery was twenty-four, and might well be held to have expatriated himself.[2]

In 1895, indeed, Mr. Uhl [3] declined to assure a person born in Maryland thirty-five years before of protection should he return for however short a time to his parents' country, Germany. But his authority is not commanding. More important, perhaps, are the warnings of Mr. Frelinghuysen (1882) [4] and Mr. Blaine (1892) [5] to the effect that "it would be perilous" for the born American subject to visit Germany, and that "the U.S. passport would not guarantee him against claims to his allegiance or services made whilst in Germany." The attitude of Evarts and Hay is clear and plain, and in accordance with principle. That of Frelinghuysen, Uhl, and Blaine is confused and self-contradictory. It does not seem such as to command respect. Unless we are

[1] *For. Rel. U.S.* (1886), 12; (1887), 402–4.
[2] Moore's *Digest*, *ut sup.*
[3] Moore's *Digest*, *ut sup.*
[4] Moo. *Dig.*, § 428. Frelinghuysen to O'Neill, 8 August, 1882.
[5] *For. Rel. U.S.* (1892), 189. Blaine to Phelps, 3 May, 1892. Case of Henckel. See also case of Block, *ibid.*, 184–8, 191, and Blaine to O'Neill, 15 November, 1881 (all cited in Moo. *Dig.*, § 428). In the last case Blaine actually said that the child of alien parents loses its U.S nationality on return to the country of their allegiance. This cannot possibly be true, unless the return be permanent. In another case, in 1885 (Moo. *Int. Dig.*, II, 530), Frelinghuysen expressly left the supremacy to the country within whose territorial limits the individual happened to be. He might be in neither. And what if his goods are in one and himself in another?

to suppose that the law is that born Americans will not be protected against Germany, but will be protected against Costa Rica, there is a clear conflict of opinion, which ought surely to be resolved in favour of the doctrine of Evarts and Hay.

Great Britain has at various times obtained the concession from American Powers [1] that the sons of British parents shall not be required to perform military service until they are 21, and to serve by a substitute. Such concessions appear to be in their nature revocable, and they were granted on the footing of reciprocity.

It will be seen that the question presents several aspects. There are the obligations of nationality, and there are the benefits of nationality to be considered, as between the individual and the State. And, again, there are the rights and the responsibilties of the State as regards other States in respect of him. Sometimes there is a tendency to regard the matter (as in the Statutes of Anne and George II) as if the municipal benefits of nationality were alone concerned. Sometimes there is a tendency to lay stress on the obligation of the individual to do military service. It is quite infrequent to find any discussion of the possibility of the responsibility of a State for persons whom it disclaims as subjects.

On the whole, it would appear to be the better opinion that the right of a State to claim as subjects all the agnatic descendants of its subjects has not been established. There is a great deal of academic recognition of the right on paper, and some little assertion of it in practice. But there are equally emphatic denials of it in practice. It is a principle of which the limits are quite uncertain. No one supposes that France could claim as a subject an Englishman whose only connection with France was that his great-great-grandfather was a Frenchman. The principle furnishes us with no point

[1] *E.g.*, Costa Rica, San Salvador, Guatemala Nicaragua, Honduras (63 S.P. 273, *seqq.*).

at which to draw the line, and if applied without qualification it is inherently absurd. States which adopt it introduce so many exceptions, in order to swell their conscription-lists, that they might almost as well adopt the established rule of *jus soli*. That rule was at a quite recent period the unquestioned rule of Europe and America. No really vigorous struggle between important States has demonstrated that it has been displaced by the inadequate and futile rule that either rule will do.

And yet the solemn treatment by authors of *jus sanguinis* as on a par with *jus soli* must go for a great deal. It shows that the world's opinion has rapidly moved in the direction of admitting the country of descent (to some unexplained extent) as equally entitled to the individual's allegiance.[1] Whether it has moved quite far enough may be seriously doubted. Certainly it has moved far enough to make it difficult for the country of birth to assert its right as against the country of ancestry.

The feeble attitude adopted by Frelinghuysen and Professor Westlake, in presence of the problem presented by conflicting claims to the allegiance of an individual by different states, is that each must admit the claim within the other's borders. As we have seen, this leaves unsolved the difficulties of third states;[2] and, as usually stated, it involves another difficulty. The statement is usually found in the form that one state must acquiesce in the ill-treatment of its asserted subject when he is personally within its borders. But it is clear that it may be only his goods that are within its borders; does the same rule hold? Or it may be that his repu-

[1] Both rules are in fact sufficiently ridiculous. That a transient couple should confer on their child the nationality of their hotel is absurd enough. That a country should try to keep its hold on children who have nothing in common with it but a remote ancestor is just as foolish. The true relation ought to be based on domicile—or on a function of domicile and education. At one time, official employment in the service of the state was held to confer its national character.

[2] In particular, as regards the application of the Most-Favoured-Nation clause in treaties. This is a conspicuous, but by no means the only, instance.

tation, his domestic rights, his literary or industrial rights may be affected by something transpiring within its borders ; does the same hold good ?

It is far more juridical to conclude that general consent is necessary for the abrogation of an established rule : that *jus soli* was an established rule ; and that no general consent has been shown to such an inane procedure as the introduction of a competing rule which will inevitably lead to conflict, friction, and uncertainty. In this view, the *jus sanguinis* rule is one which is simply of municipal validity.

Internationally, the rule of *jus soli*, it is submitted, holds the field. It is not a question of " the subjection of human beings to the land," or of " persons being considered as less important than stone and lime." No one considers human beings as the appanages of fields and mountains : and the true aspect of the matter is only obscured by those who declaim against such a " feudal " conception. Even among the Jews, who were not feudalized, the antithesis was between the " stranger " and those " born in the land." The truth is, that human beings are subjected to a sovereignty which is limited by reference to land, and the less confused the position is by the intrusion of other sovereignties, the better for all concerned.

Both criteria—*jus soli* and *jus sanguinis*—must appear absurd, not only to the individualist, but to the collectivist also. That a person should be expected to display undying and unlimited devotion to a country merely because he happened to be born within its borders, or to be descended from some one who once lived there as a subject, is a proposition which is ridiculous on the face of it. It may be true of some countries, but it is not true of the world. It is very dubious whether in a Christian, a Buddhist or a Mohammedan such a transcendent attachment is not the due of Heaven alone. In the cosmopolitan modern world, it can only appear out of place—except, indeed, in such exclusive commu-

nities as those of which Japan is the most important extant example—in which the pressure of alien cultures still creates a strong national self-consciousness. It may be said that the example of the World War, and the cheerful self-sacrifice of myriads, proves the contrary. That is to forget that conscription on a vast scale, and moral pressure on a far vaster scale, and official mendacity on an appalling scale, were characteristics of that struggle.

If we inquire what is the tie which ought reasonably to justify the temporary leaders of a community in calling for the ungrudging sacrifice by the individual of everything that is most precious, it will certainly not be any such artificial tie as these. It is very arguable that nothing can justify such a demand. It is not the particular nation, but Civilization as a whole, that protects and develops the individual, and the latter is not conspicuously indebted, say, to Canada, for his life, health and culture, because he happens to be born in Winnipeg. It is Western Civilization, reaching back to Athens, which has made him what he is. Whatever the fair and reasonable demand of the State on the individual may be, it seems proper to conclude that it cannot be based on such meaningless *criteria* as the *jus soli* and the *jus sanguinis* provide—and that the tie between them should be created by something more real and substantial. It appears to be proper that permanent residence, in the sense of the English Domicile, in which all idea of ever leaving the adopted bound is excluded, should become the sole criterion of nationality.

2. Naturalization.—Naturalization, on the other hand, is a matter on the principle of which less doubt can exist. The old doctrine of indelible allegiance, although repeated up to the middle of the nineteenth century by authors of repute, has disappeared from the general consciousness, and it seems certain that, if a person has discharged all his ascertainable military and other obligations to his sovereign, he can be freely

adopted by another, provided that he is at any rate present within the territory of the latter. This is a real instance of the Elasticity of International Law—that at the present day the doctrine of Indelible Allegiance is dead. It is regrettable that the limits of the power of a state to adopt the subjects of another are still uncertain, but it cannot be denied that the power exists. Certainly a State would not be upheld in conferring or imposing its nationality upon individuals who are not even transiently within its borders. But equally certainly it has now the power of conferring its nationality upon persons who have been long resident there, and who left their own country with all their ascertainable obligations fulfilled. It is a pity that this qualification has to be attached; it is not reasonable, in these days of inter-communication and intercourse, that a person who has definitely emigrated for good, should be debarred from acquiring a nationality in the country of his adoption, on account of some outstanding liability. Suppose that a person would certainly be liable to jury-service in ten years' time in accordance with some fixed *rota*, it would be unnatural to say that such an obligation ought to prevent him from emigrating and becoming naturalized, or to say that a person who committed some infraction of the law, and might conceivably be subjected to a slight penalty if it should be discovered and prosecuted, is thereby debarred from foreign naturalization. The truth is that when " the fulfilment of obligations " is spoken of, the performance of military service is always the thing thought of. Perhaps the proposition would be more candidly expressed as debarring naturalization, so long as the individual has not fulfilled his military service. So much is certainly recognized; but it would be wrong to expand it into a rule preventing all foreign naturalization so long as any national obligation subsists. Naturalization in defiance of a law of the original nationality expressly

forbidding emigration is of course another matter. On the other hand, it must not be forgotten that every country is entitled, within its own borders, to confer any rights that it likes upon anybody, subject, of course, to the provisions of treaty engagements.

It may probably be taken, also, that the person to be naturalized must not only be present in the adopting country,[1] but must have a still more permanent connection with it. Official employment is generally considered of itself sufficient to make naturalization proper, but, beyond that, difficult questions arise. Mere transient residence would probably not be regarded as sufficient. Lord Brougham once desired to become a French citizen on the strength of his spending the winter regularly at Cannes. But what he really seems to have meant was a willingness to acquire the municipal benefits of French citizenship—not to acquire a second political allegiance. But is a settled residence (French *domicile*) sufficient, or must there be that more permanent settlement which Anglo-American law terms "domicile," and which does not arise if there is any intention to return in certain events?

We must here speak with caution, but it is probable that the lower degree of identification with the country of naturalization is sufficient. It is well understood everywhere, which the Anglo-American "domicile" is not. It is fairly simple, while the latter is complex. And it comports well with the modern idea of liberty, and the desirability of people who are settled in a country in a settled fashion being subjects of that state. It may therefore be said with some confidence, that the naturalization of a person in the country of his settled residence, he having performed his ascertained obligations of military service in his own country, must legally be recognized everywhere as effective. That is,

[1] See the *Soglasie* (1854), 2 Eccl. & Adm. 101; Spinks, 104; and the *Johann Christoph*, 2 Eccl. & Adm. 2; Spinks, 60; where the limits on the powers of naturalization are considered. These cases, however, are complicated with the question of enemy character in prize.

if he is *sui juris* by the law of the original nationality, and desires or accepts the change.

The power of a state to impose nationality on an unwilling party is much more doubtful, but it is not certain that it does not exist, when the individual is definitely settled in its territory. Certainly attempts have been made by Mexico and other American states to impose their nationality upon immigrants, and it cannot be positively stated that the universal conscience is against this. The better opinion may be that it is so opposed—but until the case arises it would be unwise to dogmatize. The great desirability of unity within the realm, and the great weight of opinion which is coming to be in favour of making settled residence in itself the actual test of nationality,[1] independently of naturalization, may lead us to suppose that such an imposition of nationality might conceivably be regarded as requiring general respect.

It seems generally to be accepted, however, that an individual may in some circumstances be naturalized against her will: thus an unmarried minor will generally follow the condition of her father,[1] and it may be safely said that a State which assumed to retain the children after the loss of its nationality by their father—at any rate, if they were resident with the latter—would be unsupported by the Law of Nations. Whether the same would be true if it were a question of the change of nationality of a widowed mother, or a remarried mother, may be questioned. In view of the modern tendency to put the parents on an equality, it may fairly be resolved in the affirmative, except where the widow has remarried.

The law as to the naturalization of a woman by marriage with a foreigner, formerly everywhere admitted as competent and almost necessary, has of late been thrown into the utmost confusion. Several important

[1] See Wigmore.

states—the United States among them—have enacted legislation which purports in various circumstances to preserve their nationality to women who marry foreigners, and to refuse it to foreign women who marry subjects. The latter is quite within their competence: and so, municipally, is the former. But it is very uncertain whether the disintegration of the family has progressed up to the point at which a state may be at liberty to retain as its subjects women who have married foreign men.

The great progress made in the nineteenth century by the idea of naturalization was undoubtedly due to the splendid Individualism of the period. The Jeffersonian idea of the State as a useful machine for preserving the liberty of individuals to follow their own lines of self-development threw the obligations of patriotism into the background, while increasing intercourse between foreign countries disposed people to see less and less importance in national differences, and to become cosmopolitan. At the same time, the growth of mammoth states made the tie which naturally binds an individual to the place of his birth and education one which by no means coincided with his political allegiance to a distant capital. Naturalization was a natural and normal thing in such circumstances: the right of expatriation presented itself as a primordial and inalienable right of humanity. It was primarily for the individual to say what State he chose to belong to. The recrudescence of Nationalism, beginning with Italy and Hegel, has produced, in the fullness of time, a set-back. Nationalism and the rights of the State have again, in a somewhat artificial and bureaucratic form, raised their head; and the utmost energies of all the population—willing or unwilling—have been called upon without stint or scruple in the World War. It is not unlikely that this phenomenon is a passing one, and that the coming generations will regard such a devotion to a bureaucracy and an arbitrarily determined

frontier as artificial and unreal. They may return to an intimate and first-hand devotion to the land they know. In that case, naturalization will again appear as a natural and normal possibility. At present, it cannot be denied that it is looked upon with jealousy, and that much force will generally in practice attach in a doubtful case to the claims of the original country.[1] The old argument which used to be urged in favour of the indelible nature of nationality—viz. that allegiance was a tie which no third party had power to break—was clearly fallacious. It was universally admitted that any foreign woman could break it by marrying a subject. What any man could do, by adopting a lady into his family, surely his State could do, by adopting her into its society.

3. Stateless Individuals.—There has of late been a great disposition to abolish by all means the possibility of individuals existing who owe allegiance to no state. This is partly due to the *étatisme* which views with prim horror the idea of an independent individual: partly to the desire of states to increase the numbers of those liable for military service; partly to the adoption in some countries of Nationality as the criterion of the personal law; and partly to the inconveniences of the passport system. Since a stateless person has no state to grant him a passport for travelling, he cannot travel. This last objection, however, is one which is deliberately created by bureaucracy. It is believed that passports were originally granted, not by the country of the traveller, but by the country of travel. They embodied a permission, granted after due inquiry, to enter and to travel in the country.[2] It became so inconvenient to have to obtain ten or a dozen passports for a Continental journey, that the usage was introduced of the

[1] France is said to have refused to recognize the neutral naturalization of Germans *pendente bello*; Clunet, 1916, p. 521, citing *Journ. Off. de la Rép. France*, 12 January, 1916.

[2] In the same way, an envoy is furnished with a passport when he quits the country, to protect him during his exit.

issue of an omnibus passport by the country of allegiance, *visas* being appended by the officials of the countries to be visited. But there is no reason why the country to be visited should not issue the passport, and, if states would consent to do so, the whole objection would disappear. It is mere hide-bound bureaucracy that creates it, and an obstinate clinging to unnecessary forms.

The objection that a person without a state can have no personal law in countries which make the personal status depend on the nationality is readily met by the fact that such systems always supply an alternative criterion (usually domicile) in cases where the nationality is not conclusive—as where it comprises countries subject to various systems of civil law. And this alternative criterion can readily be applied to persons who have no nationality at all.

4. Nationality as the Criterion of the Personal Status.—A good deal of confusion exists in many Continental publications between Nationality as a political conception and Nationality as the criterion of the personal status. Since Nationality came to be widely accepted on the Continent of Europe as the test of the proper " personal " law to be applied in determining the civil law status of a given individual, the term " nationality " has almost come to have a secondary sense, in which it simply denotes the criterion of the personal law; and in this sense it may be quite different from the political nationality of the party. It is difficult, on this footing, to see why Domicile, in the Anglo-American sense, should not be accepted as a kind of Nationality: and probably the Continental publicists who speak of a person's " private-law nationality " have not quite realized that, if they distinguish between political nationality and " private-law nationality," they are really abandoning nationality as the criterion of private law in favour of some other invented criterion, which may not be Domicile, but

which is certainly not Nationality. In fact, the objections which Continental writers entertain to the Anglo-American adoption of Domicile as the criterion of the personal status arise simply from their not understanding it. It is emphatically not the Continental "*domicile*" which is the criterion in the English system: it is something exceedingly like their own "private-law nationality," and amounts to the adoption, for private-law purposes, of a certain foreign legal system, by identification with the foreign population which normally uses it. The perennial controversy between upholders of the rival principles of Nationality and Domicile narrows itself, on this footing, to a mere controversy between one kind of "private-law nationality" and another. The late Dr. Asser, indeed, as a partizan of the system of Nationality, has suggested that six years' residence might confer such a "private-law nationality" [1] —and he did not appear to realize that, so far from such a change involving any concession by the partizans of the system of Domicile, it was to go far beyond them. For one might well be for ten, or even fifty, years in a country without acquiring a domicile there.

In comparatively few cases would six years' residence constitute domicile. Professor Asser's naïve remark shows how difficult it is for the most erudite Continental lawyer to grasp the English idea. Of course, a domicile may be created by a few seconds' presence—but as it pre-supposes an intention to make the country one's permanent home, it can scarcely even be inferred from the mere fact of residing there for six years.

5. Canadian, etc., Nationality.—If we are right in supposing that an international status (mi-souverain or perhaps sovereign) has been tacitly granted to the great colonies of the British Crown, the question must arise of the criterion of their nationality. In the first place, does a common British nationality survive? It

[1] See 32 *Law Magazine and Review* 472; also the writer's "Nationality and Domicile" in *Wigmore Celebration Essays*.

appears to do so, because all subjects of the British king must in the United Kingdom be fellow-subjects ; [1] as was decided with reference to the days when William IV was King of Hanover.

But that nationality cannot be a new Imperial nationality, because it cannot be supposed that by any tacit means the people of the United Kingdom have been divested of their nationality and invested with a new one. It is simply the old national character, due to a Common Allegiance. But in what were styled the Self-Governing Colonies, and are now (very misleadingly to foreigners, who are puzzled to find that Ceylon and Jamaica are also among the Dominions of the Crown) called Dominions, there seems to be also a new nationality corresponding to their new international status. It will be either a subordinate or a co-ordinate nationality, according as we regard these states as mi-souverain as sovereign. And as they repudiate subordination to the United Kingdom, and as there is no organized British Empire with a single government which can be regarded as the over-sovereign, we are driven to the conclusion that the Empire is a confederation, and that they are sovereign states ; there is nothing to prevent them even from altering the succession to the Crown. If this is the correct view, who are their subjects ? It is impossible to obtain any guidance from the precedents of the United States and the Transvaal ; for where independence was granted to, or recognized in, these communities, the question of their subjects was carefully regulated, and it was to the " inhabitants " that the grant was made. This cannot be said to be the case here, where there is only a tacit grant. A subject of the United Kingdom cannot by any tacit process be deprived of his citizenship merely because he happens to be in Australia. The authorities on cession usually state that cession of a territory will carry with it the settled inhabitants, and most likely the settled inhabi-

[1] *Isaacson* v. *Durant* (1886), 17 Q. B. D., 54.

tants of the former colonies will be held to have acquired the nationality of these various new communities. An alternative view would be that only the persons born within the limits of such can be considered their subjects: but this would be inconvenient and unscientific. The King of the United Kingdom has not ceased to be the King of the United Kingdom and become King of a new Empire. He has conferred the status of a new international state on various of his possessions, and there cannot be a new international State without a new Nationality arising. The place of birth in such a case is immaterial. It will, for the future, be material; but the only question for the present is, on what persons has the new international status been intended to be conferred? For the future, no doubt, the fact of birth within the territory will be decisive unless and until a different rule is adopted by statute.

It is interesting to note that "Canada" was regarded, even after confederation, as a geographical expression. The Treaty of Washington of 8 May, 1871, allowed the free import into the United States of fish from "Canada," and the U.S. refused, after the incorporation of British Columbia in the Dominion (on 20 July, 1871), to allow fish from British Columbia to have the benefit of this provision.[1] The Earl of Derby, after consultation with the Law officers of the Crown, instructed the British Minister that the words "Dominion of Canada" in the Treaty and in statutes based upon it "must be governed by the state of things existing in May, 1871, and cannot now receive a wider construction from the fact that additional territory has since been added to the Dominion."

6. Exterritoriality and Nationality.—As has been observed above, few, if any, countries adopt either the principle of *jus soli* or that of *jus sanguinis* in its entirety. France has made many applications of the *jus soli*, with

[1] 66 Brit. S.P., 963 *seq.* Derby to Thornton, 11 August, 1875 (*ibid.*, p. 968).

the object of increasing as far as possible the area of conscription. The system of electing for one nationality or the other is of little utility in this connection, for the usual age for the commencement of military service is generally prior to the age of majority at which a person may make such an election. Great Britain has at various times extended the rights of British subjects to persons born agnatically without the allegiance to British fathers (Acts of[1] Anne and George II) and British grandfathers (Act of George III).[2] This was reduced to cover the case of one generation only by the British Nationality Act of 1914,[3] but rendered capable of indefinite extension (agnatically), by registration at a British Consulate, by an Act of 1922.[4]

It is probable that these privileges are of municipal validity only: Lord Clarendon and Lord Malmesbury distinctly declined to regard such persons as having any right to British protection as against their native country. That admission has been strangely twisted on the Continent[5] into a declaration that Great Britain would decline to protect persons born within the allegiance of the Crown, when in a country which claimed them as subjects by descent. This is an entire perversion of their language: they never said any such thing, and gave no ground for the supposition that Great Britain would always resign her own rule when it came in conflict with that of the foreign state in which the party happened to be. Clarendon and Malmesbury's words were an emphatic affirmation of the *jus soli* principle, as one which Britain could always enforce, and variations from which she would not consider herself entitled to enforce, even when they were her own.[6]

But, with regard to the requirement that the place

[1] 7 Anne, c. 5, § 3; 4 Geo. 2, c. 21, § 1.
[2] 13 Geo. 3, c. 21.
[3] 4 & 5 Geo. 5, c. 17.
[4] 12 & 13 Geo. 5, c. 44. See also 8 & 9 Geo. 5, c. 38.
[5] Cf. Cogordan, *La Nationalité*, 45 *seq.*
[6] See *Report of Royal Commission on Nationality.*

of birth shall be "within the allegiance," the point arises whether (apart from the Act of 1914, which concluded the question for the future) persons born of British parents in countries of exterritoriality are British subjects, quite apart from the Statutes of Anne and George. The question can hardly be susceptible of any but a negative answer. An Englishman in Turkey under the Capitulations was not within the local allegiance of the King of England. (Of course, he remains within the personal allegiance wherever he goes—but it is birth within the local allegiance that counts.) True, he was tried, if he committed an offence, by an English judge, and, as it came to be more and more usual to try him by English law, he came to be regarded as subject to the rules of English law, and to be looked upon as if he were living in England. But the point is, he was not living in England. He was subject to these particular courts and to these particular laws because the Sultan had agreed that he should so be. They were courts of the Sultan, although the King of Engand was allowed by Treaty to appoint the judges.

Sir Francis Piggott,[1] a devoted advocate of British interests, puts the situation admirably—"The rights which the King exercises in these countries are not his sovereign rights at all, but are merely the delegated rights of the sovereign of the country; the Courts which are created are not the King's Courts properly so called, but form part of the judicial system of the country in which they are established."

It was under the personal agreement of the Sultan that the British Crown held Courts in Turkey. But it was a loose agreement, mainly tacit, and if the Sultan had chosen to regard any ordinance of the British Consul, or any decree of the British Court, as not being covered by his agreement, he would have been at perfect liberty to uphold his own views of the treaty—as

[1] *Exterritoriality*, p. 5.

he did when he refused the surrender of Kossuth[1] to Austria, and the surrender of Joris (who had shot at the Sultan) to Belgium. Nor could British subjects in Turkey have been free to infringe the obligations of Turkish neutrality in case of war; nor can they be supposed to have been free to plot against Turkey without incurring the penalties of treason, or being liable to expulsion by the territorial sovereign. Nor, although foreign police were allowed to execute the powers of the consular courts, could it possibly be admitted that they might have done so by firing on the Turkish police in case the latter interposed. In other words, although the control of the foreign governments over the foreign residents was very extensive, it by no means put them in the position of an *enclave* with which Turkey had nothing to do. These privileged, or disabled, foreign residents remained locally in Turkey, their position rested entirely on the Sultan's promise, which was by no means an absolute or unqualified one, to regard them exactly as if they were in England. There is no reason to suppose that they were exempted from the usual state necessities. Had an emergency arisen, they could have been forced to participate in the defence of Turkey against barbarous Kurds. They were within the Turkish local allegiance, although Turkey had promised to treat them in a particular way. Had Turkey broken its promise, the only remedy would have been complaints and war. Consequently the children of such persons were not within the local allegiance of the King, and their children were not born within it.[2] This is still more obvious in the case of protectorates, and of man-

[1] In fact, the surrender of Kossuth was not demanded by Austria on any ground of jurisdiction over him exercisable directly by Austria as if he were in Hungary and not in Turkey. It was based on the quite independent ground that Turkey had entered into a treaty with Austria for the mutual surrender of political criminals. And Turkey availed herself of the treaty option to expel him.

[2] Cf. *General Instructions to Dipl. and Consular Officers of the U.S.*, No. 340 (27 July, 1914), where the same rule is positively laid down for Americans. Dicey (*Conflict of Laws*, 806) and Piggott (*Exterritoriality*) emphatically adopt the view stated in the text.

dated territory (not in class C). It has been held in *In re Osdagli*,[1] that a British subject domiciled in Egypt (a country of extra-territoriality) is domiciled in Egypt and not in England. If he had never left the local allegiance of the King, he would never have lost his English domicile, though he might have been temporarily subject to the Anglo-Egyptian law in matters in which domicile is not decisive.

So, in France, under Francis II, the Swedes were placed, as between themselves, under the jurisdiction of the Swedish Consuls; so, in England, by the Treaty between Philip III and James I, suits brought by an English subject against a Spaniard had to be decided by the Spanish consul.[2] Can it be thought for a moment that Spaniards in England thereby became a Spanish *enclave*, and that their children would not have been subjects of King James? Very certainly they would have been subject to the English law of treason.

As Mr. Cadwallader wrote in 1875,[3] "An offence committed in Japan by a British subject is not 'committed within the jurisdiction of Great Britain' within the meaning of the Treaty" [between Great Britain and the U.S.].

It may be argued that the provisions of the Act of 1914 are expressly retrospective. They cannot be so construed without injustice, for the effect might be to make persons retrospectively guilty of treason. Accordingly, the retrospective operation must be narrowed as much as possible. And as the Act speaks of cases in which the King "exercises" jurisdiction, it clearly cannot apply to cases in which at the date of the Act the King no longer did so (*e.g.* Japan). Moreover, it only speaks of "the child" of a British subject born in such countries as having British nationality conferred upon it. On similar language in the Acts of Anne and

[1] (1919), A. C. 145.

[2] Labrousse, *Les Servitudes en D.I.*, 38, citing R.G.D.I.P. (1902) 51.

[3] *For. Rel. of the U.S.* (1878), p. 821, Cadwallader to Bingham, 18 August, 1875.

George II it was held that the effect was not to create an endless series of British subjects born abroad, but to give the privilege to the first generation only. Therefore the agnatic grand-children born in such countries of British subjects are still outside the Act, retrospective or not. Their fathers are British subjects, but " British subjects " in the sense of ability to transmit the character. It is submitted that to create an infinite series of British subjects in Egypt or China, quite possibly in the teeth of the Egyptian or Chinese law, would be a result against which the court would struggle; and the precedent of the Acts of Anne and George is exactly in point.

§ 2. Regional Understandings: Monroeism

It may sound startling, but there is nothing specially American about the original Monroe Doctrine.[1] Its two branches embody sound universal propositions of International Law. One (§ 7 of the Message), that territory occupied by a civilized state is not open to colonization by any other; and the other (§§ 48, 49), that a republican state is entitled to exist as much as any other. Anything contained in the Monroe Doctrine beyond that is a mere statement of fact. Such facts were (1) that the American continent was then, in 1823, entirely parcelled out among civilized Powers, so that no future colonization could there take place; and (2) that the United States, whose existence as a nation depended on the legitimacy of republicanism and revolution, could not but regard the attempted reduction of Spanish states in America to the obedience of Spain as a menace to themselves.

Law and facts alike were unexceptionable, except for the statement that the continent had been entirely

[1] This chapter was written before the author had the advantage of reading the magistral article of M. Léon de Montluc in the *Revue de Droit International* (Sottile) for 1928. The reader may also be referred to *L'Amerique Latine et l'Imperialisme Americain*, by Mr. L. Guilaine.

occupied by civilized states and was therefore not open to the planting of new settlements. This was probably not true then, but it is entirely true now, and has been so for at any rate three-quarters of a century.

It will be seen that the Doctrine, as laid down by Monroe, has two branches. They were entirely unconnected with one another in point of form, and occur at two different ends of a long Message (paras. 7 and 48, 49). The two clauses were directed, the one against Europe, the other against aggressive absolutism.

The declaration against Europe occurs in connection with a reference by President Monroe to a North-Western boundary dispute with Russia. "In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion," observes Monroe—behind whom, of course, was John Q. Adams—"has been judged proper for asserting as a principle in which the rights and interests of the U.S. are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European power . . ." (§ 7). That this meant a notice given by the United States that they would prevent by force of arms any European acquisition, by peaceful or forcible means, of territory in America, would have been a step of unparalleled violence. As well might France have dictated to the world to keep out of Africa. "Such a thing," says the American Woolsey,[1] "probably was not thought of." The only intent of the paragraph was to put it on record that, in the opinion of the President, unsanctioned colonization would be invasion. The whole continent being, in his opinion, parcelled out, there was no room for what is now styled "occupation." In this he may have been wrong, but no one cared to contradict him. To suppose that Monroe was taking exception to a possible cession of land by, say,

[1] *International Law*, § 48, p. 55.

Brazil to Great Britain, as a friendly arrangement, is to suppose that he was objecting to a perfectly normal and lawful thing, common in the intercourse of states. When a declaration is susceptible of an outrageous meaning and of a sensible one, one is bound to conclude in favour of the latter. That the United States President should have been presuming to treat European states as dangerous pariahs,[1] whom it was unsafe to have as neighbours, would have been offensive in the extreme. That he should make clear his opinion that there was no space vacant in America for their "occupation" is entirely in keeping with the measured and dignified terms of his Message.

That he was not contemplating forced or voluntary cessions of territory at all is apparent from the word "colonization." Conquest is not "colonization": purchase is not "colonization." But occupation emphatically is. The declaration is introduced in connection with a boundary dispute: in connection, that is, with a matter in which questions of occupation were all-important. It was extremely natural that Monroe and Adams should "judge proper" to avoid them, as far as possible, in the future, by giving public notice, *urbi et orbi*, that all the soil of the Americas was "free and independent"—that is, included in the sovereignty of some free and independent state. The young Republic was noted already for its deference and devotion to Law. To make such a startling departure from legal principle as to deny the common rights of states to European and American nations in their mutual intercourse might

[1] Mr. Hughes appears to justify the modern extreme forms of the Monroe Doctrine as being dictated by fear: the European powers are too dangerous to be permitted in America. Not to speak of the fact that they are there already, in Canada, Cayenne and Guiana, it cannot be supposed that the United States are in such mortal terror of Europeans! It is much more complimentary to the United States to believe that Woolsey was justified when he wrote: "We fear no neighbors." Cf. Woolsey, *International Law*, § 48, with C. C. Hyde, *L. E. Hughes*, p. 342: "His view was that the U.S. was justified in opposing a transfer of American territory to a non-American power, because it felt and had reason to feel that such action jeopardized its own safety."

have suited the coming demagogues, the rough Andrew Jacksons and their like. It would have been utterly repugnant to the polished and lawyer-like Adamses, Madisons and Monroes. That this interpretation is the true sense of § 7 is certain when we read Adams' own Message of 15 March, 1826.[1] There, the President observed that Monroe's declaration rested on the fact that " the two continents consisted of several sovereign and independent nations, whose territories (with the existing European colonies) covered their whole surface." Therefore, there was no room for " colonization," except by the consent of one of these nations. " The government of Russia has never disputed these positions, nor manifested the slightest dissatisfaction at their being taken." [2]

" Europe would be indignant," said Clay,[3] " at any American attempt to plant a colony on any part of her shores, and her justice must perceive in the rule contended for only perfect reciprocity." Of course this implies that America, like Europe, was regarded as parcelled out among recognized independent states. There would be no " reciprocity " if America were allowed to acquire territory in Europe in circumstances in which Europe could not acquire it in America.

The more important declaration comes towards the end of the Message (§§ 48, 49), and is quite disconnected from the subject matter of the first.

" In the wars of the European powers in matters relating to themselves, we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced, that we resent injuries or make preparations for our defence.

" With the movements in this hemisphere we are of necessity more immediately concerned. . . . The

[1] See also his letter to Rush, 22 July, 1823.

[2] This was hardly correct: see Rush, *Residence at the Court of London*, II, 88, in which Britain and Russia are said to have expressed dissent from this part of the Message.

[3] Clay to Poinsett, 25 March, 1825: 13 Brit. State Papers, 485.

political system of the Allied Powers is essentially different in this respect from that of America. . . . To the defence of their own [political system] . . . this Nation is devoted. We owe it, therefore, to candour, and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. . . . With the existing colonies and dependencies of any European Power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it and whose independence we have . . . acknowledged, we would not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European Power, in any other light than as the manifestation of an unfriendly disposition towards the United States. . . .

"It is impossible that the Allied Powers should extend their political system to any portion of either continent [N. or S. America] without endangering our peace and happiness . . . it is equally impossible, therefore, that we should behold such interposition, in any form, with indifference."

What Allied Powers? The Holy Alliance. What "system"? The system of aggressive absolutism, which refused to regard revolted or republican states as legitimately free.

In spite of the cursory reference to "any European Power," no one can read these paragraphs without seeing that the object of them is to avoid the application of the system of the Holy Alliance to America. It is the Allied Powers—not European Powers as such—of which the President is suspicious. It is their "system" which, if carried across the Atlantic, would be dangerous to the peace and safety of the United States. It is their (actually then projected) design to reduce the Spanish republics to the obedience of Spain, on the ground of

the fundamental vice of their origin, that would "manifest an unfriendly disposition to the United States."

It is evident that the whole declaration is directed to the Holy Alliance, its principles and its threatened practice, and that, because those principles were against the principles of International Law. To call a nation no nation, because it was a revolted and a republican nation, would be to insult and unfrock the United States, and obviously would be manifestly unfriendly.

The declaration is simply against the doctrine that a revolted state is illegitimate and therefore a fit subject for foreign oppression and control: "the system" of "the Allied Powers," incompatible with the system of the Law of Nations and the United States. It did not contemplate a state of things in which it would put it in the power of any American State to make the United States a party to all their wars: which, as Calhoun remarked, would be to go "infinitely and dangerously" beyond the declaration of Mr. Monroe.[1]

The whole declaration must be read in the light of its times. It was not the assumption of a general benevolent interest in the affairs of the new republics, or the intimation of any feeling that they ought not to be liable to the usual consequences of war with European Powers. It was merely a very proper intimation that an active denial of their right to be states at all would be a breach of the Law of Nations which could not but have its repercussions on the United States, which had vindicated their own statehood in exactly the same way as they had.

Consider the situation. The Holy Alliance was at its zenith. The Congresses of Troppau and Laibach had enabled Austria to restore a despot in Naples, and France to restore a despot in Spain. The next move was no matter of conjecture. It was definitely proposed [2] that France should reconquer the South American

[1] Why French authors at one time spelt Monroe's name with a diëresis over the final vowel remains to me a mystery.

[2] See British State Papers, 1822, 1823.

States for Spain. Spain had never recognized their independence, and on the theories of the Alliance they had no right to exist. Whether the young United States would have, or could have, done anything to prevent this is highly dubious.[1] But Great Britain could; and as her old enemy, France, was the Power to whom the real influence in the New World, conquered by her for Spain, would fall, Great Britain sought a way to prevent it. Canning had just replaced the dead Castlereagh at the Foreign Office: he was a settled antagonist of France, and he was determined to prevent at all costs this extension of French influence. He proposed to Adams, Monroe's Secretary of State, to make a joint declaration against the projected attack on the South America States. Adams then had him in a cleft stick. Monroe issued his declaration independently of Great Britain, secure in the calculation that the latter Power must anyhow co-operate in the policy, because of her jealousy of France. Canning was furious at being trapped, and could only console himself with epigrams. The New World had "redressed the balance of the Old" with a vengeance!

The suggestion possibly first occurred to Canning in the course of a casual conversation with Rush, the American Minister. Discussing the French invasion of Spain, Rush remarked that if she succeeded in restoring absolutism, "There was the consolation that Great Britain would not allow her to go further, and stop the progress of emancipation in the Colonies" (*sic*). Canning immediately asked, "What would America say to going hand-in-hand with England in such a policy?" Action would be unnecessary; the moral effect would be enough. Rush astutely temporized; in fact, he and Canning were playing two different games. Rush and his government were actuated by republican

[1] Webster considered that if only distant places like Chili or Buenos Ayres were to be attacked by the Holy Alliance, the U.S. might well limit itself to a remonstrance (Speech, 14 April, 1826, *Works*, III, 203).

sympathies ; against France as a nation they had no antagonism. Canning cared nothing for republicanism, except to hate it. He disliked the idea of recognizing the revolted colonies and of weakening Spain. With him the enemy was France ; and he was driven to invoke American support, because Spain was in the grip of France.[1] There is no doubt that Rush considered Castlereagh (of whom he speaks very highly) a better friend to the United States, and a more reliable man, than Canning—with whom something of the character of the brilliant adventurer remained to the end of his days.[2]

These were the circumstances in which the declaration was made. When in the course of it we read of "oppression" and "control of destinies" of American states by "any European Power," we must read the language in the light of existing facts. It was oppression and control consisting in the denial of the quality of statehood to communities which possessed all the distinguishing marks of States, that were in Monroe's mind, not a vague "oppression" and "control of destinies" which might cover anything from settlement across a disputed boundary to interference in a presidential election.

Monroe's own account of what he meant by the "European Powers" is contained in a letter written to Jefferson on 17 October. He refers to the letters of Canning "suggesting designs of the Holy Alliance against the independence of South America, and proposing a co-operation between Great Britain and the United States, in support of it, against the members of that Alliance" . . . "My own impression is that we ought to meet the proposals of the British Government, and to

[1] Canning's own somewhat tendencious account of his conversation with Rush, contained in a letter to A'Court (31 December, 1823), printed by Stapleton (*Canning and his Times*, 395), observes that "Monarchy in Mexico and monarchy in Brazil would cure the evils of universal democracy and prevent the drawing of the line of demarcation which I most dread—America and Europe. The U.S., naturally enough, aim at this division."

[2] Cf. Richard Rush ; *A Residence at the Court of London, from* 1819 *to* 1825, Ch. XXI. On the 20th Aug., 1823, Canning wrote formally to Rush (Moo. *Int. L. D.*, VI, 389), proposing joint action.

make it known, that we would view an interference on the part of *the European Powers*, and especially an attack on the Colonies by them, as an attack on ourselves, presuming that if they succeeded with them, they would extend it to us . . ." [1] "The European Powers" was therefore short for "The European despotic Powers of the Holy Alliance." Mr. Monroe was not thinking of Sweden or Switzerland, and he was actually contemplating the co-operation of Great Britain. He was not, therefore, excluding Europe. He was only concerned with excluding aggressive and intolerant absolutism. With the suggestion to invoke Great Britain, Jefferson heartily agreed,[2] and so did the ex-President Madison.[3]

So late as 1850, the conclusion of the Clayton-Bulwer Treaty by which Great Britain and the United States mutually agreed not to assume or exercise dominion over a certain region in Central America shows clearly that Britain was regarded as free to assume it in other parts of the Western Hemisphere. The Presidential deliverance was welcomed in this sense in England. It was hailed by Brougham and Mackintosh, not as a challenge to Europe, but as an encouragement to liberty. The Tories saw in it a check to France, and their criticisms fell unspoken because of this. It raised the hopes of a knot of Brazilians, who invoked the assistance of the United States in 1825 against Portugal, only to be rebuffed by Henry Clay,[4] who explained that it was not meant as a general guarantee of revolutions on the part of the United States; in 1828, he made it clear to the Argentines that if Portugal, in union with Brazil, had been attacking Argentina, that would have been far from presenting the case contemplated in Monroe's message. And then the Doctrine slept for twenty years.

Meanwhile the decorous Republicanism of Washington and Hamilton and Monroe and Clay and Adams had

[1] Monroe to Jefferson, 17 October, 1823, Moo. *Int. D.*, VI, 393.
[2] Jefferson to Monroe, 24 October, 1823, *ibid.*, 394.
[3] Madison to Monroe, 30 October, 1823, *ibid.*, 396.
[4] See Report of 29 March, 1826, 13 Brit. State Papers, 484.

been replaced by the rough zeal of pioneers like Andrew Jackson, who broke into the charmed circle in 1829.[1] Judge Story writes in 1845,[2] "This government is becoming daily more and more corrupt, and the decline and fall of the American Republic will not be less a matter of history, in an age or two at farthest, than that of other republics whose fate is recorded in past annals." Polk was in that year (1845) the President; he picked up Monroe's declaration and denaturalized it so that Adams, at least, could not recognize it.

The world, whether growing more corrupt or not, was growing smaller and more constricted.

The struggle for Oregon in the North, the struggle for the Isthmus in the South, together with the enthusiasm of the Slave States for expansion, had co-operated with the increasing prosperity of America to produce a Chauvinistic feeling which was crystallized by Polk in his distortion of Monroe's declaration. When people

[1] As showing the dignity and aristocratic character of the early American republic, the following account of Mr. Monroe's inauguration may be inserted from Judge Story's correspondence (*Life and Letters*, I, 399): "Washington, March 6th, 1821.—Yesterday was the day appointed for the Inauguration of the President, upon his re-appointment to office . . . A vast crowd was in the Capitol to witness the ceremony . . . in the Chamber of the House of Representatives. This is a most splendid and magnificent Hall in the shape of a horse-shoe, having a colonnade of pillars, which ascend to and support a lofty dome. The hall was early thronged with ladies and gentlemen of the first distinction . . . About twelve o'clock the President came into the hall, dressed in a plain suit of black broadcloth, with a single-breasted coat and waistcoat, the latter with flaps in the old fashion. He also wore small-clothes, with silk stockings and shoes with gold buckles in them. His appearance was very impressive . . . On the left [were] all the foreign ministers and their suites, dressed out in their most splendid court dresses, and arranged according to their rank. Immediately in front of the President, and at a short distance, were placed seven chairs for the Judges, who went into the hall in their judicial robes, attended by the Marshal . . . Altogether the scene was truly striking and grand." After the ceremony was over "the etiquette was to throng to the President's house, there to congratulate him and Mrs. Monroe upon the happy auspices of a new reign."

[2] *Life and Letters of Joseph Story*, II, 510; Story to W. W. Story. It is not always realized that the United States were informally but directly invited by Russia to accede to the Holy Alliance, or "League of Peace." Adams to Middleton, 5 July, 1820, *apud* Moo. *Int. L. D.*, VI, 379. "History in its passage offers strange analogies."

now speak of the "Monroe Doctrine," they mean the Polk Doctrine. They do not mean that a State must view with alarm attacks on a neighbouring State made because its claim to statehood is identical with its own; nor that there is no unoccupied room in America for other States to occupy and colonize at their own pleasure. They mean that Europe must be kept out of America.[1] And this is what Polk meant. In 1845, on his inauguration, Polk "reiterated and reaffirmed" Monroe's declaration, but in such terms as to create the impression that he meant much more than Monroe had done. "It should be distinctly announced to the world," he observed, "as our natural policy, that no future European colony or dominion shall, with our consent, be planted or established in any part of the North [2] American continent." This might have meant no more than the original declaration of Monroe, viz. that the soil was all "occupied" already, and so Quincy Adams, who was still alive, understood it. Quincy Adams had drafted Monroe's Message, and must have known what it meant.

But the Chauvinistic public interpreted Polk's Inaugural Address as a caveat against the acquisition of control, however obtained, by Europe in America. That Polk agreed with them is plain from the events of 1848. Yucatan, then independent, offered its sovereignty to Great Britain, Spain, and the United States. Polk recommended Congress to take steps to prevent either Spain or Great Britain from acquiring the territory. It would be, he urged, in contravention of Mr. Monroe's twenty-five-year-old declaration. But the House of Representatives, as before, looked coldly on the proposal, and Mr. Calhoun, who had been in Monroe's administration, observed that the Polk doctrine would go

[1] Such Chauvinism was by no means shared by Webster. "The records of the diplomatic intercourse will show how sincerely and how steadily the United States have manifested the hope that no political changes might lead to a transfer of these [American] colonies from H.M. Crown" (*Works*, VI, 514).

[2] *Sic*, and it shows that Polk's declaration was motived by the Texan and Oregon questions.

" infinitely and dangerously beyond Mr. Monroe's declaration. It puts it in the power of other countries on this continent to make us (the United States) a party to all their wars. " [1]

The House of Representatives might be with Calhoun, but the vulgar sentiment was with Polk. Under the denaturalized name of " The Monroe Doctrine," the Chauvinistic zenophobia of Polk " went down like butter." It covered now, not Monroe's and Adams's and Calhoun's declaration against aggressive absolutism and armed occupation, but a new and even more enthusiastic declaration against Europe. Such a declaration was, of course, repugnant to the many who inherited the older tradition. Dana's masterly commentary on Wheaton concluded, on this topic, that (1) Monroe's declarations relate (apart from " colonization ") to the introduction into America of the system of political interference with the affairs of independent states : (2) that they commit the United States to no particular course of conduct, but leave them free to act as suits the circumstances of each case ; (3) that they only embody the opinion of the Cabinet of 1823, have no legal force, and have been embodied in no pledge or alliance ; (4) that the " colonization " declaration was on a distinct subject, and meant only that there existed by that time no vacant land open to occupation by all comers. Mr. Seward, in 1866, took the same stand : " Those who think that the U.S. could enter as an ally into every war in which a friendly republican state of this continent becomes involved forget that peace is the constant interest and the unwavering policy of the United States, . . . we have no armies for the purpose of aggressive war ; no ambition for the character of a regulator." That school of opinion has persisted up to our own day. But the Press and the public took Polk's phrases in a far wider sense.

In these circumstances, the " Monroe Doctrine "

[1] Woolsey, *International Law*, § 48, p. 57.

had become a vague label which might cover anything in the dictionary of Chauvinism. But it was quite impossible to give it a definite content in its new aspect. European authorities accordingly spoke of it as a thing which did not bind them and with which they had nothing to do. They regarded it only as a symbol of the desire which was not infrequently entertained by irresponsible persons in the United States of extending the actual dominions of that country to all parts of the Americas. They went on their own way, applying the ordinary principles of International Law to their intercourse with other American states. The French took hostile steps against La Plata in 1829; the British filched [1] the Falklands in 1833; they were alleged to have encroached in the same year on Guatemala (yet President Jackson declined to interfere); there was a British attack on New Granada in 1837; a renewed French assault on La Plata in 1838, and there were French operations in Mexico in the same year: the British captured the island of Ruatan (claimed by Honduras) in 1841, and blockaded San Juan from 1842 to 1844; Britain and France together attacked La Plata in 1843. Simultaneously with the announcement of the "Polk doctrine" in 1845–6, the British claims to the undeveloped land in the North-West were in part admitted (1846), and Britain captured the town of San Juan, claimed by Nicaragua (1848). In 1857 the same Power blockaded San Salvador, and in 1859, in concert with Spain, Britain made an expedition against Mexico, in which she was joined by France. Spain annexed San Domingo in 1861. In 1862 there was a blockade of Brazilian ports by Britain, and in 1866 Spain went to war with Chili and Peru, occupied the Chinche Islands,

[1] So it was said. But the question is intricate. Spain was once undisputed owner of the Falklands—but it did not follow that La Plata, on shaking off her authority, succeeded to the whole of her territory in the Western Hemisphere. Old Spain was as much entitled to it. Probably the Falklands were derelict, and fairly open to British occupation in 1833.

and bombarded Valparaiso. There was a British expedition against Paraguay in 1867, a British bombardment of Omoa in 1873, and a British occupation of Corinto in 1895. In 1853, when a joint British and French expedition to Cuba in aid of Spain was projected, Mr. Marcy contented himself with saying that it would be " exceedingly regretted " : and General Cass, when a similar proposal to protect Nicaragua against filibusters was put forward, mildly observed that he " thought it would give much dissatisfaction to the American people." General Cass, again, when appealed to in 1860 by Venezuela in a dispute with Spain, said that " It would be both improper and impossible for the United States to decide upon the course of action towards Venezuela which Spain may think required by her honour and her interests." General Sherman in 1877 remarked, " This government is not under any obligation to become involved in the constantly occurring quarrels of the Republics of this hemisphere with other states." Both these officers were Secretaries of State at the time.

In 1869, another quarter of a century on from Polk, General Grant gave a new twist to Monroeism. " European dependencies in America," he said, " are no longer regarded as subject to transfer from one Power to another." [1] How far this was different from Monroe's Message is obvious from Monroe's emphatic reservation, " With the existing colonies and dependencies of any European Power we have not interfered and shall not interfere."

It was an intolerable pretension, that Great Britain might not purchase St. Pierre or Martinique from France, nor France acquire a coaling-station from Holland in Caracas. Therefore, although Mr. Fish (General Grant's Secretary of State) remarked that the sale of St. Bartholomew to Italy by Sweden might be construed as contrary to that cardinal policy of the U.S. which objects to new colonies of European governments in this

[1] Message of 6 December.

hemisphere, the European governments did not regard themselves as trammelled by it, and St. Bartholomew was in 1877 sold to France.[1]

In 1882 and 1883 Lord Granville firmly repudiated the binding force of the extended doctrine.[2]

In 1895 (another twenty-five years) came the great explosion, when an Olney doctrine was overlaid on those of Monroe, Polk, and Grant. Mr. Cleveland's Secretary of State, Mr. Olney, laid it down that the "Monroe Doctrine" covered not only the aggressive denial of legitimacy to American republics, as Monroe had declared—not only the open and acknowledged acquisition by European states of territory in America, as Polk and Grant had asserted—but also the assertion of rights to territory in dispute. This was not illogical—one way of acquiring territory is to claim it as one's own. But it was an emphatic adoption of the Polk doctrine—the doctrine that Europe could not be allowed to acquire, by hook or by crook, another foot of land in America. And more important still was the public attitude, which seemed to approve the assumption by the United States of a general protectorate of America, and the consequent intervention of the United States in every dispute with a European Power. This idea obtained formal expression in the militaristic President Roosevelt's term of office, when that officer emitted a declaration the gist of which was that in case of any threatened attack by a European Power on an American, whether with the view of obtaining territory or not, the United States Government would support the American State by force of arms if it was in the right, and would leave it to its fate if it was wrong. In pursuance of such a policy, he left Venezuela to reckon with British, Italians, and Germans, who began to knock Venezuelan forts and ships to pieces in 1902 in order to exact damages for purely monetary claims of a very dubious nature.[3]

[1] Desjardins, *apud* R.D.I. (1896), p. 153.
[2] Notes of 7 and 14 January, 1882, 14 August, 1883. Brit. St. Papers.
[3] Many of these were for Civil War damage; no country is obliged

It will at once be apparent how different such an attitude was from General Cass's dignified refusal to decide on the course of action towards Venezuela which Spain might think required by her honour and her interest. And in San Domingo Colonel Roosevelt had an opportunity of showing Europe that he was determined to decide about everything himself.

Germany was pressing San Domingo; Roosevelt decided that San Domingo was wrong—but not wishing to give Germany a foothold in the Western hemisphere, he invaded San Domingo himself, and established the first of that series of virtual annexations, which, in Hayti, Nicaragua, and Honduras, have caused the name of the United States to be taken in vain throughout Central and South America as a merely nominal worshipper at the shrine of Liberty. No doubt San Domingo was not paying her debts; no doubt the cession of territory, or the acceptance of some measure of foreign control, was the only way in which she could discharge them; no doubt Germany was pressing for something of the kind (and she had America's example to point to, in annexing California because Mexico had no other assets). But modern practice and civilized feeling loathe the idea of exacting the repayment of debts by fire and sword; Germany could have been made to desist on common grounds of humanity, without putting San Domingo in debt-slavery to the United States. Nor would a temporary occupation of San Domingo ports by Germany have been any more of a menace to the safety of the United States than the British invasion of Mexico in 1858 had been. But, in fact, Roosevelt's materialistic mind saw a fruitful field running to waste in San Domingo, and was eager for any excuse to rush in. Instead, therefore, of boldly

to pay for incidental damage to strangers sustained in the course of suppressing insurrection. Least of all was the United States inclined to do so, as the events of 1861–65 proved. Others were simple debtor and creditor claims on account of railway construction, and it is generally recognized to be unlawful to collect debts by slaughter and devastation.

proclaiming that a debt-collecting war on the Republic would mean war with the United States, he raised the cry of " The Doctrine in danger ! "—and set off to collect the debts himself. This was natural in the hasty personage whose thirst for material improvements led him to steal a province from Colombia.[1]

But this attitude of Colonel Roosevelt was not unpleasing to the governments of Europe. Instead of the necessity of wrangling with recalcitrant debtors, with a growling United States in the background, when there was a debt to collect (and the claims of governments were becoming increasingly and almost exclusively debt-collecting jobs), here was the obliging American President ready to discipline their debtors for them, and to let them squeeze them dry by force of arms ; which was precisely what they wanted. British Ministers, executing a neat *volte-face* from the uncompromising attitude taken up by Lord Salisbury in 1895,[2] began in 1903 to extol the Monroe Doctrine, and to make the most undignified prostrations before the United States ; so that Bonfils, in a contemporaneous edition of his well-known work, could say that the doctrine had been " formally admitted " by Great Britain.[3] It could not be " formally admitted," because it had no form ; but it came as near being formally admitted as a formless thing can come, when at the Versailles Congress of 1918 [4]

[1] " I took the isthmus." Another Chauvinist, Mr. Blaine, at one time proposed a similar arrangement to keep France out of Venezuela. A more subtle statesman, Dr. Woodrow Wilson, bettered Roosevelt's instruction, in Hayti, Honduras, and Nicaragua.

[2] The " Davis Resolution " affirming the Doctrine was dropped in Congress at the crisis of the incident. Finally, the actual dispute between Venezuela and Britain was referred to arbitration—as was eminently proper. If Lord Salisbury had accepted this solution at first, much embarrassment would have been spared.

[3] Bonfils gives the most extraordinary list of occasions on which the Monroe Doctrine has been admitted by Europe, ranging from the action of the United States in Crete (!) in 1886 to the ineffective objections made to the occupation of the Chinche Islands by Spain in 1866, and to the equally ineffective objections to the construction by Lesseps of a Panama Canal.

[4] At the Hague Peace Conference of 1899, the U.S. delegation had declared that their participation was subject always to their mainte-

the *Société des Nations* adopted, as Art. 21 of their constitution, the statement that "Regional understandings like the Monroe Doctrine" were not to be affected by the Société's Covenant. The Article is, as usual with the hurriedly drafted clauses of the Versailles Treaty, badly expressed. In English it is ambiguous, and speaks of not affecting "the validity of international engagements such as treaties of arbitration or regional understandings like the Monroe Doctrine for securing the maintenance of peace." The Monroe Doctrine is certainly not an "engagement," but the absence of a comma after "arbitration" makes it appear as if it were regarded as such. At any rate, it is set down as "a regional understanding for securing the maintenance of peace." It may be questioned whether the words "for securing the maintenance of peace" qualify the words "international engagements" or not, but at any rate they qualify "regional understandings." The Monroe Doctrine is thus set on a porphyry pedestal along with treaties of arbitration, as a mode of securing the maintenance of peace. In the French, the sense is a little clearer; the words do not suggest that the doctrine is treated as an "engagement." "Les engagements internationaux, tels que les traités d'arbitrage, *et* les ententes régionales, comme la doctrine de Monroe, qui assurent le maintien de la paix, ne sont considerés comme incompatibles avec aucune des dispositions du présent pacte."

What is a "regional understanding"? We do not know. Presumably, a general understanding applying to a particular region: but, possibly, an understanding extending only to the Powers in a particular region. Taking it in the former sense, we have to note a substantial divergence between the English and French texts. The former says that the protected "regional understandings" are such as are directed towards

nance of their "traditional attitude towards purely American questions." No one knew what this meant, and it was passed over in silence.

securing the maintenance of peace; the latter that they are such as do secure it. It is scarcely possible to represent the Monroe Doctrine, in any of its forms, as having "secured" peace: the United States have been involved in three considerable wars, and war was long chronic in Central and South America. It is impossible for any one who has studied the genesis and history of the doctrine to suppose that its object was the maintenance of peace. Mr. Seward is as good an authority as anybody as to what the doctrine meant, and he emphatically said in 1866 that the United States do not object to legitimate wars; their only objection is to their ending in the subversion of the national constitution. So General Cass had observed officially in 1858, "Nor do the United States claim to interpose in any hostilities which might take place (between Spain and Mexico)." [1] So Mr. Fish repeated in 1871, "If Germany or any other Power had just cause of war against Venezuela, the United States Government could interpose no objection to her resorting thereto." [2]

The object of the Monroe Doctrine was not the maintenance of peace: its primary object was, at first, the safety and independence of the country, and subsequently, in its less legitimate aspects, the exclusion of direct European influence from the Western hemisphere. To represent it as being tolerated as a piece of peace machinery was perhaps intended as a compliment, perhaps as lip-service to the peace principle—and in either case the fact would have been entirely charac-

[1] He adds that "Their policy of observation and interference is limited to [cases of] the subjugation of any portion of the territory of Mexico, or of any other American State to any European State whatsoever." This is, of course, the Polk Doctrine; it is instructive to see that a thoroughgoing supporter of this extension of the Monroe declaration was nevertheless entirely opposed to taking a hand in the wars of American States with those of Europe. Cass to Dodge, 21 October, 1858, cit. Moo. *Int. L. D.*, VI, 478, § 955.

[2] The only objection stated is to coercion by a combination of European powers, which forcibly recalls the origin of the Doctrine: Fish to Schenck, 2 June, 1871. See Moo. *Int. L. D.*, VI, 532, where the same lines are said to have been followed in 1886 by Mr. Bayard: Bayard to Scott, 14 October, 1886.

teristic of that remarkable document, the Treaty of Versailles—but it was not sober sense. It was tolerated, and labelled "Pacificism" (as everybody knows), because the United States insisted on it. But nobody to this day, not even the Société des Nations, can tell what it means : and they have so informed Costa Rica.

How an "understanding" can be "valid" is not explained. But is it meant that the Elasticity of the Law of Nations has introduced a *privilegium* for the benefit of the United States, so that they have some special right to be consulted and indeed obeyed in all affairs transpiring on the American Continents ? American statesmen, like the Emperor William of Germany, have held such language. "The will of the United States, when they choose to make it known, is in the last resort supreme on this continent," said Mr. Knox on one occasion. Upon the whole, it would be difficult to come to that conclusion. The United States, since the acquisition of the Philippines, cannot isolate the West from the East. Rapid and frequent transit facilities have brought the whole world into small compass. The threat to American independence and to the legitimacy of republican states is a thing of the remote past. The only substratum for a Monroe doctrine to-day is Imperialism and economic self-interest. These are not motives which can be admitted by the world.

Argentina, Chili, and Mexico do not seem disposed to accept the Monroe Doctrine in any shape ; [1] the whole of Latin America is in closer cultural touch with Spain and France than with New York. The respect accorded to the doctrine in its more recent forms can appear in our modern days only as a general desire to respect the wishes of so powerful a nation as the United States.

[1] At the 4th American International Conference, in 1911, Brazil proposed that formal approval should be given to the Doctrine. But the Argentine, and probably also the Chilian, delegates, though willing to approve "the Declaration of President Monroe," refused to approve the "Doctrine" called by his name, on account of its uncertain applications. The Argentine Señor Cantile made an emphatic statement in 1927 to the same effect at Geneva.

There is nothing legal about it. The United States have no special right to be consulted or deferred to in the affairs of other American countries. All we can say is that they like to be, and that powerful States are apt to be given what they like.

The principle of contiguity, and the consequent right of supervision over the political affairs of a neighbouring state, was discredited over a hundred years ago. It was the avowed principle of the Holy Alliance, and their aim, too, was Peace.

It is impossible to better the words of Woolsey:

"To lay down the principle that the acquisition of territory in this continent, by any European power, cannot be allowed by the United States, would go far beyond any measures dictated by the system of the balance of power, for the rule of self-preservation is not applicable in our case; we fear no neighbors. To lay down the principle that no political systems unlike our own, no change from republican forms to those of monarchy, can be endured in the Americas, would be a step in advance of the Congresses at Laybach and Verona, for they apprehend destruction of their political fabrics, and we do not. But to resist attempts of European powers to alter the constitution of states on this side of the water is a wise and just opposition to interference. Anything beyond this justifies the system which absolute governments have initiated for the suppression of revolutions by main force" (*International Law*, § 48).

It is believed that these sentiments would be concurred in by most American authorities on the Law of Nations.[1]

It will be apparent how much the wide extension of the "Monroe Doctrine" has hardened during the last

[1] Useful articles in French on the subject are De Montluc, R.D.I. (1929); Desjardins, R.G.D.I.P. (1896) p. 137; Lehr, R.D.I. (1913), p. 50; Moore, *ibid.* (1896), p. 301; Barclay, *ibid.*, p. 502; Laferrieve, R.G.D.I.P. (1906), p. 237. There is, of course, a considerable literature in the United States, Dole's work being especially outspoken. In England the principal authority is Reddaway's monograph.

half-century. Since the days when in America itself Woolsey and Dana and Cass were denying its force and impugning its morality, it has come to be spoken of with bated breath as a principle to be reckoned with in the councils of Europe. No one can tell what it means, any more than when Adams, the Minister to London in 1860, called it "a sort of understanding." "There was a sort of understanding that as long as European powers did not interfere in America, the United States might abstain from European alliances; but if a combination of Powers were to organize a government in Mexico——" What? The United States would exceedingly resent it, and if possible oppose it by force of arms? Not at all: "The United States would feel compelled to choose their allies in Europe, and take their part in the wars and treaties of Europe." [1] A principle does not need to be taken seriously as a rooted principle of policy which Adams could officially call "a sort of understanding."

§ 3. Modern Protectorates

It is almost entirely a question of nomenclature, yet it is well to point out that the modern "Protectorate," except in rare cases, is nothing more nor less than annexation. It is an annexation of which the "protecting" Power desires to avoid the full effects. In particular, it desires to avoid the constitutional effects, notably the admission of the people of the protected state to the category of its own subjects.

"It would be extremely inconvenient," said Governor Jervois, on subjugating Pêrak, "that these people should become entitled to the rights and privileges of British subjects." [2] Consequently, he "protected" Pêrak, and set up a dummy sovereign, who was told he must not only listen to the advice of a British resident official, but act upon it. This was to deprive the country

[1] 52 British State Papers, 330.
[2] Cf. L. M. & R., May and August, 1901, *Debt-Slavery in Malaya.*

of every shadow of independence, and the naïve delusion entertained by the Foreign Office that it is "foreign territory" cannot stand for a moment in International Law, and should not command the respect it does in English Courts.[1] A "protectorate" of this kind is entirely different from a true "Protected State." Control and responsibility must go together. If a sovereign exercises all control in a given territory, that territory is part of his dominions; and Pêrak is much more under the control of the British Government than Queensland is. The use of the neologism [2] "Protectorates" has spread to vast annexed tracts in Africa, where one never speaks of "protected states," because there are no States to protect. Such tribes as occupy the territory are obviously in the same situation as native tribes in territory which is openly annexed. In short, all such "protection" is a synonym for annexation, and it is an abuse of language to call their people "foreign." The example of India, where the highest rulers have been tried and condemned by British officials, applying no law but their own ideas of propriety, tends powerfully to obscure the position. Constitutionally "foreign," the Indian princes up to now have internationally been subjects of the Crown. Their recent success in securing an admission that the Dalhousie doctrine, under which their treaties with the Crown are for the Crown to interpret as it pleases, cannot be sustained, may be thought to have conferred on them a new international status; but, if so, this is still in the embryo stage. The extensive control which they nevertheless exercise in their own territories differentiate them somewhat from Pêrak and the other Malay States (except Johore), which are to all intents and purposes Crown Colonies.

It is a question of nomenclature; but the consequences of a faulty nomenclature may be far-reaching. No one disputes that these communities might have

[1] *Kelantan* v. *Duff Development Co., Ltd.* (1923), A. C. 395.
[2] Le néologisme de *protectorats* (Engelhardt, *Protectorats*, 5).

been annexed. But the consequences of annexation would have been apparent. It would have been impossible to represent the localities as foreign. At present, while they do not enjoy the rights of foreigners—War, and the right of appeal to the Powers of the world as sister- (or at any rate "half-sister") States—they are equally deprived of the rights of British subjects. It is a position which is neither just nor reasonable.

The similar "protectorate" which the British government permitted itself to proclaim, *pendente bello*, over Turkish territory, namely Egypt, is distinguishable is no essential respect from these. International Law, which, like Micawber, "swallows formulas," cannot but disregard the pretence that a country which a sovereign controls is foreign to his Crown. He must be responsible for what is done there; the population must be treated as his subjects; in the interpretation of commercial treaties it is not a foreign country.

The true Protected State has almost died out. Madagascar, Corea, and Zanzibar provided the last flickers of the institution. It is difficult to ascertain how far they retained any fragment of independent volition prior to their absorption: the Ionian Islands had very little, if any. The "protection" of the Batavian, Helvetic, Cisalpine, Etrurian, Parthenopean, Roman and Ligurian Republics by Revolutionary France amounted to dictation, and made the name of protection a by-word. In point of fact, protection was always a *pis-aller*. The protecting Power could not be responsible for a State which he could not control; the promise of protection led inevitably to intromission with domestic affairs, and the limits of that intromission were necessarily uncertain. It is occasionally said that the resignation of foreign relations to the protecting State is a common and almost characteristic mark of a Protected State. It would be much nearer the truth to say that it is a mark of absorption and annexation. If a State is debarred from official intercourse with other

Powers, they cannot be expected to regard it with the same interest and respect as they do States with which they are in daily touch. The Protected States of bygone times normally retained the right of embassy and the control of foreign affairs. Why not? The promise of protection was made for a *quid pro quo* in the shape of support: the arrangement was a bargain, and there was no reason why the one party should be dragged blindly into a war begun by the other. Genoa, in the depths of her "protection" by Louis XII of France, sent Ambassadors to Rome. San Marino in 1896, "protected" by Italy, sent a Minister to Paris. Danzig in 1454 retained the right of legation when she accepted the protection of Poland.[1]

Protected states of this old type entered merely into contractual relations with the protector. They retained the control of foreign relations, and they were free to break their engagements at the risk of no penalties other than those risked by an independent state. Neither their rulers nor their people owed any allegiance to the protecting Power, and no act of theirs would be treasonable towards it. Such relations were established at various times in the fourteenth and fifteenth centuries by Genoa with the French and Spaniards; by Monaco with Florence, Savoy, Milan, France, and Austria; by San Marino with Urbino and Rome; by Venice with Byzantium; by Ragusa with Venice and Hungary; by Andorra with France and the Bishop of Urgel; and by Danzig with Poland.[2] Austria exercised throughout the earlier nineteenth century a very complete protection of the States of the minor Italian princes, but without in the least affecting their international status.

Andorra, San Marino, and Monaco must be regarded

[1] See the *Brit. Year-Book of Int. Law* (1921–2), p. 108: *Protectorates and Mandates.*

[2] By Art. 6 of the Treaty of Tilsit Danzig was placed under the joint protection of Prussia and Saxony (the King of Saxony being Grand-Duke of Poland); and was disabled by Art. 8 from interfering with the free navigation of the Vistula.

as something less than Protected States. They are subject to so considerable, if infrequent, interference by their protectors that they must be taken to have sustained some diminution of sovereignty. For instance, France and the Bishop of Urgel combined to prohibit the establishment of gaming-tables at Andorra; and the recent treaty of Monaco with France deprives the former Power of important attributes of sovereignty.

Whether the great Colonies of the British Crown are now to be regarded as Protected States may be dubious. They fulfil very much the conditions of a Protected State of the old type. The United Kingdom is tacitly bound to protect them; they are tacitly bound to defer in some degree to its foreign policy and to afford it such military support as they can. The agreement is tacit, but it appears to exist. At the same time, the Colonies have foreign representation, and their domestic affairs are so free from British interference, that Natal, in the days of a Liberal government in England, was accorded the use of British troops to carry out a native policy which was highly distasteful to the British public.

The institution of Mandates has drifted into complete chaos. The mandates of Class A provided for by the Treaty of Versailles, in which the mandatary [1] is regarded as an adviser merely, and the State as completely independent, have been interpreted so as to place the mandatary in the place of a dictator, whose advice must be taken. Class B were never intended to be anything else: the "administration" was to be in the hands of the mandatary—and these have drifted very much into the position of Class C, which were from the first regarded as incorporated into the dominions of the mandatary.

A Protected State may be, and generally was, a fully sovereign state. Its engagements sounded in

[1] The spelling "mandatory" is only proper in the case of the adjective. "Mandataries" is the Latin form, and "mandatary" is the well-established form in Scots Law. "To sist a mandatary" is to appoint an agent for purposes of suit.

contract. A Protectorate (or a modern "protected state," dictated to by its "protector") has no international existence at all. A *mi-souverain* state has an international existence, but it has actually resigned, and parted with, important attributes of sovereignty, though it can scarcely resign the right of legation and still preserve any shred of international independence. Instances of such a *mi-souverain* state were Bavaria, Wurtemburg and Saxony under the German Empire of 1871: probably all the states of the old Reich, in the eighteenth century, not excluding Prussia and Austria, were nominally *mi-souverain* owing to the over-lordship of the Empire. But the recalcitrancy of Prussia to the Empire's decrees in reality converted the Reich from an Empire into a Confederation.

§ 4. Leases and Pledges of Sovereignty

The Elasticity of International Law is also shown in the modern development of a new International institution—the Lease of territory. It has been much controverted what are the effects of such a lease: and, in particular, whether the nationality of the subject inhabitants of the leased territory is temporarily changed, and how far the treaties of the lessor need be observed by the lessee.

An early instance of such an arrangement is afforded by the lease in 1849 by Honduras to the United States of the Island of Tigre,[1] but Pitt-Cobbett seems to be correct in asserting that China [2] has been almost the only *locale* of such arrangements. The concession of Cyprus to Britain for as long as Batoum and Kars shall remain in the occupation of Russia seems to be *primâ facie* in the nature of a lease. It seems to be generally

[1] 40 S. P. 999. Cf. *Ibid.* 400.

[2] Kiao-tshao to Germany (99 years) and Wei-hai-wei to Britain (25 years), 1898; Port Arthur to Russia (25 years), 1898: taken over by Japan, 1905, and extended to 99 years, 1915.

considered that such leases resemble the English Lease and the Roman *Emphyteusis* rather than the Roman *Locatio-conductio*, which conferred no "real" right, and amounted merely to a contract by the lessor, which, like other contracts, depended for performance on the personality of the latter. It did not give the lessee possessory remedies, or any right against third parties. But in International Law, as in most modern systems, the lessee is regarded as having "real" rights, and an independent position against all the world, during the currency of his term. It therefore follows that war between the lessor and lessee will not put an end to the lease. If war annuls contracts, it does not annul conveyances. Not depending on contract, and solely on the lessor's continued observance of a promise, such a lease is not put an end to by war, any more than a private lease is put an end to by the bankruptcy of the lessor. It remains as a "real," though temporary, right: but of course the lessee is in a specially favourable position to convert it into military occupation, and eventually into conquest. Doubtless, unless special terms of neutralization or of rescission have been attached to the lease, the territory can be attacked and occupied by the enemies of the sovereign lessee: whilst, on the other hand, it cannot be attacked by the enemies of the lessor. This must produce a singular situation when the term approaches its end: there seems no doubt that the territory must be handed over *flagrante bello*. In practice some satisfactory conventional arrangement would probably be arrived at—the most natural would be the prolongation of the lease, to which the enemy could, in most circumstances, scarcely object.

It is true that servitudes must be construed strictly as diminutions of sovereignty. If a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of

proving its claim beyond doubt or question.[1] And concessions granted within a territory must usually be construed as conferring no exemption from the local sovereignty at all, *e.g.* fishery and mining rights. But where the intention plainly is to grant the whole administration of a territory, the fewer exceptions which are admitted to the grant—apart from its express provisions—the better.

Such " real " leases of territory must, of course, be distinguished from leases of land, without any impairment of sovereign rights. But it must probably be concluded that it is the local sovereignty which is leased, and not the personal sovereignty. The position, if this is the correct view, would then resemble that of territory under foreign military occupation. We should thus have a fairly definite and certain guide as to the rights of the lessee and the inhabitants. It is tempting to work out the topic, on the analogy of private-law leases : to consider the limits of waste, the obligation to cultivate and develope, rights of re-entry, the question of whether a forcible re-entry is war, the situation of a State which holds over, compensation for improvements, etc. Such an investigation would demand a work to itself. In the course of any attempt to deal with these problems the object of the lease must be the dominant touch-stone. And that object is not to substitute the lessee temporarily for the lessor : but to give the lessee temporary rights of profit and occupation. It is not like the lease of a farm with its sheep and cattle, but like a sporting lease of a deer-forest with the right to take the game. If the deer stray into another forest, all claim to them disappears.

Ships registered in the ports of leased territory must probably be taken to be ships of the lessor, if registered prior to, and of the lessee, if registered subsequently to, the grant of the lease.

Certainly, it is an anomalous position. That Britain

[1] Hall, *International Law*, 159 (6th Ed.).

should have sovereign rights in Wei-hai-wei, where the whole population were subjects of another Power, namely, the Emperor of China, appears strange. And it is perhaps neither likely nor desirable that such an institution should be of frequent occurrence.

Pledges of sovereignty are older than Leases. We can adduce the well-known instance of the Orkney Islands pledged to the Crown of Scotland on the marriage of James III to Princess Margaret of Norway, in 1470. There would seem to be some reason, in this case, for regarding the sovereignty, local and personal, as pledged together. In the case of Lease, the object is the enjoyment for a limited time of limited, though extensive, rights. In the case of Pledge, there is no severance of particular rights contemplated: the pledgee is put in exactly the situation of the pledgor, and it is dependent on the latter whether that state of things shall be permanent or not. At any rate, in practice, the personal, as well as the local, sovereignty appears to have been regarded as transferred: the transaction thus resembles the Roman *pignus* (which the pledgee might not use) less than the English mortgage (with the mortgagee in possession).

The essential difference between lease and pledge would thus lie in the fact that the various rights included in sovereignty are not all intended to be the subject of a lease. Personal allegiance can well subsist unchanged throughout its currency. But in pledge there is no reason why the right to personal allegiance should be severed from the rest of the sovereign's rights. The intention is clearly to keep the personal and local allegiance together, in one hand or the other. Naturally, if due care is taken to express the intention, this normal result might well be departed from. Thus, the King of Norway might have stipulated that it was only the administration and profits of the Orkneys that were pledged to Scotland.

§ 5. The Signature and Force of Treaties

1. The Authority of Ministers to bind the State.—It is a little singular that so few works have been specifically devoted to the immensely important subject of Treaties.[1] It seems to have been in the minds of writers that sufficient guidance will be afforded by the analogies of the familiar rules of the Civil Law of Contract. But such is by no means the case.

We are met *in limine* with the enormous difficulty created by the fact that Treaties are engagements between artificial persons, namely States, and that these corporations have no Articles of Association, laying down in terms how their powers can be exercised. Constitutions are very imperfect substitutes for such Articles; and we have to fall back on the common law of nations.

A corporation[2] must act by some living person; States are no exception to the rule. It is generally admitted that the acts of the Head of a State are binding upon his State, and the making of valid contracts is an instance. A treaty made under the Great Seal of the United Kingdom affixed by Royal Warrant under the Privy Seal would clearly be as good a treaty as a treaty signed by Plenipotentiaries. A treaty signed and sealed by the President of a South American Republic, acting in his official capacity, would be equally unimpeachable, subject to the grave question of his constitutional capacity, which will be examined later. The Head may be a hydra-head, as in the dyarchy of Sparta, the Council of State of Venice or the directors of the Union of Soviet Socialist Republics; which introduces complications—but, apart from these exalted persons, single or multiple, when we come to their agents, we are met with endless uncertainties. The Sovereign need not be regarded as

[1] See, however, Crandall, *On the Making and Interpretation of Treaties.*

[2] As to the nature of a corporation, see *The History of Majority Rule, Quarterly Review*, January, 1910.

the servant or employee of the State—he may be more in the position of its Guardian, Consort, Committee, or Trustee, having power to act on its behalf, but not being subject to its control and direction. His position is *sui generis;* but when we come to other and inferior persons, they appear in the light of agents of the Sovereign or other person whose acts bind the State as a whole. Such agents are normally and usually Plenipotentiaries; that is, persons furnished by the Head of the State with full powers specifically to negotiate and conclude a particular agreement. So far is the theory of agency carried, that unless the Full-Power expressly (or perhaps implicitly) dispenses with it, it is necessary that the terms agreed to and definitely sealed, between the Plenipotentiaries, should be ratified by their Principals.[1] The theory of the accepted law, therefore, is that the State can only be bound by the solemn acts of Plenipotentiaries solemnly appointed to carry out specified ends. But the frequency of intercourse between States, which is increasing every day, has brought about a highly irregular state of things, in which quite informal arrangements are made by official persons, which in some obscure way are supposed to bind the State. Mr. Ch. Dupuis [2] has recently observed with much force that this is a most dangerous innovation. There are no limits—at all events, no ascertainable limits—to the extent to which a Minister may commit his country if it is accepted. The next step will be to extend the practice beyond Ministers—and all kinds of officials will be found purporting to pledge their country's faith behind its back.

Very few instances of such agreements are to be found until the present century. It was at one time among the prerogatives of the direct representatives of the Sovereign in distant parts, such as the great Viceroys of the seventeenth century, to make Treaties.[3]

[1] Satow, *Diplomatic Practice, in loc.*
[2] *Apud* R. D. I. (1928).
[3] *Vide infra.*

Commanders-in-Chief have always, by necessity, been invested with power to make military capitulations concerning their theatre of war: small matters of trivial routine may have been the subject of binding agreements made informally by underlings. But the first Agreement of an ordinary kind which is readily discoverable to have been concluded without Full-Powers is the Rush-Bagot Exchange of Notes dated respectively April 28 and 29, 1817, concerning the limitation of Armaments on the Great Lakes of North America. It appears to have been left uncertain at the time what the real effect of this exchange was. In fact, it still remains arguable that its true effect was a mere statement of intention, indicating that each party was prepared to carry it out, so long as the other did the like—but essentially revocable in its nature. For instance, it was never ratified as a binding agreement, and never presented for ratification. It has been carried out scrupulously ever since its inception, but it may well be doubted whether it has any obligatory force. If it has, then all the paraphernalia of Treaties—the Full-Powers, the Ratification, the Sealed Parchment—are superfluous rubbish. And yet these superfluous sequelæ are of the first importance. They secure that a nation shall not be bound except by the act of one known and definite Head: that their agreements shall be formally and carefully drawn up, and that the acts of the agents who actually conclude them shall normally be subject to revision. They secure that there shall be the minimum of future dispute as to the actual authority and personality of the agent, and they obviate half the questions as to his constitutional powers.

The custom of looking to the Head of the State as the person to authenticate a treaty is doubtless derived from the period when the King embodied the State in his own person. But it has great conveniences, chief among which must be remarked the fact that there can rarely be any doubt as to the identity of a natural person.

At the same time, if a foreign state is officially informed, with the concurrence of the Head of the State, that some other person or body is the treaty-making power, the authentication of that person or body would appear to be necessary and sufficient. Thus, the Swiss Federal Council generally appears as a party in Swiss treaties, while the Republic of San Marino contracts in its own name.[1] In such cases, the seal of the Council or Republic must be affixed by some human agency to the Full-Powers and to the Letters of Ratification: and it is obvious that there must always be vastly increased occasion for disputes as to the regularity of the process, and the manner in which the consent of the Council or Republic was conferred.

Still, a Senate or Council is a formal body, which may be treated *pro hac vice* as the true Head of the State. But there is a loose and increasing practice of expressing "Governments" to be the parties to treaties and conventions and perhaps of dispensing with all Full-Powers from and Ratification by the Head of the State. Sir E. Satow actually gives a form for a ratification by a "Government": but it is apparently his own invention and does not appear to have been actually in use. It is obvious that if the term "Government" is used merely as a periphrasis for the Head of the State, there is no point in its use, and it is only misleading and inadvisable, except in cases where it is well understood to be equivalent to the Head of the State, and employed as a means of softening the unpleasantly direct methods of a disagree-

[1] Formerly the practice was for the Swiss Confederation to be itself named as a party. The United States often adopt the singular formula of naming the United States as a party, and then stating that the *President* has appointed a plenipotentiary. Sir E. Satow (*Diplomatic Practice*, II, 177), is hardly correct in saying that treaties are usually expressed to be made by "republics" in the case of republican countries. France and South America seem (of late, at any rate) almost invariably to prefer to express them as made by Presidents. Switzerland expresses them as made by the Federal Council. The Free Cities of Bremen, Hamburg and Lübeck contracted by their Senates. The Netherlands seem to have contracted by the States-General rather than the Stadholder.

able treaty in the ordinary form. But if it is really meant that "Governments" are able to commit their respective States to engagements, by issuing such instructions as suit themselves in place of formal Full-Powers, and by putting themselves forward as the sole ratifying authority, the matter becomes a very grave innovation. What, we must inquire, is a "Government"? It is a loose phrase, which may cover many things. Is its will manifested only by the signatures of all the Cabinet? (if there exists a Cabinet) or by the Foreign Minister? [1] or by an alleged majority of the Cabinet? or by the Prime Minister?

Such "Government" agreements stand on a highly precarious footing. A Government, even if we know precisely what and who it was, has no power to engage the faith of the country. A new Government might, quite reasonably, decline to be bound by its predecessor's unauthorized vagaries.[2]

Whether they take the form (as in the Anglo-French arrangement of 6 July, 1912, on the application of a treaty to the British colonies) of a protocol, or of a mere exchange of notes, it would seem that they amount to little more than an expression of intention which may at any time be recalled. The mere insertion of a phrase stating that the signatures are "duly authorized" cannot confer on them more authority than they possess. In such cases, can the informal agreement be rendered binding by the tacit consent of the Head of the State or of the known constitutional treaty-making authority? It would be very difficult to maintain such a proposition.

The practice is becoming frequent, but it is surely useless, ambiguous and dangerous, and ought to be

[1] Sir E. Satow's suggested form states (*Diplomatic Practice*, II, 280) that "the Government" have seen the instrument: it is not apparent what this means—but the real sting of the form is in its tail: it is simply signed by the Foreign Minister, who in this easy way—the Government "seeing" the document through his eyes—could commit his country to anything.

[2] See *infra* the repudiation by the Administration of Mr. Blaine of its predecessor's solemn declaration.

discontinued. It is inconsistent with our Canons of Simplicity and Certainty that any one should affect to make binding contracts for the country except the recognized Head of the State, single or multiple, *in propriâ personâ*.

The jurist must long hesitate before determining whether to include this topic under the head of Certainty or under that of Elasticity. The many and great inconveniences of laxity in the forms of concluding treaties will weigh heavily in the scale in favour of clinging to the long-established system of requiring Full Powers from, and Ratification by, the Head of the State. Informal arrangements made by Ministers are in this view mere revocable statements of intention. But it is impossible to shut one's eyes to the fact that every year important agreements are being informally made, which are intended to be binding, and which are regarded as such.[1] It appears difficult to deny that these informal instruments have binding force, and that, although States may long persist in concluding treaties in the time-honoured way, there is no real necessity for them to do so. It will, on this footing, be necessary to examine the limits of the new principle of informality, and this investigation raises necessarily the larger question of the international powers and capacity of a Foreign Minister.

Every country must have some one or more individuals whose function it is to communicate officially with the outside world. We shall style them uniformly "Foreign Ministers," though their several national titles may be "Secretary of State" (as in the United States), "Chancellor" as in the old German realm, or as the case may be.

There is usually no difficulty whatever in ascertaining who is Head of the State. At present, every country, except San Marino and the Soviet Union, has one definitely ascertainable monarch or elective head. The

[1] See *Yale Law Journal*, March, 1925: "Danger Signals in International Law."

only difficulty lies in the event of a struggle for the position. And it is universally admitted (except perhaps by the Soviet) that the Head of the State, at any rate acting within simple constitutional limitations, can bind it to anything. But if we admit that Ministers can bind it, we are at once in a nebulous fog. Is it only the Foreign Minister who can bind the State? What about the Prime Minister? What exactly is a "Foreign Minister"? In some Cabinets, the Cabinet Chief is a dictator—can he not do what his subordinate, the Foreign Minister, can do? In other Cabinets the Chief is *primus inter pares;* he can be outvoted, out-talked, or deposed. In such a case, can the Foreign Minister make an agreement without his privity or consent? Can each Minister bind the country in the affairs of his Department? Must a Minister have the express sanction of his Sovereign? A multitude of questions like these will arise to embarrass the discussion of the binding or revocable nature of every such ministerial arrangement.

It is to be confessed that the difficulties inherent in the concession to Ministers of power to commit their country in a binding fashion are enormous. And yet it is evident that the uncontradicted public utterances of Ministers, even of the less conspicuous of them, do in fact commit the country. If a responsible Minister solemnly announces the truth of a fact, or invites other States to rely on the State's pursuing a certain course, is the obligation of the State to stand by his statements, or to abide by his declarations, a moral one alone? [1] If a Foreign Minister writes to the Minister of another State, "You may rely on this country's never acquiring a port in Africa"—is it not a promise which binds his principal? If a Prime Minister declares *urbi et orbi*, "We shall never press for the repayment of the Johnson-Higginson Loan," is a succeeding Premier entitled to throw over his declaration as a matter which does not concern the new Administration? It cannot be denied

[1] Cf. the so-called "Balfour Note" on Repayments of Allied Debt.

that the official and uncontradicted declarations of Ministers possess a certain weight which passes beyond creating moral rights, and enters the sphere of law. It is on this capacity of theirs that the force of informal arrangements must rest. Yet when the American agents to negotiate a treaty with Mexico in 1848 gave the most positive assurances, officially confirmed, that it bore a particular meaning, these assurances were held not to be binding on the United States, and a subsequent administration disclaimed them.[1] And it may be well held that it rightly disclaimed them, and gave the world a salutary lesson on the inherent limitations on the powers and promises of Ministers.

It is as difficult to admit as to deny that States can be regularly and permanently bound by conventions made by "Governments," and by informal and unratified engagements of Prime Ministers and Foreign Ministers—possibly by their secret and in fact unauthorized engagements.

Such ministerial engagements are extremely convenient in practical respects. The question of the constitutional powers of the Minister need not arise, because the informal engagement is not termed a "Treaty." Not being a "Treaty," it needs no discussion in Legislatures, and no publicity except such as is necessitated by the provisions of Art. 18 of the Société des Nations, which require the publication of all Treaties and "International Engagements."

It is true that "international engagements" which are not registered at Geneva are declared by this Article to be not binding; but the binding character of an international engagement cannot be affected by the fact that the parties have previously agreed that it shall not be binding. It derives its force from their present consent, and no previous undertaking not to consent can alter the fact that they have so consented.[1] The recent Chilo-Spanish Treaty binds the High Contracting

[1] Crandall, *Treaties*, 77.

Parties not to resort to the Council of the Société des Nations before endeavouring to solve their difficulties by the method of conciliation provided by the treaty, which shows that an agreement can always be superseded by a later agreement. Other parties to the compact might indeed complain; but what damage could they have sustained? The framers of the compact appear to have regarded themselves rather as legislators than as contracting parties, and to have ignored the fact that a compact can always be altered by mutual consent. Seius cannot bind himself in England to sell goods for £50, except in writing; and it will be of no help to him to stipulate with Titius that this requirement of writing shall not apply, because it is enacted by a superior authority. But if Seius, Titius and Sempronius agree that all their contracts with each other shall be invalid unless in writing, there is nothing to prevent Seius and Titius from agreeing to make a valid contract and to waive this stipulation, although they may be liable to Sempronius for any damage he may sustain.[1]

Just as in the case of Land Registration systems, the provision of a formal Registry for international engagements which are considered binding removes many of the objections to informal arrangements such as exchanges of notes, protocols, and the like. But considerable room for objection still remains.

1. There are nations which are not parties to the registration system. The United States, the Soviet Union, Mexico, Andorra, and Danzig may be taken as instances.

2. Engagements appear to be possible which are outside the category contemplated in the compact of the Société des Nations. It would not be reasonable to register an engagement for the sale of old iron. Engage-

[1] *Bowen* v. *Hall*, 6 Q. B. D. 333, was decided in a case of employer and servant: the general language used in the judgments was far too wide. Can it be supposed that if A, B, and C agree together not to work for a particular master, A could not sue X for his wages, if he were in fact so employed, or that he could be dismissed without notice?

ments may be entered into at joint consultations—such as the alleged undertaking by the Hungarian representative at Paris to accept a certain basis of settlement in the case of a dispute with Roumania—which appear to be regarded as having some effect, though no one thinks of registering them.

3. Unilateral declarations on which it is reasonable for other Powers to rely may be regarded as constituting an engagement. But what is there to register? Registration seems to imply a bilateral document.

4. Verbal engagements do not appear to be contemplated by the compact as subjects of registration.

And, even in the parallel case of land registration, most, if not all, systems fall short of insisting, with the primitive harshness of the *nexum*, on registration as a *sine quâ non*. The experience of the old Yorkshire and Middlesex Land Registries in England ended in making registration, if not an empty formality, at any rate far from essential to a conveyance or an encumbrance.

In an elastic system like that of the Law of Nations, it is difficult to establish rigid formal requirements for the conclusion of juristic acts. Public opinion will look beyond the forms to the intention. Once abolish the necessity of observing the familiar form of concluding treaties, sealed by Plenipotentiaries and ratified by the Head of the State, and a state of things will be introduced in which the making of statements on which other governments are entitled to rely will involve a binding liability on States, the form of registration will assume only a secondary importance, and the difficult questions will emerge of who are entitled to speak for the State, and what binding force is to be attached to their utterances.

Hitherto, the only person entitled to bind the State has been the Head of the State. Utterances of Ministers, notes of departments and informal agreements by officials have had, in the past, such moral weight as reasonably attached in each case to them; but they have had no legal validity. To bind the State, the Crown, or the

Chief Executive must personally authorize the act by its seal. But if miscellaneous Ministers and ministerial officials are to be regarded as Agents of the State for general purposes, it must be carefully considered precisely where their powers begin and end.

That problem has two aspects, a constitutional and an international aspect. The powers of Ministers may be mapped out by municipal law, but it by no means follows that their international powers are thereby limited. It is a well-known principle that International Law does not require the Government of one country to be acquainted with the constitutional law of another. For this there are many reasons. Municipal law is never a safe or easy matter for foreign observers to understand. The foreign Government will seldom be able to secure more than one or two first-class experts on the subject, and they will probably contradict one another. Constitutional law is, again, intimately interwoven with politics. To pronounce an opinion upon it is generally tantamount to taking sides in an internal controversy. Constitutional law is, further, particularly prone to be controlled by usage, of the existence and force of which the foreign observer is ignorant. Above all, the simplicity of International Law demands that a Government shall not be embarrassed by the necessity of examining the complex and alien legislation of another. A familiar instance of this cardinal principle, that no State is bound to learn another's constitutional law, is afforded by the fact that in the event of a civil war, the party which has constitutional right on its side is in no more favourable a position as regards foreign countries than any other. It is not the party which is right, but the party which wins, that is entitled to represent the State; and if constitutional law is to decide who has power to conclude a treaty, a revolutionary government, being unconstitutional, will never be able to make any treaties at all!

It is therefore asserted with some confidence, that

the opinion is mistaken which holds that the powers of government agencies to bind their country are to be ascertained by study of their national Constitution. That would be to throw an unfair and indeed intolerable burden on foreign powers. The test must be an international one. No nation would make a treaty which was liable to be repudiated at any time by the other party on the allegation of some constitutional flaw. Indeed, as a perfectly valid international government may be a very unconstitutional one, all the treaties made by a duly recognized government might be repudiated by its successor on the ground that it had no constitutional power to make them, if constitutional law is to be admitted to decide such questions: which, of course, is absurd, and destructive of the whole theory of recognition.

We may lay down, at any rate, the following rules:

1. A limitation on the treaty-making power which is expressly made known to the other party must be duly recognized.
2. A limitation which is made known to his plenipotentiary must be acted upon for the purposes of the current negotiation.
3. A limitation which is notorious to the world must be accepted.

An instance of the last-mentioned head will readily occur in the shape of the well-known limitation according to which the Chief Executive of the United States cannot make a binding treaty without the concurrence of two-thirds of the Senators of that Federation. Questions of law as to whether such a majority had really and lawfully been obtained would appear to be irrelevant in this connection. An apparent majority, however questionable in law, ought to be sufficient for foreign countries, provided that its existence is certified through the usual channels of intercourse. A difficult situation might arise if some national authority, not in formal

communication with foreign governments, were to challenge the certificate. Suppose that Senators, or the Senate, or the Supreme Court, or some State Governor or Legislature, in the United States were to communicate with the envoy of a foreign country, or to its Foreign Minister, informing him of their view that the requisite constitutional authority for a particular treaty with that country had not been obtained, or had been improperly obtained, would the country in question be bound to take notice of the statement? The attempted division of constitutional powers in such cases puts these national authorities in the position of having national powers without any international voice. They cannot accredit envoys, they cannot contradict the envoy of the President, and, great as would be their moral authority, they could not affect the foreign country with notice of a flaw (real or asserted) in the treaty. The inconvenience and impossibility of allowing a country to speak with a divided voice make it imperative that the official assurances of the duly accredited envoy of the State should be regarded as binding the State as a whole. This does not apply to cases of a real international federation, where the federated nations enjoy a measure of international existence. In such a case their protests must be duly regarded, and, even if they do not enjoy the right of legation, their messenger must be capable of intimating their opinion, and of affecting the other Power with notice of it.

Nor can the limitations of Municipal Law affect the content of a treaty; and here it would seem immaterial whether or not the other State knew of the limitations. To hold otherwise would amount to making the municipal law of a particular state the law of the world. No individual, by proclaiming himself as incapable, can avoid the effects of his contracts. No one, by giving notice that he will not be responsible for debts or obligations contracted by him unless in writing, can really make writing an essential of all his contracts. A nation

may inscribe in its Constitution a provision that the national territory is inalienable, but that will certainly not prevent its being validly alienated by a treaty of peace. A constitutional provision is merely an indication of how the nation has made up its mind to behave. If its responsible agents say that it wishes to behave differently, there is no reason why they should not be believed. The only point of difference between a treaty alleged to contain unconstitutional terms and a treaty which is unimpeachable in this respect is that the Powers of the Plenipotentiaries would require in the former case to be more closely scrutinized, so as to ascertain beyond doubt that they are really authorized to do what is by their own admission contrary to their municipal law.

Logically, there may be no difference between the admission by a Chief Executive that he does not himself enjoy plenary powers of concluding a treaty, and the admission that the subject-matter of a treaty is or may be constitutionally beyond his competence. But the former question (limited as we have limited it above) is a simple one and touches the very essence of the treaty-making power. The latter is a complicated one, involving possibly the study of a whole range of constitutional questions, and touches only the limits of the power. It might nevertheless be wished that the two were assimilated, and that the authority of the person who accredits envoys were accompanied by no international necessity for the concurrence of persons who are not in diplomatic relations with foreign powers. But so long as it is plain, on the one hand, that observance of the constitutional provisions regarding senatorial consent is internationally necessary to the validity of a treaty with the United States, and, on the other hand, that observance of the constitutional provisions regarding the alienation of territory is not necessary to the validity of a treaty of cession, it is obvious that the distinction must be made. It may be urged that a cession contained in a treaty of peace is in fact a necessity which overrides all con-

stitutional safeguards; but the supposed necessity is not apparent. It seems much more juridical to hold that foreign nations are not concerned with constitutional safeguards.

In former times, the Viceroys of remote possessions were sometimes understood to have a subordinate treaty-making power, without the necessity of being provided with plenipotentiary powers, or of having their engagements ratified. Naturally, their powers must have been subject to the limitation that the engagements into which they entered did not go beyond the concerns of their territories; it would have been absurd, for instance, if the East India Company had assumed to cede the Island of Jersey, or if the Viceroy at Brussels had engaged for the toleration of Protestantism in Carinthia. Within those due limits, it seems that agents invested with regal power took with it some fraction of the treaty-making prerogative of regality. Phillimore [1] cites as an instance the East India Company.[2] The Spanish Viceroys of Milan, Naples, the Netherlands [3] and the Philippines, the Dutch Governor of Java, and the Imperial Viceroys of Flanders had also power to send ambassadors, and must therefore be supposed to have had power to conclude engagements through their agency. To-day it seems that no such quasi-sovereign Viceroys exist: the possibility is, however, an argument against the theory that the British self-governing Colonies are really independent States, in so far as it is based on their independent power to conclude treaties. For admittedly subject Viceroys did the same. In such cases, the Viceroy, like the Sovereign, usually acted by his plenipotentiary; an extraordinary case may be found so lately as the mid-

[1] *International Law*, I, 199, § 122.

[2] Which actually contracted *in its own name*, but (as Phillimore remarks) really as the Delegate of the Imperial Government, and as engaging its responsibility.

[3] Queen Elizabeth refused to treat with the envoy of the Duke of Alva—"*utpote misso a non principe.*" See Bynkershoek, Q. J. P., II, c. 8, and Phillimore, *op. cit.*, II, 165, § 128. Louis XV, however, had a regular Minister at Brussels.

nineteenth century, where the engagement was made by an Arabian prince with a military officer "acting for the government of Aden," and was ratified by the Viceroy of India ![1]

The States of the American Union are debarred from entering into any engagements with foreign powers: a stipulation which, strictly speaking, would prevent them from selling coal or borax to a foreign country or agreeing with a foreign country for the interchange of official publications.

2. Multilateral and Polylateral Treaties. — It might be convenient to reserve these two terms for two distinct things: it has been suggested that a "multilateral" treaty should denote a treaty to which there are several parties, each undertaking different and distinctive obligations towards some or all of the rest, while the term "polylateral" (we need not be driven to say "polyhedral") should be reserved for that type of treaty, now becoming increasingly frequent, in which the obligation of each party is almost exactly the same, and which, accordingly, are almost equivalent to a congeries of identical bilateral treaties. Such, for instance, is the Universal Postal Convention.

Such "polylateral," "polynational," treaties are becoming very frequent, and may prove the cause of grave embarrassments. It must often be a question how far the continued existence and participation of every state, or of some particular states, which is or are party to the treaty, is essential to the continuance of the obligations of the rest. On principle, a treaty between twenty powers is not the same as a treaty between nineteen, and if one should cease to exist, the compact is not what was formally agreed upon. Possibly a tacit agreement to renew the treaty or convention may be implied, but it cannot be presumed. The reservation of power to non-signatory states to adhere to such

[1] See "Danger Signals in International Law": *Yale Law Journal* (March, 1925).

engagements may again create a source of difficulty and dispute. It seems clear that no organism can adhere to a polynational treaty unless it is a State; and if in the opinion of one or several of the High Contracting Parties it is not a State, the question might arise whether the adhesion is good as regards the rest. Clearly it is not: the parties cannot be supposed to have contracted to enter into treaty relations with any organisms but those which they themselves consider States, and, however dry and mechanical its objects, a polynational treaty is something more than a mere complex of bilateral treaties: all the parties are placed in direct contractual relations with one another. To admit the adherence of an organism to a polynational treaty is therefore tantamount to recognizing the character of that organism as a State.

It may also be a serious question to what extent, if any, the parties to such a polynational treaty are damnified by the breach of a provision which directly affects only one or more of their number—to what extent one can complain of an asserted breach by another, without the concurrence, or contrary to the wish of, the rest—and so forth. Such treaties as these are often represented as the administrative legislation of nations; but so long as they rest on a contractual basis the analogy with legislation must remain faint and misleading.

The draft convention of Geneva (1927) dealing with restrictions on international commerce is an example of such polynational treaties which seem to involve endless difficulties of interpretation, owing to the reservations and exceptions which various, in fact all, adherents introduce. The introduction of a reservation to a treaty may be either on signature or on ratification; in either case it is the offer of a different treaty [1] from that which has been negotiated or signed. Whether a Plenipotentiary to exchange ratifications has power to accept an alteration may be gravely doubted. Whatever may be the

[1] Hall, *Int. Law* (6th ed.), p. 326.

powers of a general state agent, such as a Minister for Foreign Affairs, it seems difficult to show that an agent appointed for one thing may do another. Whether a Plenipotentiary to conclude and sign a treaty may bind his country by accepting a reservation which makes it a different treaty from that which it ostensibly is may equally be the subject of doubt. A negative answer would seem, in spite of the laxity of modern practice, to be clearly indicated. But in the case of polynational treaties the question is much more difficult, as it may be argued that the intention was to leave the various adherents considerable latitude. An agreement to which the parties are bound in patches is, however, such a juridical monster, that science can only pronounce against the possibility. Triangular disputes between parties, bound in different measures to the observance of the treaty, would be hopeless of solution, even if we allowed that bilateral disputes could be settled by reference to the greatest common measure of agreement. For it would manifestly be unfair that in the same dispute, involving A, B, and C, A should have greater rights against B alone than against B and C combined.

The legislative look of International Conferences for administrative objects, such as sanitation, communications, transport, the drug trade and the like, must not blind us to the fact that the conventions which are the outcome of their deliberations are treaties as much as any other, and require the unanimous consent of all the High Contracting Parties. As has been well remarked,[1] the acceptance of one article by one of the parties may be based on the acceptance of the same article, or another, by all the rest. The repudiation of either article by one or more of the other parties in such

[1] See Malkin, *Reservations to Multilateral Conventions*, in British Year-Book of Int. Law (1926), p. 142. This contains a useful enumeration of occasions on which individual states have attempted to enter into such polylateral conventions *sub modo*. The foregoing part of the present section of this work was written before the writer had the advantage of perusing Mr. Malkins' essay.

a case renders the instrument an entirely different thing from that which was bargained for. Nor can we think it at all consistent with principle, that the alterations which one party desires should be capable of valid acceptance by the tacit or even express consent of the Plenipotentiaries of the rest, or by incorporation in the procès-verbal of exchange of ratifications. It would be absurd if a Plenipotentiary of the highest ability could not make the least provision in a treaty without the possibility of its being refused ratification by his principal; whilst a Plenipotentiary entrusted with the routine duty of verifying and exchanging ratifications could make, and could consent to, the most sweeping alterations. Nor can it be sufficient for them to declare in Notes, Protocols or Procès-Verbaux, that they are "duly authorized" to make the alterations. If they are not duly authorized, it does not help matters to say that they are. The effect of such a procedure is to withdraw what may be a vital element in the treaty or convention from the control of the treaty-making authority. And so, where statements were officially made by the American Government agents to the Mexican, on the occasion of the signature of a treaty in 1848, the Mexican Government was subsequently informed that they could not be regarded as binding.[1]

It should be noted, as a practical detail, that when an instrument is executed "in duplicate," and is drawn up in two different languages, the meaning is not that the document in one language is a duplicate of that drawn up in the other. Two copies of each version must be made and exchanged. The same principle prevails where there are more than two languages, and also where the instrument is drawn up in triplicate, quadruplicate, etc. The Japanese Treaty with the United States of 1857 was drawn up "in quintuplicate, each copy being in English, Japanese, and Dutch," *i.e.* fifteen copies altogether.

[1] *Supra.* Crandall, *Treaties*, 77.

3. Rebus sic Stantibus.—There has been some disposition in recent years to introduce a dogma according to which a clause is implied in all treaties making their continued observance conditional on the circumstances remaining the same. If such a doctrine had any force no one would ever make a treaty; for it is obvious that circumstances, and very relevant circumstances, are constantly changing. The world, at its most stable moments, is in a state of flux, and treaties are sought as an anchor, not as a float. The promisor undertakes that whatever happens—short of supervening illegality or impossibility—he will perform. It is possible that the stipulations of treaties may become antiquated; the remedy is to show that performance is impossible or illegal. The thing stipulated for may be such as to shock the moral conscience of the world: the Assiento Treaty would nowadays be void as binding a State to permit the carrying on of the slave-trade. A State which has stipulated to supply quinine in quantity may find it impossible to do so on account of the sudden failure of the crop. But mere inappropriateness to modern conditions cannot dissolve the express stipulations of a treaty, without destroying the whole value of treaties, except as provisional statements of intention. It has been asked whether anybody would propose to put the stipulations of the Treaty of Utrecht in force at the present day. Of course not, because the treaty has long ago been annulled by the outbreak of war between the parties. Even those who do not formally concede that war puts an end to treaties, which do not contemplate its occurrence, will admit that the new treaties of Paris, Versailles and Vienna are meant to supersede and vacate the engagements of Utrecht. Nevertheless, in so far as that treaty defined the scope of the term "contraband," it is very arguable that its provisions are binding yet, as it contemplated the event of war, and would not be dissolved by those treaties.

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intelligitur rebus sic stantibus " is that some contracts are obviously made subject to an implied condition.

It is a general rule, applicable to the agreements of nations as to those of individuals, that the terms of a written agreement must be taken to be complete, and that they cannot be added to by importing terms from outside their content. But their content must be reasonably interpreted; and, if it is clear that some term or condition was thought too obvious to be expressed, a fair interpretation will give effect to it. Thus a contract for the purchase and sale of a specific cargo of corn is, in English law, void, if the cargo is, unknown to the parties, at the bottom of the sea. They have not said so, but clearly they were not promising to buy and sell the cargo whether it existed or not, but were contracting solely with reference to a particular state of facts. The whole matter turns, not on the impossibility or otherwise of performance, but on the understanding of the parties. Was one of them guaranteeing that performance was possible? Suppose A contracts with his wife B to allow her £500 a year for her private expenses: it is obvious that A does not intend to pay it, or any other sum, if they should be divorced.

So in *Reckitt* v. *Barnett, etc.* (1928: 166 Law Times Rep., 357), an apparently unrestricted power of attorney was held by the House of Lords to be restricted to a power to act in the management of the donor's affairs.

The test given by Phillimore is one of absurdity,[1] and it seems the best that can be applied. If it would be

[1] Hall's test (*Int. Law*, p. 350 (6th ed.) is found in the necessities of self-preservation. This is a trifle too narrow, though superficially it seems more scientific than the test of absurdity. The term " self-preservation," moreover, has acquired a technical sense in which it means little more than self-protection, it may be in relatively minor matters. The test of " absurdity " would probably have solved the perplexing " *Coronation cases*," in which seats let for King Edward VII's coronation procession (which was eventually postponed) were asserted to have been taken, and ships in similar circumstances chartered, on the footing that the coronation festivities would take place as arranged. (*Krell* v. *Henry* (1903), 2 K. B. 740; *Civil Service Co-op. Soc.* v. *G. S. N. Co.*, *Ibid.*, 756).

absurd to make a stipulation or a treaty, if it were to be applicable in certain contingencies,[1] then that stipulation or treaty may be regarded as invalid when and if the contingencies happen. But nothing less than sheer absurdity will do. The general doctrine, advanced by Fiore, Heffter and Bluntschli, to the effect that if a treaty becomes incompatible with the "rights and welfare" of the people, or with its "free development," it is no longer binding, would render all treaties valueless. "High-sounding generalities, by which anything may be sanctioned, are the favourite weapons of unscrupulousness and ambition." [2]

"Upon a scrupulous fidelity in the observation of treaties . . . obviously depends, under God, the peace of the world," says Phillimore.[3] "The treaty-breaking state is the great enemy of Nations, the disturber of their peace, the destroyer of their happiness, the obstacle to their progress, the cause of . . . War." He only echoes Vattel, who says,[4] "La foi des traités, cette constance invariable à remplir les engagements, dont on fait la déclaration dans un traité, est donc *sainte et sacrée* entre les nations dont elle assure le salut et le repose"; and the Mohammedans who proclaim, "O ye who believe, keep your covenants." Accordingly, Phillimore, although considering the Treaty of 1856 between Russia and the Allies "neither just nor wise," laments that it should have been necessary at so advanced a date as 1871 to emphasize its binding character.[5] So, the Duke de Broglie

[1] It must be carefully borne in mind that impossibility is not absurdity. It may be quite sensible to stipulate for an impossible thing, or for a thing which becomes impossible, because the promisor may very well be intending and intended to guarantee its possibility. And the illustration copied by Phillimore from Grotius, to the effect that a country cannot be bound to carry out a contract to supply corn to another, when the crop is blighted, and is all required to feed its own population, must be limited to this, that it is not bound to specific performance. It may very well be liable in damages (Phillimore, II, 155, § 89).

[2] Hall, *ut sup.*, 352.

[3] *Int. Law*, II, 69, § 44.

[4] *Ibid.*, II, ch. 15, § 220.

[5] Phillimore, *Int. Law*, II, p. 77.

remarks, "I founded the preamble on the *statu quo*; but I thought this *statu quo* ought to be called *la foi des traités*. It would be very unpopular in France if we were openly to pledge ourselves to renounce all right to the departments we have lost; but there is not a single soul bold enough to come forward and declare that we ought to violate . . . the good faith of treaties." [1] And a very recent writer, Mr. J. P. Bullington,[2] expresses the opinion that the doctrine of *rebus sic stantibus* . . . "is so pregnant with danger, as to outweigh any considerations of possible benefit which might be derived from it in exceptional cases." Elasticity cannot be invoked to justify laxity.[3]

4. Transitory and Executory Treaties. — The distinction between these is the distinction between a right *in rem* and a right *in personam*—between a conveyance and a contract. A transitory treaty exhausts its effect at once; but it may be far more important and far-reaching than an executory treaty which continues. The transitory treaty ceases to operate; but its effects do not. It is like a gift or a sale: the instrument exhausts itself in operating a changed state of things.[4]

[1] Talleyrand, *Memoirs* V, 198.

[2] See *Univ. of Pennsylvania Law Rev.* (December, 1927).

[3] In a case decided in the Court of Claims (the *James and William*, 37 Ct. Cl. 303), it was apparently held that any nation may abrogate any treaty at pleasure, so long as she does it without any reservation. By a treaty of 1778, the U.S.A. had agreed with France that tar should not be contraband; by a treaty of 1799 with Britain they had agreed that tar should be contraband. Britain and France went to war; and the consequence was that an American ship could safely take tar to England but not to France. This was manifestly unfair, and the French Government purported to "abrogate" the contraband clauses of the French Treaty, on 14 Nivose, An. III, upon which the Americans "abrogated" the entire treaty (by Act of 7 July, 1798). Nothing irregular can be seen in this: the French pretension to disregard the treaty in part was clearly incompetent; and the rescission of the whole treaty was a fair response. But the Court of Claims make the surprising remark that "A nation may abrogate a treaty as it may make a treaty—on its own motion, upon its own responsibility." What they really seem to mean is that on that motion and upon that responsibility a nation may break a treaty.

[4] Cf. *States and Current International Servitudes*, I, § 6.

It would seem, however, that really transitory treaties are comparatively rare. The change is only promised, as a rule. Something like *traditio* or delivery is often needed to perfect it. Thus, most treaties of cession affect to "cede" the territory; but in fact this is only regarded as a promise to cede, the actual transfer being carried out later. A cession may be so expressed as to be executory.

On this question of the distinction between an executed cession and an executory treaty Lord Stowell's judgment in the *Fama* (17 February, 1804: 5 C. R. 106) contains some valuable remarks. After premising that to effect a full transfer of sovereignty there must be, not only a (possibly secret) treaty, but some patent and public act, he proceeds to say that this principle is fully recognized by diplomatic practice. "Where stipulations of Treaties for ceding particular countries are to be carried into execution, solemn instruments of cession are drawn up, and adequate powers are formally given to the persons by whom the actual delivery is to be made. . . . Many articles must remain *executory* only, and not executed, until carried into effect; and until that is done by some public act, the former sovereignty must remain."

Lord Stowell instances the cession of Nova Scotia to France by treaty of 21 July, 1667, the act of cession not being drawn up until February, 1668; the treaty by which France ceded Louisiana to Spain in 1762, where, again, it was not until the next year that the act of cession was executed. He also alluded to *Wroughton* v. *Mann* (1780), in which East Florida was ceded to Spain by Great Britain in 1803, yet the English laws continued until the Spaniards took delivery from General Tonin. The Court of Delegates held that the cession by the ratified treaty was executory, and that until it was executed by delivery the British possession and the British laws continued in force. It would almost appear that a treaty, however precise in terms,

could not in itself operate a change of sovereignty until some public act of possession had taken place.

In the case of the abortive Lease to the United States by Honduras of the Island of Tigre (28 September, 1849), a "protocol of a conference" was signed at Leon de Nicaragua in the exact form of a treaty; the parties (Mr. Squier and Mr. Guerrero) style themselves the plenipotentiaries of Honduras and of the United States, and they "agree to the following Articles." These articles declare, *totidem verbis:*

"Art. I.—The Republic of Honduras cedes to the United States of North America the Island of Tigre, in the Gulf of Fonseca, for the time pending the ratification or rejection of the General Treaty between the two Republics, this day signed by the undersigned plenipotentiaries of the same, provided such time shall not exceed eighteen months.

"II. A decree to this effect shall be immediately issued and published in due form by the actual Government of Honduras, under the authority of which the principal diplomatic officer of the United States in Central America, or his representative, shall, in the name of his government, take possession of the said island, and adopt such measures as he may think proper to secure the objects set forth in the foregoing preamble.[1]

"III. Nothing in these articles shall be understood to alter or impair the laws and regulations at present existing in the said Island of Tigre."

No provision was made for ratification.

The "cession," though stated in the present tense, evidently needed the issue of the Presidential decree, and perhaps also the taking of possession. The decree was duly issued on 9 October, 1849, but the United States

[1] Shortly, the full and perfect enjoyment of the advantages of the proposed Grand Interoceanic Canal through the Isthmus of Nicaragua, and the removal of any cause of apprehension that Tigre might fall into the hands of foreign and unfriendly Powers (*scil.* Great Britain). See 40 S.P., 999.

Government disavowed the whole transaction ; [1] in fact, the commander on the station had already declined to support Mr. Squier, as he " could see nothing in either his own or Mr. Squier's instructions to justify him in such a course."

Dr. Labrousse, in the work which he has devoted to International Servitudes,[2] does not refer to the rights of fishery which were dealt with in the Anglo-American Arbitration of 1910, and with regard to which so much controversy arose as to whether the Treaty which granted them was transitive or executory. In fact, he does not deal in much detail with any positive servitude except rights of passage by water, and he regards rights of garrison as negative servitudes, restricting the right of self-defence, rather than as positive servitudes, obliging the country to admit foreign garrisons. Dr. Labrousse treats of Capitulations and Financial Control as servitudes ; in our view they are clearly mere personal obligations, depending entirely on the undertaking of the sovereign, and vanishing with his disappearance. Thus, as has been observed above, the Consular Jurisdiction disappeared from Cyprus and Bosnia when they fell respectively under the control of Britain and Austria, and no doubt they would disappear—as in Turkey—in the event of war.

5. Effect of War on Treaties.—The effect of war on treaties is to put an end to them.

The exceptions are :—

(1) " *Transitory* " *treaties*, where the result of the

[1] Bulwer to Palmerston, 2 March, 1850. *Ibid.*, 1019. Mr. Clayton variously terms the Protocol a " convention " and a " treaty."

[2] *Les Servitudes en D. I. Public*, Bordeaux, 1911. Nys (*Droit International*, II, 270) declines to admit the notion of an international servitude, as inconsistent with sovereignty. The present writer is a firm adherent of the principle of sovereignty, but it may often happen that in virtue of sovereignty a state may wish to admit another to the limited exercise of sovereign rights, just as it may wish to cede territory, in the very exercise of its sovereignty. A sovereignty which one cannot qualify by the grant of a servitude is only a truncated sovereignty. Rivier, among many other authors, may be cited as admitting the idea of international servitudes (I, 296).

treaty has passed from the region of contract to that of property, *e.g.* a treaty of cession. As long as the cession is not carried out, but depends on the *promise* of the ceding party, a fresh outbreak of war would annul the promise, and the other State would have no special rights in the ceded province, whereas, if the administration had actually been handed over, the outbreak of a fresh war would not annul what had been accomplished as a result of the treaty.

(2) *Treaties which in their terms contemplate their exercise in the event of war, e.g.* the Hague Conventions.

There has been in the later nineteenth century a doctrinal tendency, in France and elsewhere, to consider the permanence of treaties the rule, and their determination the exception. But this has never been applied or relied on in practice. Nations have almost invariably formally renewed all their treaties on the conclusion of peace—and this was done when there had been no formal declaration of war in the case of the Venezuelan operations of 1902. It was assumed that the acts of violent hostility had amounted to war *de facto*, and had made it necessary to reaffirm all treaties.

The doctrinal aberration just alluded to is nothing but a remnant of that tendency to limit the effects of war to the actual clash of armed forces, which is at present entirely discredited and discarded. Permission to civilian enemies to reside, and trade, and litigate, is now universally considered dangerous. The supposed permanence of treaties is nothing but a branch of the same theory. Even in France, it has now been abandoned. In the *Revue de Droit International Public* (1916, pp. 223 *seq.*), M. Pillet observes that the character of modern war —" doit avoir pour conséquence logique la rupture de tous les traités autres que ceux faits en vue de la guerre. Ces traités n'ont plus de raison d'être ; on ne sait pas s'ils en reprendront jamais ; cela dépend des conventions qui seront faites à l'issue des hostilités. A quoi bon les conserver ? On conservera bien un traité alors qu'un

simple obstacle de fait destiné à disparaitre s'oppose à son exécution, mais ici l'obstacle est plus sérieux, et les traités sont relatifs à un certain état de rapports dont on ne sait pas s'il renaîtra jamais. Dans la Guerre nouvelle la solution rationnelle est la résiliation des traités, sauf à remettre en vigueur à la paix ceux qui ne paraîtront pas trop démodés."

And Pillet is one of the authors who were cited in support of the idea that treaties were in principle unaffected by war! (*Droit de Guerre*, I, 104.)

It may safely be concluded that the old doctrine—always sustained by great authorities, and seldom or never contradicted in Great Britain or America—was the sounder one. According to this, all treaties, except those obviously framed for war, automatically dissolve.

This is, indeed, philosophically the sound view. In war one nation is seeking to impose its will on another. If it can succeed in doing so, it can secure the rescission of treaties. The whole of the relations of the two states are thrown into a state of flux, and it is illogical to regard any points as fixed and exempt from the flow.

And it is a view which has always been taken in practice. No statesman has ever contradicted it, and many have stated it with approval. Talleyrand adverts in his *Mémoires* to the fact that all treaties between the parties are necessarily dissolved by war. Clarendon says the same, in a letter cited in his Life by Maxwell (Vol. II, page 26), "Brunnow has done a very unwise thing off his own bat, by inquiring, in a semi-hostile, 3.4 insolent tone, what we meant by sending steamers through the Dardanelles. The answer I have given him may not be palatable to his Court, but he has brought it on himself. I don't see that matters are made much worse by a declaration of war (Nesselrode and Co. had no idea that such an event was probable!), and as that annuls all treaties, we may come to some arrangement, though I own I have not the least expectation of it" (5 October, 1853). In the United States, Secretary

Buchanan had in 1845 observed, "The general rule of International Law is that war terminates all subsisting treaties between the belligerent powers" (34 British State Papers, 98, 97). President Polk said the same in his Message of 7 December, 1847,[1] and Secretary Bayard in 1885 wrote that the treaty (British-American) of 1784 had lapsed by reason of the war of 1812. At the Congress of Paris in 1856, in the protocol of 25 March (see Testa, *Traités*, V, 86), the following discussion is reported :—

"M. le Comte Walewski dit que l'état de guerre ayant invalidé les traités et conventions qui existaient entre la Russie et les autres puissances belligérantes, il y a lieu de convenir d'une stipulation transitoire qui fixe les rapports commerciaux de leurs sujets respectifs à dater de la conclusion de la paix.

"M. le comte Clarendon émet l'avis qu'il conviendrait de stipuler mutuellement, pour le commerce et la navigation, le traitement de la nation la plus favorisée, en attendant que chaque puissance alliée puisse renouveller avec la Russie ses anciens traités, ou bien en négocier des nouveaux."

[The Russian plenipotentiaries could not consent to accord most-favoured-nation treatment. They proposed a return to the *Status Quo.*]

"M. Manteuffel observed on the difficulty of negotiating with Turkey on account of the most-favoured-nation clause . . .

"M. le Baron Bourguency et les autres . . . reconnaissent que les capitulations répondent à une situation à laquelle le traité de paix tendra nécessairement à mettre fin . . ."

In fact, the Russian suggestion was adopted, and Art. 32 of the Treaty of Paris re-established the *status quo* in respect of treaties, until fresh ones could be concluded. Fresh ones were made, and Hall (*International Law*, p. 380) says that Russia and Sardinia even thought it necessary to re-stipulate the abolition of the obsolete

[1] See Lawrence's *Wheaton* (2nd Ed.), p. 877, note (249).

droit d'aubaine. The only exceptions to the express revival of treaties seem to be the Austro-French war of 1859, and the Russo-Japanese war of 1904.

In 1878, the Treaty of San Stefano (Russo-Turkish) provided (Art. 23) the re-enactment of all treaties relating to commerce, jurisdiction and the position of Russians in Turkey "and which had been suppressed by the *state of war*," and this was repeated in the definitive Treaty of 1879 (Holland, *European Concert*, p. 348).

The war of the Duchies (1864) was terminated by a treaty re-establishing all treaties (Art. 2, Martens and Cussy, I, 307). The wars between Austria and Sardinia in 1859 and 1866 were so terminated (Hall, *op. cit.* p. 380; Martens and Cussy, I, 388), and so was the war of 1866 between Austria and Prussia (Hall, *op. cit.* 380). The Franco-German war of 1870–71 was ended by a treaty reviving certain treaties therein mentioned (*Ibid.* 381).

The practice seems constant to require all treaties to be renewed; regarding them as dissolved by war. An exception may exist for "multiplex" treaties such as postal unions. Even as between Spain and Morocco (1860), Art. 14 of a treaty of peace re-established former treaties. So in the Perso-British Treaty of 1857, the former Convention against the Slave Trade was expressly re-affirmed (Art. 13). (Martens and Cussy, I, pp. 10, 147).

The practice is based on the clear opinion of Vattel and Whcaton that all treaties are dissolved by war, except those obviously contemplating it and "transitory" conventions such as cessions. There appears to have been no dissent from this until Klüber and Heffter took up the position that war must be held to interfere with treaties as little as possible. Bluntschli and Calvo, Fiore and Pillet, took the similar view that all treaties in principle survive, though they may be suspended.

The older view is expressed by Kent, "As a general rule, the obligations of treaties are dissipated by

hostility, and they are extinguished and gone for ever." He only excepts war conventions (*Comm.*, I, 176). Wheaton, Hall, Twiss and Phillimore take up practically the same position.

Applying these principles, we may conclude :—

1. *The rupture of diplomatic relations has of itself no effect.*

It does not even seem necessarily to interfere with the continued exercise of their functions by consuls. If their exequaturs are withdrawn, it would in many cases appear to be a breach of commercial treaties, which could only be justified as a measure of reprisals, but which, as such, must produce its full effects, including the temporary suspension in countries of exterritoriality of privileges of consular jurisdiction and vesting it in territorial tribunals and jurisprudence.[1]

II. *The outbreak of war has the following effects :*

(1) As to outstanding monetary liabilities, the outbreak of war not only suspends, but does away with, the necessity of making payments. The case is not one of voluntary loan by private persons—in which event it is in accordance with received custom that the interest should be punctually paid, in spite of war. For the object of that rule is to enable States to borrow from private capitalists by making their creditors certain that war will not deprive them of their stipulated interest. It is a rule which has no application to Government loans and demands.[2]

In the case of the Spanish-American Treaty of 1834 (see Moore's *Digest*, § 779, p. 377) the U.S. had claims

[1] See Martens and Cussy, *Recueil*, I, 193. German-Chinese Treaty of 2 September, 1861, Art. 4.

[2] This time-honoured rule, under which interest was punctually paid in England during the Crimean War on the "Russo-Dutch Loan," was largely disregarded in the war of 1914. Enemy interest was sequestrated, which meant ultimate confiscation in case of victory. The annuity due by Britain to the Grand Duchess of Mecklenburg Strelitz (Princess Augusta of Cambridge) was rather shabbily cut off, while the annuity due to the Duchess of Edinburgh was duly paid to Her Royal Highness in Coburg, the excuse being that it was due under a treaty with Russia—as if a treaty could compel a State to aid its enemy.

against Spain arising out of the South American Revolutions, in discharge of which, in 1834, Spain agreed to pay the U.S. 12,000,000 reals in Spanish Consols, bearing interest at 5 per cent., and the U.S. were to distribute them among the claimants. Payment was suspended during the war of 1898, and the treaty was declared null by Spain. But on the conclusion of peace without special mention of treaties, the overdue coupons were paid without much demur. However, by the subsequent treaty of 2 July, 1902, all treaties were expressly annulled, with the exception of this one, " which is continued in force by the present convention." This presumably shows that express continuance was thought necessary. So the payment of the " Boxer indemnity " to Germany was discontinued by China in and after the recent war with Germany.

Bluntschli (§ 658) thinks that money debts by one belligerent State to another are unaffected by the war, but that payment of capital and interest are suspended (whilst payment to *individuals* must proceed uninterrupted). But the absurdity of this view is seen if we remember that a bag of bullion or specie in the territory of one belligerent, belonging to the other, can clearly be appropriated. *A fortiori* the money still in its own hands, owing to the enemy, can be " appropriated by the right of war." In the case of bonds, it is the engagement and not the physical instrument that is the important thing, and Phillimore [1] concludes that " If part of the booty of the conqueror be a promissory note, [he cannot] put himself in the place of the promisee, and exact the debt from the promisor." So that, even if the enemy has the belligerent's bond or note, payment can be repudiated.

(2) As to Exterritorial Rights and Settlements there arises the delicate question of whether these exterritorial Settlements rest on property or on contract. Do they in principle depend on the undertaking

[1] *International Law*, III, 21.

of the local Power to respect them, or are the foreign rights, once acquired, independent of the local will? If the former, they vanish on the declaration of war, like all other rights depending on the territorial Government's promise. If the latter, they continue to subsist, but of course lie open to immediate conquest.

A similar question has often arisen between Britain and America regarding the fishery rights in Canada conceded to America in 1783. If they were mere British promises to allow fishing, they disappeared when war between America and Britain broke out in 1812. If they were transfers of a right to fish, good against all the world and independent of British permission, then they continued to subsist, irrespective of war.

Exclusive Settlements (except in *leased* territory) seem to repose in theory essentially on promises. They remain the territory of the State—an attack on them by a third party would technically be an invasion, not of foreign territory, but of the State's territory; the territorial State's police might penetrate them without impropriety, or at any rate without doing more than violating an undertaking. No one would feel, if the British Settlement in Amoy were entered in peace-time by a Chinese armed force the same shock that they would feel if Chinese troops invaded Kowloon.

Most treaties of exterritoriality do not, indeed, contemplate exclusive Settlements. They only engage to facilitate the acquisition of premises by the merchants of a particular country. So far as such a treaty is concerned, these need not have been segregated, but might have been dispersed among the houses of natives of the country. The formation of a Settlement is a mere matter of mutual convenience; and in the case of Japan, the policy of dispersal was adopted at Niigata in pursuance of the very same treaties under which Settlements grew up at Nagasaki and at Yokohama.

Therefore the rights, being merely contractual,

disappear at once. And if they did not, they could at once be abolished by formal conquest, though this would require to be confirmed by the treaty of peace.

The private rights to their property possessed by individual foreign owners in the Settlements are, of course, quite another matter.

(3) As to Consular Jurisdiction. The same question arises in regard to these rights, of whether they repose on contract (*i.e.* on the word of the territorial Government), or whether they have a "real" character, independent of its undertakings. It is tolerably certain that they depend solely on the word of the Government. If it interferes with them, it has broken a promise, not invaded a property. That they depend solely on its word is shown by the fact that no conqueror or transferee would be bound by such arrangements. A conqueror on transference does not succeed to the obligation of the vanquished party's *promises*, though it must respect its *cessions*. Therefore when Britain took over Cyprus there was no question of the maintenance of the "Capitulations" or rights of Consular Jurisdiction; and similarly when Austria took over Bosnia and Herzegovina the Consular Jurisdictions disappeared.[1] That Bulgaria was not successful in abolishing the rights was simply due to her weakness.

If this view is accurate, the Consular Jurisdiction disappears entirely on the outbreak of war. Turkey proclaimed the abolition of the "Capitulations" in the late War; she regarded the Italian privileges as abolished in the Tripoli war, and they were expressly restored (with qualifications) by the Treaty of Constance. The same thing happened, though with less specific detail, in 1878–9.

But if these privileges were a cession of "real" rights, they would be the subjects of suspension only,

[1] The case of Egypt is different. A native sovereign was not openly superseded by Great Britain in the management of the country, and Britain was anxious to disclaim the control which in fact she exercised.

and would revive, unless expressly revoked, when peace supervened.

There can be little doubt—the presumption always being in favour of sovereignty (Hall, *International Law*, p. 331, ed. 6)—that Settlements and Consular Jurisdiction alike rest solely on the powers and will of the territorial State, and terminate automatically with the outbreak of war. The consular courts are, as we have seen,[1] in the last analysis the courts—though the abnormal courts—of the local sovereign: they are not really the courts of the European Power for whose benefit they are established. Sir F. Piggott's statement has already been quoted: "The Courts which are created are not the King's Courts properly so-called, but form part of the judicial system of the country in which they are established" (*Exterritoriality*, p. 5).

That there may be friendly consuls ready to take up the work of the enemy consuls is nothing to the point. There was no *obligation* in 1917 on China to recognise the Dutch in the matter of acting as intermediaries of Germany. As a matter of convenience, and indulgence, and for the protection of German life and property, the representations of the Netherlands' Minister in China were listened to with respect and attention. But he did not stand in the place of the German Minister, nor did the Netherlands' consuls automatically succeed to all the functions of the German ones. If he or they did so, diplomatic relations would not have been suspended: they would have been continued.

Art. 4 of the Chino-German Treaty (1861) did indeed provide that when the German consuls were absent they might obtain the execution of the treaty through a friendly power. But war abrogated that treaty.

(4) As to executory promises in general it need only be repeated that these must be regarded as entirely revoked by war, except where they expressly contemplate performance during or in spite of hostilities.

[1] *Supra.*

6. Treaty Rights and Belligerent Necessities.— Belligerents are sometimes inclined to place restrictions on neutral trade in ways inconsistent with their treaty obligations. The attempt to secure that neutrals in the War of 1914 should not trade with Germans, by refusing them the ordinary trade facilities if they did, or by penalizing their allied customers if they did, was objected to on this score. In the American Civil War Great Britain took exception to somewhat similar measures adopted by the Federals.[1] On 14 April the Collectors of Customs were instructed to refuse clearance to shipments of anthracite, and on 12 May, 1862, Messrs. Adderley & Co., Nassau, Bahamas, informed the Government that their vessel the *Time*, loading with coal at New York, had been detained pending (1) discharge of the coal, or (2) a bond being given restricting the persons to whom it should be sold. A statute of 20 May empowered the Treasury to refuse a clearance to vessels laden with goods which there was satisfactory reason to believe were intended for the insurgents, and to exact bonds and enforce forfeitures. Treasury instructions under this statute refused a clearance to vessels carrying contraband or "corals [? coals], iron, lead, copper, tin, brass, zinc, platinum, boilers . . ." and liquors of all kinds. The British Consul-General reported that these powers had been extensively used for the annoyance and injury of British trade. Coal had been stopped, even when going to Canada. Dry goods and shoes had had to be re-landed, and much inconvenience had been caused. The Collector of the New York Customs prohibited the export to Nassau or the West Indies of coals, dry goods, shoes, quinine, drugs, tin-ware, etc., when he had reason to suspect them to be destined for the welfare of the Confederates. Mr. Stuart, of the British Legation, cited individual cases of hardship (P.SS. *China*, *British Queen* and *William H. Clear*), and added that, as the bonds were to be

[1] See *Brit. Parliamentary Papers*, *N. America*, No. 14 (1863).

enforced if the goods came into Confederate hands at any time however remote, the process amounted to an almost total prohibition of trade. In response to this, Earl Russell thought that the refusal of clearances to contraband or other specified articles was competent to the United States, so long as the prohibition was impartial. But he could not understand how clearance could be refused to ordinary merchandize on a mere assumption or surmise of "imminent danger," unless reasonable ground existed for believing the destination to be a Confederate port. A distinction ought to be taken between (1) articles of which the export was prohibited as contraband by general orders of the U.S. to any places within certain geographical limits, and (2) shipments to the Bahamas or any other part of the British dominions of provisions and other articles of imminent use not made contraband by any such general order. The former sort of prohibition was general, public and impartial, and might be justified, in spite of commercial treaties, by belligerent exigencies. But interference with ordinary exports to the Bahamas was another matter. The trade between the U.S. and the Bahamas was regulated by the Treaty of 1815 between the U.S. and Great Britain (extended to the Bahamas in 1830), which made it lawful for British vessels from the Bahamas to import and export to and from the U.S. any articles which might be imported and exported in U.S ships. That engagement was still in force, and interference with articles not contraband was plainly inconsistent with it. As regards the *Time*, he could not protest if the bond was always imposed on exports of coal as coal might be of military use. But if exceptionally imposed on the vessel in question, there would be a grievance. In a subsequent note, Mr. Stuart transmitted complaints from six British firms at Nassau, protesting against the Federal Government's dictating and saying with what individuals they should deal in their own country.

Seward admitted that the restrictions were applied exclusively to Nassau, because there was no reason to suspect abuses elsewhere. The restriction was a measure dictated by the public security endangered by the insurrection, and was not a measure of trade. He expressed himself, however, as prepared to consider the matter further. On 13 September, Russell repeated that the British Government was unable to acquiesce in the U.S. interference, " which is in contravention of treaties and established principles of international law." The U.S. seemed to imagine that goods could be embargoed if in the judgment of an inferior officer they might fall into the possession of an enemy. Great Britain could not assent to such a doctrine. She was entitled to insist that her commerce should not be interrupted. On the 22nd he added that the gravity of the case was increased since Nassau alone was struck at. " The United States of America assume to virtually prohibit the export from New York to Nassau of articles not contraband of war, with a view to prevent British firms from making Nassau a depot of commerce with the Confederate States of America. An inference of ultimate use is drawn from the magnitude of shipments, comparison of consignments, notoriety and the connections of Nassau firms. But the trade between Nassau and the C.S.A. is (subject to the limitations imposed by the Law of Nations) as legitimate as trade between Great Britain and anywhere. Even if the coast of the C.S.A. were effectively blockaded (which it is not), Nassau firms would still have a right to sell goods in Nassau to Confederates or anybody else, without the slightest violation of neutrality. The goods might be seizable at sea. . . . But that does not justify a belligerent in imposing an embargo in its own ports merely because this may probably tend to cripple or embarrass another lawful trade. It is a false assumption that it is a violation of neutrality for a British colony to carry on any retail trade with the

C.S.A. during the existence of the blockade, and that the inefficiency of that blockade may be made good by placing an embargo on British trade at New York."

Seward replied (8 October, 1862), with some justice, that a State must be at liberty to interdict within its own borders the supply of comfort to its enemy. It did not appear that that right had been surrendered by the conclusion of commercial treaties. However, he withdrew the Treasury Instructions of 14 April (which had been geographically restricted on 18 May), and left the case to rest on the statute of 20 May above mentioned. As the liberty of trade conceded by the Treaty of 1815 was to be " subject to the laws and statutes " of the U.S., and it had now been restricted by statute, there could be no cause for complaint. The answer of the British Government (17 December, 1862) was that an Act of Congress could not override the treaty: the whole engagement could not be made illusory by domestic legislation—the words only meant that foreign traders must not expect to be exempt from the ordinary law. Therefore the U.S. could cut down the liberty of commerce by imposing on it conditions intended to operate outside their territory. A prohibition by Congress of all trade with the Bahamas unless Britain would prevent all trade with the C.S.A. would amount to a refusal on the part of Congress to perform the terms of the treaty unless Britain would consent to act under the dictation of the United States. Prohibitions applying to special geographical limits and to special articles might be unobjectionable, but a general power to prohibit the export of general merchandize was too much; it was a prohibition of trade. If the law was not discriminatory, the practice was. The forms of domestic legislation had been made subservient to an endeavour to control a particular branch of neutral trade, as carried on, not in U.S. territory but in the territory of the neutral Power: a denial of the commercial intercourse guaranteed by treaty, except on terms to which no independent foreign

nation could assent without compromising the rights of neutrality and her own sovereignty within her own dominions. Mr. Seward replied (19 January, 1863), admitting that a general prohibition of trade with the Bahamas unless Great Britain would prevent trade with the C.S.A. would be a breach of the treaty. But the present was not a general prohibition: it was only a prohibition of goods suspected to be for the use of the C.S.A. The trouble was that everything for the Bahamas was suspected to be for the use of the C.S.A.; however, Lord Russell stopped the controversy (10 June, 1863), having "reason to hope that their representations would not remain without effect."

It is clear that commercial treaties cannot override the necessities of war, but less clear that dictation of the course of commerce of a neutral country is such an overriding necessity as naturally to be expected to be excluded from its purview.

§ 6. Neutral Duties

1. War Zones.—The theory of the nineteenth century and earlier was that the high seas were the common highway of nations, and that although civilization had not proceeded to the point of interdicting them to belligerent violence, yet that belligerency conferred no right on warring nations to interdict their use to the rest of the world.[1] It seemed, indeed, probable in 1900 that the next victory of peace would be the refusal of neutrals to allow the high seas to be made the theatre of armed conflict, and that they would insist on a safe sea.

The contrary happened. Nations began for the first time to monopolize portions of the ocean for fighting. In the Russo-Japanese War of 1904–5, edicts were published which preluded to a new system. On 15 April,

[1] See Descamps, *Le Droit de la Paix et de la Guerre*, and also R.G. de D.I.P., 1908, p. 629; Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 119.

1904,[1] there was issued a circular from the Russian Foreign Office striking at the presence in the "zone of operations of the Russian fleet" of neutral vessels carrying correspondents of the Press. Such ships, using "d'appareils perfectionnés n'étant encore prévus par les conventions existantes"—wireless telegraphy no doubt is meant—were to be seized as prize, and the correspondents treated as spies, and presumably liable to the capital sentence at the hands of a court-martial. It is obvious that a neutral Press correspondent, although his reports may be useful to a belligerent, does not act at the orders, or for the benefit, of the opposite belligerent, and he cannot be treated as carrying enemy despatches, much less as engaged in espionage, because of his impartial and open activities.[2] Dr. Takahashi was impressed by the importance of preserving the secrecy of naval operations, and of course, as he points out, it is much superior to the interest of neutrals to receive accurate intelligence. But he fails to appreciate that the latter interest is not the only one involved. It is not every war which is waged in a remote corner of Asia. The whole question of the right of neutrals to a free sea is involved. A neutral vessel provided with proper papers for an unblockaded port, and with no compromising despatches on board, ought to be able to go anywhere on the high seas without interference. Above all, in the past, no such arbitrary interference was ever ventured. It might be convenient to belligerents to introduce it now; but is their convenience or that of the

[1] Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 115; Takahashi, *International Law in the Russo-Japanese War*, 387.

[2] Takahashi seems to regard the circular as perhaps conceivably justifiable on the ground of the "unneutral service" of the neutral vessel. But the idea in the mind of those who framed the circular was not that of unneutral service but of espionage. You cannot shoot a captain who carries enemy despatches. The idea of treating a vessel as engaged in unneutral service because she transmits information which, no doubt, will reach the enemy, though not through any concert with him, is viewed with distrust by Takahashi, and in 1909 the Declaration of London distinctly repudiated it, stipulating (Art. 45) that the transmission must be "in the interest of" the enemy.

whole neutral world the more important? Are belligerents to be encouraged beyond their encouragement in 1700? Professor Takahashi's view fails to take account of the patent fact that a neutral in a belligerent country is more or less identified with that country; on the high seas, he is in his own country. The case of the *Industrie*, which he reports (*op. cit.*, p. 397), was clearly one of enemy assistance. The *Industrie* was a German ship, chartered by the proprietor of a Chinese newspaper published at Chefoo; her movements were evidently not those of a trader, and the only question was whether she was employed by neutrals or by Russians; the Court found on very plain evidence that she was employed by the latter.[1] Napoleon certainly did not believe in the doctrine of a war zone from which the emission of intelligence might be excluded. At a moment when it was crucially important to prevent the whereabouts of L. Allemand's fleet from becoming known, that fleet scrupulously refrained from interfering with neutral Swedish and American ships which crossed its path, though it took the most stringent and drastic methods with ships of its Portuguese allies, sinking them *spurlos versenkt*.[2] Lawrence [3] had suggested that press boats might be excluded from zones where "important warlike operations were in process of development," and that both belligerents should have a censor on board to control the messages. But belligerents would never be satisfied with controlling professed press boats; such a censorship, if established, would be rendered nugatory by press messages from other vessels. Hershey criticizes the phrase "zone of warlike operations" as very vague,

[1] The *Samson*, inadequately reported (Takahashi, *op. cit.*, 402), is to the like effect; the alleged "press boat" was really to take medical supplies into Port Arthur, then under blockade.

[2] Desbrièves, *Projets et Tentatifs*.

[3] *War and Neutrality in the Far East*. Hershey, *op. cit.*, gives a useful bibliography of contemporary literature on the subject: p. 124 (n.). He makes the illuminating comment that the Russian circular was possibly suggested by the well-known threat of Bismarck in 1870 to treat balloonists as spies.

as it obviously is, and saw no necessity for such an interference with neutral liberty. He was, however, prepared to allow belligerents to break up wireless messages at sea "under certain circumstances"; though he condemned in the strongest terms the Russian pretensions to control the conduct of neutrals on the high seas.

The discussion centred, it will be seen, round wireless telegraphy. But the principle of the demand for control of wide areas of sea on the part of belligerents broke out in other directions.

Wireless telegraphy was only the occasion of these demands: it was the growing pitch of belligerent pretension which formed their real motive. Nobody can suppose that it would not have been highly convenient and "necessary" for belligerents, previously, to control the high seas in many various ways in their own interests, had it been permissible. The assertion of a high belligerent prerogative found another channel in the pretension to sow the seas with automatic contact mines. Russia was reported to have set floating mines in the whole strait of Pe-chi-li, and in the channel between Miao Islands and Liao-tie-Shan.[1] And the fact that extensive sowings were made is proved by the simple fact that many Chinese junks were in point of fact blown up,[2] and this even after the lapse of years. But as the writer remarked at the time, all this happened in the Far East, and damaged little beyond Chinese junks. Europe and America remained careless.

[1] Hershey, *ubi sup.*, 125, 127.

[2] It is remarkable, however, that Takahashi (*op. cit.*) in a very detailed list of Japanese mercantile ship disasters does not list a single one as due to contact with floating mines, and does not mention the subject of mines in his index. He does, however, in his Diary (p. 769) allude to operations of "sea-clearing" in which various Japanese navy ships were destroyed by mines off Port Arthur (*T. B.* 48, 12 May; *Miyoko*, 14 May, 1904); and to the loss of the *Hatsuse* and *Yoshino* on 15 May. Also, two Russian gunboats are listed as sunk, one by a mine on 5 June, and the *Kaimon* on 5 July; another Russian gunboat on 18 August, the *Sevastopol* (injured) on 23 August, and two T.B.D. on 24 August. Which of these mines were deposited in, or allowed to float to, the open sea, does not appear—but probably most of the occurrences took place outside territorial waters.

So far, bad: and the new belligerent idea of zones of ocean which would be withdrawn from peaceful commerce and devoted to purposes of war was too convenient to belligerents to be forgotten. Instead of belligerents being, as the world had thought, regarded as public nuisances to civilization, they turned out in the twentieth century to be its spoilt children, whose whims were sure of respectful consideration. The extension of the category of Contraband, the acceptance of the flighty doctrine of Continuous Voyages, the sinking of neutral prizes, the sowing of contact mines, all these were so many instances of what the present writer styled in 1905 [1] "the recrudescence of belligerent pretensions." As the War of 1914 was waged between powerful naval states, and no neutral states of any comparable resources remained, it was inevitable that neutral rights should be defied. And so the world saw the ocean appropriated by belligerents. A step in that direction had already been taken. Where Imperial Russia led, Imperial Italy was not slow to follow. On 20 August, 1909, an Italian decree was issued purporting to enable the territorial sea to be closed in time of war, to a limit of ten miles. And on 18 June, 1912, after the Turco-Italian War, this was translated into a parliamentary statute. Possibly it was found that the authority of the edict of 1909 was insufficient to enable the ten-mile zone to be monopolized in practice during that war. At all events there seem to be no records of its being put in force. Finally came the War of 1914, in the course of which war-zones, interdicted to neutral vessels, were freely introduced. This practice began with the initial German illegality of sowing the seas with contact mines. The Russians had done this, in the Far East, in 1904–5; but it was in the Far East, and nobody cared. But "the price of our liberties is eternal vigilance," and Europe, having tolerated the Russian claim to infest

[1] Paper read at the International Law Association Conference at Christiania, 1905—*vide* its Report, p. 129.

the high seas in 1904, found it impossible to treat it as a groundless pretension in 1907. The Second Hague Conference, coerced by Russia and Germany, had to adopt a complicated code regulating submarine mines, through which a coach-and-horses could easily be driven.[1]

In August, 1914, it became apparent that Germany was about to sow the North Sea with mines. This initial departure was the *fons et origo* of all the subsequent chaos in the law of war at sea—just as the initial illegality in the invasion of Belgium was the cause of all Germany's subsequent misfortunes on land. For it immediately brought in as "reprisals" the British proclamation constituting the North Sea between lat. 51° 15′ N. and 51° 40′ N., and long. 1° 35′ E. and 3° E. a "military area" or "zone" in which neutral traffic would be supervised by the Entente Powers: that, in turn, provoked the German counter-reprisals of 4 February, 1917, by which the waters in the neighbourhood of the British Isles were proclaimed a war zone dangerous to shipping, and that again, just as in the familiar old days of Napoleon, which we thought had gone by for ever, gave rise to the furious extensions of contraband and contraband destination, which ended in the German proclamation of "unrestricted submarine warfare," which virtually treated every neutral as an enemy.

"If a ship of war," says D. Webster, "in thick weather, or in the darkness of the night, fire upon and sink a neutral vessel, under the belief that she is an enemy's vessel, this is a trespass—a mere wrong—and cannot be said to be done under any right accompanied by responsibility for damages."[2] "She is not at liberty

[1] The Hague Code allowed the use of old stocks of mines which did not become innocuous when detached. Who can tell whether an exploded mine is new or old? It allowed the use of anchored mines if fitted with a sterilizing apparatus (which might, or might not, work). It allowed the use of floating mines fitted with apparatus which would (or might not!) render them innocuous in an hour.

[2] 32 British State Papers, 470 (28 March, 1843). This opinion does not seem to have been produced to the Commission d'Enquête which sat on the Dogger Bank affair, and which in effect affirmed the responsibility in damages, but denied the wrong.

to inflict injuries upon other innocent parties, simply because of conjectural damages." There is this difference between a ship-of-war's sinking an innocent vessel by mistake, and her sinking the latter by means of mines—in the one case there is an honest mistake, in the other there is a deliberate design.

It may surely be taken that this innovation, which enables nations to monopolize the high seas in order to be a nuisance and a menace to the neutral world, will be universally condemned. If neutrals do not resist it to the uttermost, they deserve their fate. The assumption to infest a wide sea with mines and submarines, and to control neutral shipping throughout its extent, is fundamentally inconsistent with neutral freedom. At bottom, the question is, as in so many other of the modern problems of war, " Is neutrality or belligerency to be encouraged ? " All through the nineteenth century the tendency certainly was to discourage belligerency. Nations could always settle their quarrels peaceably; and if they chose to fight, neutrals must not be damnified beyond the minimum. This twentieth century, with its Kiplings, its Nietzches, its Strindbergs, its Bernhardis, its Roosevelts, and its other apostles of violence, is inclined to think with Steevens that " We have let brutality die out too much," and seems prone to give the belligerent his head.

It is a retrograde tendency. The world has got past the schoolboy stage. The Kellogg Treaty seems to indicate that the nations view with academic disfavour the notion of war. It remains for them to prove their sincerity by reverting to the attitude of the past generation and insisting that belligerents shall be a minimum of offence to the neutral world, and incidentally by keeping clear the neutral seas, and refusing to permit belligerent mines and belligerent dictation there. Bellona must go.

2. Internment.—It has been justly observed with reference to the view of neutral duty put forward in the

Alabama case, "What, according to the case of the U.S., must be the ordinary situation of a neutral in a maritime war? It must be a situation of perpetual and unremitting anxiety, surrounded by dangers, harassed by a crowd of new obligations unknown in peace, which nothing short of sleepless vigilance will satisfy, while any lapse in the performance of them, on the part even of a subordinate officer, is to be visited with heavy national penalties. The transactions of private commerce must be made the object of minute inquisition and incessant supervision; private persons, suspected of being agents of either belligerent, must be tracked, when within the neutral country, by spies and informers; trade with the belligerent nations must be fettered by restraints and prohibitions; the hospitalities ordinarily extended to belligerent ships in ports of the neutral must be guarded with precautions, for the strict enforcement of which no honesty or zeal on the part of the local authorities can afford an adequate guarantee. . . . States would be tempted to abandon a position so precarious, and menaced by such heavy penalties; to choose, in preference, the certain evils of war itself, and to seek protection in an alliance with one belligerent or the other."

The standard of neutral duty, fortunately, has not been raised quite so high as the Rules of Washington require. The hospitality accorded to the Russian fleets on their way to destruction in the Far East in 1904–5 shows that a belligerent warship in a neutral port is not a monster to be driven out in twenty-four hours but a friend in a natural position, so long as she does not convert it into a base.

The genesis of the facultative rule requiring warships of a belligerent to depart in twenty-four hours is hard to trace. It seems to have arisen out of the dislike of privateers bringing their prizes into neutral ports: they were rough and difficult to control: and in their own interests States began to prohibit them from staying

more than twenty-four hours. Such a prohibition is found in the celebrated French Ordonnance de la Marine of 1681 (Art. 14).[1] Another early rule required an interval of at least twenty-four hours to elapse between the sailing of rival enemies from a neutral port. Such a regulation is found in the Tuscan *règlement* of 1778,[2] which is only an example of many others of the same period,[3] *e.g.* those of Genoa (which treats the rule as an established and binding one), and Venice (which calls it the most general and uniform one ("*più generale o più réccvuto uniformamente*"). These *règlements* and edicts of 1778 were also particularly strict against belligerents' besetting neutral ports with a view to intercepting their enemies.[4]

Take the Genoa Edict,[5] "Il ne sera pas permis aux bâtiments de nation en guerre de s'arrêter pour courir sûs à vue, au préjudice du commerce public et pour empêcher d'autres de sortir du port ou de suivre librement leur direction; et bien moins encore pourront ils se réfugier dans les ports et échelles, ou se mettre au guet pour aller à la rencontre des navires qui arrivent, ou pour poursuivre ceux qui partent."

When precisely the regulation limiting the stay of prizes (and frequently of privateers) to twenty-four hours was extended to men-of-war, it is difficult to ascertain. But it does not seem to have been earlier than the middle of the nineteenth century: and it is still not obligatory. The Netherlands, for instance, did

[1] "Aucun vaisseaux pris par capitaines ayant commission étrangère, ne pourront demeurer plus de 24 heures dans nos ports et havres, s'ils n'y sont retenus par la tempête, ou si le prise n'a été fait sur nos ennemis." This was applicable to all prizes, and not to privateers only: Holland had already prohibited the entry of prizes altogether (in 1658). (Yet in 1779 Paul Jones took two prizes for two months into the Texel.) Russian privateers and prizes were excluded from Danish ports in 1720.

[2] Martens, *Recueil*, III, 27.

[3] Treaty of Washington, Brit. Case, Vol. I, p. 29.

[4] Yet, in 1862, the *Iroquois* "cruised in the offing" at Martinique, in the hope of capturing the *Sumter* (*ibid.*, *passim*), and so did the *Ino* and *Kearsarge* at Algeciras and Gibraltar. The *Tuscarora* adopted the same strategy at Southampton.

[5] Martens, *ubi sup.*, p. 67.

not proclaim it in the Russo-Japanese war of 1904–5.[1]

Internment is a very modern thing, as applied to ships and their crews. In fact, it is a very modern thing altogether.

The internment of vessels after an engagement is best treated in connection with the internment of troops, out of which new practice it undoubtedly took its rise. The practice furnishes a striking illustration of the elasticity of International Law. It must always have been obligatory on a neutral to disarm or disperse bodies of belligerents coming within their territory, whether defeated or not. No country would be expected to watch its enemies assembling and recruiting under the shelter of its neighbour. But the obligation to imprison them is a new thing. It appears to be impossible to deny, however, that it exists.

At the Hague Conference of 1899 it was provided that the belligerent force must not only be dispersed and disarmed, but imprisoned, by the neutral. This practice of imprisonment does not seem to be of earlier date than 1871, when Bourbaki's army was allowed to be imprisoned in Switzerland, and it is difficult to justify rationally. Why should not disarmament and dispersal suffice? The demand for internment was characteristically Prussian and militaristic; and although the institution is incorporated in the Hague Convention of 1907, it appears to go beyond the law. It makes the neutral the jailer of the belligerent, and throws on him an expensive and onerous obligation. It confers on the enemy all the benefits of a crushingly successful pursuit, and places his opponent in a mouse-trap.

One must regard with suspicion, therefore, its extension to men-of-war and their crews. Unlike an army, a man-of-war is in a normal and reasonable position in neutral territory. Why she should be treated differently because she has had an unsuccessful engagement with an enemy is hard to see. She may be allowed to

[1] Clunet (1905), p. 475.

remain indefinitely,[1] even if she is on her way to attack an enemy, so long as she does not use the neutral port as a base. Why may she not be allowed to remain, after having done so? Still more objectionable is the provision of the Hague Convention dictating the imprisonment—euphemistically styled "guard"—of "shipwrecked, wounded or invalid persons" who are "landed" at a neutral port. Humanity dictates that distressed seamen shall be received with every kindness: why should they be placed under guard in so strict a manner? The Article does not apply to escape by swimming, or floating, ashore, which is not being "landed at a neutral port." And it does not apply to men picked up by a neutral vessel which is not a warship, and landed subsequently: the survivors of H.M.S. *Aboukir* were accordingly not interned in Holland. If picked up by a neutral man-of-war, the unfortunate "sick, wounded or shipwrecked"—who have hitherto been thought objects of mere compassion—must be subjected to "every possible precaution" to prevent them from taking part in the war. Practically, this again means imprisonment. And the whole system constitutes a striking, and typically Prussian, departure from the old idea of hospitality to distressed mariners. In one old case, indeed, a Spanish frigate which put into Jamaica in distress was released by the British. This was quixotic: but we have perhaps become a little too enlightened since those days.

Another un-English provision, Art. 47 of the Declaration of London, requires a neutral merchantman to give up every person "incorporé" in the armed forces of a belligerent, at the demand of the latter. As it may be very doubtful what "incorporé" really means, doubtful whether a given individual comes within the term, and still more doubtful what his probable fate will be in the hands of his captors once he goes over the ship's side,

[1] The time of stay is left to be determined by "local regulations" and might be twelve months for all that appears.

the exceedingly objectionable nature of this provision, by means of which men may be dragged from the shelter of the British flag into worse than slavery, is manifest.

We prefer Earl Russell's view, in the case of the *Deerhound*, which picked up the survivors of the *Alabama*, to the effect that British sailors would never give up to their enemies distressed men whom they had rescued from the water—whoever had put them there.

3. Wireless Communications.—Little was heard in the war of 1914 regarding the duties of neutral nations. Belgium was over-run because she preferred neutrality to helping the Germans, and Greece was violated because she preferred neutrality to helping the Allies. Both were acts which we had rather not characterize. Neutrality never was at so low an ebb: not even in Napoleon's day.

One particularly noticeable interference with the everyday life of neutrals was the assumption on the part of the Allies to control the wireless transmission of news. There is no doubt that the transmission of news may be very damaging to a belligerent: there is equally no doubt that a neutral is entirely entitled to transmit it. The enemy might as well assume to control the mails as to control the wireless. It may be inconvenient for the enemy that the waves cannot be cut like cables or seized like despatches. But the enemy's agents established in the neutral country are fully as much entitled to use wireless apparatus there as they are to write and post letters there, or to send telegrams thence. To require that the neutral shall interdict them or supervise them is to make him a party to the war. He might as well be required to expel the enemy's subjects, and to allow no ships to leave for the enemy's ports. If the United States may allow huge shipments of munitions to go to France, it is a little odd that Venezuela may not send Germany a line of wireless news. It cannot be supposed that such restrictions will be regarded by the impartial historian as anything but an abuse. And

although it is an abuse which has been sanctioned by a recent treaty, it is none the less an obscurantist, tyrannical, and retrograde measure, placing the interests of belligerents above those of neutrals, and enabling them to suppress inconvenient truth.

The Hague Conventions seem to go far in this direction. In terms they forbid belligerents to do certain things in neutral territory, but the inference appears to be drawn that neutrals are forbidden to allow belligerents to do them. The forbidden things are, (*a*) to erect a wireless station "or other apparatus" intended to be used for communicating with belligerent forces; (*b*) to use such an installation already established by them exclusively for military purposes, and never opened for public messages. "Belligerents" here must mean "belligerent States," it cannot be supposed to mean private persons, and the section (*b*) is extremely narrow in its scope, striking solely at strictly military or naval stations established in foreign territory—which must be a rare thing. But in the war of 1914, the Allies went far beyond this in their insistence that the use of the wireless should be denied to their opponents.

§ 7. War Rules

1. Conduct of Warfare.—We intend here to speak of the Rules of Warfare as between belligerents, which may be cited as a striking and conspicuous example of the right Elasticity of the Law of Nations. We see in mediæval times, and especially in the decay of the mediæval world, great license prevailing. Dr. T. A. Walker's *Science of International Law* is illuminative on this head, and shows us that, even at its best, the age of chivalry took little account of sufferings inflicted on the common herd. The kindly care of prisoners, the exemption of non-combatants from unnecessary injury, the prohibition of sack and pillage, had arrived even

[1] H. C. 1907, V, 3.

before Rousseau proclaimed that the business of war was one which should concern the armed forces of the State alone. The further *temperamenta* which were introduced by the various humane efforts of the nineteenth century, beginning with the Geneva Convention of 1864, and the Declaration of St. Petersburg in 1874, are conventional, and, theoretically regarded, are no evidence of a more stringent sense of duty towards their enemies on the part of belligerents. But they show what was desired. In our own day, there has been something of a set-back. It began with the South African War of 1899, in which the mild practice of the Crimean War was distinctly abandoned in various respects by Great Britain. The Crimean War was probably the mildest-mannered war since the Italian tournament-conflicts of the fifteenth century. No stories of forced oaths, hostages, vicarious destruction, and the like are to be found in the annals of the Crimea. Russian ships were allowed safely to depart, and were given six weeks to arrive in their own ports.[1] Russian subjects remained at large in London. There were no concentration camps. Nor were the Austro-Russian war of 1866 and the Austro-French war of 1859 any more bitter. Dunant was impressed by the inevitable cruelties of the battle-field, with its modern indiscriminate artillery pounding, but no special hardship seems to have struck him with regard to the civil population, beyond the inevitable disturbance and destruction incident to battle.

The Franco-Prussian war of 1870 introduced a new note—that of severity and hostility to the civil population. Vicarious reprisals; the taking of hostages; the burning of villages; acts of war by non-combatants; their ruthless suppression; the treatment as capital criminals of members of *levées en masse;* a certain amount of destruction and pillage—all recalled more the

[1] In the case of the blockade of Archangel, 14 days were allowed for exit, and when the *Elise* was seized at Leith in ignorance of this indulgence, costs and damages were given against the captors (Spinks, 88).

days of the Peninsula than those of the Crimea. But nearly all was justified on strictly scientific lines; it was "necessary." The disputes which arose concerning the position of *levées en masse* (un-uniformed) were settled by agreement. The pillage and destruction were extenuated or denied. The fierce vicarious penalties were formally justified as reprisals or as necessary for the protection of the armies and their lines of communication. On the whole, the Franco-Prussian War did not seem to have changed the position; it had only clarified it. The world knew that Germany would be severe, and would use her power over civilian enemies to the full. But there was considerable confidence that she would not be imitated, and that the progressive amelioration which had marked the century would continue. The circumstances of the Russo-Turkish War, the Bulgo-Servian War, and the British operations in Egypt were too unusual to admit of any useful lessons being drawn from them. But the South African War showed that British commanders could be just as ruthless as the Prussians in dealing with the people of an occupied territory. Not only so, but they went beyond the German practice. The purported annexation of countries which still had an army in the field, and the consequent treatment of their people as rebels and traitors, recalls the days of Bruce and Wallace. The free use of vicarious penalties of a most drastic nature, in the form of farm-burnings and the forcing of the population into deadly "concentration camps," went far beyond the Prussian examples. Such penalties were indeed sometimes exacted merely because the unfortunate subjects of them had relatives in the enemy ranks. Cases, apparently authentic, were reported in which men were shot who desired to surrender.[1] The way was thus paved for the general carelessness of non-combatant life and property which was displayed in the course of the War of 1914. At the same time, the ground has been shifted

[1] See the author's *International Law in South Africa, passim.*

from the idea that war is a contest between States waged by their armed forces, and replaced in theory on the old terrain, that war is in essence a contest between peoples, in which the conflict of armed troops is only an incident, and in which all forms of pressure on the population have one sufficient justification, viz. that they tend to overcome its resistance. How far this process has gone is a difficult question. It is probable that the wide exemption which was accorded to non-combatants in the nineteenth century was less due to the supposition that severities exercised on them were gratuitous and without influence on the issue of events than to the Individualism of the century, which revolted at inflicting extremities of violence on peaceable private persons for the faults of their rulers, for whose acts they were really not responsible in any fair sense. But the two novel conflicting streams of doctrine, the Prussian dogma of the identification of the individual with the State, and the parliamentary dogma of the identification of the individual with his democratic Government, have this eddying whirlpool in common, that the individual has to accept identification with the Government.

It is, accordingly, not only a severe, and perhaps harsh, application of the Prussian practice of 1870, that the non-combatant has to fear. It is a sweeping identification with his or her Government, which makes all violence lawful, so long as it is not purely wanton and motiveless.

We are chronicling, not criticizing, and have only to present our conclusions, which are that the Elasticity of the Law of Nations has a conspicuous illustration in this matter of the Laws of War. And its dependence on current theories of politics comes out very clearly. As long as populations were small, and united by real personal ties of almost daily intercourse with their lords, warfare was restricted only by considerations of religion and chivalry. With the establishment of large organized States, the distinction appeared between

combatants and non-combatants, and the treatment of the common soldier himself was improved. The summit of this process was reached when, with the Individualism of the nineteenth century, it became abhorrent to popular feeling to visit on the populace the sins of the Government. Since the closing years of that century, there has been an evident return to the identification of the individual with the State, and an inclination to view with complaisance any injuries inflicted on non-combatants, provided that they have more or less bearing on the course of hostilities.

Sir Graham Bower has pointed out that so long as the legality of Reprisals is recognized, it is hopeless to look for any settled Laws of War.[1] Reprisals ought to be exceptions, not a policy. Otherwise a crescendo of reprisals will soon sweep the barriers of law away. Raids on Scarborough are followed by raids on Carlsruhé, and children killed in Yorkshire are companied by children slaughtered in Würtemburg. Yet what underlies the Laws of War is the feeling that some things ought not to be done, whether the enemy does them or not, and whether he can be deterred from them by suffering them or not. At present, the codes of Laws of War, provided in endless complicated sections of Hague Conventions, are mere occasions for endless complicated disputes. The eventual victor will dispense himself from the blame of them; the eventual defeated party will have to shoulder it. All that has been done will be dismissed as "reprisals" for his misconduct. Reprisals, if tolerated, must be limited to specific, moderate and proportionate satisfaction for specific damage. Otherwise, they only resemble the feuds of Albania, in which a single assassination becomes the parent of an endless line of reciprocal slaughter.

In spite of all this, the humanitarian and individualistic movement of the nineteenth century has by no means spent its force. Even as it is, War is not the

[1] *Transactions Grotius Society*, I, 23, *et passim*.

savagery, pillage, and destruction that it was. Reprisals, fierce vicarious penalties, much unlicensed license, there may be—there must be. But the old absolute submission to the will of the military chief and the exactions of an undisciplined soldiery are gone. The law of the invaded country cannot be altered; the state possessions cannot be sold or annexed; pillage, if possible, is greatly restrained; really open towns with no objective in them cannot be bombarded. Prisoners are still sacred; wanton damage [1] is reduced to a minimum.[2]

It remains to consider the point which is often made, that under modern conditions, the civilian population, quite apart from any theoretical identification of its individual members with the State, is actually contributing directly to the military efforts of the nation. In munition factories, in transit occupations, in agriculture, in mines and tailors' shops, it is keeping the army and navy in being. And therefore it is argued that it should be open to direct and violent attack.

This is no new argument. It is a point which was taken in 1793 by the British Government as justifying, not indeed the shooting down of the French population, but their starvation by the treatment of corn as contraband. Whether it was destined for the troops or for the people, the British claimed to confiscate corn as absolute contraband, without distinguishing between ports of destination—those of naval or military equipment and

[1] The suggestion that I ventured to make thirty years ago might be repeated here—that neutral military *attachés* with full powers and immunity ought to be permitted to accompany not only the headquarters, but all commands in the field, to report summarily on the treatment of the civil population.

[2] It may be urged that the sinking of the *Lusitania* proves the contrary. But that act, though doubtless horrible, was not wanton: there were actual munitions on board, and it must always be a question of morals, rather than of law, how far a belligerent is justified in sinking an enemy's ship, with great loss of enemy civilian life, and some loss of neutral life, in order to deny a limited quantity of munitions to his enemy. In 1804 Canning deliberately ordered the attack of four Spanish treasure-ships, with great loss of civilian life, in order to deny money to Napoleon. War had not even been commenced with Spain, and the probability of the treasure reaching Napoleon was a probability only.

ordinary civil ports. Count Bernstorff, the Foreign Minister of Denmark, had no difficulty in repelling this pretension, and Lord Lansdowne, Brougham, and Sir James Mackintosh, together with other notable British authorities, thoroughly agreed with him. The British Government had urged that this war was different from all other wars, because "revolutionary France had thrown off all restraint," and was to be treated rather as a dangerous lunatic than as a normal State. Also she had called the whole population to arms, which justified the treatment of the whole nation as combatants, and furnished sufficient reason for regarding food as contraband when in transit to that people. Bernstorff drily remarked that the diagnosis of Great Britain alone was not sufficient to brand France as an abnormality in the eyes of the world, and that she herself had objected to the interception of provisions by Sweden.[1]

The sequestration (virtually confiscation) of private property and the imprisonment of private persons which were resorted to so freely in the War of 1914, seem to be capable of legal, but scarcely of moral, justification.

2. Sequestration.—Sequestration is to all intents and purposes confiscation plus an expression of intention to restore at a future date. Since if you lose you will be forced to restore, and if you win you can stipulate that you shall not be forced to restore, the name by which the proceeding is called is of little importance. In their laudable anxiety to limit interference to the mere conservation of assets, some countries refused to permit sales of businesses as going concerns, and thus actually diminished the value of the property, whether regarded as a fund for eventual bargaining with the enemy, or merely as a sacred trust for his subjects. More and more, as the war went on, the English courts departed from the original principle that the sequestration had nothing in common with a bankruptcy.

[1] *Supra.*

Sales of sequestrated property became the rule rather than the exception.

On this question of the liability of enemy private property to confiscation, it may be worth while to quote a curious old unpublished case. It is that of a firm called Vaughan & Co., who had been sued after the peace of Amiens in 1802, by one Carto, a French (Mauritius) merchant. On the renewal of war, Vaughans petitioned the Crown to formally confiscate the judgment debt due to Carto and to restore it to them. The Law Officers explicitly recognized the legality of the process. "It must be acknowledged that there is no doubt of the legal competency of the proceeding in question. H.M. prerogative exists undoubtedly to the extent of entitling himself by inquisition to the debts due to an alien enemy. But I believe that it has rarely, if ever, been used to lay hold of the private property of an enemy, unless for enforcing the payment of a debt. Cases of the nature have occurred, where foreign property has been seized into the King's hands, and the parties claiming an interest in it have been required to refer their claims to arbitration, and the Crown has given the property as the award has shown to be just." This is interesting as showing that the effects of enemies were not indefinitely sequestrated, but that on a proper inquisition they were formally confiscated to the King and distributed to creditors. (Treasury In-Letters, 16 July, 1803, 3310: see also *ibid.*, 4993.)

Modern practice seems to have arrived at much the same result. Only the desire to disclaim the appearance of confiscation has led to considerable awkwardness in point of form. The effect is the same as confiscation; for in case of confiscation when peace arrives the other party will insist on restitution, if victorious, whilst if the sequestrator is victorious he will be in a position to insist on keeping what he has sequestrated.

Of course no business stock can be locked up indefinitely; and the retention of the proceeds subject to all

the expenses of custody and realization for the ultimate benefit of the enemy is a mere retention of a ledger credit (an entry in an account book). The assets are added to the national stock (except the goodwill, which commonly disappears).

In Great Britain, the sequestrator (called "custodian") was invested formally with the ownership of the sequestrated property, and thus much technical difficulty which occurred in France was avoided. Even before the institution of sequestrators, it was held that the Enemy Trading Act prevented the enforcement of judgments against Germans (*Leader* v. *Disconto Gesellschaft*, 3 June, 1915).

It appears to have been the policy of the courts in Scotland and England to leave it entirely to the discretion of the official sequestrator what creditors he should pay and what sums he should expend in advertising for them. The court, though invested with control, declined to interfere in these details, even in regard to very large sums (*D. Rowan & Co.* (1916), 2 Sc. Law Times, 165 (Anderson); *Fried* v. *Krupp Aktiengesellschaft* (1916), 2 Chancery, 194 (Younger). In the former case machinery supplied by a Scotch firm to Austrian shipbuilders was impounded and sold, and a secured debt was authorized to be paid to the Scots firm, if and as the sequestrator might see fit to pay it. In France, there has been great want of uniformity in the practice on the subject. The civil court of the Seine followed much the same course as the British tribunals, assimilating the sequestration very much to a bankruptcy, but a bankruptcy administered in a more or less arbitrary fashion.

It may be noted that the French system of sequestration was founded on no express legislation, but on the theory that the courts are authorized to appoint a sequestrator when a debtor has ceased to fulfil his engagements: and the prohibition of commercial transactions with the Germans was assumed to have created such a situation. In one case a sequestrator

was not even allowed to lease a velvet factory, which was rapidly going to ruin, on the plea that his functions were " strictly conservatory " ! (Clunet, 1917, p. 1063 (23 December, 1916), Lyons Civil Court) ; and in another case, on the same plea at Havre, leave was refused to sell German cocoa (*Ibid.*, 22 December, 1915), and in still another (Seine) the lease of a business as a going concern, with its trade secrets, was not allowed (*Ibid.*, 1448, 15 May, 1917), whilst in yet another, where French and neutral interests were involved, a general liquidation and sale were ordered (1916, Clunet, 1280 : Seine, 13 July, 1915). For another example of sale and distribution see *Ibid.* (988), which gives the details.

It is notable that in the later cases, the idea of the sacredness of private property is dropped, and gives place to that of the " *ôtage economique.*" It was obviously quite impossible for the sequestrators to do what Mr. Briand exhorted them to do, and to " stop trade and manufacture, while preserving the capital of the German intact." The stoppage of business must mean a heavy loss of capital.

In fact, as Professor Pillet well observed in a series of remarkable articles in the *Revue Générale de Droit International Public*, the idea of putting war in a water-tight compartment and letting it affect the business relations of the States and their subjects as little as possible has been shown by the War to be untenable. The Germans themselves replaced their system of " Supervision " by one of liquidation on 31 July, 1916, so far as Great Britain was concerned.

The rule of the code attached to the 4th 1907 Hague Convention " No. 23 (H) " is frequently disregarded, either (1) as reprisals, (2) as overridden by the express laws against intercourse with the enemy, or (3) as avowedly applying only to the conduct of an army in the field.[1] Germany evaded it by making the disability to sue apply to persons " domiciled " abroad, and

[1] Cf. Clunet (1916), 1001 with *Ibid.*, p. 1303.

whether in enemy countries or not, and by disguising it as a moratorium (see Clunet, 1916, 788).

Another matter in which we seem scarcely to have improved on the practice of the eighteenth century is thrown into relief by the following passage from Pradier-Fodéré :[1] "Mourning is a manifestation of feeling from which Courts do not refrain even in time of war. Louis XIV wore mourning for Leopold I and Joseph I, Emperors of Germany, who died in the course of the War of the Spanish Succession. Charles VI of Germany directed in 1712, in the course of the same war, that mourning should be worn, and funeral ceremonies observed, on the occasions of the deaths of the Dauphin, the widow of the Dauphin, and the Duke of Brittany." He adds that "Even in time of war, princes do not discontinue the use of each other's decorations." Compare this with the vindictive deprivations of titles, clearances of armorial bearings, and the like childish acts which signalized the enlightened War of 1914 !

3. Displacements of Sovereignty.—It has been usual to say that in former days the sovereignty of an invaded state passed bodily from the invaded sovereign to the invader. The writer has given reasons in *Invaders and Insurgents* [2] for questioning this statement, and for suggesting that the supposed amelioration of the Law of Nations precluding the possibility of a substitution of sovereignty *flagrante bello* never in fact took place. If this view is the correct one, no change has been accomplished, and the hostile occupant of territory neither is, nor ever was, its lawful sovereign. Hall may be taken as a typical exponent of the theory of substituted sovereignty, but the instances he cites are very few. The question is much complicated by the fact that very frequently invaders were sovereigns who laid claims to the allegiance of the invaded population in any event.

[1] *Cours de Droit Diplomatique*, I, 173.

[2] *Yale Law Journal* (1926–7), p. 966. See, however, Lamiere, *Théorie et pratique de la conquête dans l'ancien droit : L'Occupation Militaire de l'Italie : Les Occupations Militaires en Espagne.*

They asserted their claim to be their true lords, hitherto unjustly kept out of possession, and in such circumstances it is natural that they should have treated them as subjects. But it would seem unlikely that the Kings of Scotland, when invading Yorkshire or Northumberland, treated the population as *ipso facto* Scotsmen, or that Henry VIII treated Frenchmen as subjects when he invaded France, or that when Castile was invaded by Francis or Picardy by Charles V those monarchs regarded their invasions as temporary annexations.

As long ago as 1644, we find De Villèle telling Marshal de Noailles that "Les peuples conquis par la force des armes . . . ne doivent être considérés comme sujets du prince qui a la domination de leur pays qu'au cas de véritable cession ensuite de la conclusion d'une paix."

The weakness of his case seems to be shown by Hall's citation of the impressment by Frederick II of the Saxon army in 1756. That was not a case of an invader's claiming *ipso facto* the allegiance of the people of occupied territory at all: the capitulation of Struppen [1] handed over the Saxon army (officers excepted) to Frederick, and the whole kingdom of Saxony was put in his possession by the same convention. He had therefore the Saxon King's treaty authority for regarding the Saxons as his subjects and the Saxon soldiers as his troops. Even so, great disapprobation of the step was everywhere manifested. But a hundred years earlier, when Charles X of Sweden invaded Poland,[2] in July, 1655, the Polish forces made many capitulations with the Swedish king, by which they seem to have accepted the obligation to serve under him—at any rate "until the times should alter." It may be very improper for an invader to accept the services of his enemies' troops in preference to making prisoners of them, or slaughtering them; but plainly it does not amount to a claim to impress them, or to a claim to recruit their fellow-

[1] Carlyle, *History of Friedrich II.*
[2] 12 Koch and Schoell, *Traités de Paix*, 171, 172, 177.

countrymen. So far as the writer is aware, there is nothing to prevent a belligerent from offering employment to the subjects of his enemy. Hall further cites the sale of the Swedish Duchies of Bremen and Verden by Denmark, as occupant, to George I (26 June, 1715).[1] But this was nothing more than the sale of an expectancy: so executory did the matter remain, that the Treaty of Greifswald (6 September), between Britain and Prussia, stipulates that when peace should be made with Sweden these provinces "should be" ceded by Denmark to Hanover, and they were duly ceded accordingly in 1719. And then the King of Great Britain paid to Sweden the mesne profits which he had received from the duchies, restored to Sweden the military *matériel* seized there, and indemnified the landed proprietors for their sequestrated rents. A similar case had occurred in 1656, when Sweden invaded Poland and ceded to Brandenburg "en toute souveraineté et propriété," four occupied Polish provinces.[2] But it is evident that this also was an executory expectancy only, for by the Treaty of Labiau, five months later,[3] the Elector agrees to renounce the Swedish provinces, in case it should not be possible to *obtain* the cession of some part of them at least from Poland. Another of Hall's instances is the incorporation of Bavarian militia in 1743 in the Italian armies of Austria. But there had been a complete *debellatio* of Bavaria: the Austrians had overrun the Electorate and expelled the Elector.

It is instructive to notice the difference between the provisions of the Treaty of Aranjuez[4] by which France, Spain, and Naples engaged with Genoa to "restore" to her certain places which had been "usurped" from Genoa by Sardinia at various times,

[1] Koch and Schoell say that the treaty has never been printed. It would be worth while examining it at the Record Office.

[2] Treaty of Marienburg, 15 June, 1656. 12 Koch and Schoell, 183 (note 3).

[3] *Ibid.*, p. 188.

[4] 7 May, 1745. Koch and Schoell, *Traités de Paix*, II, 367.

and the secret articles by which the same Powers undertook to conquer for Genoa certain other territories. The former (Art. 8) were, as soon as and when conquered, to be put into the possession of the Republic, and the "subjects" of the places mentioned were to be forced to acknowledge it as their sovereign. The latter (Secret Art. 2) were to be put in its possession only "at the date of the first future peace, truce or preliminaries."

There are certainly some cases in which an invader exacted an oath of allegiance from the authorities of captured towns. This may either have been *mala praxis*, or it may have involved only the *ligeantia localis* which is due to the sovereign actually exercising supreme power in a territory from persons who are not his subjects. Thus, in 1715, the Danish king, occupying Stralsund, Rügen and Pomerania beyond the Peene, "s'y fit prêter hommage": [1] while no such act is recorded of his Prussian ally, who simultaneously occupied Stettin and Swedish Pomerania between the Peene and the Oder. Possibly the Danish sovereign was merely imitating Louis XIV's act in exacting oaths of allegiance in 1692 from the authorities of Namur and Hainault—and Louis was never a safe guide in international etiquette.

But the facility with which oaths are taken, and nationality changed, appears in a very curious light in the case of the *Elisia* (1815).[2] It is not a case of mercantile character, as it concerns only the nationality of of a supercargo. He was named Harding, and was born in Massachusetts, but lived at St. Bartholomew (Swedish); he had been sailing thence since 1808, and was then made a Burgher of the island for $35. "As long as he holds the Burgher's Brief, he considers himself a subject of the King of Sweden; he took the oath of allegiance to that effect only; so that when he lays aside the Burgher's

[1] 13 *Ibid.*, 256.

[2] Lushington's Folio Prize Appeals (*penes* Inner Temple), 1813–14, p. 480.

Brief he considers himself absolved of his allegiance to Sweden—and that then he becomes a subject of the United States."[1]

As lately as 1781, when the doctrine of substituted sovereignty was as dead as a door-nail, the oath of allegiance was still imposed by capitulations. Thus, when Demerara was taken from Holland on 14 March in that year, the capitulation, which, according to Lord Stowell, was "very favourable," provided that the inhabitants should take the oath of allegiance, and that they were to be permitted to export their own property and to be treated in all respects as British subjects "until His Majesty's pleasure should be known." This shows that they did not *become* British subjects; and although Stowell, in the *Danckebaar Africaan*,[2] goes on to allude to them as "British subjects," this can only be regarded as an elliptical expression, meaning "persons who, enjoying the protection of British subjects, were to be regarded as British subjects for purposes of prize law."[3]

It is naturally difficult to ascertain precisely what was the practice in this matter. For the rights universally conceded to an occupying invader are exceedingly wide, and do not fall far short of sovereignty. The only things which it is agreed that he must not do are to change the laws, to alienate immovables, and to force the population to assist him actively in the war, especially by forcing them into his own army. But no invader particularly wants to effect a permanent change in the laws, and the

[1] For another curious case of facile assumptions of nationality, the reader may be referred to the *Titus* (I.T.P.A., 1806–11, page 60): a person, born in Friesland, was at first a subject of the Prince of Orange; in 1801 "he became a subject of the King of Prussia," and in 1804 "of the Governor of Papenburg." It is interesting to note that the commander of the vessel was one Caleb Cushing—a name afterwards remarkable in the annals of the United States.

[2] (1798), 1 C. R. 111, citing the *Negotie en Zeevaart*. Cf. the *Herstelder*, *Ibid.*, 113.

[3] So far as prize law goes, if sufficiently good evidence is produced—which is difficult—a private person adhering to the friendly established Government, but living in a district of local revolt and hostility to Great Britain, may have the benefit of his personal inclinations: per Stowell, in the *Herstelder*, p. 118.

services of a professional army, as we have just seen, were easily secured. So that there seems little remaining but recruitment. Recruitment from the hostile population seems only to have been resorted to *sub rosâ*, or on the basis of a voluntary enlistment. It is hard to understand the existence of the limitations which undoubtedly existed on an invader's power, if he were really regarded as a substituted sovereign. "Private property in land," observes Hall himself, "was very early regarded as exempt from appropriation" by an invader, because he cannot give a firm title. But if he is sovereign, why cannot he? His authority may be precarious in duration, but it cannot be affected in intensity. So with regard to judgments pronounced during the occupation: the Peace of Oliva (1660)[1] confirmed (with certain exceptions) those pronounced during the war in places occupied by the Swedes. If the Swedes were sovereign there, no confirmation was needed.

Two years earlier, Sweden and Denmark having been at war, the Peace of Roskilde (1658),[2] which terminated hostilities, stipulated that Sweden ceded to Denmark, not "all the islands, provinces, towns and fortresses which she has occupied in the course of the war, in Denmark, Norway, and the Duchy of Holstein"—as one would have expected if occupation was equivalent to sovereignty—but "all the rights and claims which she might have (*peut avoir*) to (*aux*) the islands, provinces, towns or fortresses" so occupied. This is not the act of cession which one would expect from a sovereign: it may only cover liens for expenses incurred during the occupation in the nature of *impensæ utiles*. The same language was indeed used in the Peace of Oliva,[3] when Poland ceded to Sweden all the rights which might (*pouvoient*) up to the present belong to her in Esthonia;

[1] 12 Koch and Schoell, *Traités de Paix*, 354.
[2] 12 Koch and Schoell, *op. cit.*, 243.
[3] *Ibid.*, 346.

and it might be objected that in this case Poland was acting not as occupier but as sovereign, and yet used the same qualified and hypothetical words. But the explanation is that Poland had never really exercised sovereignty in Esthonia. The Grand Master of the Teutonic Order had purported to cede Esthonia to Poland, but the enemy had occupied it instead, and eventually had been evicted by Sweden, which had ruled the country for a hundred years. The title of Poland was thus a shadowy and executory one; which explains the unusual terms of the cession.

When an occupation has endured so long as to outlast living memory, it may seem to ripen into sovereignty. Sweden and Poland from the third decade of the sixteenth century were at war for nearly a hundred years, a state interrupted only by truces, such as were concluded for prolonged periods in 1629 and 1635. In 1660, when peace was made by the Treaty of Oliva, Poland wholly failed to secure that inhabitants of Livonia who had fled on the original Swedish invasion, and had left their estates derelict, should be reinstated in them. Sweden, however, did not justify her refusal on the ground of substituted sovereignty, but set up an independent claim based on an obscure grant made by the Emperor Maximilian: otherwise this would be an authority against W. E. Hall's proposition that it was early recognized that private lands could not be alienated by a military conquest. Substantially, it would seem that the length of time during which the Swedes had been in possession morally outweighed the fact that a technical state of war had existed all along; but Sweden preferred to rest the case on the dubious grant of Maximilian.

It has, at any rate, now been accepted for at least a century and a half that, whatever the former practice may have been, an invader and military occupant cannot change the allegiance of the population of the occupied territory by the mere fact of occupation. To

change the allegiance, and to justify the invader in forcing the people to afford him military and other active assistance, there must be either a complete *debellatio*, or a treaty of cession. It is not sufficient that the invaded sovereign should be reduced to the extremest straits. So long as he is in the field, however poor his prospects of ever expelling the invader, he is entitled to the allegiance of his people.[1] The British proclamations purporting to annex *flagrante bello* the Orange Free State and the Transvaal, when the war against them had reached a stage satisfactory to the English Government, deserve the strongest reprobation. The Canons of Simplicity, Certainty, and Objectivity all demand that it shall not rest with the arbitrary will of an invader to say at what point the misfortunes of an invaded sovereign shall disentitle him to the allegiance of his people, and place him in the position of a rebel. It is hard to see how any Scotsman can approve the procedure of Great Britain in the Orange Free State and the Transvaal, and at the same time applaud the achievements of Bruce and Wallace. Such illegal "annexations" cannot always be prevented, but foreign nations naturally refuse to regard them as valid.

There is a ready means, however, to an unscrupulous politician of overcoming this salutary rule. That is by fomenting or aiding a revolutionary party which will support the invader as a liberator. Intervention in the affairs of a foreign state by way of invasion to support an insurrection is doubtless inadmissible—but how if the invader be already there?

Britain was in Egypt and in Cyprus with armed forces when she went to war in 1914 with Turkey. She could not legally alter the status of Cyprus or Egypt without infringing every rule of the Law of Nations on the

[1] The test is not the same in this case as in that of the recognition of the independence of a portion of the territory. In the latter case, the question is whether the sovereign is making active efforts to retain the territory, with some prospect of success. In the former case the question is whether he is still obeyed anywhere, whatever his prospects.

subject. Cyprus was an integral part of the Ottoman Empire which she was administering for a limited, if indefinite, period by treaty. Egypt was part of the dominions of the Porte—whether as an autonomous province or a *mi-souverain* vassal does not matter. Cypriotes and Egyptians alike were subjects of the Sultan: how could they be diverted from their allegiance by another Power? In this way. A complaisant prince was found in Egypt, who would rebel against his Sultan and his Khedive, and allow himself to be placed by British arms on a precarious throne as an independent King, "protected" by Great Britain.

From a juridical point of view, this was precisely as flagrant a breach of international law as if Germany had set up a pretender in Brabant and forced the Belgians into the German ranks as his troops. Morally it was not much better. No Egyptian—subject as he might be to daily British management—but was entitled to regard himself as a subject of the Sultan, and incapable of being forcibly ranked among his enemies. Essentially, the transaction was a return to the abandoned old practice (if really it ever existed) of conquest by occupation. Egypt had the Turkish flag, had no diplomatic representatives, was subject to the Turkish "capitulations," and had an army which was part of the Turkish army. "The Military and Naval Forces which may be maintained by the Pasha of Egypt and Acre, forming part of the forces of the Ottoman Empire, shall always be considered as maintained for the service of the State": [1] and thus Judge Phillimore had decided in the *Charkieh*[2] that the ruler to whom the administration of Egypt had been committed by the Sultan of Turkey was not even a semi-sovereign, but was a mere privileged subject of the Porte. So also Mr. J. Bassett Moore treats of the Mixed Courts of Egypt under the head of "*Turkey*."

[1] Austria, Britain, Prussia, Russia and Turkey, in the Convention of London (1840). [2] (1873), L. R. 4 Ad. & Ec. 59, 120.

Egypt was in law nothing but a privileged part of Turkey, and on this footing no further argument is necessary to demonstrate the illegality of the British occupation. It is possible to represent Egypt as having gradually acquired a certain international personality—that of a *mi-souverain* state, under the suzerainty of Turkey. But the case is not thereby improved. A *mi-souverain* state may possibly be admitted to have the power to make lawful war upon its suzerain in order to maintain its rights: it cannot be admitted to have the right to join its enemies.

Great Britain, in short, purported to do what she would have been the first to complain of Germany's doing in Belgium—to alter the national character of a country as a military occupant. In affecting to sever the tie which bound the Egyptian population to Turkey—whether as Turkish subjects or as the subjects of a Turkish vassal matters not—she was using her occupation to effect a change of sovereignty, departing flagrantly from principle, and encouraging future belligerents to emancipate her own colonies and vassal rajas.

The case of Cyprus is still more unaccountable. Cyprus was admittedly Turkish territory, and the Cypriotes nothing but Turks. How could they possibly be forced to change their allegiance? Only by brute force.

4. Invaders and Insurgents.—But these indefensible departures from the laws of war lead us naturally to consider what is the position when there occurs a spontaneous revolt in occupied territory. The seizure of Egypt and Cyprus by Great Britain may be represented as the recognition of revolts, but it is obvious that they were revolts which were stimulated and carried through by the occupying Power. If the repudiation of Turkish connection in Egypt and of Turkish nationality in Cyprus had been a spontaneous movement, what would have been their effects on Turkish sovereignty? If Brabant had spontaneously deposed King Albert and elected a German prince, what would have been

the effect on Belgian sovereignty ? In general terms, what is the effect of military occupation on the right to revolt ?

There certainly exists a right to revolt : it is recognized by the Law of Nations, which provides that if and when the State ceases all serious efforts to suppress it, the territory in revolt constitutes a new and independent State. The right cannot be supposed to be suspended merely because the State is at war : the question is not whether the present State may not be likely at some future time to reduce the rebels to her obedience, but whether she is making serious efforts to do so now. Other nations cannot be expected to wait until she gets her foreign wars off her hands. Suppose, even, that the revolted territory is in the immediate neighbourhood of the seat of war ; it can hardly be imagined that the prosecution of the foreign war is necessarily to be regarded as an attempt to reduce the rebellious province. No doubt it helps towards it ; but the test is not a remote and indirect one, but an immediate one. The test is, whether hampered by foreign war or not, is the parent State, as a fact, taking immediate and direct steps, with some prospect of success, to restore its authority in the locality affected ? It will not do to say that it proposes to take them if and when it has dealt with the foreign enemy. The point is, is it prepared by force to maintain its authority here and now ?

But when the revolt is actually within the territory occupied by an invading army, what is to be the conclusion ? Is the possibility of independence to be indefinitely suspended merely because the usual test of the success of the revolt is inapplicable ? The usual test is to inquire whether the government has continuously been, and is still, making active efforts, with some not unreasonable prospect of success, to regain its authority. But the hostile occupation prevents it from doing so at once. It may be quite impossible, in a military sense, to attack the seat of the occupation and revolt.

It may even appear that, whatever may be the upshot of the war, and however successful the invaded State may be in resisting attacks, or even in making attacks, elsewhere, it can never hope to turn the invader out of occupation by force of arms, or by any peace which can be reasonably expected. It is certainly possible, in some cases, to say that it is making efforts, with some prospect of success, to subdue the rebels, if it is actually directing its aims against the foreign enemy in that quarter. But if it is compelled by the exigencies of war to leave that quarter alone, or substantially alone, is the revolt to have no effect in disturbing its sovereignty? On the whole, our conclusion must be that the hostile occupation acts as a sterilizing medium to preserve the *status quo*.

The danger that the revolt may be a veil for the designs of the occupant is too patent to allow revolts to work a change of sovereignty in such a case. A successful revolt in a distant colony cannot be regarded as a final severance from the parent country unless and until the latter has had a fair opportunity of sending an expedition to assert its authority. In the same way, a revolt in an occupied territory cannot be regarded as terminating the authority of the parent State until the artificial obstacle has been removed, so long as serious efforts are made to remove it. To hold otherwise would be to enable occupants to tamper with the allegiance of the inhabitants. Revolts in occupied territory might be spontaneous, but it would be difficult to prove that they were. The dealings of trustees on their own account with trust property may be perfectly honest, but minors ought not to have to prove that they are not. The suspicions of prize captors may be perfectly well founded, but neutral merchants ought not to have to prove that they are not. In the same way, an insurrection in occupied territory may be perfectly spontaneous and free from an occupier's stimulus, but the sovereign ought not to have to prove that it is not. The sovereign has the clear antecedent right: the occupier

is in a most favourable situation for secretly undermining it; the only safe conclusion is to remove the possibility of its being so undermined. The sovereign ought not to be put to the impossible task of proving that the revolt was collusive and not spontaneous. Votes there may have been, but were they free?[1] Revolutions there may have been, but were they representative? The imperious question of allegiance cannot be left to depend on such likely occasions of quibble and contradiction.

Invaders would always turn the possibility to their own advantage. As it is, they can make what use they please of voluntary treason. But they cannot coerce the people: they cannot force their enemies to be their soldiers, their guides, or their law-givers.

Can they force each other? Can they proclaim their independence, and under the sanction of the Law of Nations compel their fellow-countrymen to do what the enemy could not force them to do, and to turn their arms on their own countrymen? It must be pronounced impossible. Even in the case that we have just supposed, in which there is no reasonable likelihood that the invaders can ever be dislodged by force of arms from the seat of the insurrection, they ought not to be allowed to turn to account such force as they could derive from a mutation under the auspices of the allegiance of the district.[2]

Needless to say, this principle does not apply when the geographical position is reversed, and an insurrection breaks out throughout an area which includes, instead of being included by, an occupied territory. The mere

[1] Nice and Savoy voted almost unanimously in 1860 to be French rather than Italian! (Heimweh, *Droit de Conquête et Plebiscites*, p. 25). He admits that the French plebiscites taken on the successive invasions by the armies of the Netherlands and the Rhineland were thoroughly fallacious.

[2] But is an invader, under such circumstances, bound to restrain the violent acts of its sympathisers against the loyal population, or at least to refrain from availing itself of their results? Within the limits of its capacity, it is submitted that it certainly ought to do so There is no difference between exercising illegal severities on the population and allowing sympathisers to do so.

accident that the district is more difficult to subdue than it would be in normal times does not dispense the parent State from the necessity of making immediate and direct efforts to exert its authority if it wishes to keep it. But there are distinctions to be drawn. If the foreign enemy is actually attacked, by direct force in this comparatively small territory which he has occupied, there may be much to be said for the contention that this constitutes a sufficiently direct attack against the rebels. Particularly will this be so where the foreign enemy has occupied the port of a district which revolts. As in the theory of acquisition by occupation, the "hinterland" may be thought to depend on the port. If no such direct attempt is being made, whether against the rebels or against the foreign enemy encamped in their midst, there seems no reason why the existence of a war which might by some chance extend to that region should interfere with the capacity of the inhabitants to throw off the rule of the metropolis. In a somewhat similar problem, that of the complete conquest of one State by a State which is at the same time at war with another, Hall is of opinion that the conquest cannot be considered complete if "by any reasonable chance" the other war might extend to the conquered territory; and he instances the case of the Genoese Republic, which was completely conquered by the French Republic, asserting that the conquest was not complete so long as Great Britain might conceivably have invaded Genoa and freed it from French control. This opinion can hardly be considered correct. A war, like those of Sweden and Poland, might be prolonged for many years, and it would be most inconvenient to hold that neither belligerent could meanwhile effect any permanent conquest of an entire State, so long as a reasonable possibility existed of its conquest being attacked by the other. The hard case of Genoa must not lead us into bad law.[1]

[1] At the same time, we must guard ourselves from supposing that there is a complete *debellatio* when the metropolis or the capital is

Such a successful assertion of independence against a metropolis embarrassed by war ought not, however, to involve the inhabitants of the invaded area. We must not permit ourselves to be ruled by geography. The mere fact that a province, or a district, is given a particular name, and is coloured lilac or pink or yellow upon the map does not make it necessary that a revolt in part or most of it should involve the whole. The measure of the rights of an insurrectionary Government is its actual control: if there are outlying portions of the area which had previously the same local Government or the same name, but which are not in fact controlled by the leaders of the insurrection, they plainly remain part of the old State. And there is no presumption that they are so controlled. There is no presumption that any particular area must follow a united fate. For what would the area be? The country—the village—the county—the province? There would be no rule at all. No local power can avail to make a rebel of any one within its borders except by a successful assertion of permanent control. Like the inhabitants of an island off the coast who remain outside the orbit of an insurrection on shore the inhabitants of the occupied area must remain outside the insurrection. For it is not safe to allow the risk of their coercion by the foreign enemy.

We may proceed to inquire what is the rule in case the occupied area, though not including the revolted area, includes a great portion of it. It has been seen that the ordinary rules of Recognition should apply to cases where the revolted area lies entirely outside the occupied area, that they should be suspended when it

captured, but outlying regions, or even colonies, remain unconquered. In the case of a Personal Union, when one country, like Saxony, is completely conquered, while another, like Poland, remains intact, a more difficult situation arises. Why should not the sovereign, with the force of one of his kingdoms, recover the other? The allegiance of both is to himself, and in this case there does not appear to be an *ipso facto* change of allegiance in any part of his dominions. When Hanover was completely overrun by Napoleon, it may be doubted whether the Hanoverians ever ceased to be subjects of King George.

lies entirely within it, and that they should apply where the occupied area constitutes a small *enclave* within the revolted area, with the exception of the *enclave*, as to which the operation of the rules of Recognition should be suspended during the continuance of the occupation. But now consider the revolt to extend to an area, a considerable part, or even the greater part, of which is under foreign occupation. Is the comparatively small portion outside to be allowed to secede, even if the brain of the revolt be inside the occupied area? In this case the dangers of possible fraud by the occupying belligerent are too great to be disregarded; and it will probably be conceded that no revolt can change the sovereignty until the occupied area is either evacuated or reduced to small proportions.

The mere fact, however, that rebels receive countenance and assistance, or even national support, from enemies of the metropolis is not sufficient to prevent a change of sovereignty. Thus, the United States owed their independence in a large measure to the assistance furnished by Louis XVI of France, when at war with England. Even if the revolt is stimulated from abroad, the same revolt will follow. But the case is entirely altered when the occupation precedes the rebellion. And a revolt in a port-capital carried out under the guns of an enemy must doubtless be assimilated to a revolt occurring in an occupied territory.

5. Communication with the Enemy. — It is scarcely a matter of International Law, but rather a matter for each country to decide for itself, how far it will allow its subjects to communicate or trade with the enemy. We have hazarded the opinion, in company with Lord Stowell, that such trade is only forbidden because of its involving the necessity of such communication: if we are right, there is therefore only a single question involved.

And in this respect practice seems to be much stiffer than formerly. During the Napoleonic wars, a licensed

mail packet used to sail daily between England and French ports. In the *Juffrow Catharina*,[1] Stowell alludes to " the more than ordinary difficulty in carrying on any correspondence with the enemy's countries," obviously considering that correspondence was not absolutely improper or prohibited. The case concerned the unlicensed import from an enemy country of a parcel of lace, and because of the difficulties of countermanding the order for the lace (an order given before the outbreak of war), Lord Stowell dispensed with the necessity for a licence, and restored the goods. Certainly, in *Barrick* v. *Buba* [2] a commission to be executed in an enemy country was refused, as implying an unlawful communication with the enemy. But it by no means follows that, because a court will not direct a commission to the enemy, a private individual can hold no communication with him, and the statement therefore appears to be made *obiter*.

That it is the fact of direct intercourse, and not the commercial profit of it to the enemy, that is struck at by the rule against " trading with the enemy " appears in the clearest fashion from *O'Neal* v. *Cordes* (Fac. Coll. No. 221, p. 498). The Court of Session was in great doubt about the right of a neutral to trade between two opposing belligerents : he did so as a mere intermediary (although technically he had the entire property in the goods), yet because this neutral insulator was interposed, the court reluctantly allowed the validity of the trade. No considerations of commercial profit were adduced or adverted to. If they had been relevant, they would have been decisive, for it is obvious that a Dutch enemy made as much profit by sending goods to Scotland through an obliging Hamburg middleman as if he sent them direct himself, or nearly as much, for the Hamburger charged only two per cent. for his name. In the *De la Motte* case (2 How. St. Tr. 770) nothing is said as to the

[1] (1804), 5 C. R. 141.
[2] 16 C. B. 402.

criminality of any but contraband trade with the enemy, and even that is represented as venial. So, in the *Odin*, no positive criminality in the intercourse is alleged (15 March, 1799; 1 C. R. 248). See also the *Rapid* (8 Cranch, 155), where it was strenuously argued that it was the commercial nature of the transaction, and not the fact of intercourse, that was the characteristic vice of "trading with the enemy": the court decisively rejected the contention. The hardships of such cases as the last-mentioned (in which a person was merely sending for and bringing away his own goods) is mitigated by the power of the Crown to grant Licences. In the Privy Council Records (Vol. 170) examples of licences will be found authorizing persons to re-land goods put on board the *Hoop* and *Flora* (pp. 279, 284; 27 and 29 May, 1806), and on board the *Amélie* and *Zelden Rust* (p. 300; 3 June). And so licences have been granted to British creditors to ship goods in payment from enemy countries (it is usually stipulated that neutral vessels shall be the vehicle, which shows that the danger of free intercourse, and not commercial advantage, is the foundation of the rule). See *Ibid.*, p. 244 (22 May), where Agassiz, Wilson & Co. were granted licence, as creditors of Martinique planters in the sum of £15,000, to ship produce in Martinique on board neutral vessels; and p. 343 (9 June), where a similar licence was accorded to one Nesbit. It is interesting to note that "a steam engine" was among a cargo for Sweden in 1806 (*Ibid.*, p. 429).

It must carefully be noted that "trading with the enemy" in the sense of municipal statutes is not necessarily trading with the enemy so as to subject the property to condemnation in the sense of prize.[1]

In the *Samuel*[2] a subject was allowed to bring home a ship bought from a neutral in the enemy's port.

6. False Colours. — Much complaint was made

[1] See *Orenstein* (1915), Sessions Cases, 55.
[2] (1 July, 1802), 4 C. R. 284 n.

during the recent war of what was called the misuse of the United States flag—namely, the hoisting of U.S. colours by British vessels in order to mislead the enemy. This was thought likely to endanger the safety of genuine American ships; and it might be wished that such a *ruse de guerre* were not lawful. As things stand, however, it is one of the commonest ruses, and entirely lawful, whether adopted by a man-of-war or a merchantman. In the Lushington Folio Prize Appeals it is stated, in the case of the *Victoria* [1] (20 April, 1809) that, "The American flag was hoisted on board this ship to deceive the French, and prevent [her] being fired on—which had the desired effect." In the case of the *Stromsomheid*, a Danish ship captured on 6 August, 1799, the privateer *Mayflower* represented herself as, and was supposed to be, a French vessel, and actually made the capture under French colours. The ship was released by the Lords of Appeal, but apparently only because they were satisfied of her innocent neutral character.

"To sail and chase under false colours may be an allowable stratagem of war," observes Lord Stowell, "but firing under false colours is what the maritime law of this country does not permit." [2] The U.S.A., in 1915, made the proposal, too sensible to be accepted, that mines and destruction by submarines should be abandoned (except for harbour defence) in return for the abandonment of the use of neutral flags as a disguise, and the supervision by America of all food cargoes destined for civil use in Germany (*Times*, 18 March, 1915).

7. Commissioning Vessels at Sea.—It is really impossible to find any but a pedantic ground for the objection sometimes advanced against the commissioning of vessels at sea. Lord Oxford was, in 1907, commissioned as First Lord of the Treasury, he being then in the South of France; court officials take evidence on oath in foreign

[1] *Inner Temple Folio Prize Appeals* (1806–10), fo. 469: 20 April, 1801). [2] The *Peacock* (4 C. R. 187).

countries; and if the territorial power has no objection, there is no possible reason why such acts should not be accomplished abroad. To commission a man-of-war in a neutral port may be a violation of neutrality—but this does not apply to the high seas. It is convenient for a country which has many scattered possessions to maintain that her less fortunate rivals cannot commission their ships with the same facility that she can: but there is no substance in the contention. To commission a ship is simply to accept its control and responsibility: this can be done, as a matter of physical and mental fact, wherever the ship may be: and to deprive the act of its consequences merely because the ship was not in the local territory at the time is a psychological impossibility.

Sir W. Harcourt [1] observes, "As there is no rule of International Law which forbids such delivering of commissions on the high seas, we cannot, of course, refuse to recognize the title of such a cruiser to all the legitimate rights of war in places beyond our jurisdiction. . . . We cannot dispute the validity of such a commission on the high seas, or the legality of any capture made by such a vessel." And Professor Mountague Bernard [2] says, "A vessel may be built, equipped, armed, commissioned and employed as a cruiser, without ever having entered a port of the nation under whose flag she sails." The *Tatsuta* was commissioned at sea by the Japanese during the war with China; the *Alabama* was commissioned at sea; the *Petersburg* and *Smolensk* were commissioned at sea in 1904, in the Mediterranean: and they were not withdrawn from service on that account, but because they had unlawfully traversed the Dardanelles in the colourable character of merchantmen.

In the course of an instructive debate at the time of the American Civil War,[3] Sir B. Peacocke instanced the

[1] Report, Neutrality Laws Commission.
[2] *British Neutrality*, 401.
[3] III Hansard, Vol. 174, c. 1785.

Ceylon,[1] East Indiaman, and the *Castor*, commissioned at sea by the French captors, and the *Georgiana*, a whaler similarly commissioned by the U.S. *Essex*: and, indeed, a captured man-of-war must almost necessarily be commissioned at sea, if incorporated into the immediate service of the captors, and not used as a tender. In the last-named case, "The American captain, without taking his prize into port, or taking out the cargo,[2] supplied her with ten additional guns and sixty men, and employed her under one of his lieutenants to cruise against British vessels." Sir W. Scott held in this case that she was sufficiently set forth for war, and that the commander of a single vessel had the same authority to grant a commission as a commodore. Lord Cairns, Lord Chelmsford, and Lord Kingsdown also took part in the before-mentioned debate, and none of them referred to any possibility that the *Alabama's* commissioning at sea was in any way irregular or invalid.

The Declaration of London rightly gives effect to this view, which has never seriously been challenged.

§ 8. Exemption of Private Property from Maritime Capture

From what has been said above, it will be apparent that wide extensions of Contraband and the doctrine of Continuous Voyage between them make the exemption from capture of private property a myth. This ideal of humanitarian and pacificist effort came nearest realization when at the Hague Conference of 1907 Lord Fry and his colleagues offered the world, in the name of Great Britain, the absolute abolition of Contraband. Why Germany, in particular, did not seize such a chance with both hands, is hard to explain. Certainly it was a startling proposal; more startling by far than Mr. Hughes' deliverance at the Washington Congress in

[1] See 1 Dodson's *Rep.* 105.

[2] She was, of course, an enemy, and not a neutral, ship.

1921. But it would have solved innumerable difficulties, and would have gone far towards establishing the freedom of the seas. Possibly it was thought that a strong naval power like Great Britain could afford better than any other to give up Contraband, because she could, better than any other, rely on a regular Blockade. The Germans may have said to themselves, "Timeo Danaos." Anyhow, that great gesture is past history. But if and when the institution of Contraband is replaced among the institutions of the Law of Nations —for at present it does not exist: it has given place to what is essentially Paper Blockade—then it will be proper to consider the question, which bulked so large in the thoughts of the last generation, of the exemption of ordinary mercantile goods of the enemy from capture at sea, not only when laden on neutral ships, but when put on board ships of the enemy. It is perhaps a question of less importance than it seems, for the enemy's trade can always seek neutral flags—and, if the intention is to preserve the enemy's carrying trade, then the difficulty arises, that ships have almost always been considered contraband. If the ships are constantly captured and condemned, how can the carrying trade be preserved? The exemption of ships from the category of contraband is therefore a necessary consequence of the principle. Clearly, it is of somewhat dubious advisability: a fast liner, at any rate, is a useful cruiser.

Short of declaring vessels not to be contraband, the Declaration of Paris went really as far as any one could desire in the direction of exempting private property from capture. It was only an illegitimate interpretation of the exception of contraband that deprived it of effect. It represented the triumph of a principle which may be traced back to De Mably in 1748, and was warmly taken up by Prussia, and later by the United States. These two Powers adopted it by Treaty in 1785, but the provision was omitted when the treaty was renewed, in 1799 and 1828. Holland in 1782 and Sweden in 1783

made similar treaties with the United States, which thus stand out as conspicuous advocates of the new principle, though their courts, permeated by English influence, held firmly to the ancient doctrines. Franklin observed that there were three classes of the population who ought always to be exempt from the effects of war—farmers, merchants, and fishermen.[1] Jefferson held similar views, and they were, indeed, thoroughly in consonance with the Individualism of the day. Rousseau's celebrated theory that war is an affair between State and State, not between individuals, seemed to require that the private business of merchants should be left undisturbed by national conflicts. France tried to get the principle accepted in 1792, but without much success, except that Austria seemed temporarily willing to allow commerce to go on between France and Imperial Ostend, and that minor states like Genoa, Naples, and Portugal, with Turkey and Denmark, adopted a more or less benevolent attitude.[2] Later, Napoleon I expressed himself (in August, 1809) strongly in favour of the principle: "Les bâtiments de commerce appartenant à des particuliers doivent être respectés." In his *Mémoires* (III, ch. 6, § 1, p. 301) Napoleon says: "Il est à désirer, qu'un temps vienne, où les mêmes idées libérales s'étendent sur les guerres de mer, et que les armées navales de deux puissances puissent se battre sans donner lieu à la confiscation des navires marchandes et sans faires prisonniers de guerre de simples matelôts de commerce ou les passagers non militaires. Le commerce se ferait alors sur mer entre les nations belligerantes comme il se fait sur terre au milieu des batailles qui se livrent les armées."

The Americans strongly urged the principle of total

[1] There is extant a report to the British Treasury of the conclusion by the belligerents of 1797 of an informal agreement to exempt fishing boats (Treasury In-Letters (1804), Bundle 926, No. 3674: 31 July. See also Order in Council of 16 April, 1806). The exemption may thus be found to rest rather on agreement than on any rule of practice.

[2] Cf. Aegidi and Klauhold, *Frei Schiffe unter Feindes Flagge* (Meissner, Hamburg, 1866).

exemption in 1823, Mr. Rush in London being instructed by J. Q. Adams to propose an Anglo-American treaty [1] in which merchant and trading vessels should be exempted, with their cargoes, from capture.[2] But the question of impressment, on which the British Government had never officially given way, rendered these negotiations fruitless. Mr. Rush reported his conviction that "Great Britain is not prepared to accede under any circumstances to the proposition for abolishing private war upon the ocean," and the American Government thenceforward concentrated their efforts on the endeavour, finally successful, to obtain recognition of the restricted principle, "Free Ships, Free Goods."

Costa Rica and Granada (now Colombia) are said to have adapted the principle of absolute exemption in a treaty of 11 July, 1856 (Art. 2), and Aegidi and Klauhold could find no other instance in 1866. The restricted principle was adopted by the Allied Powers in 1856 in the Declaration of Paris, and it might be a matter for surprise that the United States refused to adhere to that declaration. But, as is well known, the reason was that the Declaration abolished privateering, which institution the United States regarded as an indis-

[1] Adams to Rush, 28 July, 1823.

[2] The treaty already concluded in 1795, however, expressly preserved the right of capturing enemies' property in neutral ships (Art. 17). France then, in 1798, urged on the United States that on "Most-Favoured-Nation" principles they ought not to allow the British (under this treaty of 1795) to seize French goods on American ships, whilst (under a treaty of 1780 with France) they did not allow the French to seize British goods there laden. The States replied with the somewhat subtle thrust, that the British right to seize French goods did not *rest* on treaty, but existed antecedently—and they observed that the French had only to blame their own imprudence in resigning the right to seize their enemies' goods in cases where the enemy had not disabled himself from seizing their own (see Martens' *Recueil*, V. 672). Exactly in the same way, the British who had made a treaty with Holland embodying the principle "Free Ships, Free Goods," were obliged to see their French enemies, who had no such treaty, capturing British goods on Dutch vessels, while they had bound themselves not to capture French (see the *Stavorse Lynbaan* (1761), 4 Fol. Dec. 145; Fac. Coll. No. 27, p. 54; 178 Kames. del. Dec. No. 178, p. 241). This difficulty may have stimulated the "Rule of the War of 1756."

pensable weapon for the protection of their trade when belligerent, and for the attack of that of their enemies. They were working, not only for the security of the carrying trade, but for the security of *all* trade—even to the extent of exempting the enemy's goods on the enemy's ships. This the statesmen of 1856 in Europe were not prepared to concede. So long as the total exemption of merchandise was not conceded, the United States preferred to rely on privateers as a weapon in war-time, and to put up with the capture of belligerent goods on board their ships when neutral.

When invited in 1856 to accede to the Declaration of Paris, the U.S.A. Secretary of State (Marcy) addressed a dispatch to the other invited Powers advising them to hesitate in acceding to it. Mr. Marcy pointed out its incompatibility with existing treaties; and further, that *commercial* maritime states could not surrender the power of privateering (to improvise a force of cruisers) without at the same time securing the abolition of the belligerent right to capture private property at sea. Otherwise they would be at the mercy of States which maintained strong navies; and Mr. Marcy regarded the maintenance of strong military and naval forces as detrimental to a nation's prosperity and a menace to domestic liberty. A similar dispatch was addressed to the Powers signatory to the Declaration (28 July, 1856), maintaining that the right to employ privateers is essential to the "freedom of the seas" (unless private property is exempted from maritime capture). If the U.S. accepted the Declaration ("No privateering"; "Free Ships, Free Goods"), they would have to become a military power and build a strong navy. States with a strong navy might very well resign privateering—they only emphasized their ascendency at sea thereby, and gained the dominion of the ocean. "Such a dominion was not compatible with the Freedom of the Seas, and arose mainly from the practice of subjecting private property on the ocean to seizure

by belligerents." The U.S. therefore proposed to add to the Declaration an absolute exemption of all private property (except contraband).[1]

It is said that the Earl of Derby had just observed in the House of Lords that the total exemption of private property at sea from capture would be the necessary consequence of the Declaration of Paris: and, indeed, both the Tories and the Chauvinist Premier (Palmerston) surprised the world by according a certain sympathy to the idea of total exemption: which certainly was very attractive to a nation with so extensive and vulnerable a commerce as that of the United Kingdom. Palmerston (at Liverpool, 7 November, 1856) observed in a speech, that, "In the course of time those principles of war which are applied to hostilities by land, may be extended, without exception, to hostilities by sea, so that private property may no longer be the object of aggression on either side."[2] Of course, Cobden strongly supported the American proposition. France seems to have been prepared to accept the U.S proposition for total exemption, but owing to diplomatic mismanagement (the U.S. Minister, Dallas, in London, refusing to co-operate with Mason, the Minister in Paris) she fell into line with England in ultimately proving recalcitrant. Russia was willing (Note of 28 November, 1856): so were Portugal and the Netherlands. So was Prussia (Gerolt to Secretary of State, 7 March, 1857).

But in America itself an agitation was springing up in favour of declining to resign the right to commission privateers, even as against the concession of total immunity for all maritime trade. Pierce and Marcy were succeeded as President and Secretary of State by Buchanan and Cass, and the policy of the latter, viz. to couple total exemption with the abolition of privateering, was therefore temporarily at an end. With some acuteness, the new Executive detected that there were

[1] Aegidi and Klauhold, p. 17.
[2] *Ibid.*, p. 25.

gaps in the security offered by total exemption, so long as it was uncertain what could be done under colour of Blockade and stoppage of Contraband. They therefore went further than Marcy, and proposed as ancillary to the abolition of privateering, not only total exemption of trade, but a definition of the necessary exceptions to that exemption.

The veiled question of comparative naval strength now revealed itself. Mr. Buchanan observed as President: "Mr. Marcy had gone too far in his propositions, and it would be more advisable to retire from the discussion; since the U.S. could not surrender the right of privateering, *until they had as powerful a navy as Great Britain.*" [1]

The whole subject now assumed a different colour. Lord Palmerston (14 July, 1857) retracted his Liverpool speech. The Americans appeared as adhering to privateering, not particularly for the protection of their trade when belligerent, but as a counterpoise to the regular navy of Great Britain. (It must be remembered that at that date, prior to the invention of armour-plating and heavy ordnance, the man-of-war and the merchantman were interchangeable: thus it was quite doubtful whether the *Alexandra*, building in 1861 at Liverpool, was intended to be a merchant vessel or a Confederate man-of-war.)

In the China War of 1860, France and Britain spontaneously declared Chinese private property inviolable (Notes of 30 June and 4 July).

In the American Civil War the South issued letters of marque to privateers, thus producing some revulsion in Federal American feeling, and the Federalist North determined to adhere unconditionally to the Declaration of Paris. But when they (the Federals) found that their adhesion would not be regarded as binding the South, they declined to carry the matter further, and even dropped all negotiations for separate treaties on the

[1] *Ibid.*, p. xxi.

topic with Russia, the Hanse towns, and Prussia. A convention was made with Russia, and left unratified; Mr. Seward, contemplating the possibility of war with Britain and France, wished to reserve the right to privateer, and was much surprised when Russia told him she would consider privateers, under her treaty, as pirates if they touched Russian vessels.

The American nation had thus to a great extent abandoned under the stress of civil war and the prospect of foreign hostilities its devotion to the principle of the total immunity of commerce. Italy, however, took it up (Commercial Code, 1865), on the basis of reciprocity, as did Austria (decree of 13 May, 1866) and Prussia (19 May, 1866). A Select Committee of the British House of Commerce reported (7 August, 1860) that "in their opinion the time had arrived when all private property not contraband of war should be exempt from capture at sea."

Since 1860, no official action seems to have been taken either by the United Kingdom or by America on this subject. The United States have never adhered to the Declaration of Paris—which in fact, as we have seen, is obsolete.[1]

It is not without interest to remark that over a century ago, in the *Marquis de Somerueles*,[2] a collection of paintings and prints was restored to American enemy claimants: "The arts and sciences are admitted amongst all civilized nations to be exempt from operations of war." It is unlikely that German artistic property would have been left unconfiscated in 1915.

The private baggage of enemy passengers on board ship was never exempt in principle, but was often restored as a matter of courtesy, as when the Netherlands Ambassador's (Van Lang) was taken, in 1804, though the consent of the captors was made a condition

[1] See *Frei Schiffe unter Feindes Flagge* (Aegidi and Klauhold, Hamburg, 1866) and *Ibid.* in English translation (but without the *pièces justificatifs*).

[2] Stewart's *V.-A. Reports* (Nova Scotia), 482.

of this restoration.[1] The private property of Doña G. de Penaredonda, "who resides in the city of Madrid," was mentioned by the Privy Council to the Treasury on 17 November, 1805.[2] Its amount was £410 12*s.* 9*d.*, and the question of its restoration was favourably considered. Of course, Britain had many sympathisers in Spain. But, again in 1805,[3] the private property of Spanish passengers was held to be "mere cargo," the circumstance of the owner being on board being held immaterial. "H.M. Advocate is not aware that H.M. Government has restored property of this description belonging to passengers—but only their baggage and any little articles in their own personal possession." In 1803, however, Governor van Batenberg's private property, *ex* the *Planter's Welvareen*, had been directed by the Privy Council to be restored to him,[4] "and that comprised 6 pipes of wine, some 1,000 cwts. of cotton, 3 bags of coffee, 1 h.h. of sugar, etc."

If the modern idea of war is to prevail, the principle of the exemption of private property from maritime capture [5] is as out-of-date as the Declaration of Paris. If war is not only a relation of State to State, but involves every individual adhering to either party in its demands through one belligerent and in its attacks through the other; if every workman and housewife is regarded as a prop of the army and to be exterminated accordingly; it is clearly absurd to refrain from exterminating the merchant's trade and the ship-owner's business. The fashionable collectivism of the day is, however, slowly giving place to a neo-individualism which in ten or twenty years may be very powerful. In point of fact,

[1] Treasury In-Letters (Record Office), 1804 (976), No. 3712: 3 August. See also *ibid.*, 1803 (907), 3016: 30 June, where the cabin stores and presents of Dutch passengers are allowed to be warehoused duty free, their personal baggage being already landed.

[2] *Ibid.*, (958), 7010.

[3] *Ibid.*, 1805 (954), 6067: 29 October.

[4] Privy Council Register, Vol. 163, p. 54. *Cf.* p. 64 (7 June).

[5] The principle is strongly approved by Hershey, *Essentials of International Law*; and was also advocated by the late Sir John Macdonnell, K.C.B., in England.

a private individual (at any rate in the Occident), is much more than a humble contribution to the greatness of the State. Civilization is greater than the State; Music and Art are greater than the State; human kindness is much greater. These truths, obscured for the moment by the fantastic demands of Governments for implicit obedience, as if there were something sacrosanct in the present organization of the western world, forbid the utter absorption of individuals in the quarrels of those who rule them, whether in the name of the few or the many. And our Canon of Elasticity would correspondingly ensure due freedom for their property at sea. It is not because opinion is favourable to belligerents, that the principle is temporarily obscured; it is because it is favourable to *Étatisme*. Before private property can be safe at sea, the superstition of state supremacy must be exploded.

§ 9. Peaceful Modes of Settlement

It is evident on the most cursory reflection that there is no analogy between the Supreme Courts of the various nations and a Supreme Court for the world. The institution of a world court is not the extension of the principle of district courts, county courts, provincial courts, and supreme courts to the stage of the world; it is the institution of a totally different thing. District courts, county courts and national courts are established to do justice between private persons in jurisdictions of varying extent. Such a world court could be established to do justice between private persons throughout the world. But the World Court of which publicists speak is a court which has nothing to do with private affairs. It is an unwieldy institution established to exercise jurisdiction over some fifty individuals, and its closest analogy is the village *panchayat* of India.

The whole history of international arbitration has been vitiated by the blind endeavour to establish a

" Court." It must be obvious that when forty or fifty individuals are living together, a court is a pompous superfluity. What they want is not a court, but conciliation. And we cannot join in the chorus of self-gratulation that at last the world has a court, or something resembling one.

The controversy concerning " juridical " and " political " disputes owes its origin to this *idée fixe* of providing the nations with a court. After all, the differentiation between the two classes is perfectly easy. A " juridical " dispute concerns legal rights, a political dispute concerns the question as to how far a State ought to refrain from using its legal rights. And the difficulty is that these two questions are generally intermingled. The questions of what is the law, and of what is a fair use to make of the law are seldom far apart. Without subscribing to the heresy of those who assert that arbitrators have an inherent power to go beyond the law, and to decide the dispute *ex æquo et bono*, *i.e.* on their own ideas of what the law should be, we must nevertheless recognize that in many or most disputes the real question is not so much as to the law but rather as to the fair thing to be done. By the *Austrägalordnung* laid before the German Diet in its early days, arbitration was made imperative in the case of all internal State disputes. On that occasion, Prussia insisted on limiting arbitration to " legal " (excluding political) disputes. The project accordingly fell through altogether.

In endeavouring, therefore, to erect a court which shall be a final and universal solvent for the disputes of States, reformers are on a mistaken path.

The system of the *Société des Nations* provides a court for the solution of difficulties which the parties agree are susceptible of a juridical settlement, and it provides another court (the *Conseil* of the Société) for the attempted solution of other disputes. It provides definite processes for the enforcement of the award in

the former case, and it provides a vague but sufficiently terrifying apparatus for the enforcement of a unanimous award in the latter case. In both cases, the fatal defect is a want of elasticity. States are not yet ready to submit beforehand to the decisions of persons whom they have not themselves selected as arbitrators for the particular cause.

In the present state of opinion, the essential necessity for the decision of a dispute between States is acceptability of the arbitrators. This spells elasticity in the selection of arbitrators; and every effort of the well-meaning advocates of pacific methods of settlement is being vigorously devoted to eliminating elasticity and making arbitration rigid. The rigid and self-elected council, the rigid and formalized court, even the restricted and nationalised panel of the Hague Tribunal, these are no fit substitutes for the free choice of nations.

The first necessity of International Arbitration is to burst the bonds of these institutions. The ideal method of settling disputes in a small community of fifty is not to appoint judges, sheriffs, and constables, but for the parties to agree to refer their quarrel to others in whom they both have confidence. Arbitration *ad hoc* is the ideal. And in the choice of arbitrators, personal fitness is the only thing which ought to be considered. The nationality of the arbitrator is totally irrelevant. The habit of appointing arbitrators drawn from some particular nation is an obsolete superstition. It arose from the habit of invoking nations to arbitrate in the persons of their chief magistrates. Thus, Napoleon III arbitrated between Portugal and the United States in the *General Armstrong* case, the King of Holland arbitrated between Britain and the United States in the Maine Boundary case. Nothing less was thought suitable to the dignity of States. But, then, the Crowned Head being personally ignorant of the subtleties of International Law, an expert had to be invoked, and rapidly the expert nominated by the monarch was substituted

for the monarch as arbitrator; while finally the monarch is eliminated, yet the arbitrator is obliged to be of a particular nationality. This no more conduces to efficiency than the provisions by which each member of the Swiss Federal Council must come from a different Canton. The parties to the dispute ought to choose as arbitrators the persons who are considered by them both as most fully qualified to decide the question.

Nations which would not care to arbitrate before a selection of personages half of whom they object to—or nearly half—might have much less hesitation in inviting the decision of such fair-minded persons as the late Lord Courtney. The absurd principle of appointing arbitrators of the disputants' nationality, who are almost invariably advocates on the Bench, would disappear if the sole qualification of an arbitrator were personal fitness and acceptability to both sides. And an arbitrator ought always to be an arbitrator; nations should never consent to appear and argue, whether the tribunal is styled an arbitrator or a court, in an attitude of inferiority or humility.

Again, great elasticity is necessary for the due disposal of all the factors in the case. A commission of inquiry might be best for the ascertainment of the facts. A panel of jurists—perhaps one, perhaps fifteen—might be best for the establishment of the law. A party of statesmen, bankers, lawyers, and private persons of reputation and character might be best for arriving at a practical settlement. If the parties cannot between themselves agree on a combination satisfactory to them both, the ideal settlement cannot be reached.

We have then to fall back upon a method of settlement which, if less ideal, is such that it may be accepted in advance by both parties. As we are committed to a maximum of elasticity, it is impossible to lay down such a universal method beforehand. It is therefore necessary to provide for its selection *ad hoc* by a body in which

both parties may have confidence. It may be suggested that each party should range the various Powers in order of acceptability, and that the twelve highest on both lists should each appoint a representative to consult on the appropriate methods of reaching a final settlement and to render a unanimous decision. As this investigation concerns only methods of procedure, there is no necessity for the selection of specially skilled persons, and the method of nomination by States is simple and sufficient. An investigation, or series of investigations, of the law, facts and morals of the case, conducted on the lines laid down by such a body, might well be accepted in advance.

Whether the nations ought to bind themselves in advance to carry out the award or recommendations of arbitrators is, however, a serious question. Insufficient importance has been attached to the sheer weight of a decision rendered by the parties' own chosen judges. The main object of arbitration ought always to be regarded as the obtaining by the parties of an impartial and reasoned opinion on their conduct and obligations. It is by no means essential that they should necessarily agree to abide by the award.

So-called "Sanctions" are in general to be deprecated, as bringing nearer the possibility of violent conflict. It cannot too often be repeated that the one thing on which the people of all the nations of the world are agreed is the paramount necessity of avoiding war, while preserving to each nation its absolute freedom within its own dominions. The attempt to enforce awards or recommendations by violence runs contrary to this fundamental desire. If a nation will not fulfil an award, why carry fire and sword into its territory? It is better to leave it alone to digest its indiscretions. The idea that an "aggressor" is one who declines to carry out an award explains the opposition to, and the failure of, the Geneva Protocol. An "aggressor" is not a State which declines to carry out an award. It is a State which violently

attacks another in its own territory (including its ships).[1]

But whatever systems of arbitration nations may be found willing in advance to accept, nothing can supersede the methods of good offices, mediation and conciliation. Mediation differs from the other two in being a formal process of negotiation,[2] and it differs from arbitration, even where the award has a moral value only, in not being restricted to the determination of specific questions of law or morals. Conciliation and Good Offices are still less formal; though sometimes confused, they were distinguished from Mediation by Canning when he remarked, "You have judged quite correctly in not pressing the mediation of His Majesty. The refusal of the French Government puts any formal exercise of it out of the question. But, substantially, our good offices may do all that the most regularly accepted mediation could have done."[3] No better system of conciliation has been devised than that of the "Bryan Treaties." These established between each individual pair of States a permanent Board of individually chosen conciliators, pending whose efforts the parties were pledged for a limited time to observe the *status quo*. Whatever opinion may be entertained of Mr. Bryan as a statesman, these treaties are perhaps the most practical engine yet established for the preservation of peace.

[1] See this line of argument developed further in the *Quarterly Review*, 1929.

[2] See Satow, *Diplomatic Practice*.

[3] Canning to A'Court, 11 January, 1823; 10 S. P. 37.

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