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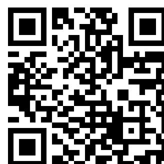

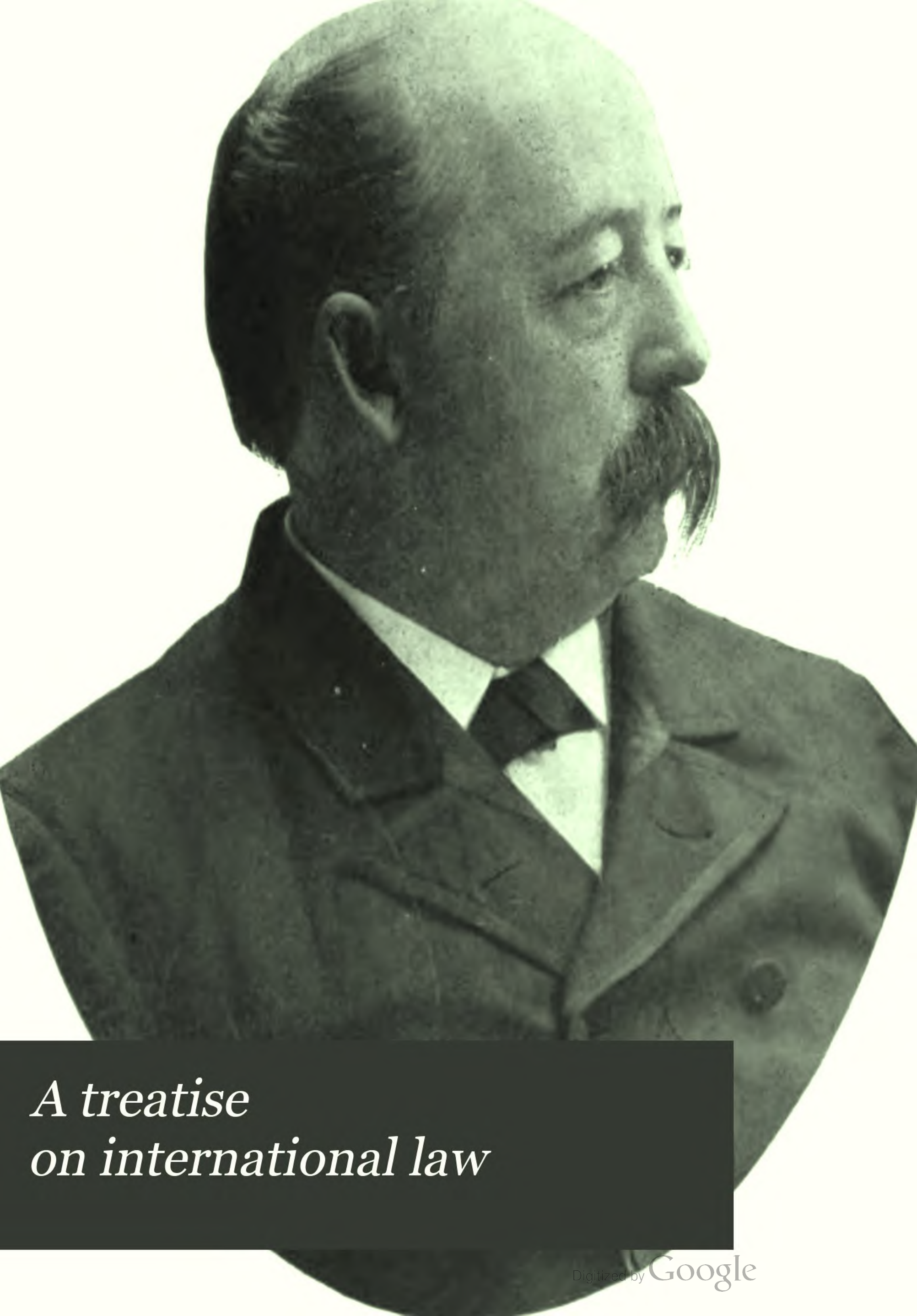

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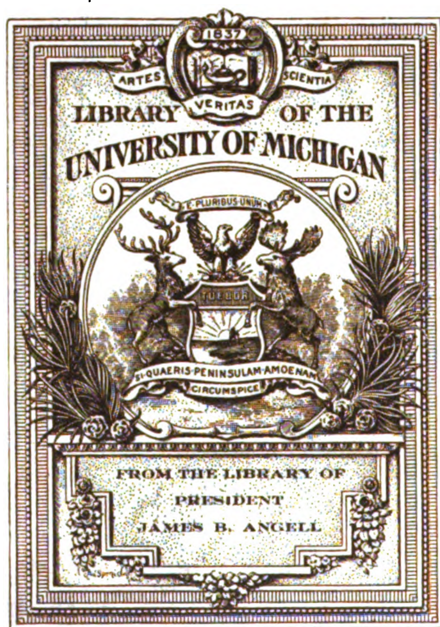

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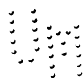

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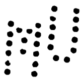

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ON

INTERNATIONAL LAW

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AMERICAN DIPLOMACY

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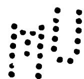

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A TREATISE

ON

INTERNATIONAL LAW

INCLUDING

AMERICAN DIPLOMACY

BY

HON. CUSHMAN K. DAVIS
Late Chairman Committee on Foreign Relations, U. S. Senate

INTRODUCTION BY

HON. HENRY CABOT LODGE, L. L. D.

ANNOTATED AND REVISED

BY

PETER J. HEALY, D. C. L.

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INTRODUCTION.

The lectures contained in this volume were delivered by Senator Davis when many important international questions were attracting the attention of the American people. By legal training, supplementing his natural ability, and by his experience as chairman of the committee on foreign relations in the United States senate, Senator Davis was eminently qualified to deal with these questions, and, in view of the subsequent action of the United States with respect to the Hawaiian Islands and Cuba, which he here discusses at length, these lectures will be found especially interesting and instructive, inasmuch as the United States proceeded along the line of his suggestion. The varying views of the many writers on international law in regard to questions which are not entirely settled tend to confuse the student who is just beginning the study of this great subject. To such students, therefore, these lectures should

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prove of real value, because the general principles laid down are conclusions drawn from a comparison of the best authorities of the present time, and from the history and practice of nations in their international intercourse. The lectures, omitting all that is merely speculative and theoretical, are to be especially commended for their applicability to present international relations, for their precision of statement, and their comprehensive definition of terms.

The extensive intercourse of the United States with the nations of the earth at the present time, its growing influence as a world power, and its proximity to contending forces in the Orient, make it peculiarly necessary that every American, and especially the younger man, who desires to act intelligently in regard to the questions of the day, and thus help to advance the interests of his country, should familiarize himself with the law of nations. Although international law is not embodied in any code, and has no means to enforce its admitted obligations, nevertheless the general diffusion of sound knowledge in regard to it among the civilized people of the earth will do much to bring an intelligent and well-directed public opinion to bear

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upon the settlement of questions of great moment which are constantly arising among nations, and thereby, perhaps, to avert war, or to alleviate suffering and oppression.

A work too exhaustive in detail is never profitable to the beginner. Fundamental principles, expressed in simple language, will establish in his mind a safe and intelligent basis for thought and action, and will prepare him for more extensive investigations.

As a thorough knowledge of Blackstone, containing, as it does, the fundamental and essential principles of the common law, enables one to better appreciate the many modifications that have since been introduced, so a knowledge of the essential principles of international law, as laid down in these lectures, will prepare a student to deal intelligently with any questions that may arise.

International law, like municipal law, is constantly expanding and advancing, and the recent convention at The Hague gives promise of a purpose on the part of the civilized states of the earth to provide means, if possible, for the adjudication of differences, under the dirction of law, instead of appealing at once to the arbitrament of war.

The importance of the subject no one can

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question, and the conclusions and opinions of a man like Senator Davis, who had the rare knowledge which comes, not only from the study of books, but from the practical applications of theories and principles, merit the most careful consideration, and ought to be widely read.

HENRY CABOT LODGE.

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INTERNATIONAL LAW.

CHAPTER I.

OF THE NATURE AND SOURCES OF INTERNATIONAL LAW.

§ 1. Importance of the subject.
2. Definition of international law.
3. Origin of international law—The Hindus and Egyptians.
4. —— The Jews.
5. —— The Greeks and Romans.
6. Influence of the early church.
7. The peace of Westphalia.
8. The influence of Grotius.
9. The American and French Revolutions.
10. Sources of international law—Treaties.
11. —— Usage.
12. —— The moral law.
13. Coercive force of international law.

§ 1. Importance of the subject.

The subject of international law is one of great extent and complexity; it is also of daily and surpassing interest in the increased intimacy of national intercourse. Nations far remote now touch one another

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where formerly they had no point of contact. Intelligence is conveyed more speedily than if it were borne upon the wings of the morning. Relations of all kinds—social, monetary, political, and commercial—occur with hourly frequency. Under such conditions, the interest of any state in its international affairs becomes exceedingly important. Indeed, you cannot look at any daily paper without seeing how frequent and various these international questions have become. One morning the question is whether the United States is bound to return Senorita Cisneros, released from a Spanish prison by the enterprise of a newspaper correspondent. The next, we see that Costa Rica has declared war against Nicaragua, where we have that large interest, the Nicaraguan canal, created by contracts of our citizens with those governments, and with the United States the question is, what effect will this war have upon our relations with those states, in view of our rights in that great enterprise? So that I am justified in saying that our international interests are of daily increasing recurrence and importance.

Another characteristic of the relations of

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our government to other powers is this: Whatever may be the distractions of party and the vicissitudes of political ascendency in our internal affairs, it is a maxim of this government that, whatever party may be in power, the continuity of our foreign intercourse and policy should never be broken. That maxim has seldom been infringed, and whenever it has been disregarded it has been to our detriment.

§ 2. Definition of international law.

The definitions of international law are many. Some of them are very elaborate, and contain an argument within the definition. I think that as good a definition as can be given for practical purposes is that international law is that body of rules which governs the intercourse of states. We know that states have intercourse; we know that it is regulated by rules; we know that this must be so; we see them obeyed, no matter by what method they may have been established,— and so it is a sufficiently accurate, although it is a very compendious definition, to state

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that international law is that body of rules which governs the intercourse of states.[1]

§ 3. Origin of international law—The Hindus and Egyptians.

To a proper understanding of even the most fragmentary discussion of this great

[1] "International law, in a wide and abstract sense, would embrace those rules of intercourse between nations which are deduced from their rights and moral claims, or, in other words, it is the expression of the jural and moral relations of states to one another." Woolsey, Int. Law, § 3. See, also, sections 4, 5.

"International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces as consonant to justice, from the nature of the society existing among independent nations, with such definitions and modifications as may be established by general consent." Wheaton, Elements, pt. 1, § 2.

"International law, or the law of nations, may be defined to be the rules of conduct regulating the intercourse of states." Halleck, Elements, c. 2.

There is a considerable divergence among writers on international law, not only with respect to the proper definition of the term, but also with respect to the origin and source of the law.

Halleck (Elements, c. 2) points out that "most writers endeavor to frame their definition so as

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subject, into the minute details of which I cannot be expected to go in what I shall say to you now or hereafter, some account of the history of international law will not be inappropriate, and, I think, is indispensable.

In the older civilizations—those of Egypt and India for instance—we find no trace of it. Great nations arose, some immured in their own seclusion, others in competition, who wasted each other by fire and sword, and swept thousands into slavery, and no trace appears of international relations, nor of any modification of the primeval law that every stranger is an enemy. Why was that? As to India and Egypt, whose civilizations antedate the very morning of recorded history, it was the existence and effect of caste. It was the drawing of the sharp line of distinction between the divinely favored nation and all other nations, whereby the nation esteeming itself thus privileged, and all other nations as inferior, as Egypt and India did, could not, under the prohibitions of their theocratic systems, enter into any relations

to embrace the source of this law, rather than describe the nature and character of the law itself."

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with foreign states except those of aversion or hostility and subjugation.

§ 4. ——The Jews.

Nor do we find international law in the history of the Jews, although it has often been attempted to show its existence from entirely inapplicable passages of their Scriptures. There is, in my opinion, no trace in the history of that nation of what, in our time and for the last five hundred years, has been understood to be international law. Why? Because the Jews were, in their own estimation, a peculiar people, a favored people, a people divinely set apart from other nations. They were forbidden by their law to make covenants with other nations. They were promised, in the supreme fullness of time, dominion over all other nations, and this explains why we see no real trace of international law and relations of the Jews with other states, and it also accounts for the atrocities and bloodshed of the wars in which they overran Palestine.

§ 5. ——The Greeks and Romans.

In the processes of time, the Greek and

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Roman civilizations appeared, with no system of caste, with no assertion of an exclusively divine mission and favor, and here, for the first time, we see the germ, and the growth from the germ, of modern international law. I know it has been denied by many writers that there was any feature or function in the Greek and Roman civilization which can properly or probably be attributed to international law as we understand it, but I am inclined to think that this is an error. It would be an interesting topic of investigation by any one so inclined, to look into this question, and see whether the foundations of international law did not exist deeper and broader in the Greek and Roman civilizations than modern writers are willing to admit. How could it be otherwise? Their philosophers taught the equality of men; the equality of states was practically assumed; the little peninsula and islands of Greece were divided into commonwealths possessing refined and exquisitely finished systems of government. They made leagues with each other; they fought each other; they made treaties of peace with each other. As to Rome, she had under her pro-

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tection the kinglets of Asia Minor, Palestine and Egypt, and the cities of Spain; her first wars of conquest were against the tribes surrounding the city; she sent and received ambassadors; she made demands by heralds for satisfaction, and made formal declarations of war after satisfaction had been refused. The details of these transactions in their legal aspects have not come down to us, but there must have been a system of international rights and wrongs, and remedies for such wrongs, of which history has given no sufficient account, and which must have existed and operated from the very nature of the situation. The Code, the Pandects, and the writings of the poets and historians contain many passages which sustain this opinion. The negotiations and treaties between Mithradates and Sulla, and those between the Pontic king and Sertorius, who was then the *de facto* ruler of a great part of Spain, were very formal and complicated, and adjusted vast international questions.

§ 6. Influence of the early church.

International law, as we understand it,

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and from which it has expanded to its present proportions, first clearly appears from the date of the ascendency of Christianity around the Mediterranean and on the continent of Europe. The cardinal principle from which it sprung was the Christian doctrine of the inviolable and indestructible equality of man to man, as a man. It was a doctrine never taught before as a religious precept; a doctrine never generally conceded before, whatever may have been said in the abstract speculations of the philosophers; a doctrine which had never before secured any political acceptance. There is the basis of the modern republic; there is the basis of the modern state, by whatever form of government it is ruled; there is the basis of the conception of the equality of nations.

Of course, after the fall of the Roman empire and the submergence of Europe under the successive barbarian invasions, the power of Christianity, and the force of such international law as existed at that time, were very much weakened, but there did remain the commanding power of the Church, —then the Church Universal,—speaking through the voice of pontiffs, and often with

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the voice of supreme morality, with an authority which took centuries to weaken in its influence upon the independence of states, and which exercised the power of the chastisement, deposition, and installation of kings. The Church was often the supreme arbiter which enforced, from the doctrine of morals and from the canon law, the rights of nations. With whatever purity of intention that jurisdiction was for a long time asserted, the Church at last lost the confidence of mankind, upon which its authority rested, and ceased to be dominant in international relations. Little by little civilized Europe, through barbarism, through the feudal system, through the Crusades, through the expansion of the spirit of commerce, through the independence of municipalities, through the gladsome light of education which illumined the world, began to assume those national forms which have continued to the present time.

§ 7. The Peace of Westphalia.

The Protestant Reformation was effected in the process of this evolution, and immediately two principles engaged in conflict. One

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was the liberty of conscience,—the liberty of personal judgment upon religious questions. The other was the *ex cathedra* doctrine of the entire subjugation of individual will and opinion to the dogmatic authority of the Church. This conflict took a political form. It produced the great Thirty Years' War. It was Luther and Calvin against the old order of things; and while it was a religious war, it was much more. It was also, in substance and effect, in a resultant sense, a war for national emancipation and independence. This long conflict was ended by the peace of Westphalia in 1648, and I advise the study of the treaties by which that peace was made.[2] By those conventions, the geography of Europe was fixed, as to its exterior national boundaries, substantially as it now is. That peace was the edict which established the status and relations of the states of Europe, great and small. Excepting the Pope and Russia, which had not yet appeared as a member of the commonwealth of nations, all the states of Europe joined in the treaties. They curbed the power of

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[2] See Appendix A.

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Spain; they placed the Netherlands upon the pedestal of an enduring nationality.

As I am considering only its political effects, I will merely say that the peace of Westphalia fixed the map of Europe; substantially took religious matters out of all play and action in international politics, and caused them to cease to be an occasion of war, by solemn compacts in which all the powers of Europe joined, except Russia and the Pope, who protested against the treaties.

You will permit me here to make a short digression. We have all read Macaulay's review of Ranke's History of the Popes, and have recognized the truth of his statement to the effect that, geographically and as to boundaries, Europe stands as to the situs of creeds substantially where it did when the religious wars in Europe finally ceased. Parishes that were then Catholic have remained Catholic to this day; parishes that were then Protestant have remained Protestant. Little principalities and bishoprics and dukedoms, as well as great states, all at one time filled with religious fervor, intolerance, and passion, which ebbed and flowed in battle and persecution, have remained since that

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peace without change in their religious opinions, although those passions have entirely subsided. Macaulay accounts for this by the subsidence in Protestant energy, and by a reformation and purification in Catholicism. I do not think that this opinion fully explains this result. I think that an additional reason is that by the removal of religion and differences of religious opinion out of the arena of international disputes, the operations of men's convictions upon those subjects were allowed to remain free and uncoerced, and thereby the boundaries of faith and creed were fixed. This has been rudely expressed, but you can read Macaulay's essay, and determine for yourselves what weight ought to be given to this portion of my observations. Anyhow, the result of the peace of Westphalia was this: It established the map of Europe; it made equal the states, great and small; it guaranteed their existence; it divorced religion from international politics, and made a general system of international law absolutely necessary.

§ 8. The Influence of Grotius.

The events and causes which produced the

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treaty also produced Grotius, from whose immortal work the science of international law has ever since flowed in an unfailing and broadening stream.[3]

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[3] Mr. Hallam says: "It is acknowledged by every one that the publication of this treatise [De Jure Belli et Pacis, by Grotius] made an epoch in the philosophical, and, we might almost say, in the political, history of Europe."

Grotius, after the publication of his work, was appointed ambassador at Paris by Oxenstiern. The Elector Palatine Charles Louis established at Heidelberg a professorship of the science of international law, created by Grotius, and the science has been promoted in like manner ever since.

Grotius founds morality and law upon the whole compass of man's human and social, as well as animal and individual, nature. He bases philosophical morality on the social impulse by which man is actuated, in addition to the desire of his individual good. "This social impulse is," he holds, "the source of jus, or natural law,—the basis of property and contract." "It is," he says, "too narrow a view to say that utility is the mother of rights. The mother of rights is human nature, taken as a whole, with its impulses of kindness, pity, sociality, as well as desire of individual pleasure and fear of pain. Human nature is the mother of natural law, and natural law is the mother of civil or instituted law."

Grotius thus stands favorably distinguished from the later writers, who base law and moral-

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§ 9. The American and French Revolutions.

The American Revolution was followed by the French Revolution, its offspring. The latter was deformed in many respects, but it was fruitful of benefactions to the human race. Those revolutions had an impressive influence on international law and its application. They warred against many princi-

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ity on mutual fear and necessity of property rights.

The origin of the law of nations in modern Europe has been by some writers traced to two principal sources,—the canon law and the Roman civil law.

Mr. Wheaton says: "It was founded mainly upon the following circumstances: First, the union of the Latin church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns, and between nations. Under the auspices of Pope Gregory IX., the canon law was reduced to a code, which served as the rule to guide the decisions of the church in public as well as private controversies. Second, the revival of the study of the Roman law, and the adoption of this system of jurisprudence by nearly all the nations of Christendom, either as the basis of their municipal code, or as subsidiary to the local legislation of each country."

To the careful observer it will be evident that international law is not of sudden growth. While

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ples which had been theretofore accepted, which they contended ought to be superannuated, and the result was that many rules which had been deemed indisputable and indispensable in times prior to those momentous events became obsolete, and passed into the region of outworn theories, no longer suitable for practice. It is a remarkable fact that Franklin and Napoleon destroyed that system of finesse, chicane, duplicity, and cunning which in former times was called diplomacy. They taught the duty and advantage of plain speaking and business methods in international negotiations.

Grotius first puts in practical form the essential principles of the law of nations, it will be found, upon research, that those principles were the product of ages, and of the many eminent jurists and writers who devoted their time and energies to the betterment of mankind. That "there is nothing new under the sun" resolves itself into a truism, upon proper research. There is evolution in law, as in every other movement of human thought, and it will be found that every great legal doctrine had its origin in a remote period. Chancellor Kent (volume 2, p. 516) says: "The civil law is taught and obeyed not only in France, Spain, Germany, Holland, and Scotland, but in the islands of the Indian ocean, and on the banks of the Mississippi and the St. Law-

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§ 10. Sources of international law—Treaties.

Let us inquire for a moment what are the sources of international law, and how it is evidenced. The most conspicuous source—perhaps the one which most attracts the attention; certainly the one we read most about in history—is treaties by which the signatory states give laws to each other as between themselves, as to what shall be done in a certain contingency, or in composing existing differences; but this is a very limited source of general international law. A treaty between France and the United States binds only those governments. It does not bind England; it cannot; it binds only the signatory powers; so that, except by a treaty of general nature signed by many states, as in the cases of the treaties of Westphalia in 1648, and that of Vienna in 1814, binding so many states as to make it a rule of almost universal obligation, such a convention is not an international law.

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rence. So true, it seems, are the words of D'Aguesseau, that the grand destinies of Rome are not yet accomplished. She reigns throughout the world by her reason, after having ceased to reign by her authority."

The foundation of the Roman civil law dates

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§ 11. —— Usage.

Another source is usage. To students I cannot better illustrate what I mean than by saying that this usage is the common law of nations. Its origin is not perceptible; its growth is gradual. As to the common law of England, who knows precisely when and where it arose? We all know the many (some of them very far fetched and remote) explanations given of its origin by the commentators; some very grotesque, such as the supposition that it had its origin in a body of statutes now lost, the memory and knowledge of which, however, still repose in the minds of the judges, transmitted to and by them from generation to generation. The common law of England and the common

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particularly from the year 450 B. C., with the important codification known as the "Twelve Tables," which, we are told, was an arrangement and promulgation of the leading principles of the law then in force in Rome. It is contended by some writers that prior to this codification a commission was sent to Greece to study the laws of that country, and whatever was found meritorious in that ancient field of philosophic thought, and applicable to the conditions in Rome, was embodied in the "Twelve Tables." This is disputed, but it is worthy of investigation. We have

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law of nations have sprung from customs, from irresistible conveniences, from tacit understandings, by which not only classes of men as between themselves, but states as between each other, have accommodated differences or made intercourse desirable and peaceful. Who established the doctrine that territorial sovereignty over the ocean is limited to a marine league from the shore? By what authority was the principle ordained that private property on land is not subject to confiscation as is private property cap-

left but fragments of the "Twelve Tables," but even the fragments serve as an index to the development of the civil law at that time. See work of Messrs. Dirksen and Zell, adopted by Professor Ortolan in 1844. As Rome expanded in population and power, an expansion of her jurisprudence became necessary, and the body of laws known as the "Jus Honorarium" was developed. Then the edicts of the praetors became an additional authority. The Curule Aediles, upon certain occasions, published their edicts, and they became a part of the "Jus Honorarium." Under the rule of Hadrian, and the praetorship of Salvius Julianus, the body of doctrine, which was of slow growth, was put in the form of what was called the "Perpetual Edict,"—a code of mixed law and practice. The "Perpetual Edict" supplanted the "Twelve Tables," and became the standard of civil jurisprudence. Passing over the

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tured on the high seas during war, or the doctrine of contraband of war and blockade? Who decreed the principle of the inviolability of ambassadors, or that piracy is a capital crime? You find these rules written in no code, laid down for the first time in no treaty, prescribed by no superior power. They have developed automatically, as the common law of England has developed, into a body of law which every nation recognizes, and which the common consent of the civilized world holds to be binding upon every nation.

§ 12. ——**The moral law.**

And then, beyond and above all that, there is a source of international law, denied by

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"Responsa Prudentium," or opinions of the jurisconsults, the "Constitutions," and the Gregorian, the Hermogenian, and the Theodosian Codes, we come down to the Justinian Code, which was prepared and proclaimed in the sixth century of the Christian era, and which embodied the active principles of all the preceding codes, and the law as it then obtained in Rome. That compilation of laws consisted of a code in twelve books of imperial constitutions, a digest called also "Pandects," in fifty books, and the Institutes. Following this work came Novells, or new Constitutions of Justinian. This Code Justinian was

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many writers who, in my opinion, adhere too closely to technicality, and too little enter into the spirit and fact of these evolutions of jurisprudence. That source is the precepts, obligations, and sanctions of the moral law; that law which deals with the absolutely right and the absolutely wrong; that law which is written in the conscience of all men, and speaks from it with judicial authority; that law of which every man is at once subject and competent judge; for, say what we may of the disparities of intellect, natural gifts, and will, there is one respect in which all men are equal, and that is in the guidance

prepared with consummate skill by a commission, selected for their surpassing skill and ability, headed by Tribonian, the most authoritative expounder of the law in his time.

While the Roman empire endured, and wherever its power extended, its law was the law of the land in some form. Professor Amos, in his work on Roman Civil Law (page 393), says that the Roman civil law became the basis of jurisprudence in the Greek-speaking countries, both of Europe and Asia, and is still found underlying the Mohammedan law to an extent that is worthy of note. There was a great revival of legal studies throughout Europe in the eleventh and twelfth centuries. During the fifteenth and sixteenth centuries, the same spirit prevailed in Germany,

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of that inner and infallible monitor which teaches all men equally what is right and what is wrong. That is the great depository of international law which, from its unerring

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and resulted in the reception of the Corpus Juris as the basis of jurisprudence. The southeastern portion of France was known as "the country of the written law," and it was the civil law in a comparatively pure form. The Roman system became fundamental in Spain, and from France and Spain it emigrated to Lower Canada, to Louisiana, and also to New Mexico, Arizona, and California.

Upon fair investigation it will be found that the Roman law played a large and important part in the law of England, and consequently in the law of the United States. The early history of England proves that it could not be otherwise. England was under Roman rule from the landing of Julius Caesar, 54 B. C., until his legions retired about the year 450 A. D., a period of about five hundred years. During at least four centuries of that period, agriculture and commerce were developed. Cities and towns sprang up with great rapidity. The young Britons went abroad to colleges and universities, and particularly to the famous law school of Berytus in Phoenicia, where the Roman civil law was taught. Roman veterans colonized Britain, and married British women. In that rising and vast civilization there must have been questions of personal rights and of contracts, as well as many other questions arising out of social contact, to be solved. They

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tribunal as exigencies arise, prescribes the rights, duties, and liabilities of states. When that law speaks upon a certain case, and

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must have been solved in accordance with the principles of the only extensive code known to the people of that time,—the Roman civil law.

THE INFLUENCE OF THE CHURCH ON ENGLISH LAW.

The church was established in Britain at a very early day. The Roman Catholic Church of Britain was represented in all its orders at the council of Arles in the year 314. At the end of the fourth century the church was firmly and fully established in Britain, and was in constant communication with Rome. After the Romans abandoned Britain, the work of conversion began among the Anglo-Saxons, who had come to the island and made rapid progress. The churchmen were men of the highest order of intelligence and legal learning. They knew the Roman law to some extent, and its offspring, the canon law. Many of them were judges. If there was a legal document to be prepared, they alone were competent to do the work. See Pollock & Maitland, Hist. Eng. Law.

Professor Maitland, in his work called "Social England," says: "From the days of Ethelbert onwards, English law was under the influence of so much of Roman law as had worked itself into the traditions of the Catholic church." With these considerations, then it must be manifest to the student that to form a proper conception of the underlying principles of the law of nations he should familiarize himself with the Roman law, and with its growth and development.

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with a decisive voice, there is no custom or prescription, however hoary, no precedent, however entrenched, which can long stand against it. It works its way into custom, usage, and law in due course of time.[4]

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[4] "In 1753, the British government made an answer to a memorial of the Prussian government, which was termed by Montesquieu, "Response sans replique," and which has been generally recognized as one of the ablest expositions of international law ever embodied in a state paper. In this memorable document, 'the law of nations' is said 'to be founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage.'" Phillimore, I. § 20.

"In the present imperfect state of international law, which recognizes the obligatory force of no written code, and acknowledges no permanent judicial expositor of its principles, we must necessarily resort to precedents collected from history, the opinions of jurisconsults, and the decisions of tribunals, in order to ascertain what these principles are, and to determine what are the proper rules for their application. Some of these principles and rules have been settled for ages, and have the force of positive laws which no one will now venture to dispute or call in question; while others are admitted by particular states, and cannot be regarded as binding upon any one who has not adopted them.

"The sources of international law are, therefore, as various as the subjects to which its rules are

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§ 13. Coercive force of international law.

John Austin contended that international law (so-called) cannot be considered to be law, because it has no coercive force, no

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applied, and in deducing these rules we should distinguish between those which are applicable only to particular states, and those which are obligatory upon all.

"Sources of international law: The Divine law, history, the Roman civil law, decisions of prize courts, judgments of mixed tribunals, ordinances and commercial laws, text writers, treaties and compacts, and diplomatic papers." Halleck, Elements, § 17.

Bynkershoek derives the law of nations from reason and usage on the evidence of treaties and ordinances, the same principle frequently recurring.

"The various sources of international law: (1) Text writers of authority. (2) Treaties of peace, alliance, and commerce declaring, modifying or defining the pre-existing international law. (3) Ordinances of particular states prescribing rules for the conduct of their commissioned cruisers and prize tribunals. (4) The adjudications of international tribunals, such as boards of arbitration, and courts of prize. (5) Written opinions of official jurists given confidentially to their own governments. (6) The history of the wars, negotiations, and treaties of peace." Wheaton, Elements, § 12.

The most valuable collection of decisions of international tribunals is contained in Valin's trea-

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sanction.[5] Let us see. There must be a coercive force somewhere, because mankind obeys that law, nations obey it. In the first place, there is the force of opinion. In the next place, there is the force of pacific retaliation, of restrained intercourse, of international boycotting and outlawry, of unfriendly legislation. And then, finally, there is the supreme arbiter and coercive force of war. War, dread and dreadful as it is, is sometimes an indispensable agency of the assertion of the rights and even of the preservation of a nation. It is as true of nations as it is of individuals, that their existence often depends upon the rightful exercise of their physical forces to the last extremity.

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tise on the French prize code, and in the reports of cases decided in the English court of admiralty, and in the reports of the supreme court of the United States. See opinion of Lord Story, in United States v. La Jeune Eugenie, 2 Mason, 456.

To ascertain the unwritten law of nations, says Chief Justice Marshall, we resort to the great principles of reason and justice. We consider them as being in some degree fixed by a series of judicial decisions. Bentzon v. Boyle, 9 Cranch, 198.

[5] Austin, Jurisp. Lectures 5, 6. And see Reg. v. Keyn, 2 Exch. Div. 153 (per Lord Coleridge).

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The first duty and the all-embracing duty of states is to respect the sovereignty of each other, just as individuals are bound to respect the personal independence of each other, to inflict no wrong by way of physical aggression or otherwise upon each other. Grasp firmly the idea that states are persons, with rights and duties, and subject to liabilities, and then apply the analogous rights of persons as to each other to that larger and more complex person, and you will receive a conception, clear beyond a definition anybody can give you, of the rights and duties of states as to each other. It may be generally expressed to be their duty to observe the rules of international law just as men observe, in their intercourse, the rules of society. If anybody says, or shall argue theoretically (for he cannot argue practically), that there is no system of international law, because it is not enforceable by any coercive sanction, recur to what I said a few moments ago. Let us go into the region of society, outside the realm of enacted law, and consider a force which bears on us more persistently than any system of law,—daily custom, that coercion of usage and inter-

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course which society applies to its members. We offend against the social regulations, we do acts of impropriety punished by no enacted code, and yet how quickly and efficiently society converges upon us its punitory forces in one focus of consuming power and retribution. It is so with nations. Let a nation refuse to establish prize courts, let a nation refuse to obey the law of blockade, let a nation refuse to obey the law of neutrality in force against one nation in favor of two others who are at war, and that nation, like an individual, by the majestic process of opinion executed by the entire civilized world, will be thrown out of the pale of civilized comity, just as you and I would be expelled from the social pale if we offended against the unwritten law of society. It is vain to contend that there is no sanction to that great system of law which has ruled the civilized world since the time of Grotius, and ruled it with increasing power every year.

It is enforced, in the most conspicuous instance that I can now think of, in the admiralty prize courts of the various nations.[6]

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[6] In a case arising out of the collision of two

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There is not a maritime state upon the face of the globe that has not established its prize courts of admiralty. And for what purpose? To enforce certain rules and precepts of international law. Those rules and precepts are written in the codes of no states; they are written in no code whatever. They are the immemorial possessions of the human race, coming down from a remote time, formed by the accretion of ages, and ordained by the common consent of mankind. So that Lord Stowell, or Mr. Justice Story, or any of the great admiralty judges who have sat on that bench of judgment, have made and enforced their decisions from tribunals established by their own states for the purpose of making operative that immemorial and universal law which is the enactment of no state, yet which binds all nations. What code has enacted the law of prize? What

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foreign ships, which afterwards arrive in an American port, the admiralty courts of the United States may take jurisdiction. The Belgenland, 114 U. S. 355.

Great Britain, by an act of parliament in 1878, expressly extends admiralty jurisdiction over that portion of the sea as by international law is considered territorial waters.

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code has enacted the law of blockade? In what code originated the law of marine insurance, of general average, of the rights of shippers, of the rights of sailors, or the general law merchant? All these, by origin, are part of international law, properly speaking, and are enforced by the tribunals of the various nations. They are organized and instituted to enforce them. These courts are the product of universal international law, and are not its origin. Lord Stowell did not enforce, as to prizes, blockade, contraband, or the rights of neutrals, the code of Great Britain, nor did Mr. Justice Story enforce any code of the United States of America. They declared the universal, all-embracing mandates of international jurisprudence, for which each state has supplied a coercive agency, a deliberate and judicial sanction. While some of these subjects, such as marine insurance and the laws of shipping, have long since passed, by silence or judicial adoption, into the juridical systems of the several states, and have become parts of their municipal codes, it is none the less true that their origin is to be found in an international law which, by the very process of its

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enforcement as such, became by degrees the law also of the several states.[7]

It is contradictory to all the teachings of a universe governed by law to contend that nations are not subject to it, and that international law is merely an advisory homily, lacking all coercive sanction. Its supremacy is the very condition of all national existence. Two castaways on a desert island must establish legal relations with each other

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[7] In the case of The Scotia, 14 Wall. 170, after discussing the law of the sea as arising out of the Rhodian code, the ordinances of the Hanseatic league, and parts of the marine ordinances of Louis XIV., the court say: "They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such, and it is evident that, unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must, indeed, be proved as facts, but it is not so with the law of nations."

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as conditions of coexistence. Law is the very postulate of the most rudimentary social organization. Its first basis is the connubial and parental affections. It began its sway in the morning twilight of time, with the authority of paternal justice as its first manifestation. As the tribe evolved from the family, the jurisdiction of law expanded commensurately. The tribe became a nation, and law grasped the scepter, enrobed the priest, and ermined the judge. Nations came into being by migration and differentiation. They assumed the form of vast, concrete personalities, subject to duties, entitled to rights, and capable of crimes. They occupied a crowded world. They stood in unavoidable relation to each other,—a relation of duties, rights, and wrongs which implied a law which granted the rights, prescribed the duties, and denounced the wrongs. And thus international law was revealed to the nations from the Sinai of history. It rules the czar and the president alike. It applies as well to the most special as to the most general relations of all the states. There is not an inhabited spot on the earth's surface exempt from its jurisdiction. It is with

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those "who go down to the great deep in ships." It is a universal code, which governs all the civilized states of the world.

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CHAPTER II.

OF THE NATURE AND TERRITORIAL JURISDICTION OF STATES.

§ 14. State, definition of.
15. Territorial limits of state.
16. Exceptions.
17. Equality of states.

We have as the parties to international relations the states of the world. I apply this expression, here and elsewhere, to the civilized states, because, as to the uncivilized states, there are certain vague distinctions and limitations unnecessary to be considered at this time.[1] Those parties are states. They are not sovereigns, they are not classes, they are not territory, they are not "nations," in the large and general use of that word, but they are states.

§ 14. State, definition of.

Now, what is a state? A clear definition

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[1] Woolsey, Int. Law, p. 4; Phillimore, I. cc. XXIX, XXX; 1 Kent, Comm. p. 4; Lawrence, Int. Law, § 4.

"International law applies to the civilized states of the world." 1 Twiss, § 9.

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should be impressed indelibly upon our minds, because it applies to every discussion and issue in which international relations are involved. I should define a state to be a body governmental and politic, comprising all the human beings within certain defined territorial limits, organized for the purpose of governing, and which does supremely govern, within the limits of that territory.[2]

[2] "The marks of an independent state are that the community constituting it is permanently established for a political end, that it possesses a definite territory, and that it is independent of external control." 1 Hall, Int. Law (3d Ed.) p. 18.

"A state is a body politic, or society of men united together for mutual advantage and safety." 1 Halleck, Elements, p. 42.

"A nation is a people permanently occupying a definite territory, having a common government, peculiar to themselves, for the administration of justice and the preservation of internal order, and capable of maintaining relations with all other governments." Field, Int. Code (2d Ed.) p. 2.

States.

Sovereign states may be defined to be any nation or people organized into a body politic, and exercising the rights of self-government.

Dependent states.—The mere fact of dependence, however, does not prevent a state from being regarded in international law as a separate

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A state in international law is an artificial and yet a compositely human person. It has a personality; it has rights; it is subject to duties; it can do wrong and suffer penalties; and it must have relations to other states which may be defined in the same manner.

§ 15. Territorial limits of state.

Bear in mind that a state is a body gov-

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and distinct sovereignty, capable of enjoying the rights and incurring the obligations incident to that condition. Many European states which are still regarded as sovereign do not exercise the right of self-government entirely independent of other states, but have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, or by the stipulations of unequal treaties of alliance and protection. 1 Halleck, Elements, p. 60; Phillimore, I. § 77.

"For the purposes of international law, that state only can be regarded as sovereign which has retained its power to enter into all relations with foreign states, whatever limitations it may impose on itself in other respects. * * * It is to be observed, however, that, between states of qualified sovereignty, the law of nations has application, so far forth as it is not shut out by restrictions upon their power." Woolsey, Int. Law, p. 38, § 37.

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ernmental and politic which does supremely govern within certain defined territorial limits. I use this phrase "territorial limits," for the reason that it produces clearness of conception; and it is well, perhaps, to define a little further in regard to this expression. We are accustomed to regard the territorial limits of any state bounded by the ocean as the shore line.[3] But while it is true, as a general conception, that the sea is under no nation's sway, yet, by a usage long since passed into law, the territorial jurisdiction of every state bordering on the sea extends to a distance of one marine league from the shore. This limit of sovereign jurisdiction has been established to secure defense, to prevent smuggling, to prevent criminals hovering upon the coast, to prevent crime, and, generally, jurisdiction over the contiguous sea territory exists for the security of the adjacent state and its people.[4] Beyond that, the sea is like the air;

[3] National jurisdiction extends to gulfs and bays, if they are practically separated from the sea by the configuration of the coast. Hall, Int. Law, § 41; Direct U. S. Cable Co. v. Anglo-American Tel. Co., 2 App. Cas. 394.

[4] Manchester v. Massachusetts, 139 U. S. 240; Reg. v. Keyn, 2 Exch. Div. 63.

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it is no man's possession; it is no nation's territory; it rolls ungoverned by any human ordinance except as to the ships thereon. They are floating tracts of nationality.[5] The

[5] 1 Kent, Comm. 26; U. S. v. Rodgers, 150 U. S. 249.

RIGHT OF ASYLUM ON SHIPS OF WAR AND ON MERCHANT VESSELS IN FOREIGN PORTS.

In 1855, Attorney General Cushing held that a "prisoner of war on board a foreign ship of war, or of her prize, cannot be released by habeas corpus issuing from courts of the United States, or of a particular state." In 1856, he held that "ships of war enjoy the full rights of extraterritoriality in foreign ports and territorial waters." 1 Whart. Dig. 138. It therefore appears that the right of asylum could be granted on American ships of war. It has been frequently done in South American ports.

ON BOARD MERCHANT SHIPS.

The right of granting asylum to political refugees does not belong to merchant vessels in the ports of such refugees' country. Sotelo's Case (1840) 1 Calvo Droit International (4th Ed.) 569.

Opinion of Lord Aberdeen (1844), Report of Royal Commissioners on Fugitive Slaves, 154.

Case of Gomez, Bayard, Secretary of State, to Hall (March 12, 1884) U. S. Foreign Relations, 1885, page 82. Merchant vessels possess no right of asylum.

A departure from this rule was made in the

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weak point in the Bering Sea controversy was our attempt to controvert the principle that the sea is not subject to dominion. The Russian government had, during its posses-

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case of Barrundia in 1890. Barrundia was a political refugee from Guatemala, who took passage, at a Mexican port, on the Pacific mail steamship Acapulco (American) for. Salvador. The steamer, in its course, was to call at several ports of Guatemala, and the government of Guatemala proposed to arrest Barrundia at the first opportunity. The American minister, Mizner, and the American consul general, Hosmer, advised the captain of the Acapulco and the authorities of Guatemala that it was lawful to do so. In the attempt to arrest Barrundia on board of the ship, he was killed. Mr. Minzer was censured and recalled from his post. Commander Reiter of the United States ship of war, Ranger, who was present in the port at the time, was sent into disgrace for not interfering to prevent the arrest.

Mr. Blaine's position in this case does not seem to be supported by any authority on international law.

The right of asylum in Barbary states ought to be extended. See 1 Whart. Dig. 104.

In the opinion of Sir William Scott, the right of asylum as regards political refugees does not properly belong to ships of war.

Case of John Brown (see 1 Halleck, Int. Law, p. 185). In 1820, John Brown, a British subject, commanded a vessel engaged in revolt against the Spanish colonies. He was taken prisoner by

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sion of Alaska, tried to hinder the navigation of that sea by foreign ships within one hundred miles of the coast. The United States and Great Britain protested vigor-

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the Spaniards, but escaped from prison, and took refuge on board H. M. S. "Tyne," lying in the port of Lima. With respect to this right, Sir William Scott said: "An important question is proposed to me, viz., 'whether any British subject coming on board any of H. M.'s ships of war, in a foreign port, and from the judicature of the state within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the kingdom of Great Britain and Ireland?' Upon this question, proposed generally, I feel no hesitation in declaring that I know of no such right of protection belonging to the British flag, and that I think such a pretension unfounded in point of principle, is injurious to the rights of other countries, and is inconsistent with those of our own."

In 1849 Lord Palmerston held a directly opposite view. Report of Royal Commissioners on Fugitive Slaves, page 155.

For a full discussion of the question of exterritoriality of ships of war, see the separate reports of Lord Chancellor Jas. Cockburn and Mr. Rothery in the Report of the Royal Commissioners on Fugitive Slaves.

IMMUNITY OF SHIPS IN A FOREIGN PORT.

National ships of war, entering the port of a friendly power open to their reception, are to be

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ously, and in the correspondence during Mr. Harrison's administration we made the great mistake of contending that Bering sea was, or might be made, a "closed sea."

§ 16. Exceptions.

There have been a few enforced or unno-

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considered as exempted by the consent of that power from its jurisdiction. The Exchange v. McFaddon, 7 Cranch, 116.

"A ship of war of a foreign state cannot be proceeded against in a suit for salvage." The Constitution, 48 Law J., Prob. Div. & Adm. 13.

A public vessel of a foreign state, not a ship of war carrying the mails, and also carrying merchandise, is nevertheless exempt from the jurisdiction of the admiralty courts in England. The Parlement Belge (Court of Appeals, 1878) L. R. 5 Prob. Div. 197.

In January, 1879, the United States frigate Constitution, laden with machinery which was being taken back to New York from the Paris Exposition at the expense of the American government, went aground upon the English coast near Swanage. Assistance was rendered by a tug, and, a disagreement having taken place between its owners and the agents of the American government as to the amount of the remuneration to which the former was fairly entitled, application was made for a warrant to issue for the arrest of the Constitution and her cargo. The American government objected to the jurisdiction by the

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ticed exceptions to this rule of marine boundary. During the imprisonment of Napoleon, Great Britain closed the sea surrounding St. Helena to foreign vessels. Pearl fisheries on the coast of Ceylon are made exclusively

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court, and the objection was supported by counsel on behalf of the crown, and the application was refused on the ground that the vessel, "being a war frigate of the United States navy, and having on board a cargo for national purposes, was not amenable to the civil jurisdiction of this country." Times, January 29, 1879.

Merchant vessels, while in nonterritorial waters, are subject to the jurisdiction of the courts of their own state, and no other, except for acts of piracy. Hall, Int. Law, p. 171, § 60.

"Where a merchant vessel is found in a foreign port, it is generally understood that all matters of discipline and all things done on board which affect only the vessel or those belonging to her, or which do not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to whom the vessel belongs. But if crimes are committed on board of a character to disturb the tranquillity of the port, the courts of the country should take jurisdiction, and murder is held to be such a crime." Wildenhus' Case, 120 U. S. 1.

The French courts take the same position. Court of Cassation (1859) Ortolan: Diplomatic de la Mer. 455.

"As a general principle, the citizens or subjects

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British property outside the one-league limit. Hudson Bay was recognized as a closed sea under acts of parliament respecting the Hudson Bay Company in the treaty of 1818 between the United States and Great Britain. The fishing banks of Newfoundland, more than two hundred miles distant from any shore, were recognized, granted, and parti-

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of the same nation have no right to invoke a foreign tribunal to adjudicate between them as to matters of tort or contract solely affecting themselves. It rests in the discretion of the court whose authority is invoked to determine whether it will take cognizance of such matters or not." Betts, J., in The Reliance (U. S. Cir. Ct. S. D. N. Y., 1848) 1 Abbott, Adm. Rep. 317.

JURISDICTION OVER VESSELS ON THE HIGH SEAS WITH RESPECT TO COLLISIONS.

A collision on the high seas between vessels of different nationalities is prima facie a proper subject of inquiry in any court of admiralty which first obtains jurisdiction. The courts of the United States in admiralty may, in their discretion, take jurisdiction over a collision on the high seas between two foreign vessels. The Belgenland, 114 U. S. 355. See Mostyn v. Fabrigas, Cowp. 161, and the notes thereon in Smith's Leading Cases, 340; Mason v. The Blaireau, 2 Cranch, 240.

The flag a ship flies is not conclusive on her as

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tioned as national property by the treaty of 1783. Great Britain for centuries asserted territorial sovereignty over the seas which surround the British Islands. But these are merely exceptions, which impose no rule, and derogate nothing from the general law.[6]

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to her nationality. See case of The Palme, Boyd's Wheaton (3d Ed.) p. 458.

In the case of U. S. v. Diekelman, 92 U. S. 520, Waite, C. J., says: "As to the general law of nations, the merchant vessels of our country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty."

[6] Whewell (Grotius Translation), pp. 78-82; Halleck, Elements, p. 76, § 13.

"National territory consists of water as well as land. The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same state. The general usage of nations superadds to this extent of maritime territory an exclusive territorial jurisdiction over the sea for the distance of one marine league, or the range of a cannon shot along the shore or coast of a state." Wheaton, Elements, pt. 2, c. 4, § 6; Phillimore, I. cc. CXCVI-VII; Field, Int. Code, p. 15, § 28; Mr. Jefferson, Secretary of State, to Mr. Genet (Nov. 8, 1793) 1 Am. St. Pa-

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§ 17. Equality of states.

It is also a cardinal and axiomatic principle of international law that all states

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pers (Foreign Relations) 183; 1 Wait, Am. St. Papers, 195.

"The greatest distance to which any respectable assent among nations has been given has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever is the utmost range of a cannon ball, usually stated at one sea league. The character of our coast, remarkable in considerable parts of it for admitting no vessels of siege to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever." MSS. Notes, Foreign Legation.

The limit of one sea league from shore is provisionally adopted as that of the territorial sea of the United States. Mr. Jefferson, Secretary of State, to the Minister of Great Britain, Nov. 8, 1793.

ACQUISITION OF TERRITORY.

A state may acquire territory by discovery and occupation, and by treaty, from the enemy at the conclusion of a war, also by annexation in whatever manner its form of government will permit. The bare fact of discovery is insufficient to establish a proprietary right. The act of discovery must be followed in a reasonable time by occupation. What constitutes a reasonable time must depend upon the circumstances of the case. The

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are equal,—absolutely equal, unquestionably equal,—and are not responsible to other states for what they do within the sphere of

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taking possession of an unoccupied island by an uncommissioned navigator does not constitute possession by the state of which he is a member, unless the state subsequently ratifies his act, and proceeds to occupy or settle the place. If a company of colonists settle upon an unoccupied island, and the state of which they are members ratifies their act, it constitutes possession and occupancy by the state.

As to the conditions of effective occupation, see Vattel, liv. 1, c. 18, §§ 207, 208. "A title to territory by reason of contiguity (ratione vicinitatis) in the case of arcifinious states, so called, according to Varro, because of their territory, admits of boundaries fit to keep the enemy out (fines arcendis hostibus idoneos),—in other words, of states whose territory admits of practicable limits, such as rivers and mountains,—is a reciprocal title. In such cases, each state has an equality of right, so that the watershed line of greatest elevation in the case of mountains, and the thalweg or midchannel, in the case of rivers, which corresponds to a line drawn along the lowest part of the bed of the river or the line of deepest depression, forms the judicial boundary between two said states. The practice of nations has conformed to this principle in regard to territory which is not arcifinious, in cases where there is intermediate vacant land contiguous to the settlements of two nations. Each nation has an

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their government. This applies as well to Hawaii as to Russia; to the smallest state as well as to the greatest. The little republic

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equal title to extend its settlements over the intermediate vacant land, and thus it happens that the middle distance satisfies the judicial, whilst it is the nearest approximation to a natural boundary, and the most convenient to determine."

As dominion is acquired by the combination of the two elements of fact and intention, so, by the dissolution of these elements, or by the contrary fact and intention, it may be lost or extinguished. De Martens Precis, § 37.

"A nation is under an obligation towards other nations analogous to that under which an individual stands towards other individuals with regard to the discovery of a thing if it seeks to found an exclusive title to its possession upon the right of discovery. It must manifest in some way or other, to other nations, its intention to appropriate the territory to its own purpose. The comity of nations then sanctions a presumption that the execution of the intention will follow within a reasonable time the announcement of it. The comity of nations requires that the discovery should be notified to other nations; otherwise, if actual possession has not ensued, the obvious inference would be that the discovery was a transient act, and that the territory was never taken possession of animo et facto. * * * Lord Stowell has accordingly noticed, as an indisputable fact, that in newly-discovered countries, when a title is meant to be established for the first time, some

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of San Marino, situate entirely within the kingdom of Italy, with 32 square miles and 8,000 people, is one of the oldest governments in Europe by virtue of that very principle. That republic, in 1872, concluded a treaty of protective friendship with the kingdom of Italy, by which it is surrounded.[7]

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act of possession is usually done and proclaimed as a notification of the fact. The Fame, 5 Rob. 115." 1 Twiss, § 3.

Title by settlement may be perfected by enjoyment during a reasonable lapse of time, without the fact of discovery.

Wolfe, Institutions du Droit, de la Nature et des Gens, § 23, says: "Title by settlement, as distinguished from title by discovery, when set up as a perfect title, resolves itself into title by usucaption or prescription."

A question of greater difficulty arose upon the discovery of the western continent as to the extent of territory a state was entitled on the occupation of a portion of the seacoast. 1 Twiss, § 24.

7 "Nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, and manners." 1 Kent, Comm. p. 21; Halleck, Elements, c. 4, § 1; Field (2d Ed.) p. 10. "All nations are equal in rights." Kluber, Droit des Gens, § 89.

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CHAPTER III.

OF THE INTERNATIONAL OBLIGATIONS OF STATES WITH RESPECT TO THEIR CITIZENS AND DENIZENS.

§ 18. Allegiance.
19. Expatriation.
20. Extradition.
21. Denizens.
22. Liability for unlawful injury to denizens.

§ 18. Allegiance.

When you come to look into the human constituents of states, you find that they are subjects or citizens who are all bound to the state by an obligation which is called "allegiance." It is the tie which binds man, woman, and child to the government, and by reason of which, in consideration of equivalents which the state is bound to render, whether by social contract or divine mándate, that government, within certain limits, has been vested with authority and power over them. The doctrine of allegiance attaches itself to the doctrine of states naturally. In the discussion of allegiance, a great many curious questions come up for consid-

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eration, some of which are not yet entirely settled.[1]

§ 19. Expatriation.

Allegiance being conceded, and it must exist or all government disintegrates, the question arises: Is this allegiance indissoluble, or is it severable at the will of either party? Can the state throw off the citizen, or can the citizen renounce the state, expatriate himself, and transfer his allegiance to another

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NATURAL ALLEGIANCE.

[1] Section 1, art. 14, of the constitution of the United States, provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Such persons owe a natural allegiance to the United States. For a construction of the above section of the constitution, see the case of United States v. Wong Kim Ark, 169 U. S. 649.

The phrase, "subject to the jurisdiction thereof," must be carefully considered in determining who are citizens. For instance, a child born in the United States to a foreign diplomatic representative is not subject to the jurisdiction of the United States, and hence not a citizen of the United States.

If a portion of this country were, in time of war, invested and held by an alien enemy, a child born to a subject of such alien enemy within the

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state? It is probably a correct abstract proposition that the subject cannot renounce his allegiance except by the consent of his

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territory held by such enemy during the period of temporary occupation would not be a citizen of the United States.

TEMPORARY ALLEGIANCE.

All strangers are under the protection of the sovereign while they are within his territory, and owe a temporary allegiance in return for that protection. Vattel, liv. 1, p. 230, 101 et seq.; Bynk. F. L. bk. 2; Ibid. iii. p. 150.

The exception above noted as to foreign diplomatic representatives applies in this case.

Villasseque's Case, Court de Cassation (1818) Ortolan: Diplomatic de la Mer. (2d Ed.) bk. 1, p. 324.

A crime committed by a French citizen in Spanish territory, occupied and administered by the French army, is held to be committed in a foreign country.

Children born abroad of citizens of the United States, and continuing to reside abroad, are not citizens of the United States unless they elect to become such on coming of age. 2 Whart. Dig. p. 210.

STATUS OF AMERICAN INDIANS.

Elk v. Wilkins, 112 U. S. 94; Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 515; Crow Dog's Case, 109 U. S. 556.

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sovereign. And yet the civilized states of the world have practically disregarded this principle, for I believe that all of them have passed laws for the naturalization of aliens without requiring the consent of the sovereign of the applicant as one of the conditions of abjuration of allegiance to him.

One would think that an alien thus naturalized would be sustained in all the rights of citizenship by the naturalizing state to the same extent as if he were a native citizen. Logically he ought to be. But a curious conflict of laws has frequently arisen,—a conflict between the old feudal principle of indissoluble allegiance and the right of the subject to abjure that allegiance which is implied in the naturalization laws which have been enacted by all civilized states.

It has arisen in this way: A fully naturalized citizen of the United States returns to his native European state, which thereupon makes accusation against him which depends for its validity upon the principle of indissoluble allegiance. It has been uniformly held by the European courts of justice that this principle is legally correct, and thus the naturalized alien has been prevented

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from obtaining any consideration of his claim to immunities which a native-born citizen could undoubtedly assert, or at least have considered.

The question arose in Reg. v. Warden, before Chief Baron Pigot, in a trial at Dublin in 1866. The chief baron instructed the jury that, "according to the law of this country, he who is born under the allegiance of the British crown cannot by an act of his own, or by an act of any foreign country or government, be absolved from that allegiance."

The state department of the United States has held variously upon these conflicting propositions. Mr. Webster admitted the legality of the principle of indissoluble allegiance in cases where the naturalized alien had returned to his native country, and its application to him while there, while Mr. Cass most vigorously asserted the validity of the principle of severable allegiance, no matter where the naturalized citizen might be. I cannot find that the supreme court has ever passed definitely upon this question.

The latent danger of this conflict of principles was so apparent that by treaties con-

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cluded since 1866 between the United States and the leading powers of Europe, and by statutes enacted by many states, the right of expatriation and of transfer of allegiance has been recognized.[2]

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[2] "Subject to the laws defining civil incapacities, depending upon age, mental condition, personal domestic relations, and public service, every member of a nation, however his national character may have been acquired, has the right of expatriation, which cannot be impaired or denied." Field, Int. Code (2d Ed.) § 266.

It will be remembered that out of this question arose the war of 1812 between Great Britain and the United States, and though the treaty of peace concluding that war was silent upon the question, the right of expatriation was never again denied by Great Britain. The congress of the United States, by an act passed July 27, 1868, declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty, and the pursuit of happiness." It further provides "that any declaration, instruction, opinion, order, or decision of any officer of this government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this government." See 2 Whart. Dig. § 171.

One method of expatriation from American citizenship is illustrated by the following case: A man named Heinrich was born in the city of New

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§ 20. Extradition.

As I am trying to deal with subjects of practical interest, and am touching lightly upon large and speculative questions, let me call your attention to a question arising every day in the intercourse of nations. Men who have committed crimes in one country take refuge in another. A subject of Germany or France or Russia comes to the United States. His hand is bloody with murder, perhaps. What are the rights of Germany, Russia, or France in the case supposed, and

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York, in 1850, of Austrian parents, who were temporarily resident there. They were never naturalized in the United States, and, in accordance with the naturalization treaty with Austria, were never citizens of the United States. In 1852, Heinrich returned with his parents to Austria, where he remained for the next twenty years, performing none of the duties of an American citizen, but, on the contrary, enjoying some of the rights and privileges of Austrian citizenship. In 1872 he was notified that he would be held to the performance of his military duties in Austria. To this he demurred, claiming the interposition of the American minister in his behalf, upon the ground that he was an American citizen. According to the several municipal laws of the interested states, he was a native-born citizen of the United States because born in its territory; of Austria

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what are the rights and duties of the United States? There are two opinions on this subject. One is that, irrespective of any treaty compact, and as a duty of universal international obligation imposed by the comity of nations, it would be obligatory upon the United States, without any such compact, to deliver up the criminal.[3] There is another and more restricted opinion, which holds that there is no duty whatever of that character,

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because of his Austrian parentage. After some correspondence, the United States government declined to interfere in his behalf, on the ground that he had expatriated himself (1) by long residence in Austria, by which he created the presumption that he intended to reside there permanently; (2) by his having signified his willingness to become an Austrian subject, by obtaining passports and traveling under them in that character.

A formal naturalization convention was entered into between the United States and Great Britain in 1870. We have also naturalization conventions with the following countries: Austria, Baden, Bavaria, Belgium, Denmark, Ecuador, Hesse, Mexico, North German Union, Sweden and Norway, and Wurttemberg.

[3] This is the opinion of Grotius. De Jur. Bel. ac Pac. lib. 2, c. 11, §§ 3-5; Vattel, lib. 2, c. 6, §§ 76, 77; 2 Rutherford, Inst. Int. Law, c. 9, p. 12.

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unless it has been stipulated by an antecedent treaty covenant.[4]

I have never been able to see, as a matter of juristic speculation, why the first proposition is not correct, but it is due to the present state of the authorities and law upon this subject to state, as a general proposition, that no state, and especially not the United States, is bound to deliver up such a fugitive from justice from another state, in the absence of treaty binding it to do so. I can go further, and say that in the United States it would be unlawful for the executive department to attempt to do so. It would have no law to warrant it. Our constitution provides that a treaty shall be the supreme law of the land, and if there is no treaty authorizing the extradition and delivery of a criminal, or no statute empowering such action, it is asked with great pertinency and force, Where does the executive get the authority to lay its hand on any person, every man be-

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[4] Puffendorf, Elements, lib. 8, c. 3, §§ 23, 24; Martens, Droit des Gens, lib. 3, c. 3, § 101; Kluber, Droit des Gens, pt. 2, tit. 1, c. 2, § 66; Mittermeyer, das Deutsche Strafverfahren, Thiel 1, § 59, pp. 314, 315.

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ing entitled to a judicial hearing under due process of law in every case which affects his liberty or property? The same limitation might not apply to other countries which have not those constitutional guaranties. Hence, as a proposition of international law, it can be stated that the United States, in the absence of treaty obligation, is not only not bound to, but has no authority to, extradite any criminal fleeing to its shores.[5]

There have been some infractions of this

[5] This question is discussed at length in the case of Holmes v. Jennison, 14 Pet. 540. Though the supreme court did not take jurisdiction of the cause in the above case, the members of the court, including the chief justice, delivered individual opinions respecting the question.

In 1793 Mr. Jefferson answered an application of Mr. Genet, the French minister, in the following terms: "The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender coming within their pale is received by them as an innocent man, and they have authorized no one to seize or deliver him."

Mr. Monroe, as secretary of state under President Madison, in his instructions to our commissioners at Ghent, said: "Offenders, even conspirators, cannot be pursued by one power into the territory of another, nor are they delivered

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rule of restricted obligation in our own country, one of which I will lodge in your memories for the purpose of emphasizing the general principle. During our Civil War, a Cuban, by the name of Arguelles, who was a governor or commandante of some prov-

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up by the latter, except in compliance with treaties or by favor."

There is no rule of international law requiring states to deliver up fugitives from justice from other states. In the United States, extradition is exclusively a federal question. A person extradited can only be tried for an offense stipulated in the treaty. 2 Whart. Dig. 270; United States v. Rauscher, 119 U. S. 407.

In countries whose jurisprudence is founded on the civil law, crimes committed abroad may be punished at home. Such states, therefore, usually decline to surrender their own subjects. But where the common law prevails, crimes are regarded as local, and punishable only by the laws of the place where they are committed. In the latter case, the surrender of subjects for crimes committed abroad is necessary if the offenders are to be punished at all.

Consult extradition treaties between the United States and other states. Both England and the United States are willing to surrender their own subjects. Burley's Case, Parl. Papers 1876; North America (No. 3) p. 12, per Cockburn, C. J.; In re Windsor, 6 Best & S. 527; Ex parte Von Aernam, 3 Blatchf. 160.

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ince in Cuba, a man of great authority in his jurisdiction, fled to the United States under the following circumstances: The African slave trade had become unlawful in Cuba, although slavery was still lawful in that island, and cargoes of slaves were still being illegally transported there from Africa. Such a cargo was landed within his jurisdiction. The negroes were seized. He then reported to the authorities over him that they had all died of disease, whereas in fact they had not died, but he himself had taken them and sold them into slavery. He fled with the proceeds to the United States. It was a heinous and ghastly crime. It is something which afflicts the hearts of men in hearing it told even. We had no extradition treaty with Spain which covered the case, and yet Mr. Seward—those were times of martial law, and of lax obedience to civil law—immediately had Arguelles seized in New York and sent back to Cuba, where I trust he met his deserts. Spain reciprocated not long after. You will remember that Tweed, when he fled from New York, landed in Spain. The Spanish government seized him, and he was brought back to the United

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States for trial and punishment. These cases are exceptions to the general law on this subject.[6]

§ 21. Denizens.

In the modern intercourse of nations, there are sojourners in every community, denizens in our midst, citizens or subjects of foreign countries, who have not renounced, and perhaps do not intend to renounce, their allegiance to the state from which they came. The question often arises in a practical and most forcible shape, What are the obligations of the United States to these people and to their governments under these circumstances? While such denizens do not vote, and are not subject to military service, they pay taxes, they share in the fiscal burdens of the community, but not in the exercise of its sovereignty. They are here,—Scandinavians, Irish, English, Poles, Italians, Ger-

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[6] In the treaties of extradition between the United States and the following countries, it is provided that citizens of the country on which the demand is made need not be given up: Austria, Baden, Bavaria, Belgium, Bremen, Hayti, Japan, Mecklenburg, Ottoman Porte, Spain, Sweden and Norway, and San Salvador.

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mans, French, or whoever they may be, subjects or citizens of the countries from which they came. They have the same rights before the courts, the same rights to the enjoyment of property, as a general rule, except as to land, with a citizen of the United States. They are not distinguishable from citizens in point of enjoyment of any personal right which I can think of at this time, excepting the ownership of land and the franchise of citizenship.

§ 22. Liability for unlawful injury to denizens.

But questions have occasionally arisen, and will recur in our history so long as we are a polyglot people,—a nation of many nations, with a Babel of many tongues, yet all lapsing audibly into English speech,—as to the responsibility of this government to foreign governments for inflictions of violence upon the persons or property of these resident aliens. Under the fury of race prejudice, or under the impulse of passion having no connection with the race prejudice, such as that growing out of labor troubles for instance, the subjects or citizens of foreign countries denizened in our midst are in-

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jured in their person or property by mob violence. Sometimes their lives are taken, or their property destroyed. What is the obligation of the United States in cases of that kind? Before I define it, I will cite the most prominent incidents that have occurred. About fifty years ago there was great excitement throughout the south on account of the filibustering from this country on the shores of Cuba. Bloody executions were inflicted in that island, some of the sufferers being citizens of the United States. The feeling became so intense that a mob in New Orleans sacked the Spanish consulate, and tore down the national flag and shield. Again, in 1884, at Rock Springs, in the territory of Wyoming, a colony of Chinese, peaceful men, perfectly satisfied with their wages, and laboring in their daily toil with the proverbial industry of that people, were asked by a turbulent mob, composed largely of aliens, to join in a strike for higher wages. John Chinaman did not see it in that way, and refused to join. The result was that the mob, in its rage, slaughtered one hundred and twenty-four of them, burned their houses, and destroyed their property. During President

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Harrison's administration, again in New Orleans, great resentment arose in regard to the Mafia association alleged to exist among the Italians resident in that city, not citizens of the United States. The result was that a mob, rising suddenly in the excess and abuse of public indignation, took from the prisons of that city some alleged Italian murderers and publicly executed them.

In each of these cases, Spain, China, and Italy made the most earnest reclamations against the United States, insisting, to the extent of straining diplomatic relations very severely, that there was an obligation on the part of the United States to these governments representing their subjects thus denizened in this country, which had been violated to an extent which bound this government to pay the damages caused by the injuries which had been inflicted. Secretaries Webster, Bayard, and Blaine respectfully answered in substance as follows: The United States is under no obligation for the safety and security of any foreign subject resident within its territory that it is not under to its own citizens in any case of riot and lynching committed under similar circumstances;

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that the outbreaks were sudden, without any warning to the United States, and were not permitted by its negligence. If it were a wrong just as likely to have been perpetrated on these people if they had been naturalized citizens, this government recognized no responsibility. These propositions are correct.[7] Why should this government be responsible? Why should aliens, it may be unanswerably inquired, have a greater privilege or right of recompense against this government than native-born or naturalized citizens would have under the same circumstances? They come here knowing our social conditions, and bound to know the limitations of national liability, and it cannot be admitted that a Chinese, an Italian, or a Spaniard residing here by the comity of nations, or on the faith of treaties even, can have any greater claim for indemnity against this government than any native-born citizen would have under like circumstances. The result was total denial of the claim in each instance. But another result—highly creditable to the gener-

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[7] For an extended discussion of this principle, see Reports of American Bar Association, vol. XX, pp. 396-421.

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osity of the United States, and to be mentioned with the greatest satisfaction—was that in each case this government, while denying any liability whatever, compensated the sufferers and the families of the sufferers liberally for their losses and inflictions. I believe we paid to China, for the benefit of the injured and the relatives of those killed in the Rock Springs massacre, some $400,000, but decidedly disclaimed responsibility, and I think on undeniable legal grounds.

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CHAPTER IV.

OF THE DIPLOMATIC REPRESENTATIVES OF STATES.

§ 23. Ambassadors.
24. Ministers.
25. Privileges and immunities.
26. Consuls.

Of course, considering states as personalities, we must observe and remember that they are bodies politic and corporate in a certain sense, and that therefore they must act through agents. The state has no voice by which it can speak for itself. For that purpose it must accredit somebody; and, accordingly, in the development of international intercourse, a hierarchy of diplomatic agents has been created, variously named, and with varied powers, authority, and consideration, through which states speak to each other. These representatives reside in the courts to which they are accredited. The classification of their rank and powers is somewhat complex, and need not be gone into here.

§ 23. Ambassadors.

The highest grade of these representatives

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is an ambassador. He is a person sent from one government to another, to represent it in its international relations. He is not merely a general representative,—he represents the person of his sovereign. The British ambassador to the United States represents the person of the ruling sovereign of Great Britain. He is entitled to and receives high honors for that reason. The distinction between ambassadors and ministers is not very material nowadays, being mainly in name. An ambassador, however, has a right of precedence in audiences with the officials of the foreign government to which he is accredited.

The United States never sent ambassadors until a few years ago. Our highest diplomatic representative up to that time was a minister. It was found that an ambassador representing the person of a sovereign received precedence over our ministers, who represented no personality, and that, for instance, our minister to England had to wait for an audience until the ambassador of the king of Siam, or of some other little kingdom, had been received. This shows the power of precedence.

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§ 24. Ministers.

The next grade is that of ministers,—envoys extraordinary and ministers plenipotentiary is the full title,—but those big words do not express much of anything. A minister is sent to represent the government, but not the personality of the sovereign. His authority is as great, ordinarily, in modern times, as that of an ambassador, but he is not entitled to the same precedence.

§ 25. Privileges and immunities.

Ambassadors and ministers have certain extraordinary privileges and immunities. They are exempt from arrest. They cannot be subpœnaed as witnesses. If an ambassador or minister should commit a crime in the city of Washington, such as murder, forgery, robbery, the hand of the United States cannot be laid upon him to arrest or try him. The process of the United States courts in any action, civil or criminal, cannot be served upon him. The higher principle of the necessity of perfectly unrestrained freedom of action on his part exempts him from the jurisdiction of our laws. He is not to be taxed; duties cannot be laid on his goods. And these exemp-

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tions extend to his entire household,—to his family and to his servants. He can be sent back to his home, there to be tried, and the only thing to be done in a case of crime committed by him would be to send him home for trial. Most of the continental states of Europe have the power, under their judicial systems, to try their subjects for offenses committed in other countries. This power does not exist in the United States under the provisions of its constitution. A minister of this government, therefore, expelled by the power to which he was accredited by reason of a crime committed by him within that foreign jurisdiction, would wholly escape punishment by any judicial proceedings.[1]

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[1] This immunity, in a limited degree, existed from a very early age.

"The personal property of an ambassador cannot be seized as security, nor taken in execution by judicial process, nor by the prerogative of the crown, for any debts by him contracted." Grotius, vol. 2, c. 18, § 9.

"The judges of the provincial court of Holland, in the seventeenth century, were often wrong with respect to this privilege of ambassadors, and the states general was often obliged to interfere on behalf of the ambassador." Bynk. F. L. XIII.

Ambassadors, in early times were sent on spe-

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§ 26. Consuls.

There is a prevalent misapprehension about the office of consul. A great many

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cial missions. Their residence at foreign courts is a practice of modern growth.

"The establishment of permanent legations is generally dated from the peace of Westphalia, in 1648." Halleck, Elements, c. 9, § 1.

In Barbuit's Case, found in chancery cases in equity under Lord Talbot (page 281) in the year 1725, the lord chancellor, in discussing a public minister's immunity from local jurisdiction, said: "If the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for the sake of the business he is to do, it is impossible that he can renounce such privilege and protection, for, by his being thrown into prison, the business must inevitably suffer."

An ambassador cannot be punished, but may be sent out of the country. Ward's Law of Nations, bk. 2, p. 522.

Neither an ambassador nor any of his suite can be prosecuted for any debt or contract in the courts of the country in which they reside. 1 Bl. Comm. c. 7.

"A public minister who engages in trade in the country to which he is accredited does not thereby forfeit the privileges and immunities accorded to diplomatic agents. But when he voluntarily appears in compliance with a writ, and submits himself to the jurisdiction, the court will not interfere for his relief." Taylor v. Best, 14 C. B. 487 (1854).

"A foreign minister cannot be compelled to ap-

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people suppose that a consul is a diplomatic officer. He is no such thing. A consul has

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pear before a court as a witness." Sen. Ex. Doc. No. 21 (34th Cong., 3d Sess.); The Guiteau Trial (1881) 1 Whart. Dig. 669; 1 De Martens, pp. 84, 86.

MANNER OF SENDING AND RECEIVING AMBASSADORS.

In order that a minister be received in that character, he is provided by the sovereign, or the chief executor of his own state, with two important papers, called his "Letters of Credence" and "Full Power." The letter of credence is addressed to the sovereign to whom he is accredited. It contains his name and title, confers upon him the diplomatic character, and serves to identify him as a public minister, but does not authorize him to enter upon any particular negotiation. The full power authorizes him to act as the general diplomatic representative of his government at the court to which he is accredited. It describes the limit of his authority to negotiate, if such there be, and upon it the validity of his acts depends. Ambassadors who represent states at congresses and conferences, or as members of international courts, or boards of arbitration, are not usually provided with letters of credence. They bear full powers, under the authority of which they act, and copies of them are exchanged among the different members of the board of conference.

An ambassador or minister accredited to a

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no diplomatic character whatever. He is merely a business agent of the government

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sovereign, upon arriving at his station, forwards a copy of his letters of credence to the minister of foreign affairs, and requests a conference with the sovereign. At this audience, which may be either public or private, his letter of credence is presented, and complimentary speeches are usually exchanged. He may then enter upon the performance of his duties.

THE FUNCTIONS OF AMBASSADORS; HOW SUSPENDED AND TERMINATED.

They may be suspended and may or may not be terminated: (1) As a result of some difference or misunderstanding between the powers, not resulting in war. (2) Upon the occurrence of important political events, which render the continuance of his mission improbable; as a sudden and violent change in the constitution or form of government in either state. Such a suspension continues until removed by proper authority, in the state in which it originated.

A mission may be terminated: (1) "By the death or by the voluntary or constrained abdication of one or both sovereigns. This, however, only in case the ambassador represents the sovereign in his personal capacity. (2) By the withdrawal or cancellation of his letters of credence or full power. (3) By his recall at the outbreak of war, or upon the completion of the duty which he was appointed to perform, the expiration of his term of office, or upon his promotion or removal to another sphere of duty.

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from which he is sent at the port or place of another government to look after the com-

(4) By his removal, which may be voluntary, or forced by the government to which he is sent. (5) By death." Heffter, p. 414.

EXPULSION.

Several instances are to be found in history of ambassadors being seized and sent out of the country.

In 1584, De Mendoza, the Spanish ambassador in England, was ordered to quit the realm for conspiring to introduce foreign troops, and dethrone Queen Elizabeth. 11 Froude, Hist. Eng. p. 623.

In 1654, De Bass, the French minister, was ordered to depart the country in twenty-four hours, on a charge of conspiracy against the life of Cromwell. Phillimore, II. § 164.

In 1717, Gylienborg, the Swedish ambassador, contrived a plot to dethrone George I. He was arrested, his cabinet broken open and searched, and his papers seized. Sweden arrested the British minister at Stockholm by way of reprisal. The regent of France interposed his good offices, and the two ambassadors were shortly after exchanged. 1 Mahon, Hist. Eng. p. 388.

In 1804, Yrujo, minister of Spain to the United States, caused annoyance to the president and ministers by intemperate conduct in diplomatic intercourse, by endeavoring, and claiming the right to endeavor, for a pecuniary recompense, to induce a newspaper in Philadelphia to advance his views. and insert articles from him impeach-

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mercial interests of the citizens of his own country. A consul has no exemption what-

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ing the conduct of the president. His recall was demanded by Mr. Madison, secretary of state, but, at the request of his government, he was permitted to depart on the footing of a minister going home on leave. See 1 Whart. Dig. p. 605.

In 1848, Sir H. Bulwer, the British ambassador in Spain, had his passports returned, and was requested to leave Spanish territory by the government. This proceeding caused diplomatic relations to be suspended between the two countries for two years, and the dispute was finally settled by the mediation of the king of the Belgians. 1 Calvo, Droit International, § 581.

In the autumn of 1888, Lord Sackville, the British minister at Washington, made himself obnoxious by certain correspondence and newspaper interviews. The attention of the British government was called to the fact, but it paid no heed. His passports were given the minister, and he departed the country. Parliamentary Papers, United States, No. 3, 1888; Times, November 7, 1888.

RIGHT OF ASYLUM IN LEGATION.

Right of asylum in the British legation denied by the government of Spain. Duke of Ripperda's Case (1726). Martens: Causes Celebres, vol. 1, 178. See case of United States v. Jeffers, 4 Cranch, C. C. 704. See letter to Mr. Preston, December 11, 1875, United States Foreign Relations, 1875, p. 343.

The printed personal instructions of the gov-

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ever from the jurisdiction of the courts of the government to which he is sent. He can be prosecuted civilly; he can be prosecuted criminally; he can be a citizen of the state in which he resides as consul.[2]

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ernment of the United States to its diplomatic agents, of date of 1885, contain the following clause: "In some countries, where frequent insurrections occur, and consequently instability of government exists, the practice of exterritorial asylum has become so firmly established that it is often invoked by unsuccessful insurgents, and is practically recognized by the local government to the extent even of respecting the premises of a consulate, in which such fugitives may take refuge. This government does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its agents to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct its representatives that it will not countenance them in any attempt to knowingly harbor offenders against the laws from the pursuit of the legitimate agents of justice."

[2] It is different with consuls in the Levant and China. In these countries, they obtain the general character of diplomatic representatives, and are entitled to the immunities and privileges as such. This is now generally provided for by

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treaty. See De Martens, Le Guide Diplomatique, vol. 1, 311, note.

The members of the United States consular establishment are arranged in three principal classes,—consul general, consul, and commercial agent. The first two are appointed by the president with the consent of the senate. With respect to their duties, see the Revised Statutes of the United States.

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CHAPTER V.

OF THE AMICABLE ADJUSTMENT OF INTERNATIONAL DISPUTES.

§ 27. Treaties.
28. Mediation.
29. Arbitration.
30. Retortion.
31. Reprisal.

In the progress of international intercourse, it is to be expected, and indeed it must inevitably happen, that disputes arise between nations. They disagree in their conceptions of each others' rights and duties. It therefore becomes proper and necessary now to consider the means by which international disputes are settled and terminated.

§ 27. Treaties.

In the first place, such disputes can be composed by negotiations followed by a treaty, whereby both parties settle their controversies on the basis of compact, and make a law for observance by each. That process is so familiar that it is not necessary to do more than to indicate it as the most

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usual, and generally the most efficacious, way of adjusting international differences.[1]

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[1] Treaties are compacts or agreements entered into by sovereign states. A treaty is not alone a contract between two nations. It is also law as to them under the general principles of international law, binding the subjects or citizens of each of the contracting parties. The constitution of the United States (article 2, § 2) provides that the president shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur. Article 6 of the constitution provides: "All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The question is often raised whether a state of the Union may pass a law violating treaty obligations of the federal government. The question was raised in the case of Ware v. Hylton, 3 Dall. 199. The court held: "A treaty cannot be the 'supreme law of the land,'—that is, of all the United States,—if any act of a state legislature can stand in its way. If the constitution of the state (which is the fundamental law of a state, and paramount to its legislature) must give way to a treaty, and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate?

"If a law of a state contrary to a treaty is not

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Sometimes a treaty cannot be negotiated; the views of the parties are irreconcilable; they do not understand the facts alike, or differ as to the law. Perhaps national pride and excited feeling restrain the nations from doing the proper and just thing.

§ 28. Mediation.

One of the most feasible methods of ad-

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void, but voidable only by a repeal or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control and defeat the will of the whole."

MANNER OF NEGOTIATING TREATIES.

In former times, treaties were frequently negotiated by sovereigns in person. The Holy Alliance of 1815 was signed by the emperors of Austria and Russia and the king of Prussia. They are now negotiated and entered into by ministers or plenipotentiaries, selected for the purpose by the proper municipal authority, and furnished with special full powers to act in behalf of their respective governments in the preparation and signature of the treaty. At the time appointed, the representatives assemble and exchange their credentials and full powers. Rules of procedure are usually agreed to at a preliminary session. Each power represented has a right to be heard at length upon all questions discussed affecting its interests. If ques-

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justing such disputes, next to that by treaty, —one which allows time for the passions to cool, and gives excuse ofttimes for an administration which is afraid either to act or to remain passive,—is to accept the mediation of a friendly power. Mediation is not intervention; mediation is merely advisory. It has only such effect and force as the opinion of a judicious and conscientious friend would have upon two men in private life, advising them how best to settle a dispute. I do not know a better instance of mediation than that

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tions are submitted to vote, unanimous consent is necessary to carry a measure of prime importance.

CLASSIFICATION OF TREATIES.

(1) **Transitory agreements or conventions**, see page 147.

(2) **Permanent treaties.** Those which have continuing effect, and regulate the future relations and actions of the contracting parties. Treaties of friendship and commerce, of neutrality, and naturalization, and postal and customs, are examples.

(3) **Cartels** are agreements entered into in time of war for the exchange of prisoners. They may be for the occasion, or for the period of the war.

(4) **Capitulations** are agreements entered into, in time of war, by the commanders of hostile

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to which the imperious will of Andrew Jackson consented. By treaty, concluded in 1831, France agreed to pay to the United States twenty-five millions of francs as indemnity for spoliations committed upon our commerce by France early in the present century. This indemnity was to be paid in six installments. They were to be appropriated for by the French chamber of deputies. The first installment was appropriated and paid. The United States gave a draft for the second installment on the Bank of

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fleets or armies, for the surrender of a fleet or a fortified place, or of a defeated army. Every general commanding a besieged place or separate army is presumed to have authority to enter into agreements of this kind, though his power may be restricted by the sovereign authority of his own state.

TREATIES OF ALLIANCE.

Such agreements are undertaken by two or more states with a view to secure concerted action for the purpose designated in the treaty. Alliances may be equal or unequal, offensive or defensive, or both.

(5) Treaties of guaranty are entered into for the purpose of securing the observance of a treaty already existing, or the permanence of an existing state of affairs. The conditions of the guaranty are stated in the treaty.

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France to the Bank of the United States, which was presented and dishonored. The high, unquenchable spirit of Andrew Jackson rose. He wanted to know the reason why, and he was informed that the French chamber of deputies had failed to make an appropriation. Louis Philippe had thus a good excuse for a reasonable delay, but the imperious president would admit no excuse. He made a request of congress for an appropriation to enable him to emphasize a demand for immediate payment. He irritated the spirit of a proud and sensitive people, many of whom had carried the eagles of France under the first Napoleon. It was a critical situation. Nobody had ever known how to restrain Andrew Jackson, but the good-natured sailor king of England, William IV. (from all I can read of him a very good, sensible man he was), offered his mediation. The offer was accepted. The mediator advised France to make an appropriation.

Instances of Guaranty: The sovereignty and independence of Greece was guarantied by France, Great Britain, and Russia under the treaty of London of 1832. The treaty of Paris

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The wrath of Andrew Jackson cooled, and one of the most critical complications in our history was relieved with the best results. The influence of William IV. on that situation was merely advisory,—it had no binding force on either power. The king of England was not bound to enforce his decision; neither Louis Philippe nor Andrew Jackson was bound to accept it.

§ 29. Arbitration.

Another mode of composing difficulties between states is by arbitration. Recent events have imparted great interest to that method of settling international differences. The United States has, in the course of its political existence, arbitrated under treaty in thirty-eight instances. I do not remem-

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in 1856 contained similar provisions with respect to the Ottoman empire. The cases of Switzerland and Belgium are similar.

RECIPROCITY TREATIES.

This name is applied to reciprocal treaties respecting commercial intercourse.

TERMINATION OF TREATIES.

(1) Treaties cease to be binding at a stipulated period. (2) When the act stipulated for is performed. (3) When there is a clause in the

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ber that the United States has ever refused to arbitrate any well-defined issue arising out of any past transaction. It has shown its willingness beyond any nation that ever existed, powerful as it is, not to try the su-

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treaty allowing either party to terminate it upon notice to the other party, then at the expiration of such notice. (4) When either party willfully violates a stipulation in the treaty, or fails to act in good faith, then, and in that event, the treaty is voidable, and may be terminated by the other party. (5) War terminates most existing treaties between the belligerent nations. But see page 141. (6) What particular changes of conditions or circumstances, other than those mentioned, will authorize a state to abrogate a treaty, is largely in the realm of speculation. See arguments in the United States senate on the Clayton-Bulwer treaty, in the First Session of the Fifty-sixth Congress.

INTERPRETATION OF TREATIES.

Rutherford gives the English rules of interpretation the same as applied to contracts under the common law. The rules given by Vattel and Domat are based upon the rules of the Roman law. For the examination of treaties, the reader is referred to Hertslet's Collection of Treaties, and his Map of Europe by Treaty, Treaties and Conventions of the United States, 1776-1889; Treaties in Force (1899) Moore.

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preme arbitrament of the sword, but to submit to the decision of an impartial tribunal.[2]

It happens, of course, from time to time, in the intercourse of states, just as it happens from time to time in the intercourse of individuals in any society, that a great variety of questions arises between these great personalities which compose the family of nations as to rights claimed, damages inflicted, or recompense or punishment demanded, and it is well to consider in what modes states proceed against each other to obtain recompense or punishment for such breaches of international obligation. I will first speak of those modes of action which fall short of war.

§ 30. Retortion.

There is, first, the right of state to execute measures of retortion. It may be defined as a right of retaliation which is exercised when a government whose citizens have been subjected to severe and stringent regulations or harsh treatment by a foreign country employs measures of like kind, of equal severity

[2] Many boundary disputes in which the United States has been engaged have been settled by arbitration. See Moore's History and Digest of International Arbitration.

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and harshness, upon the subjects of that government found within its territory. If France should, for instance, enact aggressive laws respecting the property or trade or personal rights of citizens of the United States temporarily residing in that country, the United States would have the right to retort in kind by enacting similar laws with respect to citizens of France dwelling within the United States.[3] The right is seldom exercised, but it exists.

§ 31. Reprisal.

Second, there is the right of reprisal when

[3] "When a sovereign prince is not satisfied with the manner in which his subjects are treated according to the laws and customs of another nation, he is at liberty to declare that he will treat the members of that nation in the same manner as his own subjects are treated. This is what is called by Vattel, 'Retorsion of Right.' Retorsion de Droit, lib. 2, c. 18, § 341." 2 Twiss, § 10.

"Retorsion is the appropriate answer to acts which it is within the strict right of a state to do, as being general acts of state organization, but which are evidence of unfriendliness, or which place the subjects of a foreign state under special disabilities as compared with other strangers, and result in injury to them. It consists in treating the subjects of the other state,

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one nation has inflicted a wrong on another, and from that right and its application has come the phrase "letters of marque and reprisal." The right of reprisal is more extensive than that of retortion. Where one government has inflicted an injury on another, and particularly where the injury is on the subjects of that government, the injured nation has a right to execute general or special reprisals against the offending government, its citizens or subjects. Such re-

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giving provocation, in an identical or closely analogous manner with that in which the subjects of the state using retorsion are treated." Hall, Int. Law (3d Ed.) p. 364.

"As a general rule, violations of comity are not the subjects of a just or necessary war. Their redress, if remonstrance have failed, is to be sought in a corresponding reciprocity of practice upon the part of the injured state towards the government and the inhabitants of the injuring state." Phillimore, III. c. 1, § 7.

There is a nicety of distinction among the writers with respect to the causes for which retorsion or reprisal may be invoked. The clearest distinction seems to be that retorsion is resorted to on account of a breach of comity or general usage, while reprisal is the method of punishing positive wrongs inflicted or the withholding of rights stricti juris.

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prisals are of various kinds. They may sequestrate the goods and chattels of the subjects of the offending government; they may put into sequestration the land or estate of the subjects of that government held in the offended state; they may seize their shipping; they may be exercised in a variety of ways,—the object being in each case to secure reparation and indemnity. These rights are not often asserted in modern times, but they still exist in the law of nations, and formerly were very much resorted to. In 1850 the British government authorized reprisals in a very irregular and stringent manner against Greece for a claim of Don Pacifico, a British subject, whose house had been broken open by a mob, which also beat members of his family and destroyed his property. A relic of the practice still exists in privateering. In the olden time, privateering was often authorized as a measure of special reprisal by and for the benefit of the injured subject, and the early state papers of Great Britain, France, and Spain are full of such cases. That is the reason why Drake and Hawkins, and some of the buccaneers of the Spanish Main of three hundred years ago, were not

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pirates. Naval war on the Spanish Main was conducted by them, acting under letters of marque and reprisal issued by their government, for indignities inflicted by Spain, and yet this condition fell far short of war between the nations.[4]

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[4] "If a nation has refused to pay a debt to, or has inflicted an injury upon, the subjects of another nation, and the former has refused to make satisfaction, or to give redress, the latter may proceed to do justice to its subjects by making reprisals on the former." 2 Twiss, § 2. See Hall, Int. Law (3d Ed.) § 120; Grotius, III, 2, IV; 1 Wildman, c. 5.

When a right of reprisal exists, arbitration is the method of settlement usually sought, at the present time, by the most advanced nations, but the injured nation has the right to determine its own course.

By the Hague treaty, entered into by the principal states of the world, to provide a ready means for the pacific settlement of international disputes, on July 29, 1899, it is provided in article 2: "In case of serious disagreement or conflict, before an appeal to arms, the signatory powers agree to have recourse, as far as circumstances allow, to the good offices of mediation of one or more friendly powers." Article 3 provides, among other things: "The signatory powers recommend that one or more powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good

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offices or mediation to the states at variance." It is further provided that "the exercise of this right can never be regarded by one or the other of the parties as an unfriendly act."

Extraterritorial Acts by a State in Self-Defense.

A violation of foreign territory may be justified on the ground of the necessity of self-defense according to some authorities.

The Caroline was an American boat engaged in transporting recruits and supplies to the rendezvous on Navy Island to assist the insurgents in rebellion against Canada. A British force was dispatched in search of the Caroline, and, finding her in an American port, attacked her, killed a portion of her crew, captured the boat, and left it to be carried over Niagara Falls. In 1842, Mr. Webster, in correspondence with Lord Ashburton, said that, for such an infringement of territorial rights, the British government must show "a necessity of self-defense, instant, overwhelming, and leaving no choice of means, and no moment for deliberation;" and it should further appear that the Canadian authorities, in acting under this exigence, "did nothing unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it." Lord Ashburton admitted the correctness of Mr. Webster's doctrine, and asserted that the destruction of the Caroline came fully within its limits; and though the act was justifiable, an apology should have been made at the time. This was accepted by the United States as satisfactory, and the sub-

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ject was allowed to drop. Parliamentary Papers 1843, vol. 61, pp. 46-51; 1 Whart. Dig. § 50; Benton's Thirty Years in the Senate, vol. 2, 289, 455; Seizure of St. Marks, 1 Whart. Dig. § 50b.

Necessity justifies an invasion of foreign territory, so as to subdue an expected assailant. The fort of St. Mark's was within Spanish territory, and, being weakly garrisoned, was liable to seizure by bands of Indians, who would make it a base of operations against the territory of the United States. General Jackson seized and garrisoned the fort with American soldiers. He put the seizure on the ground of necessity. The seizure of Amelia Island in 1817 by authority of the government of the United States was put upon similar ground. 1 Whart. Dig. § 50.

But this so-called right does not seem to be sound on principle, or safe as an international policy. If a foreign state has the right to invade the territorial limits of another upon any pretext, she has the right to invade such territory as often as she can furnish a suitable pretext. This contravenes another well-known principle of international law,—that it is the duty of every state to protect the inviolability of its own territory, and that any invasion of it is an act of hostility which may be repelled by force. If the first principle is right, then two absolute rights run counter, and produce a wrong, or may result in war. The case of the Fort of St. Marks, above referred to, was properly justified as a belligerent, not a pacific, right, and on the ground that the Spanish government, from lack of ability or will, did not perform its duty to the American nation.

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INDEPENDENCE AND SELF-PRESERVATION.

Every sovereign state may freely exercise its sovereign rights in whatever manner it sees fit, not inconsistent with the equal rights of other states. One of the most essential and important rights of state sovereignty is the right of self-preservation. It is a duty with respect to its own members which cannot be denied by other states. "The right of self-preservation is the first law of nations, as it is of individuals. A society which is not in a condition to repel aggression from without is wanting in its principal duty to the members of which it is composed, and to the chief end of its institutions." Phillimore, I. §§ 210, 211.

For the purpose of self-preservation a state has the right to employ such means as it deems best. No other nation has the right to prescribe or dictate what policy shall be pursued, except so far as its own safety may be affected or threatened. The exercise of this right may be modified or controlled by compacts freely entered into with other states.

By the treaties of 1748 and 1763, France engaged to destroy the fortifications of Dunkirk. By the treaty of 1815, France also agreed to demolish the fortifications of Huningen, and never to renew them, nor to replace them by others within three leagues of the city of Bale. By the treaty of 1856, between Russia, Turkey, and the allies, Russia agreed to relinquish her right to construct military-marine arsenals, and to maintain a naval force in the Black Sea.

If a nation, under the plea of self-defense,

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makes extraordinary warlike preparations, inconsistent with her pretended pacific intentions, which threatens the peace and safety of other states, such threatened states may very properly demand an explanation; and if a satisfactory reply is not given, they have a right to require the discontinuance of such hostile demonstrations. The erection and arming of fortifications and coast defenses are essentially means of defense, and cannot be objected to as threatening or endangering the safety of other nations; not so, however, with an extraordinary increase of the military and naval power which may be employed for offense.

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CHAPTER VI.

OF NEWLY FORMED OR INSURRECTIONARY STATES, AND THEIR RECOGNITION.

§ 32. Right of de facto state to recognition.
33. Intervention on behalf of insurrectionary state.
34. Recognition of belligerency.
35. Recognition of independence.

§ 32. Right of de facto state to recognition.

While every state has the right to say whether it will or will not have diplomatic intercourse with another state, the refusal to enter into such relations does not decide the right of the other state to be considered as a lawfully existing state. No nation, whatever the feeling may be inspiring it to not send ambassadors or ministers, has the right to otherwise question the legitimacy or existence of any *de facto* government. It has no right to question the legitimacy of any new state which comes into being, nor has it the right to question the legitimacy of any new form of government of an old state. This is a controlling principle of international law running through many years of history, and it results from the recognition of the supreme

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sovereignty of each people, and rests upon the principle that governments derive their just powers from the consent of the governed, and can be rightfully changed whenever the popular will decrees it so to be.[1]

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[1] "Sovereignty begins at the very moment when the society of which it is the origin has its birth; in other words, when a civil society is constituted with a supreme legal organ, that is to say, a government, and is separated from another society in which it had been included or merged. This principle is equally applicable to the internal and external sovereignty of states, with this difference only, that interior sovereignty exists de plano, and does not need the recognition of other states." Gallaudet, p. 70.

Date of the Commencement of a State.

Theoretically, a politically organized community enters of right into the family of states, and must be treated in accordance with law, as soon as it is able to show that it possesses the marks of a state. The commencement of a state dates, nevertheless, from its recognition by other powers; that is to say, from the time at which they accredit ministers to it, or in some other way enter into such relations with it as exist between states alone. For, though no state has a right to withhold recognition when it has been earned, states must be allowed to judge for themselves whether a community claiming to be recognized

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§ 33. Intervention on behalf of insurrectionary state.

A great deal has been said lately in discussion in public places and newspapers concerning the right of intervention, especially in regard to the unhappy and melancholy condition of affairs in the island of Cuba during 1896 and 1897. The right and duty of intervention by the United States in the affairs of that island have been insisted upon and advocated in some quarters upon grounds which the law of nations does not at all warrant. It is important to endeavor to impress quite forcibly the limitations and extent of the right of intervention.

In doing this, we are brought back again to the principle of the absolute equality and independence of states, and the duty of every

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does really possess all the necessary marks, and especially whether it is likely to live.

"Sovereignty is acquired by a state either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent." Hall, Int. Law, § 26.

"This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed between these two species of sovereignty. The internal sovereignty of a

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state not to interfere in the affairs of another, or to infringe upon its sovereignty. That is a great general principle, and it is one of the primary duties of states. Exceptional to this, however, there is in the law of nations, another special principle warranting intervention by one state in the affairs of another within its proper limitations, just as there is a principle authorizing retortion and reprisals, and, finally, authorizing war. What is the principle, and what is its definition? A state has the right to intervene in the concerns of another state, in its affairs and administration, whenever it is conducting them in such a manner as to injuriously affect or seriously threaten the peace and safety of the intervening state, or when it is conducting them in such a manner that the property and

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state does not, in any degree, depend upon its recognition by any other states. A new state, springing into existence, does not require the recognition of other states to confirm its internal sovereignty. The existence of the state de facto is sufficient, in this respect, to establish its sovereignty de jure. It is a state because it exists." Kluber, D'roit des Gens Moderne de L'Europe, § 23; Dana's Wheaton (8th Ed.) § 21.

The sovereignty of the United States of America was complete from the date of the Declaration

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persons of the citizens of the intervening state have been injuriously affected or are not safe within the offending state. It has been thought, and it has been so argued by men of the highest character for philanthropy, that states have a right to intervene merely to stop unnatural, unwarlike, and inhuman effusion of blood. However attractive that theory may be, it has no warrant or authority in international law, according to the best-esteemed precedents. If there ever was a time when it behooved the civilized world to make bare its arm and raise the sword of retributive justice over any nation, it was in the early part of this century as to Turkey, in the affairs of Greece. The great

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of Independence, July 4, 1776. McIlvaine v. Coxe's Lessee, 4 Cranch, 212. Cushing, J., in delivering the opinion of the court, says: "This opinion is predicated upon a principle which is believed to be undeniable, that the several states, which composed this Union, so far, at least, as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it."

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powers of Europe intervened. But while in reality they intervened for the purpose of stopping the sanguinary massacres which were then making the eastern waters red with blood, the pretext and legal justification on which they acted were that Turkey did not stop piracy in the Levant.

So that you can safely hold to the opinion that the right of intervention is not warranted, except within the limitations I have stated.[2]

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[2] "The right of self-defense incident to every state may, in certain circumstances, carry with it the necessity of intervening in the relations, and, to a certain extent, of controlling the conduct of another state; and this, where the interest of the intervenor is not immediately and directly, but mediately and indirectly, affected." Phillimore, I. p. 554.

"Every state, as a distinct moral being, independent of every other state, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other states. * * * No foreign state can lawfully interfere with the exercise of this right, unless such interference is authorized by some special compact, or by such a clear case of necessity as immediately affects its own independence, freedom, and security." Lawrence, Wheaton, vol. 1, p. 132, § 12.

"Another limitation of the general principle

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Now, the question is, and it is one of an exceedingly delicate character, whether the United States ought, under present conditions, to intervene in the affairs of Cuba. I think, as a matter of personal conviction, that this government should have intervened in the affairs of that island one year ago. Spain had shown herself utterly incompetent and unable to observe the treaty of 1795, under the guarantees of which, many American citizens, native born or naturalized, had settled in the island, so that, by the year 1895, when the Rebellion broke out, there were $50,000,000 of American property in Cuba, of which Mr. Cleveland stated in his last annual message to congress $18,000,000 had been destroyed,—had gone up in smoke and flame and pillage. The commerce, before 1895,

under discussion may possibly arise from the necessity of intervention by foreign powers in order to stay the shedding of blood caused by a protracted and desolating civil war in the bosom of another state. (Grotius, de J. B., lib. 2, c. 20, § 40.) This ground of intervention urged on behalf of the general interests of humanity has been frequently put forward, and especially in our own times, but rarely, if ever, without others of greater and more legitimate weight to support it." Phillimore, I. p. 568.

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between this country and that island, reached close to a hundred millions of dollars annually. It has fallen off, in that universal scene of bloodshed, massacre, and destruction, to less than twenty-five million dollars annually. American citizens have been incarcerated in Spanish prisons, have been driven from their homes to many a place of concentration, where famine and fever do their mortal work. In that condition of affairs I have been clearly of the opinion that the United States ought, with a firm hand, long since to have intervened in the affairs of that island, upon the strictest grounds I have stated,—for the protection of its own citizens, their persons, property, and interests. Far more warrant exists to do it than the great powers of Europe had to intervene seventy years ago in the affairs of Turkey and Greece.

§ 34. Recognition of belligerency.

There are two forms of recognition applicable to a newly-formed government. One is the recognition of belligerency in case of insurrection or rebellion; the other is the final recognition of independence, or of its existence as a state. No state is entitled to

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demand recognition of belligerency or of independence as a right. That is a matter to be determined entirely by the will and interest of the recognizing state.[3]

A nation may exist for many years, and be a state,—undoubtedly a state,—and yet not be recognized by many of the civilized powers of the world. It is none the less a state for that reason. It is a question, for instance, whether the United States will

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[3] "As a belligerent is not itself a legal person, a society claiming only to be belligerent, and not to have permanently established its independence, can have no rights under that law (international). It cannot, therefore, demand to be recognized upon legal grounds, and recognition, when it takes place, either on the part of a foreign government, or of that against which the revolt is directed, is, from the legal point of view, a concession of pure grace." Hall, Int. Law (3d Ed.) pp. 34, 35.

"The president does not deny—on the contrary he maintains—that every sovereign power decides for itself, on its responsibility, the question whether or not it will, at a given time, accord the status of belligerency to the insurgent subjects of another power, as also the larger question of the independence of such subjects, and their accession to the family of sovereign states." Mr. Fish, secretary of state, to Mr. Motley, September 25, 1869. MSS. Inst. Gr. Brit.

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recognize the belligerency of the insurgents in Cuba. They have no right to claim recognition; it is for us to say whether we will recognize it. Such are the narrow limits of the principle. And the question arises, taking in view the entire situation, what ought to be done in a case of that kind? In the first place, what ought to be the status of the belligerent insurgents? How far shall a rebellion have progressed, and what foothold and ascendency must it have attained, not only as to area of territory, but numbers of people, to warrant the United States, or any other nation, in recognizing the status of belligerency? There is no better answer than that given by Mr. Justice Grier in The Prize Cases, 2 Black, 667:

"The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other.

"Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insur-

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

We complained, of course, very emphatically, in 1861, when Spain, England, and France recognized the belligerency of the Confederate states. We thought their action was precipitate and unfriendly. Spain was first in this recognition, and it unquestionably was precipitate and unfriendly; but, at the same time, candor compels us to admit now that, as a matter of strict right, the recognition was, technically, lawful enough. Those nations had the right to recognize the belligerency of the Confederate states. It was unfriendly to do it, but they had the

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right. Take the case of Cuba and its status as to the recognition of its belligerency. The senate of the United States has passed resolutions to that effect, and, testing the question by Justice Grier's opinion, I think that the Cuban insurgents ought to have been recognized as belligerents some time ago. That insurrection has a constitutional government; it has a capital in the eastern part of the island, which the Spaniards have never got near enough to attack; it has a president; it has a legislature; it has passed and printed laws and enforced them; it levies duties throughout the portion of the island which it holds in money and kind, and they are paid; it has a postoffice department and carries mails; I have seen the stamps,—I have received letters bearing them; it has an army of 40,000 men, regularly organized, commanded by commissioned officers. The insurgents hold the eastern half of the island, except the seaports and a few inferior, insignificant interior towns. They have conducted war on humane, Christian principles, notwithstanding the provocation they have received. I think, therefore, that this govern-

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ment ought to have recognized the belligerency of the insurgents long ago.[4]

[4] Belligerent rights are accorded to a rebellious portion of a country that has thrown off its allegiance from the parent country, and organized armies for the purpose of maintaining its independence, in the interest of humanity, to make acts done by them in the conduct of the war, when such acts are done in accordance with the recognized rules of war, legitimate, and to prevent cruelties of reprisal and retaliation.

PIRACY.

Piracy as affecting insurgents, see United States v. Smith, 5 Wheat. 153.

The constitution of the United States confers upon congress the power to "define and punish piracies." In legislating upon the subject (Acts Cong. 1790 and 1819) congress, instead of defining piracy, merely referred to the offense of piracy "as defined by the law of nations." Held, that this definition was sufficient to meet the requirements of the constitution. On piracy, see 4 Bl. Comm. 73; United States v. The Ambrose Light, 25 Fed. 408.

Held, that a vessel found on the high seas in the hands of insurgents, who had not been recognized as belligerents by any independent nation, may be regarded as piratical. See cases of Rose v. Himely, 4 Cranch, 241, and United States v. Pohner, 3 Wheat. 610.

The practical responsibility of determining whether insurgent vessels of war shall be treated as lawful belligerents, or as piratical, rests

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This is not an appeal entirely to our sympathies for a people struggling for their liberty. On strict grounds of right and policy we ought to have recognized that belligerency. It is right for our own interest, and for the protection of our own people, to tell Spain that she must wage war according to the rules of civilized warfare. So long as recognition of belligerency is not given, Spain is entitled, and the United States must concede that she is technically entitled, to execute upon the armed insurgents, upon their noncombatant sympathizers, upon American citizens in the island, the penalties of a code which is an affront to civilization. It was never heard during the war between the United States and the Confederate states that any Englishman or other foreigner landing in either the north or the south for the purpose of taking service in the army of either came under any code of murder or assassination. So long

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with the political and executive departments of the government, and not with the judicial. These departments have it in their power, through the granting or withholding of recognition of belligerency, to determine how they shall be treated by the courts.

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as we shut our eyes to the facts, and agree with Spain that this is merely a treasonable riot, and not a rebellion, we say to Spain, and she has a right to insist that we say it: "These offenses committed under these circumstances are not the acts of revolution or of civil war, but they are mere common crimes, for which Spain may inflict any punishment she pleases."

This is why I think that, on cold grounds of policy, duty, and right, to say nothing of the dignity of this government, and of the great interest it has in the future of Cuba, and to stop the enormous destruction of American property which Spain has been unable to prevent, and much of which she herself has inflicted, we should say to Spain: "You may fight this people to your heart's content, but you must fight them as soldiers and fellow Christians; you shall not hunt them as outlaws, nor torture and assassinate them."

§ 35. Recognition of independence.

Of course the most important recognition is that by which the existence and sovereignty of a new state are acknowledged. States

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come into being by conquest, by colonization, by insurrection, and by peaceful change of old governments into new forms, or by consolidations of several governments into one. When they attain a firm consistency, and an apparent perpetuity is sufficiently established, they become proper subjects of recognition as states by other governments.

But a state, or an aggregate of people claiming to be a state, engaged in insurrection against a parent government, no matter how great the consistency and permanence of its establishment may seem to be, is not entitled to claim any such recognition as a matter of absolute right. The question of recognition is one to be determined solely by the recognizing state in the light of its own convictions, interests, and advantages. At the same time, international law does not recognize as fit or proper the precipitate and premature recognition of the sovereignty of a people in insurrection. The principle is this: In order to justify one government in recognizing the independence of an insurrectionary people, it is necessary that the contest has demonstrated that the people in insurrection have obtained a hold apparently

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firm upon a certain defined territory, to the exclusion of the parent government; that they are there conducting a government, and that their subjugation by the parent government is manifestly hopeless. The conditions which warrant a recognition of independence far exceed in their stringency those necessary to justify a recognition of belligerency. The recognition of the belligerency of a people does not imply in the least degree the present or future recognition of its independence or sovereignty. Spain and the other European powers recognized the belligerency of the Confederate states, but they never followed that action by a recognition of their independence. Why did they not? Because the cause of the Union against the Confederacy was never desperate; it could never be seen that the United States would be unable to extend, in the process of time, by its armies, the sway of the constitution over the portion of the Union that was in rebellion.

It may be well to correct here a misapprehension which has obtained considerable vogue. It has commonly been thought that, if any government recognized the belligerency or the independence of an insurrection-

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ary people, such action is a just cause of war by the parent state. Such is not the law. The recognition of belligerency or of independence affords no just cause for war against the recognizing power by the government against which the recognition is made. This is firmly settled, and it is one of the most enlightened principles of the law of nations. It is to be regretted that in the discussions of the subject of the recognition of Cuban belligerency in the public press and on the platform it has been too often assumed that such recognition of belligerency or of independence is a hostile act, which would precipitate the United States into war. We never thought of making war when the belligerency of the Confederate states was recognized by the powers of Europe. Spain never made it a cause of war when the belligerency, and afterwards the independence, of republic after republic, from the Mexican line to Cape Horn, which had wrested themselves from her sovereignty, were recognized by the United States and all the powers of Europe.

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CHAPTER VII.

OF THE ABSORPTION AND ANNEXATION OF STATES.

§ 36. Right of annexation.
37. Effect on treaties.
38. Hawaii and its annexation.

A question concerning the survival of treaty obligations has frequently arisen in the development of the world's history from the annexation or absorption of one state by another. It was a very interesting question to the United States respecting Texas, and presents itself as to Hawaii at the present time.

§ 36. Right of annexation.

The annexation of one state by another can be effected in two ways. One, by the forcible annihilation of a state by conquest, and the subjugation of its people by the conqueror; or, second, by the consent of both parties by treaty.[1]

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[1] Texas and Hawaii were both annexed to the United States by a joint resolution of congress. It was contended, with respect to the annexation of Hawaii, that congress did not have the power

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It is just as much an indefeasible right of a people to go out of existence as a state, as it is an indefeasible right in them to bring forth a state.

§ 37. Effect on treaties.

Several very interesting questions arise as to the effect of annexation upon the treaties of the annexed state. Every state which submits to annexation, whether its duration has been long or short, has, of course, many treaties with other nations. Hawaii has some thirty or forty treaties with the powers of the world. The question is, what is

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to annex an independent country in that manner; that it should be done by treaty. For an interesting discussion of this question, see a speech made by Senator J. B. Foraker in the United States senate on June 25, 1898, the senate having under consideration the resolution for the annexation of the Hawaiian republic. It being contended that the annexation could only be accomplished by treaty, Senator Foraker argued that annexation by treaty was not the proper method in such case. He contended that, as a treaty contemplated two parties and continuing obligations after its consummation, there cannot be a treaty where one party goes out of existence. When Hawaii became annexed to the United States, there was no longer a republic of Hawaii.

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the effect upon its treaties of a complete absorption of one state into another, as Texas was absorbed into the United States, as Hawaii will be absorbed into the United States, as the various small states of Italy were absorbed and transformed or amalgamated into the kingdom of Italy, or as various small principalities, kingdoms, and duchies became component parts of the German empire? Does the absorbing state take them *cum onere?* That is the question. After a great deal of discussion over very practical situations, the principle has finally come to be settled to be this: That the annexation of one state by another, in the sense of its absorption into a different political system, terminates all treaties of the annexed and absorbed state. Rights that have vested under those treaties before the annexation are preserved upon familiar principles of property and public morality. As to such rights, the treaties have been performed and executed. But the executory and promissory stipulations of all existing treaties, no matter how solemn their language, or how perpetual by their terms,—all their obligations of future performance,—become instantly as if they

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had never been contracted, and the people of the state annexed pass under the sway of the annexing state, subject to the treaties which it may have made with the powers which formerly may have made treaties with the annexed state.

I said that rights which have vested under a treaty are preserved. That was thought at one time to be counteracted by another principle,—that war abrogates all treaties between the belligerent nations. The war of 1812 between the United States and Great Britain was terminated by the treaty of Ghent, concluded in 1814. Great Britain contended in the negotiations, Mr. Clay, Mr. Adams, Mr. Gallatin, Mr. Russell, and Mr. Bayard being our negotiators, that by that war the right had been abrogated which had been granted (or rather partitioned) to us in the fisheries on the banks of Newfoundland by the treaty of 1783. Our representatives insisted correctly that the right was a vested right; that it had become ours, and then was ours, and could not be taken away except by conquest. In regard to any stipulations of the treaty of 1783 which may have been unperformed prior to the commencement of the

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war of 1812, the English contention might have prevailed. A very cogent illustration is that of Texas. Texas was an independent nation when she became annexed to the United States by a joint resolution of congress and by the act of the legislature of Texas. During the short period of her independence she had concluded with Great Britain and France treaties promissory and executory in their nature. The exact terms need not be stated, but they were of great value to subjects of France and Great Britain. Immediately upon the annexation of Texas, those powers advanced claims that this government, or that Texas through this government, ought to be held to the performance of those executory treaties. This proposition was promptly and firmly resisted, and Great Britain and France did not persist in their contention.

The question received its quietus as a result of the coalescence of the great number of petty states into the present German empire, and also of the several Italian states into the kingdom of Italy. Take, for instance, the empire of Germany. We had treaties with the kingdoms of Saxony, Hanover,

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Wurtemburg, and with a number of grand duchies and principalities; but when the empire was formed, these treaties, so far as their promissory and executory terms were concerned, ceased to be of effect. The result is that those governments, having come under the power of Prussia, the acquiring state, and, for purposes of foreign relations, integral parts of it, our relations today with the German empire, constituted, as it is, by this union of many states, are regulated by our treaty with Prussia, concluded in 1828. This affords an illustration of my statement that the treaties of the annexing power cover the whole ground by substitution for the extinguished treaties of the annexed state. So as to Italy. There were Naples and Sardinia; there were states large and states small, all independent, having their own systems of government and treaty relations with the nations of the world. But when the flame of liberation and unity was kindled and swept over Italy from the fires of Aetna to the snows of Mont Blanc, when, by a magical transformation, the people realized the glorious dream of a thousand years, when the classic spirit of Italy, "the Niobe of na-

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tions," arose and stood forth triumphant and royal where, discrowned, she had wept for long ages, all those little principalities, kingdoms, and dukedoms vanished like a scroll that is consumed in the flames, and all their treaties ceased to be obligatory.[2]

CHANGE IN FORM.

[2] As a general principle, a mere change in the form of government does not affect the duties and obligations of a state toward other nations. Treaties remain in force just as if no change had taken place, except where the compact relates to the form of government itself, or to the person of the ruler in the nature of a guaranty. Public debts due to or from the revolutionized state are not affected by such changes. Vattel, Droit des Gens, liv. 2, c. 12, §§ 183-197; 1 Kent, pp. 25, 26; 1 Halleck, Int. Law, p. 76.

The loss of a portion of the territory of a state, whether by revolution or conquest, does not affect its identity, nor change its obligations to other states. Terrett v. Taylor, 9 Cranch, 50; Calvin's Case, 7 Coke, 27.

Where one state is divided into two or more distinct sovereignties, the obligations of the original state to other states are ratably binding on all. This principle was incorporated into the treaty by which the modern kingdom of Belgium was established. Chancellor Kent says: "If a state should be divided with 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

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§ 38. Hawaii and its annexation.

I have been asked to say a few words about our relations with Hawaii, and I think I can do so with particular relevancy for the reason that Japan has recently attempted to bring into question the proposed annexation of that republic to the United States, and has raised inferentially some of the very questions concerning treaties that we are now discussing. The Hawaiian Islands are a most interesting group. They are some eight in

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those obligations fulfilled, by all the parts in common." 1 Kent, p. 26. See, also, Wheaton, Int. Law, pt. 1, c. 2, § 9; Id. pt. 4, c. 1, § 12; Phillimore, vol. I., § 137; Terrett v. Taylor, 9 Cranch, 50; Kelley v. Harrison, 2 Johns. Cas. 29; Jackson v. Dunn, 3 Johns. Cas. 109; Calvin's Case, 7 Coke, 27.

"Where a state is divided into distinct states, either by war or by mutual consent, the obligations to which it was liable are not affected by such division, and must be discharged either jointly or severally, in ratable proportions. Upon this principle, when upper and lower Alsace and other places, comprising two-thirds of a province, liable to a certain debt, were ceded to France by the treaty of Munster, it was stipulated that France should pay two-thirds of the debt." 1 Wildman, Int. Law, p. 68. See, also, Flass, p. 129, § 3.

"When a people has a king placed over it, it does not cease to owe the moneys which it owed

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number, not reckoning the smaller islands of the archipelago. They have about seven thousand square miles, and probably a population of 90,000. American enterprise and American missionaries went there more than

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being free; for it is the same people, and retains the ownership of the things which had belonged to the people. * * * If two peoples are united, their rights will not be lost, but imparted by each to the other. * * * If a state is divided either by mutual consent or by war (as the body of the Persian empire was divided among the successors of Alexander), there are several sovereignties in place of one, each having its rights over the several parts. If there was anything which they had in common, that is either to be administered in common or to be divided proportionally. * * * To this head, also, is to be referred the separation of a colony from the mother country. For, in this case, also, there is produced a new people, which is its own master." Whewell's Grotius Translation.

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

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fifty years ago, and they did what has never been done as to any other people of the islands of the Pacific. They established Christianity and civilization. They reduced the language to writing; they educated the natives; they set up a press and printed

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the revolted or dismembered territory or province." 1 Halleck, Int. Law, p. 91.

"The release of a territory from the dominion and sovereignty of a country, if cession be the result of coercion or conquest, does not impose any obligation upon the government to indemnify those who suffer a loss of property by the cession. The annals of New York furnish a strong illustration of this position." 1 Kent, Comm. p. 178.

PUBLIC DEBTS.

Most treaties relating to the transfer of territory contain a clause providing for the payment of the debts of the ceded territory. When Holland and Belgium were united, in 1814, it was provided that the new kingdom of the Netherlands should be responsible for the debts of both countries (article 6 of the treaty). See Hertslet, Map of Europe by Treaty, vol. 1, p. 38.

When Schleswig, Holstein, and Lauenburg were ceded by Denmark, in 1864, to Austria and Prussia, it was agreed between the parties that the debts of the Danish monarchy should be divided between Denmark and the ceded provinces, in proportion to the population of the two parts.

The terms of the treaty were as follows: "The debts contracted upon special accounts, whether

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newspapers and books in the Hawaiian language. The barbarian chiefs were succeeded by constitutional monarchs, and to them the existing republic became a successor. Hawaii has been seized twice by the French,

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of the kingdom of Denmark, or one of the duchies of Schleswig, Holstein, and Lauenburg, will remain respectively at the charge of each of these countries. Debts contracted for account of the Danish monarchy shall be divided between the kingdom of Denmark upon the one hand, and the ceded duchies upon the other, in proportion to the population of the two parts." Annual Register 1864, p. 236.

In some cases, territory has been transferred free from the general debt of the state to which it belonged. Under this rule, the following cases may be cited: Saxe-Coburg ceded Lichtenburg to Prussia in 1834. When Austria and Sardinia, and some of the other Italian states, rectified their boundaries in 1844. On the cession of Alsace and Lorraine by France in 1871, Germany refused to take upon herself any share of the French national debt. Wheaton, p. 45. See Calvo, vol. 3, p. 244.

TREATY OF PEACE, SIGNED AT FRANKFORT, MAY 10, 1871.

"Art. 1. Territorial cessions in favor of France. Cession to Germany of Alsace and Lorraine. Former cession not binding unless the latter be complied with."

"Art. 4. The French government shall make

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and once, I think, by the English. They let go. About the time of their seizure, or shortly after, Mr. Webster, who was then secretary of state, declared in substance that the United States would never suffer Hawaii to be encroached upon, much less acquired by any foreign power. Other secretaries went fur-

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over to the government of the empire of Germany the amount of the sum deposited by the departments, communes, and public establishments of the ceded territory; the amount of the premium of enlistment and discharge belonging to soldiers and sailors, natives of the ceded territory, who shall have chosen the German nationality; the amount of securities of responsible agents of the state; the amount of sums deposited for judicial consignments on account of measures taken by the administrative or judicial authorities in the ceded territory."

A subsequent article provides for the payment of 5,000,000 francs in 30 days, one billion during the year, one half billion by May 1, 1872, and three billion within two years; the Germans to evacuate after the payment of two billion.

ADDITIONAL CONVENTION TO THE TREATY OF PEACE OF THE 10TH OF MAY, 1871, BETWEEN FRANCE AND GERMANY, SIGNED DECEMBER 11, 1871.

"Art. 14. The canal of the Sarre, the canal of the salt works of Dieuse, and the junction of Colmar, which forms the communication between that town and the Rhine, being entirely included within the territories ceded to Germany, the lat-

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ther, and declared that it was written by manifest destiny upon the pages of a visible future that in due process of time, when Hawaii should be willing, there should be absolute coalescence of that state with the United States. The declarations of Mr. Webster have been repeated, I think I can

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ter takes upon herself the payment of the expenses of those three canals remaining due.

"The annuities still due on the sum advanced to the French state by the town of Colmar, and by the manufacturers of the east, shall, dating from 1871, be payable by the German government.

"The canal of the Rhone to the Rhine, being crossed by the new frontier, it has been agreed that the twelve annuities remaining to be paid to the old subscribers on the purchase of their shares shall be divided between the high contracting parties in the proportion of the extent reverting to each of the two countries." Hertslet, Map of Europe by Treaty, vol. 3, p. 1970.

By the treaty of Berlin in 1878, the portions of Turkish territory given to Servia and Montenegro were charged with a share of the Turkish debt. The portion given to Russia was not so charged, being taken as part payment of a war indemnity demanded by Russia from Turkey. Parl. Papers, Turkey, No. 44, 1878, and Turkey No. 22, 1878.

It will be noticed that in this settlement the portion taken by Russia as a war indemnity was not charged with any of the Turkish public debt.

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say with entire accuracy, by every secretary of state since his time.

Now, why should we have Hawaii? What do we want with those islands out in mid-ocean? We need them for outworks of na-

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It appears to me that there is a clear recognition of the principle that a nation has the right to exact from another a portion of its domain free from any liability for the debt of that nation.

"With rights which have been acquired, and obligations which have been contracted, by the old state, as personal rights and obligations, the new state has nothing to do. The old state is not extinct; it is still there to fulfill its contract duties, and to enjoy its contract rights. The new state, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other states have contracted. They may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have accepted on its own account. What is true as between the new state and foreign powers is true also as between it and the old state. From the moment of independence, all trace of joint life is gone. Apart from special agreement, no survival of it is possible, and the two states are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law. And as the old state continues its life uninterruptedly, it pos-

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tional defense, and for the protection and expansion of our commercial interests. Lay the dividers upon a globe, one point at San Francisco and the other at Honolulu. You will see that Hawaii is about 2,100 miles from San Francisco. Remove the point of dividers from Honolulu to the island of

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sesses everything belonging to it as a person, which it has not expressly lost; so that property, and advantages secured to it by treaty, which are enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continue to belong to it. On the other hand, rights possessed in respect to the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and which, therefore, is of a local character, or which, though not within it, belongs to state institutions, localized there, transfer themselves to the new person. Conversely, of course, the old state person remains in sole enjoyment of its separate territory, and of all local rights connected with it.

"Thus, treaties of alliance, of guaranty, of commerce are not binding upon a new state formed by separation, and it is not liable for the general debt of the parent state; but it has the advantages of privileges secured by treaty to its people as inhabitants of its territory, or part of it, such as the right of navigating a river running through other countries upwards or downwards from its own

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Kyska, which is situate about two-thirds of the length of the group constituting the Aleutian Islands, belonging to us, and you will find that that island is a little more than 2,100 miles from San Francisco. It has a very capacious, deep harbor. From Honolulu to Kyska is also about 2,100 miles. In other words, these lines constitute an equilateral triangle, each of its sides being 2,100

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frontier. It is saddled with local obligations, such as that to regulate the channel of a river, or to levy no more than certain dues along its course; and local debts, whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it. If debts are secured upon special revenues derived from both sections of the old state,—if, for example, they are secured upon the customs or excise;—they are evidently local to the extent that the hypothecated revenues are supplied by the two states respectively; they must therefore be proportionately divided." Hall, Int. Law, p. 95 et seq. See note at bottom of page 97.

Holland was taken by the French during the war which lasted from 1792 until 1814. It was liberated from the French government by the allied powers, by the treaty signed at Paris, May 30, 1814, part of which treaty is as follows:

"Art. 18. The French government engages to liquidate and pay all debts it may be found to owe in countries beyond its own territory on ac-

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miles in length. You will also see that, until you get tó the Aleutian group, the Hawaiian Islands are the only islands of any magnitude lying to the north of the equator. All of Australasia lies to the south of the equator. With the exception of the Hawaiian and Aleutian Islands, on all the broad Pacific until you come to Japan and Formosa there is not, north of the equator, an island of mag-

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count of contracts, or other formal engagements, between individuals, or private establishments, and the French authorities, as well for supplies as in satisfaction of legal engagements."

"Art. 21. The debts, which in their origin were specially mortgaged upon the countries no longer belonging to France, or were contracted for the support of their internal administration, shall remain at the charge of the said countries. Such of those debts as have been converted into inscriptions in the Great Book of the Public Debt of France shall accordingly be accounted for with the French government after the 22d of December, 1813. The deeds of all those debts which have been prepared for inscription, and have not yet been entered, shall be delivered to the governments of the respective countries. The statement of all these debts shall be drawn up and settled by a joint commission." See State Papers, pt. 1, 1812 to 1814, pp. 165, 166.

Treaties containing the above stipulations, verbatim, were concluded on the same day between

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nitude enough to be desirable for any purpose. The commerce of the Pacific will undoubtedly become at no distant time the most active and lucrative that the world has ever known. Humbolt so predicted more than 70 years ago. China is waking from her immemorial slumber, and Japan has as-

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France, Great Britain, Austria, Prussia and Russia.

THE SECOND PEACE OF PARIS, Nov. 20, 1815.

"Preamble: Being satisfied that the indemnity due to the allied powers cannot be either entirely territorial or entirely pecuniary, without prejudice to France in the one or other of her essential interests, and that it would be more fit to combine both the modes, in order to avoid the inconvenience which would result were either resorted to separately, their imperial and royal majesties have adopted this basis for their present transactions." Then follows division of territory. Indemnity to be paid the allied powers by France in money:

"Art. 4. The pecuniary part of the indemnity to be furnished by France to the allied powers is fixed at the sum of 700,000,000 of francs." France to support and furnish maintenance for an army of not to exceed 150,000 men, not to exceed 5 years, as a measure of precaution to maintain peace."

"Art. 8. All the dispositions of the treaty of

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sumed a surprising activity. Russia is constructing a railway across Siberia, and is dropping down from the frozen waters of the north, from Vladivostock, to find its eastern terminus at the harbor of Port Arthur, which is never closed. The western coast of the United States is very vulnerable. Our interests in the Pacific in the present and in

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Paris of the 30th of May, 1814, relative to the countries ceded by the treaty, shall equally apply to the several territories and districts ceded by the present treaty."

"Art. 11. The treaty of Paris of the 30th of May, 1814, and the final act of the congress of Vienna of the 9th of June, 1815, are confirmed, and shall be maintained in all such of their enactments which shall not have been modified by the articles of the present treaty."

By the treaty of Zurich, November 10, 1859, between France and Austria at the termination of the war, France as ally of Sardinia, Austria ceded Lombardy to France to be turned over to Sardinia. Lombardy was charged with a portion of the public debt.

"Where part of the territory of one nation is annexed, by cession or otherwise, to the territory of another, the latter nation, by the act of annexation, acquires all the rights and becomes bound to fulfill all the obligations which pertained to the former nation, in respect of the territory acquired, and its inhabitants and the property

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the near future demand a better situation than we have at present. The Hawaiian Islands constitute an outer bulwark 2,100 miles from San Francisco; the island of Kyska, to the north, little more than 2,100 miles from San Francisco, supports them. The Aleutian group of islands stretches like the curved and sharpened blade of a scimetar, and impends over Japan. The strategic

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therein, but none others." Field, Int. Code, p. 12, § 23.

"With respect to the cession of places or territories by a treaty of peace, though the treaty operates from the making of it, it is a principle of public law that the national character of the place agreed to be surrendered by treaty continues as it was, under the character of the ceding country, until it be actually transferred. Full sovereignty cannot be held to have passed by the mere words of the treaty without actual delivery. To complete the right of property, the right to the thing and the possession of the thing must be united. This is a necessary principle in the law of property in all systems of jurisprudence. * * *

"The general law of property applies to the right of territory no less than to other rights. The practice of nations has been conformable to this principle, and the conventional law of nations is full of instances of this kind, several of them being stated by Sir William Scott in the opinion

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advantages are palpably manifest. With Hawaii in the hands of a hostile power, only 2,100 miles from us, it would, of course, become a coaling station and base of supplies, from which any operation against our coast might be easily conducted. Turn the situation around. Give Honolulu to the United States as a basis of supplies and operations, and we can protect American commerce, honor, and interests from that place with an efficiency which we can never otherwise hope for.

Again, you will notice upon the globe another singular feature. As commerce traverses the Pacific in all directions, from Victoria, Portland, and San Francisco to Auckland, Melbourne, and Sydney, the track of every vessel to and fro lies through

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which he gave in the case of The Fama, 5 Rob. 106." Kent, p. 395.

"When a state ceases to exist by absorption in another state, the latter is the inheritor of all local rights, obligations, and property, and also the provisions of treaties which it has concluded to affect the annexed territory." Hall, Int. Law (3d Ed.) § 29.

"No principle of international law can be more clearly established than this: That the rights

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Honolulu. From the proposed Nicaragua canal to the northwest, to China and Japan, that track is through Honolulu. From Calloa and Valparaiso, and from around Cape Horn, for vessels going to China and Japan, the way is through Honolulu. Hawaii is one of the most important strategic and commercial points on the face of the earth. I believe that in time it will be the great entrepot and distributing point of the Pacific. It was founded by American intelligence, and was built up by American civilization and Christianity. Its constitu-

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and obligations of a nation in regard to other states are independent of its internal revolutions of government. The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty. However frequent the instances of departure from this principle may be in point of fact, it cannot, with any color of reason, be contested on the ground of right." Mr. Adams, secretary of state, to Mr. Everett, August 10, 1818, MSS. Instructions to Ministers.

"Where one nation is annexed to another so as to form a part thereof, the latter, by the act of annexation, acquires all the rights, and becomes bound to fulfill all the obligations, of the former." Field's Code, § 22.

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tion is patterned on the constitution of the United States. Its government is administered by descendants from American citizens. The preponderating productive, proprietary, and commercial interests of the Islands are in the hands of the citizens of the United States. Should we not have Hawaii, and why should we allow any other nation to take it? These are some of the considerations that moved the president of the United States and the president of the republic of Hawaii to negotiate the treaty now pending before the United States senate for the annexation of that most interesting republic.[3]

[3] Since the above statement was made, the treaty spoken of was abandoned, and the Hawaiian republic annexed to the United States by a joint resolution of congress.

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CHAPTER VIII.

OF THE NATURE AND CONDUCT OF WAR.

§ 39. Necessity and benefits of war.
40. Definition.
41. Effect on treaties and relations.
42. Mode of conducting.
43. Effect on persons of the enemy.
44. Effect on enemy's property.
45. Disposition of prize.
46. Treaties of peace.

§ 39. Necessity and benefits of war.

The science of international law is not an abstract science; it is strictly one of practical application. It considers humanity and the nations as they are; it reads history as it has been written; it legislates for the future from the past. Accordingly, it considers that which every nation has had to encounter some time in the course of its existence, namely, war. It records the theories and speculations of St. Pierre, of Kant, of Bentham, of Kamerowski, of Field respecting perpetual peace, but it also registers the fact that, back of the schemes and plans of these great men, recognized, and in certain contingencies in-

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voked, by them, is an ultimate appeal to war to compel that perpetual peace to which they so fondly and delusively aspire. International law deals with concrete and inevitable situations, and, doing so, it must take into account the rights, liabilities, and duties of nations toward each other in that state of war which, sooner or later, does come and must come to every people. Why war should be a necessity of national and human existence is an inscrutable problem. It is that state of suffering by which nations and the human race have grown to civilization and the enjoyment of liberty. It is the agonizing parturition by which national greatness and glory have been brought forth. It produced Washington, it produced Lincoln. By it the republic of the United States of America was ordained and established. Under all conditions of national existence, it is always to be apprehended that, as a very preservative of that existence, a resort to physical force will sometimes be necessary and just, and, much as we may wish and hope and pray for that era of perpetual peace which never yet has come, we cannot shut our eyes to the facts which con-

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front us, and to the unerring prophecies which history has written on its scroll.

Take the last fifty years of the century just closed, fifty years marked by more human progress, by more expansion of knowledge, refinement, softening of manners, and improvement in social conditions than any of the preceding centuries, during which the force of public opinion has never been so great, and when the extension of the sway of morality has never been so efficacious,—yet there have not been fifty years since the Christian era marked by more wars, nor by wars so destructive, so disastrous, and, in many instances, so unjust. Since 1850 the following wars have been waged: The Crimean war, the Indian mutiny, the Italian war, whereby the independence of Italy was achieved, the Civil war in the United States, the war of Brazil with Paraguay, that between Austria and Prussia, that between France and Germany, the African war, the war between Chili and Peru, that between Russia and Turkey, that between China and Japan, and that between Turkey and Greece. There is scarcely a state in the civilized or semicivilized world which, in the course of the

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last forty-seven years, has not been engaged in war, and many of them in repeated wars; and now, in the bosom of a most profound peace throughout Christendom, look at the military and naval preparations by every nation. France and Germany have under arms more men than were marshaled at any time in the Napoleonic wars. The sea is covered with floating forts of steel. In the midst of universal peace the nations are watching each other with a grim expectancy that peace will be broken, and that all the horrors of war will be precipitated upon them. Hence it is that, however much we may deplore this, and wish it were not so, it is the province of international law to teach, and it is teaching, the rights and obligations of states as to each other in time of war.

§ 40. Definition.

War is a state of hostility carried on by armed force between states. This definition does not include insurrectionary wars, which are subject to certain special limitations in definition not necessary here to be considered. War is made for the purpose of securing or defending rights. Unless for

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one of those purposes, it is entirely unjustifiable and wicked. In the nature of things, every nation, being independent, is the sole judge of the question of right as to whether it shall commit itself to war, and a fearful responsibility is thus imposed upon it. In former times, no war was held to be legal unless a formal declaration had been made. By "formal declaration" was meant announcement by the nation proposing hostilities to its antagonist that war was to made. This is no longer necessary. It is, however, necessary, in order to fix the time of the beginning of the war, on account of various legal consequences and reasons, to announce to the world, by proclamation or otherwise, that a state of war exists.

§ 41. Effect on treaties and relations.

When war begins between two nations, its immediate effect is that all the subjects of one of the belligerent nations become the legal enemies of all the subjects of the other belligerent nation. This principle has been controverted by philanthropic writers of recent times, but it is laid down by Grotius, it is the actual fact, and accords with

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the logic of war. Every subject of the one state becomes an enemy of every subject of the other state. War abrogates all treaties between the belligerents; it suspends all commercial intercourse and relations between their respective subjects, and makes them unlawful; it dissolves all partnerships between subjects of the belligerents; it suspends the operation of all executory contracts during the war, although, as a general rule, it may be said that the operation of those contracts will revive after peace has been made. It opens a great gulf of non-intercourse between the two nations, and imposes disability upon the subjects of each to do any kind of civil business with those of the other, or to have any transactions whatever except the interchange of those legal hostilities which constitute war.[1]

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[1] It must here be noted that certain treaties are entered into which provide for the contingency of war, and are not abrogated by it. There are also treaties which fix territorial boundaries and property rights upon which war has no effect. They are adverted to by the author. See page 147, note.

"Treaties of boundary belong to a class of treaties which are regarded by jurists as per-

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§ 42. Mode of conducting.

The modes of conducting war have been ameliorated in the progress of time. The best and most humane authorities maintain that a sudden, short, and decisive war is the most merciful; that the true object of war is to conquer an honorable peace as quickly as possible. But all means are not permitted to accomplish this. There are laws of war as well as laws of peace. The use of poisoned bullets or of explosive bullets for small arms is forbidden by the laws of na-

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petual in their nature, so that, being once carried into effect, they subsist independently of any change which may supervene in the political circumstances of either contracting party, unless they are mutually revoked. Vattel, Droit des Gens, lib. 11, § 292, speaks of compacts which have no relation to the performance of reiterated acts, but merely relate to transient and single acts, which are concluded at once, and suggests that they may be more properly called by another name than that of treaties. Martens (Precis, § 58) has accordingly proposed to call them transitory conventions, which Wheaton approves." 1 Twiss, § 225.

Mr. Justice Washington, in the case of Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 8 Wheat. 494, says: "But we are not inclined to admit the doctrine

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tions. It is unlawful to poison the springs of water of a country ravaged by hostilities, or to assassinate the combatants.

§ 43. Effect on persons of the enemy.

In regard to the effect of war upon persons, the progress of human enlightenment has wrought a great change. In the primeval times, and for many centuries after, it was lawful to kill the enemy taken in battle. You see repeated instances of that in the history of the Jews, and the earlier histories of all the ancient nations. Little by little, as a logical deduction, it was concluded that the right to kill an enemy implied the right to permit him to live on certain conditions, and from that arose the reduction to slavery of captives taken in war. That practice subsisted for many ages, but finally it is now the settled law of nations that no captive

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urged at the bar, that treaties become extinguished, ipso facto, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. * * * There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of terri-

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taken in war shall be killed, but is entitled to quarter. It is also the law that such a prisoner cannot be reduced to slavery, but may be exchanged during the war, and must be released at the conclusion of peace. The good that these modifications of the ancient and bloody code of war have done cannot be estimated. A force of humanity, of courtesy, of chivalry, and of right has been introduced into the conflicts of nations that has gone very far to temper the horrors of war.

§ 44. Effect on enemy's property.

The effect of war upon enemy's property was formerly the same on both land and sea. In former times, enemy's property, prop-

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torial and other national rights, or which in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war."

"It is said that treaties are perishable things, and their obligations are dissipated by the first hostility. But this is to be understood of treaties that have reference only to the pacific relations of the contracting parties, and, even in respect of such treaties, the expression is inaccurate. It is true that their covenants exist only

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erty of the subject and of the state alike, when taken either upon land or sea, became the prize of the captor. This has been changed by the forces of advancing civilization. Private property on land, not directly fitted or used for warlike purposes, is not, as a general rule, subject to seizure and confiscation by the belligerents. It can sometimes be taken, used, or destroyed for the purpose of subserving an overruling and pressing military necessity. The taking, use, or destruction in that case is justified by necessity, but it must be a strict one. But never now, as in times past, except in case of such necessity, can an enemy who invades a foreign country lawfully spread out his

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with a state of amity with the confederate states, and that they are necessarily suspended during war, because a state of war is inconsistent with pacific relations, and leaves nothing for such treaties to operate upon during its continuance; but since a treaty of peace acts as an act of oblivion in respect of the differences wherein war originated, and of all grievances committed or suffered in prosecution thereof, it necessarily follows that all engagements subsisting between belligerents at the commencement of hostilities are revived by the treaty of peace, so far as they are consistent with its provisions. Puff.

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parties of devastators, and take the private property of noncombatants. It is as sacred as if no war existed.

But upon the sea it is different. The usages of the ocean lag far behind the usages of the land in becoming amenable to the processes of civilization. Upon the ocean, during a war, all enemy's property, ship and cargo, when taken, are subject to condemnation and confiscation as prize. The old Adam is strong in humanity, even in the days in which we live, and this barbarous principle of the law of nations is nothing more nor less than a survival of that piracy in which all nations in the earliest historic periods universally engaged. It is very strange that the efforts of the best exponents and creators of public opinion on international law, although they have been directed to that end for more than

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VIII., 9; Wheaton, 494; Vattel, IV., § 42. But treaties that have reference to the belligerent relations of the contracting parties are suspended during peace, and are brought into operation during war, otherwise they would be wholly unreasonable and inoperative. Bynk. Q. J. P. II., X; Vattel, II., § 175; 1 Kent, Comm. p. 165." 1 Wildman, pp. 175, 176.

The senate of the United States having under

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fifty years, have not been able to obliterate from the law of nations this pernicious barbarism. It was abolished as to several nations by the convention of Paris about forty years ago. That treaty, of course, bound only the signatory powers. The United States refused to accede to it as formulated, but was willing to do so upon the additional condition suggested by it that "private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband of war."

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consideration the treaty of Paris, terminating the Spanish war, the question was raised in that body as to the effect of the war on the treaty of 1834 which existed between the United States and Spain. Mr. Davis, from the committee on foreign relations, and author of this work, reported that the treaty of 1834 settled a particular fact that, in accordance with that settlement, Spain engaged to pay the United States a certain sum of money, and in a particular manner, thereby acknowledging the obligation to be a part of her national debt, which, according to all the authorities, is never discharged by the event of war. This position indicates that the treaty of 1834 comes under the head of treaties, which Vattel and Wheaton denominate, "transitory conventions," and may furnish a key to other cases.

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This condition was not acceptable to the great European powers. They desired only to abolish privateering, and to leave private property on the sea subject to capture by their public ships of war. The proposition of the United States ought to have been agreed to. Its acceptance would have made substantially identical the exemption of private property both on land and sea. The canon of international law, therefore, still remains, that all property of an enemy on the sea, when taken by a public vessel, namely, a ship of war, of the adverse party, or by a duly-commissioned privateer, is liable to absolute forfeiture except in cases otherwise provided for by treaty stipulation. This, of course, ought to be, and will be, changed in the due progress of events.

The following argument and authorities were, in part, relied on by Senator Davis in reaching the above conclusion, though prepared by the annotater of this work:

Do hostilities between two nations abrogate all existing treaties? If not, what treaties revive at the conclusion of peace? These are great questions on which "doctors disagree;" in fact, most of the international law writers are too general in their treatment of the effect of war on previously existing treaties to remove from

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§ 45. Disposition of prize.

A prize taken at sea must be brought into some port of the captor for adjudication by

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the realm of doubt many questions that may arise, on the conclusion of peace, not specifically provided for in the treaty of peace.

From an examination of many of the best-recognized authorities on the subject, I deduce the following conclusions: Treaties of the following character survive a war: Those that relate to and fix a permanent condition of national existence, fix boundaries, etc. Those which determine property rights, either real or personal. Those which contain a final adjustment of a particular question. Those which contain special reference to a subsequent war, and provide for their continuation. Those which determine some great international principle. The following are abrogated by war: Treaties of alliance and friendship. Treaties of commerce and navigation, postal treaties, etc. There is a division of authorities on this question. Those treaties the provisions of which are inconsistent with the new conditions.

Wheaton (page 381; Boyd's Ed.) treats the subject as follows: "Treaties, properly so called, are those of friendship and alliance, commerce and navigation, which, even if perpetual in terms, expire of course. Treaties fixing boundaries and territorial jurisdiction."

On page 382 Wheaton says: "Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which

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a competent court, though, as between the belligerents, the title passes to the sovereign technically and completely from the moment

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are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the being of either party, and thus render the compact inapplicable to the new condition of things. It is for this reason, and from abundance of caution, that stipulations are frequently inserted in treaties of peace, expressly reviving and confirming the treaties formerly subsisting between the contracting parties, and containing stipulations of a permanent character, or, in some other mode, excluding the conclusion that the obligation of such antecedent treaties is meant to be waived by either party."

On page 707 of the same work he says: "The treaty of peace does not extinguish claims founded upon debts contracted or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect."

Lawrence (section 167) divides treaties into four classes, the first of which, only, concerns our case, if it can even fall under that head,—"those to which the name 'pacta transitoria' has been given. They are agreements fulfilled by one act, or series of acts, which produce, by being once performed, a permanent effect. Boundary conventions and treaties of cession or recognition are examples. War has no effect upon them." In the third class he places "conventions for regulating

of effectual capture. But the property is not changed in favor of a neutral vendee, or a recaptor, so as to bar the original owner,

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ordinary social, political, and commercial intercourse, such as treaties of commerce and extradition treaties. The effect of war upon instruments of this kind is very doubtful. They are, of course, suspended while the war lasts; but it is a much-disputed question whether they revive again at the conclusion of peace, or are destroyed by the war, and require to be re-enacted if they are to come into force when it is over. * * * With these facts before us, we may venture to say that, though no rule can be laid down as undoubted law, it is best to hold, on general principles, that treaties of the kind we are now considering are merely suspended by war, and revive at the conclusion of peace."

Gallaudet (page 210) says: "The effect of a state of war on treaties depends, naturally, on the character of these contracts. Thus, all engagements intended to operate in a state of peace, such as treaties of amity, alliance, and others of a political nature, are definitely terminated. Customs, postal arrangements, conventions for commerce and navigation, agreements regarding private interests, are generally regarded as suspended until termination of hostilities." On page 254 the same author says: "The conclusion of peace does not invalidate engagements made prior to the war, nor does it interfere in any way with the private rights of subjects or sovereigns, unless by special stipulation. * * * Internation-

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until a regular decree of condemnation has been pronounced by a court of competent jurisdiction belonging to the sovereign of the

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al conventions, the operation of which has been suspended by the existence of war, resume their force at the conclusion of peace, unless they have been modified or abrogated by the terms of the treaty of peace."

Halleck, Int. Law, p. 352, says: "A treaty of peace does not extinguish claims unconnected with the cause of the war. Debts existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived."

"War does not affect the compacts of a nation, except when so provided in such compacts; and except, also, that executory stipulations in a special compact between belligerents which, by their nature, are applicable only in time of peace, are suspended during the war." Field, Int. Code, § 905.

"All engagements subsisting between belligerents at the commencement of hostilities are revived by a treaty of peace so far as they are consistent with its provisions." 1 Wildman, Int. Law, p. 175.

De Martens holds that war abrogates only those treaties the existence of which is incompatible with belligerent relations.

Calvo (volume 5, § 3152) holds that all treaties remain binding, and revive at the conclusion of peace, unless changed by the terms of the treaty

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captor, and the purchaser must, in order to support his title, be able to show record evi-

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of peace, or are inconsistent with the new relations.

Woolsey (section 160, subd. 4) says: "Private rights, the prosecution of which is interrupted by war, are revived by peace, although nothing may be said upon the subject; for a peace is a return to a normal state of things, and private rights depend not so much on concessions, like public ones, as on common views of justice. And here we include not only claims of private persons, in the two countries, upon one another, but also claims of individuals on the government of the foreign country, and claims—private and not political—of each government upon the other existing before the war."

Vattel (page 438) says: "The effect of the compromise or amnesty cannot be extended to things which have no relation to the war that is terminated by the treaty. Thus, claims founded on a debt, or an injury which had been done prior to the war, but which made no part of the reasons for undertaking it, still stand on their former footing, and are not abolished by the treaty, unless it be expressly extended to the extinction of every claim whatever." He further says that the compromise and amnesty relate to their own particular object,—that is to say, to the war, its causes and its effects.

Phillimore (volume III.) lays down as a general rule that treaties are abrogated by a subsequent war, but recognizes a modification of the rule in

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dence of such an adjudication. If the ship escapes or is retaken before condemnation

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this: That a treaty which recognizes a principle and object of permanent policy survives the war. He cites the English rule in support of his position, and in that connection the proposed treaty with France in 1801, and the discussion concerning it in the house of lords. Lords Grenville, Thurlow, and others supported that view, while the Lord Chancellor Eldon opposed it. The points of omission they had under discussion at the time were, first, the point of honor of the British flag not being asserted, as was settled by the treaty of 1783; second, the stipulation with respect to the gum and logwood trade. It might be observed in this connection that Lord Grenville was foreign minister shortly before this period, and better terms of settlement with France were offered, which the noble lord saw fit to refuse. Pitt was now foreign minister, and it was proposed to discredit his administration of affairs, and a resolution was offered for his expulsion.

The broad principle that all treaties are abrogated by subsequent war has no foundation in fact, and is not supported by authority. The treaty of Utrecht was not renewed in later treaties, and in certain important particulars its binding force was universally accepted. Phillimore, vol. III. p. 807.

Mr. J. Q. Adams says: "The treaty of 1783, so far as concerns boundaries and fisheries and other national privileges and rights, was not abrogated by the war of 1812."

"It cannot be necessary to prove that the treaty

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by the prize court, the title of the original owner revests under what is called the *jus postliminii.*

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of 1783 is not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties. To suppose that it is would imply the inconsistency and absurdity of a sovereign and independent state, liable to forfeit its rights of sovereignty by the act of exercising it on a declaration of war." Mr. Gallatin to Mr. Rush, 1817, quoted in 2 Lyman's Diplomacy, 91.

War does not by itself abrogate treaties or portions of treaties which vest rights of property. Society, etc., v. New Haven, 8 Wheat. 464.

It appears to me a correct conclusion from the foregoing authorities that there can be little dispute about this position, viz., that transitory conventions determining a particular right are continuing in their nature, and are not abrogated by a subsequent war. Such was the nature of our treaties with Spain in 1834 and 1871. By both those treaties, Spain acknowledged herself indebted to certain of our subjects in a specific amount, and agreed to pay it. That act vested in our people a substantial property right, which was beyond the promisor's power to repudiate. This fact is well recognized by the joint commission in formulating the present treaty of peace. Out of abundance of caution, our commissioners suggested that the revival of certain treaties be specifically provided for, but the Spanish commis-

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§ 46. Treaties of peace.

But war ends, as all things in this world must end. A treaty of peace composes and

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sioners did not feel justified in entering upon those questions under power of their commissions. The treaty, however, leaves no room for doubt as to the intention of the negotiators regarding the binding force of pre-existing debts. See article 7 of the treaty, which reads as follows: "The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either government, or of its citizens or subjects against the government, that may have arisen since the beginning of the late insurrection in Cuba, and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war." The above article certainly indicates the intention of the parties as to pre-existing claims, and fixes definitely when Spain's responsibility ceases.

PRINCIPLES GOVERNING WAR.

Some of the principles governing war in modern times are laid down and commented on by Woolsey as follows:

"(1) Private persons remaining quiet, and taking no part in the conflict, are to be unmolested; but if the people of an invaded district take an active part in the war, they forfeit their claim to protection.

"(2) The property, movables as well as immovables, of private persons in an invaded country, is to remain uninjured. If the wants of the

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settles a conflict which perhaps should never have been engaged in. The effect of a

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hostile army require, it may be taken by authorized persons at a fair value, but marauding must be checked by discipline and penalties.

"(3) Contributions or requisitions are still permissible, on the plea, first, that they are a compensation for pillage, or an equitable repartition of what would accrue from this source, which, if pillage is wrong, is no plea at all; and, again, that they are needed for defraying the expense of governing a conquered province, which is a valid plea when conquest is affected, but not before; and, thirdly, on a plea that, in a just war, it is right to make the 'enemy's country contribute to the support of the army, and towards defraying all the charges of the war.' (Vattel, III., 9, § 165.) But, if the true principle is that war is a public contest between the powers or authorities of two countries, the passive individual ought not to suffer more than the necessities of war require." Woolsey, § 136.

Talleyrand, in a dispatch to Napoleon, on November 20, 1806, says: "Three centuries of civilization have given Europe a law of nations, for which, according to the expression of an illustrious writer, human nature cannot be sufficiently grateful. This law is founded on the principle that nations ought to do to one another, in peace, the most good, and, in war, the least evil, possible."

ATTACK OF PLACES.

In the attack of places, a distinction is made

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treaty of peace is just as decisive as the force of a declaration of war. We have seen that

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between forts, or fortified places, and what are called open, or undefended, towns. The latter, if they offer no resistance, cannot be attacked. On the contrary, it is the first duty of the commanding general of the force occupying them to prevent pillage, and to insure public order and protection of private property. Fortified places may be taken by open assault, or may be reduced by regular siege operations. If an open assault be attempted, no notice is given, as surprise in such an operation is an essential condition of success. The very fact of war is a sufficient notice to the noncombatant inhabitants of such places that an attack is at least a probable contingency. If they continue their residence, it is presumed that they do so with the full knowledge that the place may become the center of active military operations.

PAROLE.

A parole is a promise made by an individual of the enemy pledging his honor to pursue or refrain from pursuing a particular course of conduct. When given for leave to return home, the parole is accompanied by a pledge to refrain from taking part in an existing war until regularly exchanged. A parole is given in writing, in such cases, usually in duplicate; one copy being retained by the captor, the other by the officer giving the parole. Paroles are received only from officers, and, when necessary, are given

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such a declaration immediately severs all connections and ties between the people of

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by officers for the enlisted men of their commands. These instruments are obligatory upon the government of the state to which the individual belongs only when accepted or recognized by its authority. A government may refuse its officers privilege of giving paroles when held as prisoners of war. If his government refuses to recognize a parole, it is the duty of the paroled officer to return at once to captivity. A breach of parole is an offense against the laws of war, and the penalty of such breach may be death.

(1) May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war? (2) Is there any legislative act which authorizes such seizure and condemnation? In the case of Brown v. United States, 8 Cranch, 110, Chief Justice Marshall says: "Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask, Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign

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the belligerent states, and makes them enemies. The treaty of peace closes the chasm,

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power?" After discussing the various authorities and text writers on the subject, the learned chief justice says: "The modern rule, then, would seem to be that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property. This rule appears to be totally incompatible with the idea that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the jus belli, that war gives the right to confiscate, but does not itself confiscate, the property of the enemy, and their rules go to the exercise of this right." The chief justice goes on to show that, under the constitution of the United States, the declaration of war has only the effect of placing the two nations in a state of hostility, and producing a state of war; that the power resides in the congress of the United States alone to authorize the seizure of the enemy's property on the breaking out of hostilities, and the chief executive can only enforce such law when passed by congress. See, also, the case of Ware v. Hylton, 3 Dall. 199.

In the case of Ex parte Boussmaker, 13 Ves. 71, it was held that property of an enemy in the form of a dividend arising from a contract made before the war could not be confiscated.

In the case of Wolff v. Oxholm (King's Bench,

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and makes the enemies of yesterday the friends of today. The interrupted contracts

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1817) 6 Maule & S. 92, it was held that the confiscation of private debts due to an enemy was not in conformity with the usage of nations.

This decision is directly at variance with the American cases, and Sir Robert Phillimore (Int. Law, III., p. 723), in reviewing this judgment, says: "Perhaps, if the occasion should present itself, the decision of Lord Ellenborough might be reversed in England. It was the decision of a single court, not much accustomed to deal with questions of international law."

PRIVATE CONTRACTS.

Held that, in the case of contract debts as between persons who became enemies, the remedy is suspended during the period of the war, and revives on the return of peace. Hanger v. Abbott, 6 Wall. 532.

Held, that commercial partnerships existing between citizens of two states are dissolved by the breaking out of war between those states. Griswold v. Waddington, 15 Johns. (N. Y.) 57.

Executory contracts between persons who became enemies, where time is material, and of the essence of the contract, are annulled by war. Life insurance policies are of this character, but the assured is entitled to recover the equitable value of the policy at the time of the outbreak of the war. New York Life Ins. Co. v. Statham, 93 U. S. 24.

After a declaration of war, an American citi-

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regain their obligatory force, the severed relations are reunited, and war, as to these, is

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zen cannot legally send a vessel to the enemy's country to bring away his property. The Rapid, 8 Cranch, 155.

As to the duty of an American citizen to return home when the United States becomes involved in war with the country of his residence, see The William Bagaley, 5 Wall. 408.

Conquest or cession of territory works no change in private titles to land. United States v. Moreno, 1 Wall. 400.

The military occupation of a territory confers upon the invader the right to the usufruct and revenues only of the public domain. The French courts will not recognize as valid the sale of old trees (during the war of 1870-71) on the public domain, which were reserved at the time of the annual cutting. They are as inalienable as the soil of the forest itself. Mohr v. Hatzfeld (Court of Appeals of Nancy, 1872), Dalloz, 1872, II., p. 229.

A crime committed by a French citizen in Spanish territory, occupied and administered by the French army, held to be committed in a foreign country. Villasseque's Case (Cour de Cassation, 1818) Ortolan: Diplomatic de la Mer. (2d Ed.) bk. 1, p. 324.

Hesse Cassel was conquered by the first Napoleon in 1806, and remained for about a year under his immediate control, when it was annexed to the new kingdom of Westphalia, and

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as if it had never been. Treaties, however, must be formally renewed.

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formed a part of that kingdom until after the battle of Leipzig, in 1813.

The question was whether debts owing to the elector were validly discharged by a payment to Napoleon, and receiving from him a quittance in full. The prince of Hesse Cassel, being restored, denied the validity of the discharge, asserting that Napoleon possessed himself of the money in the character of a robber, and not of a conqueror. The matter was submitted to the Prussian University of Breslau for an opinion in May, 1824. That tribunal held in substance that the prince might recover that part of the debt which had not been actually paid in money to Napoleon, but no more. Napoleon had remitted a large portion of the debt in order to induce payment, and gave a full discharge. The matter was appealed to the Holstein University of Kiel, which held substantially the same. This court sanctioned an appeal to another German University (name not given), and that body rendered a lengthy and well-considered opinion, holding that the discharge was lawful. They said that the real question was whether Napoleon had or had not become the true creditor of the Hesse Cassel funds. They drew a broad distinction between the validity of acts done by a mere transient conqueror, and acts done by him after the kingdom had been wholly subdued, and the subjects had either expressly, or by necessary implication, accepted

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him as their ruler. In the latter case, the rights and title of the conqueror had been ratified by the public act of the state. Napoleon's right and title were of the latter kind. They pointed out that the prince had, from the time of his departure or abdication, been an active enemy of the new government established under Napoleon and Jerome, and that, by the laws of all countries, the property of a person, qui sub publico egit against the state, was confiscable. The Elector of Hesse Cassel, Phillimore, Int. Law, III., p. 841.

This latter decision seems, on principle, to be the correct conclusion.

The beginning and termination of the Civil War in the United States in reference to statute of limitations is to be determined by some public act of the political department. The war did not begin or close at the same time in all the states. The Protector, 12 Wall. 700. See, also, Brown v. Hiatts, 15 Wall. 177; Phillips v. Hatch, 1 Dill. 571.

Betsy Ames, a Maine brig, was captured by a Confederate privateer during the late Civil War, was carried into Charleston, South Carolina, and then sold. She ran the blockade, and took a cargo to Liverpool, of which she then disposed. She was then registered as a British vessel, and called the "Lilla." She was afterwards captured by the United States gunboat Quaker City, brought into a port of the United States, and then claimed by her original owners. The court (United States District Court for Massachusetts, 2 Sprague's Decisions, p. 177) held that "the vessel, not having been condemned by proper au-

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thority, under the act of congress in 1800 (16 U. S. Stat. at Large, c. 14, §§ 1, 2), must be restored to the original owners. Treating the Confederates in some respects as belligerents was not an abandonment of sovereign rights, and by no means precluding us from treating them in other respects as rebels."

The produce of enemy soil while unsold is hostile, whatever be the domicile of the owner of the soil. Bintzon v. Boyle, 9 Cranch, 191; The Phoenix, 5 C. Rob. Adm. 20.

A neutral merchant domiciled in a belligerent country does not acquire a belligerent character, and his property at sea is neutral property. Le Hardy contra La Voltigeante, Conseil des Prises, an IX. (Pistoye et Duverdy, I., 321).

A Spanish subject, who comes to the United States in time of peace to carry on trade, and remains here engaged in trade after a war has been begun between Spain and Great Britain, is to be deemed an American merchant by the law of domicile, although by the law of Spain the trade in which he was engaged could be carried on only by a Spanish subject; his neutral character depending, not on the kind of trade in which he was engaged, but on his domicile. Livingston v. Maryland Ins. Co., 7 Cranch, 506.

See cases of The Aurora, 8 Cranch, 203; The Venus, 8 Cranch, 253; The Frances, 8 Cranch, 335; The St. Lawrence, 9 Cranch, 120; The Mary, 9 Cranch, 126; The Mary and Susan, 1 Wheat. 46; The Antonia Johanna, 1 Wheat. 159; The Dos Hermanus, 2 Wheat. 76; The Friendschaft, 3 Wheat. 14; The Prize Cases, 2 Black, 635; The Venice, 2 Wall. 258.

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The above cases relate mainly to domicile as affecting rights and liabilities in time of war.

Ownership of Goods in Transit.

In time of war, or in contemplation of war, goods in transitu on the ocean are held to belong to the consignee. This was a claim of an English house for goods shipped on the order of a Spanish merchant, before hostilities with Spain, and captured December, 1796, on a voyage from London to Corunna. Held, that the contract, being made in time of peace, was valid; but the goods, not having been delivered to the consignee, but captured by a British ship, should be returned to the British owner. Packet De Bilboa, 2 C. Rob. Adm. 133.

On the question of title to goods in transitu see cases of The San Jose Indians, 2 Gall. 268; The Sally, 3 C. Rob. Adm. 300, note; The Anna Catharina, 4 C. Rob. Adm. 107; Les Trois Freres, Pistoye & Duverdy, I., p. 357; The Vrow Margaretha, 1 C. Rob. Adm. 336; The Jan Frederick, 5 C. Rob. Adm. 128; The Ann Green, 1 Gall. 274.

War.

Is a subject of a foreign state liable to be proceeded against individually, and tried on an indictment in the criminal courts for arson and murder, notwithstanding the acts for which the indictment was procured had been subsequently avowed by his government? The better opinion is that he is not.

People v. McLeod (1837) 25 Wend. 483. The decision in this case was under the laws of

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New York, and of course not binding in international law. It does not appear to be sound in principle, and a subsequent act of congress bringing similar questions before the federal courts obviates the difficulty of the application of local law. Halleck, Int. Law, I., 429; Works of Webster, vol. 6, pp. 247-270.

Mr. Webster, the American secretary of state, in his correspondence with Mr. Fox, the British minister, said that "the government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it."

Judge Story, in speaking of the seizure of an American vessel and cargo by a Spanish vessel, said that, if she had a commission, it was an act of the Spanish government; and if she had no commission, but the act was adopted and acknowledged by the crown, or its competent authorities, the seizure must be considered as for the benefit of the crown, and the property, when condemned, became a droit of the government. Chancellor Kent takes the same view of the question. See 1 Op. Attys. Gen. p. 81 (Charles Lee, Attorney General).

Freight.

Where a neutral vessel, carrying enemy's goods, is captured, the neutral master is, as a

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general rule, entitled to his freight, which is a lien on the cargo. The Vrow Henrica, 4 C. Rob. Adm. 343.

Freight is due to the captor, in virtue of the ship, which had been condemned when the cargo, being neutral, is carried by the captor to the place of destination. The Fortuna, 4 C. Rob. Adm. 278.

Recapture and Restitution.

The ancient rule concerning recapture and the effect on original ownership varied with each country.

In the case of The Santa Cruz, 1 C. Rob. Adm. 50, Sir William Scott, delivering the opinion of the court, said: "In the arguments of the counsel, I have heard much of the rules which the law of nations prescribes on recapture, respecting the time when property vests in the captor, and it certainly is a question of much curiosity to inquire what is the true rule on this subject. When I say the true rule, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is no rule operating with the proper force and authority of a general rule. * * * But were the public opinion of European states more distinctly agreed on any principle as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it. That obligation could arise only from a reciprocity of practice in other

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nations; for, from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary to that one nation, to pursue a different conduct. * * * I understand the law [of England] to be clearly this: That the maritime law of England, having adopted a most liberal rule of restitution on salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act toward British property on a less liberal principle. The English rule allowed one-sixth salvage to privateers."

Salvage on neutral property, retaken out of the hands of the enemy, not given unless it can be shown, by references to the ordinances or to the practice of the prize courts of the enemy, that the first seizure was made under such circumstances as would have exposed the goods to condemnation in the hands of the enemy. The Carlotta, 5 C. Rob. Adm. 54.

In the case of recapture from a pirate, the property ought to be restored to the original owner, for the reason that he was never lawfully divested. For the services rendered, however, the recaptor ought to be recompensed in the nature of salvage. Grotius, de Jur. Bel. ac Pac. lib. III., c. 9, § 17.

By the marine ordinance of Louis XIV. of 1681 (liber III., tit. 9, des Prises, art. 10), it was provided that the ships and effects of the subjects and allies of France, retaken from pirates, and claimed within a year and a day after being reported at the admiralty, shall be restored to the

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owner, upon payment of one-third of the value of the vessel and goods as salvage. The former usage of Holland, Venice, and Spain gave the whole property to the recaptors if it had been in the hands of the pirates for twenty-four hours, and the rule was based on public utility. Dana's Wheaton, p. 457.

The principle of reciprocity in respect to recapture and restitution obtains in the United States towards friendly foreign nations on the recapture of their property from the enemy by our ships of war.

By the act of congress of March 3, 1800 (2 Stat. at Large, c. 14, § 3), it is provided that the vessels or goods of persons permanently resident within the territory, and under the protection of any foreign government in amity with the United States, which shall be taken as prize, and retaken by their vessels, shall be restored to the owner, he paying for salvage such portion of the value thereof as by the law and usage of such foreign governments shall be required of any vessels or goods of the United States under like circumstances of recapture. The rule then is that American prize courts in such cases shall be governed by the decisions of the prize courts of the particular country whose ships have been captured, or by the treaty between the two countries, if any exists. For the British statutory law, see the act of 1864 (27 & 28 Vict. c. 25).

Sections 1 and 2 of the act of congress above referred to also provide that vessels or goods in case of recapture of such vessels or goods belonging to persons resident in the United States,

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or under the protection thereof, the same not having been condemned as prize by competent authority before the recapture shall be restored on payment of salvage of one-eighth of the value if recaptured by a public ship, and if the recaptured vessel shall appear to have been set forth and armed as a vessel of war before such capture, or afterwards, and before the recapture, then the salvage to be one moiety of the value. If the recaptured vessel previously belonged to the government of the United States, and be unarmed, the salvage is one-sixth if recaptured by a private vessel, and one-twelfth if recaptured by a public ship. If armed, then the salvage to be one moiety if recaptured by a private vessel, and one-fourth if recaptured by a public ship. See case of The Adeline, 9 Cranch, 244; Rev. St. U. S. tit. "Prize."

On the question of jurisdiction of national courts of the captor to determine the validity of captures made in war under the authority of his government, see the cases of The Estrella, 4 Wheat. 298; The Santissima Trinidad, 7 Wheat. 283.

Piracy is defined by the text writers to be the offense of depredating on the seas, without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other. See case of United States v. Smith, 5 Wheat. 153, and authorities cited in note.

"The provisions of the federal articles on the subject of piracies and felonies extend no farther than to the establishment of courts for the trial of these offenses. The definition of piracies

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might, perhaps, without inconveniency, be left to the law of nations, though a legislative definition of them is found in most municipal codes." The Federalist, No. 42, p. 276.

Sir Charles Hedges, judge of the admiralty court, said to the grand jury in 1869: "Piracy is only a sea term for robbery committed within the jurisdiction of the admiralty." Rex v. Dawson, 13 State Trials, 454, approved in Attorney General for Hong Kong v. Kwok-a-Sing, L. R. 5 P. C. 199.

Pirates, being common enemies of all mankind, may be tried and punished in the courts of justice of any nation, no matter by whom or where captured.

When an insurrection or rebellion breaks out in any state, the rebel cruisers may be treated as pirates by the established government, so long as the rebel government has not been recognized as a belligerent by the parent state or by foreign states, but this right ceases to exist on their recognition as belligerents. Rose v. Himely, 4 Cranch, 272; The Prize Cases, 2 Black, 635; Miller v. United States, 11 Wall. 268.

During the late Civil War in the United States, when the president issued his proclamation of April 19, 1861, declaring the Confederate ports blockaded, he virtually recognized the Confederacy as belligerent.

Conclusion of Peace.

Hostile acts committed after the conclusion of peace are illegal, and the injured party may sustain an action for damages against the wrongdoer. But if an officer commits such an act in

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ignorance of the ending of the war, his own government should protect him. The Mentor, 1 C. Rob. Adm. 179.

A vessel captured between the dates of the signing of the preliminary treaty of Luneville and the final ratification of the treaty restored on the ground of illegal capture in time of peace. The Thetis (Conseil des Prises, 1801) Pistoye & Duverdy, I., 148.

Treaty of Peace.

By a treaty of peace between two nations at war, they enter at once into all the rights, and are bound by all the duties, which are implied by that relation. As soon as peace is concluded, all hostilities must cease. If a hostile army is in occupation of the enemy's country, they can levy no more contributions. The treaty itself fixes the rights and privileges of both parties, and, in so far as that instrument is silent, they are bound by the law of nations. By the principle called that of "uti possidetis," in the absence of contrary stipulations in the treaty of peace, it is understood, vest in the two belligerents as absolute property whatever they respectively have under their actual control, in the case of territory and the things attached to it, and, in the case of movables, whatever they have in their legal possession at the moment. The occupying power takes the occupied territory, and movables which have been in the occupied territory during the occupancy without being confiscated by the enemy remain the prop-

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erty of the original owner. Phillimore, III., c. 586.

With Respect to Movable Property. "It is a well-established rule of international law that, if a treaty of peace contains no especial provision relative to movable property captured during the war, such property remains in the condition in which it exists at the time of the conclusion of the treaty, and the title of the de facto possessor is thereby tacitly and by implication confirmed." 1 Kent, Comm. p. 117.

"It is a very general modern international usage to consider that the movables on land of individuals who have taken no part in the war are exempted from hostilities and from consequent capture and confiscation. This a matter, however, rather of comity than of strict right." Phillimore, III., c. 587.

The treaty of peace usually provides for the allegiance of the people remaining on the conquered territory, or the territory which is transferred to the enemy by the terms of the treaty. When a portion of a state is separated from the parent state by revolution, and sets up an independent government, the question of allegiance is one of great nicety. See the case of Inglis v. Trustees of the Sailors' Snug Harbour, 3 Pet. 157.

It is usual in a treaty of peace to give a limited time to the inhabitants of the conquered provinces to make their choice of nationality.

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CHAPTER IX.

OF NEUTRALITY.

§ 47. **Duties of neutral nation.**
48. **Illustrations.**
49. **Trade with belligerent.**
50. **Blockade.**
51. **Visitation and search.**
52. **Contraband of war.**

The duties of one nation to another, of which I have spoken, or of one state to another, for that is a better phrase, mainly apply in times of peace. What are those duties in times of war? I am not speaking now of the two states who are at war, but of the duties of states at peace with the belligerents. That duty is absolute neutrality as between them,—absolute indifference and abstention from any action which can give aid or comfort to either belligerent. It is pretty hard to define accurately what neutrality is, or in what it consists, without expanding the definition into an essay. There are some words which convey their meaning better than any paraphrase, and the word "neutrality" needs no illustration or side lights from any expansive definition.

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§ 47. Duties of neutral nations.

When two nations become involved in war, it becomes an important question to the states not engaged in it what their duties and rights are as neutrals. These are as follows: The neutral nations must not in any manner assist or give comfort to either of the belligerents; they must be actually and impartially indifferent in the contest. The right of their subjects to trade with either of the belligerent nations is not impaired except by certain risks and conditions which will presently be explained. The primary duty is that neutral nations, as states, shall, under no circumstances, in any way, form, or manner, give aid or comfort to either of the belligerent states. They must not permit the arming of cruisers in their ports; they must use reasonable diligence to enforce their own neutrality laws; they must not permit the enlistment of soldiers in the neutral territory for either of the contending armies.

§ 48. Illustration.

Our own history furnishes several very illustrative examples. The first occurred more than one hundred years ago under the ad-

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ministration of Washington. The French republic, which had then recently burst like an armed and demented giant into the family of nations, sent citizen Genet to represent it in this country. Genet, calling international law a "rhapsody" as he did, and seeking to disregard it, proceeded to issue from his legation letters of marque and reprisal and commissions as against England. England protested, of course. It was a breach of neutrality for this government to allow the French ambassador to do so. Washington remonstrated, kindly yet firmly, with Genet, but that irrepressible Frenchman took no warning from kindness or remonstrance, and he was finally compelled by Washington, Thomas Jefferson then being secretary of state, to leave this country.

At a later date,—in 1854, I think,—while the Crimean war was raging, agents of Great Britain undertook to enroll recruits in New York and other places in this country for service in their army in the war against Russia. Their minister at that time in Washington was Sir John Crampton, and the result of that effort was that he was, in a sense, given his passports by this government, on

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account of the breach of neutrality by Great Britain and her agents in enlisting with his connivance, on American soil, recruits for the British army at war with a friendly power.

Great Britain failed to use due diligence to prevent the sailing of the Alabama and other privateers of the Confederate states. The result was that she was adjudged to pay to the United States, by the award of the Geneva Tribunal, the sum of $15,500,000 for damages inflicted by those privateers upon our commerce.[1]

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[1] Hall (3d Ed.) § 21.

For an extended discussion of the growth and development of the principle of neutrality, see 2 Twiss, §§ 208-215.

Gallaudet (page 260) says: "The history of neutrality may be divided into three periods, the first ending in the year 1780, the second with the Crimean war in 1854, and the third extending to the present time." England and France violated the most sacred principle of property rights on sea during the Napoleonic wars in order to cripple each other's power. Prior to this, however, the Empress Catherine II., of Russia, issued a famous manifesto with respect to the rights of neutrals, consisting of five principles: "(1) Neutral vessels may sail freely from port to port in neutral states. (2) Enemy's goods, ex-

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§ 49. Trade with belligerent.

The prohibition, however, as to neutrality applies only to the acts of a neutral state

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cept contraband of war, are free under a neutral flag. (3) To determine what should be considered as contraband of war, Russia refers to articles 10 and 11 of her treaty with England of June 20, 1766. (4) Only effective blockades shall be recognized. (5) These principles shall serve as the rules of procedure in prize courts."

To the above declarations, the following nations gave adhesion: Denmark, Sweden, Holland, Prussia, Austria, Portugal, the two Sicilies, France, Spain, and the United States. All these powers bound themselves to maintain the new principles, if need be, by the force of arms. The congress of the United States, by an act approved April 20, 1818, went a great length to settle our neutral obligations. 3 U. S. Stat. at Large, p. 447.

In 1814, when peace was restored in Europe, England entered into an agreement with Spain not to furnish arms or munitions of war to the insurgent colonies of South America. The British government passed the foreign enlistment act in 1819, which was based upon the American act of 1818. In 1854, England and France entered into an alliance, and agreed to the following principles: Reserving the right to seize contraband of war, to prevent neutrals from carrying the dispatches of the enemy, and to punish violations of an effective blockade, they provided that a neutral flag should cover enemy's goods; that

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as a state, or its negligence as a state; it does not prohibit the citizens of the neutral state from trading with either of the belliger-

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the property of neutrals under the enemy's flag should also be free from capture, and disclaimed any present intention of authorizing the fitting out of privateers. During the same year, the Russian government announced its intention of adhering to the allies' rules.

It was held by the supreme court of the United States in the case of The Santissima Trinidad, 7 Wheat. 284, that our citizens had a right to send armed vessels to foreign ports for sale; that the parties engaged only exposed themselves to the penalty of confiscation. The opinion was delivered by Mr. Justice Story. The question arose during the war between Spain and her South American colonies in 1816, and after we had recognized the belligerency of certain of the colonies.

From the above holding, Phillimore vigorously dissents while acknowledging the great authority. Phillimore, III, p. 408.

During the late Civil War in the United States, vessels were built in the shipyards of Liverpool to be used in the service of the Confederate states. The English court took the ground that it was no violation of the law to construct and completely equip a vessel of war in pursuance of a contract with a belligerent government, with the full understanding that such government was to make use of the said vessel in an existing war, so long as the parties constructing the ves-

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ents. This, however, is subject to the risk and consequences of carrying contraband of war or attempting to break a legal blockade.

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sel had no intention to commit hostile acts themselves, but only to sell the vessel to a belligerent power, which was free to use the vessel in such manner as it pleased.

This decision provoked earnest remonstrance from the government of the United States, and in July, 1863, Mr. Seward, then secretary of state, informed the British government, through Mr. Adams, that "if the decision [above referred to] was sustained by the supreme court of appeals, and adopted as rule of conduct by the English government, the president of the United States would understand that British law was powerless to maintain friendly relations between the subjects of her Britannic majesty and the government of the people of the United States on the only point where they were likely to be disturbed. * * * Should it become necessary to hold the interpretation of English law thus given, the United States would have no alternative but to protect their commerce against privateers sallying forth from British ports as against the naval forces of a public enemy, demanding indemnity for all injury done by these armed vessels to the government or citizens of the Union, and, in case their navy proved insufficient, would resort to arming of privateers." The British government took no effective steps to correct the evil, and it continued during the war. After the close of the war, and in 1871, a treaty providing for a

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§ 50. Blockade.

Another consequence as to the sea which results from a state of war between two na-

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tribunal of arbitration to settle the difficulties above referred to was entered into, and the following rules were laid down in the treaty for the government of the arbitrators in their deliberations: "A neutral government is bound, first, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intending to cruise or carry on war as above, in whole or in part, within such jurisdiction, to warlike use. Secondly, not to permit or suffer either belligerent to make use of its ports or waters as a base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly, to exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations or duties." Under the above instructions, the tribunal made an award against England for damages in the sum of $15,500,000.

It must be noted that the case determined by the Geneva tribunal differed widely from the American case of the Santissima Trinidad. In the American case, the United States gov-

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tions is the right of blockade. The right of blockade is applicable properly to the sealing

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ernment simply allowed her subjects to sail out of her ports with an armed ship in the usual course of trade, which ship was subsequently sold in the port of Brazil, then at war with Spain. In the British cases referred to, the British government allowed ships of war to be built in her ports under contract with, and at the instance of, the Confederate states, and allowed them to be equipped and manned at other ports within her dominion, by vessels sailing out of her ports for that purpose, of which the government had due notice, but took no effective steps to prevent. She also allowed those ships, under the Confederate flag, to enter her colonial ports, and there to be refitted and remanned.

A vessel may be fitted out in the United States for war, whether with armament or without, and sent to a belligerent port in search of a market. The Meteor (U. S. Cir. Ct. S. D. N. Y.) 3 Whart. Dig. 561.

CAPTURE IN NEUTRAL WATERS.

The capture of the ship of an enemy in neutral waters is illegal, and the ship will be restored by the prize court of the captor. Territorial waters extend three miles from the shore, or from islands near the shore. The Anna, 5 C. Rob. Adm. 373 (high court of admiralty).

Where a capture has been made in neutral waters, claims for damages by the injured belliger-

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up of the sea side of a maritime place,—the closing of its harbor. It is that process by which one nation, by a maritime force, closes to all commerce a post of its belligerent adversary.[2] The blockade must be actual, physical, efficient. It cannot be effected by proclamation. Paper blockades are invalid. The

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ent against the neutral state not allowed, if the captured ship resisted, instead of asking protection of the neutral. The General Armstrong (Louis Napoleon, Arbitrator, 1851) 2 Whart. Dig. 604.

If the captured ship first commences hostilities in neutral waters, she thereby forfeits neutral protection. A capture made in neutral waters is, as between the enemies, deemed to all intents and purposes a legal capture. The neutral sovereign can alone call its validity in question. The Anne, 3 Wheat. 435. The same is held in the case of The Lilla, 2 Sprague, 177. See, also, The Sir William Peel, 5 Wall. 517; The Adela, 6 Wall. 266.

In the case of the British ship Grange, captured in Delaware bay by a French privateer (1793), it was held by Attorney General Randolph (1 Op. Attys. Gen. 15) that, if the captured ship was brought within the jurisdiction of the United States, it was their duty, as neutrals, to restore her to the owners. To the same effect is the case of The Estrella, 4 Wheat. 298.

[2] "The object of a blockade is to prevent exports as well as imports, and to cut off all com-

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British orders in council, in the early part of this century, which declared the coasts of France to be in a state of blockade, and the counter decrees of Napoleon from Berlin and Milan, which declared England and all her ports in a condition of blockade, and interdicted intercourse by neutrals with Great Britain, were all of no effect in international law. A blockade must be proclaimed, and it must then be established and continuously maintained by a squadron or number of ships with sufficient vigilance and actual presence to make it extremely hazardous for any ves-

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munication of commerce with the blockaded place." The Frederick Molke, 1 C. Rob. Adm. 87.

"A declaration of blockade is the high act of sovereign power." The Henrick and Maria, 1 C. Rob. Adm. 148.

"In parts distant from the sovereign power, a commander must be holden to carry with him sufficient authority to act, as well against the commerce of the enemy as against the enemy herself." The Rolla, 6 C. Rob. Adm. 366.

"If a commander act without authority of his government, this is a matter between him and his government, and not a matter of which a neutral can take advantage." Id.

"The notification may be conveyed to the world either by the simple fact itself, or by a formal declaration." The Mercurius, 1 C. Rob. Adm. 82.

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sel to attempt to enter the blockaded harbor. When a vessel is captured in the attempt to enter a port thus legally blockaded, the ship and cargo, no matter whether the goods are contraband of war or not, are forfeited to the captor. There is no penal consequence upon the persons engaged either in carrying contraband of war or running a blockade; no personal punishment can be inflicted. The only guilty thing is the ship, and property engaged in the illicit transaction.

§ 51. Visitation and search.

Many questions arise as to the consequences upon the sea of a state of war as between

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EMBARGO.

An embargo is a sequestration of ships in anticipation of war or for the purpose of reprisal. Vessels subjected to it are consequently not condemned so long as the abnormal relations exist which have caused its imposition.

A hostile embargo is a kind of reprisal by one nation upon vessels within its ports belonging to another nation with which a difference exists, for the purpose of forcing it to do justice. If this measure should be followed by war, the vessels within the ports are regarded as captured; if by peace, they are restored. "This species of reprisal," says Chancellor Kent (vol. 1, p. 61) "for some previous injury is laid down in the books as a lawful measure, according to the usage of

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the belligerent nations and neutral powers. One of the most important consequences of a state of war is the right of search by public vessels of the contending powers of the vessels of neutrals. This right means that if two nations become involved in war, the ships of war of either nation would have the right to search the ships of any neutral nation (excepting its ships of war) for the purpose of ascertaining whether they are carrying contraband of war destined to the ports of the other belligerent, or whether the ves-

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nations; but it is often reprobated, and it cannot well be distinguished from the practice of seizing property found within the territory upon the declaration of war."

Where an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens, in 1803, under such circumstances as were considered by the British government as constituting hostile aggression on the part of Holland, Sir William Scott (Lord Stowell), in delivering his judgment in this case, said that "the seizure was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is ex-

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sel is making a voyage the end of which was to enter a blockaded port.

The general principle of international law is this: That every vessel on the high seas is a part of the territory of the country whose flag it bears. In times of peace, that vessel is absolutely inviolable upon the high seas. In times of peace, no power has the right to arrest, detain, visit, or search upon the high seas the ship of any other nation. A state of war between nations introduces an exception to this general rule. It deprives the neutral vessel of that sanction and safeguard of territoriality which in times of peace exempt it from visitation and search. The right of search is strictly a belligerent right. But search, as I said, is to be in aid of a legal blockade, or for goods that are contraband of war, destined to the ports of a belligerent.[3]

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actly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo." Boyd's Wheaton, pp. 402, 403.

This method of reprisal, owing to the fact that it is of interest to the world to throw safeguards around free intercourse, ought not to be pursued, and should be denounced by all nations.

[3] "It is quite true that the right of visit and

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§ 52. Contraband of war.

What is contraband of war? What are the goods or articles which, in the language of the prize courts, are guilty under such circumstances? It is difficult to define contraband of war. There have been three classifications on the subject. The first comprises such articles as powder, shot, cannon, guns, which are necessarily and indubitably useful for war, and for war only. As to those

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search is a strictly belligerent right (Le Louis, 2 Dodson's Adm. 210); but the right of visit, in time of peace, for the purpose of ascertaining the nationality of a vessel, is a part, indeed, but a very small part, of the belligerent right of visit and search. * * * Whatever may be the correct opinion with respect to the right of visit in time of peace, the right in time of war, to visit, to search, and to detain for search, is a belligerent right, which cannot be drawn into question." Phillimore, III., p. 523.

"Every vessel is bound to submit to visitation and search, whether it be the vessel of a friend or of an ally, or even a subject; and submission may be compelled, if necessary, by force of arms, without giving claim to compensation for any damage incurred thereby, if the vessel, upon visitation, should not be found liable to be detained. No circumstance can dispense with this obligation." Wildman, vol. II., p. 119.

The right of search is exercised for the pur-

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there can be no doubt. Then, there is a second class, namely: Articles such as books, domestic furniture, ordinary merchandise, which cannot have any relation to war. Of course as to those articles there can be little doubt. But, midway between these classes of property, there is an infinite variety of articles, such as horses, saddles, coal, provisions, cables, pitch, chains, medical stores,

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pose of ascertaining that certain specific violations of right are not taking place,—that contraband goods are not being conveyed to one of two or more nations engaged in war. It is essentially a war privilege. It is applied to merchant vessels alone. It may also be exercised in connection with the revenue laws of a country where a ship has left port under a strong suspicion of having committed a fraud upon such laws. This latter privilege is allowed in times of peace.

A vessel sailing under convoy of an armed ship for the purpose of avoiding visitation and search is liable to condemnation.

The Maria was a leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals and iron to several ports of France, Portugal, and the Mediterranean, and taken January, 1798, sailing under convoy of a ship of war, and proceeded against for resistance of visitation and search by British cruisers. See Vattel, bk. III., c. 7, § 114; The Marianna Flora, 11 Wheat. 1. For decisions on visit and search, see The Ante-

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which may be, or may not be, useful in war, and may or may not, therefore, be contraband. It is only as to this class of cases that any question can arise, and it has been settled to be a question of fact whether, under the circumstances of the particular case, the property is contraband.

When a ship is captured carrying contra-

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lope, 10 Wheat. 119. For the constitution and functions of prize courts, see Lawrence's Wheaton, 960. See, also, on this subject, the case of Rose v. Himely, 4 Cranch, 241, in which the supreme court held that a seizure, under customs' regulations, of a foreign vessel beyond the territorial waters of a state, was not valid. See, also, the case of Hudson v. Guestier, 6 Cranch, 281.

RIGHT TO SEIZE BEYOND THE THREE-MILE LIMIT.

A state may seize foreign merchant vessels beyond a marine league from the coast, in order to enforce its navigation and revenue laws. Church v. Hubbart, 2 Cranch, 187.

Mr. Dana, in commenting on this decision, says it is unwarranted. He says: "It may be said that the principle is settled that municipal seizures cannot be made, for any purpose, beyond territorial waters. It is also settled that the limit of those waters is, in the absence of treaty, the marine league or the cannon shot." Dana's Wheaton, p. 259, note.

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band goods, the consequence is that such goods are forfeited, as also are all the other goods on board the vessel belonging to the same owner, and also the ship, if it is his property. If the ship is not his property, she merely loses her freight and voyage.[4]

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[4] In the case of The Peterhoff, 5 Wall. 58, the supreme court of the United States says: "The classification of goods as contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is, perhaps, impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time or war; (2) articles which may be, and are, used for purposes of war or peace, according to circumstances; (3) articles exclusively used for peaceful purposes. Merchandise of the first class destined to a belligerent country or place occupied by the army or navy of a belligerent is always contraband. Merchandise of the second class is contraband only when destined to the military or naval use of the belligerent. While merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

No articles of merchandise are contraband of war so long as they remain in neutral territory, or are found on the high seas with a bona fide neutral distinction. They acquire the character

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of contraband only when they are found without the territorial waters of a neutral state, on board a ship which is destined to a hostile port. The destination of a vessel is determined from its papers. If the ultimate destination, and all intermediate ports of call, are neutral, the ship is said to have a neutral destination.

During the late Civil War in the United States, the supreme court laid down certain rules with respect to the neutrality of ship and goods, and held that the court should inquire into the destination of the goods, rather than the destination of the ship, in determining the liability to capture. If the result of such inquiry showed that the goods were destined to a belligerent port, they were held liable to condemnation, even though the ship was destined to a neutral port. See cases of The Springbok, 5 Wall. 1; The Peterhoff, 5 Wall. 58; The Gertrude, Blatchf. Prize Cas. 374; The Stephen Hart, Blatchf. Prize Cas. 387.

By the modern law of nations, provisions are not in general deemed contraband, but they may become so on account of the particular situation of the war, or on account of their destination to the military use of the enemy. The Commercen, 1 Wheat. 382. See, also, The Frau Margaretha, 6 C. Rob. Adm. 92; The Zelden Rust, 6 C. Rob. Adm. 93; The Ranger, 6 C. Rob. Adm. 125; The Edward, 4 C. Rob. Adm. 68. As to what may become contraband of war, see The Staat Embden, 1 C. Rob. Adm. 26; The Endraught, 1 C. Rob. Adm. 22; The Jonge Tobias, 1 C. Rob. Adm. 329; The Sarah Christina, 1 C. Rob. Adm. 237; The

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Ringende Jacob, 1 C. Rob. Adm. 89; The Neptunus, 3 C. Rob. Adm. 108.

A trade by a neutral in articles of contraband is a lawful trade. A contract of insurance on such goods is valid. Seton v. Low (N. Y., 1799) 1 Johns. Cas. 1. See, also, Ex parte Chavasse (Court of Appeals in Bankruptcy, 1865) 34 L. J. (N. S.) Bankruptcy, 17.

The only penalty by the modern law of nations for carrying contraband is the loss of freight and expenses. The Ringende Jacob, 1 C. Rob. Adm. 90; The Sarah Christina, 1 C. Rob. Adm. 242.

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CHAPTER X.

OF THE MONROE DOCTRINE.

§ 53. History of the doctrine.
54. Statement of the doctrine.
55. Instances of enforcement.

It is stated in the papers that Prince Bismarck has declared the Monroe doctrine to be one of "uncommon insolence." Of course whatever opinion is expressed on such a subject by the great statesman, whose words for twenty-five years made "monarchs tremble in their capitals," and who was during his term of power the primate of the diplomacy of Europe, is of serious import, even when spoken in his retirement. The phrase attributed to him was not happily chosen. Insolence is generally predicated of an inferior to a superior, and such a characterization of a great American policy, which was inaugurated when that eminent man was a schoolboy, is likely to touch the sensibilities of the American people in a very irritable place.

§ 53. History of the doctrine.

It may be interesting, and not improper, inasmuch as such words from such a man

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are sufficient to raise a question, to sketch in outline the history of the doctrine which he declares to be "uncommon insolence." It was promulgated in 1823 by James Monroe. It was suggested by Thomas Jefferson in the year 1808, and by James Madison in the year 1811. Before President Monroe announced it, he took counsel of Jefferson and Madison, who were then living in the retirement and dignity of their declining years, and it was approved by them and by John Quincy Adams, who was then secretary of state. It had its origin in the most formidable combination against human rights that the world has ever seen, and it was a protest against that combination. It sprung from the declaration of the Holy Alliance, in 1815, composed of Russia, Prussia, Austria, and France, and with whom England was in substantial accord, by which Europe had been in effect partitioned, by which the divine right of kings had been asserted, and by which all of the aspirations of humanity for a better system of government were to be repressed by an armed confederation of kings. When, in 1820, Spain revolted against the dominion of Ferdinand and its tyrannies, the

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Holy Alliance, through the armies of France, crushed the insurrection, and, in 1823, those armies, having traversed Spain, stood in triumph upon the seashore at Cadiz. At that time, the South American, Central American, and Mexican colonies had been for years in full and successful revolt against the mother country. They had established republican governments. The right of revolution had been denounced by the Holy Alliance at the conferences of Laybach, Troppau, and Verona. It was then deliberately proposed that those nations, wielding a power which had overthrown the first Napoleon, should assist Spain in subduing these new-born republics of the western world. In other words, monarchy was to be re-established on the western hemisphere by the intervention of the European powers, employing the same force which had crushed the insurrection in Spain. England refused to join in this, and, partly at the instigation of Mr. Canning, through Mr. Rush, the American minister at London, James Monroe proclaimed the doctrine of which I have spoken, and which has ever since been cardinal and elementary in American international policy. What is that doctrine?

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§ 54. Statement of the doctrine.

As promulgated by President Monroe in 1823, it can be fairly summarized as follows: That the American continents are not to be considered as subjects for future colonization by any European power; that we should consider any attempt on the part of such powers to extend their system to any portion of this hemisphere as dangerous to our peace and safety; that any interposition by European powers for the purpose of oppressing the independent nations of the American continents, or of controlling in any other manner their destiny, would be considered by the United States as the manifestation of an unfriendly disposition toward us; that there shall be noninterference by the United States with European possessions on this hemisphere as they existed in 1823. This doctrine was proclaimed as necessary to the peace and safety of the United States; it was proclaimed because it was intended that the powers of Europe should have no further rights upon this hemisphere; it was announced in support and for the perpetuity of the then struggling republics of South

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America, Central America, and Mexico, which now stand upon firm foundations.

§ 55. Instances of enforcement.

It was never violated in any substantial degree by any European power until in those dark days of our adversity and distress when, in our Civil War, we were struggling for the perpetuity of the Union, and for liberty to mankind, France, England, and Spain joined in the attack upon Mexico, from which Spain and England withdrew, and in which France persisted until she seated an Austrian archduke on an imperial throne reared upon the ruins of that republic. When our struggle was over, and the American people rose like a giant refreshed and strengthened by the very severity of the contest in which it had been engaged, the Monroe doctrine was asserted to Louis Napoleon in no uncertain tones, and he, instead of considering it a matter of "uncommon insolence," betook himself and his troops from Mexico.

What I have said is somewhat discursive, and yet it is connected with the question we have discussed. If the Monroe doctrine means anything, or if we mean anything by

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it, we mean to assert it and stand by it. We did so when England proposed to engross 70,000 square miles of Venezuelan territory, and the result was that her claim went to arbitration. We say by the Monroe doctrine to all the nations of the earth that they shall not acquire Cuba; that we will not allow France or England or Germany to intervene or interfere in its affairs. So much greater is our duty in the case of that unfortunate island in the assertion and protection of our own interests.

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CHAPTER XI.

THE PROPOSED ARBITRATION TREATY WITH GREAT BRITAIN.

Within the last few years a great and respectable portion of the American people, misled by the illusory word "arbitration," and thinking that they saw in a convention then recently concluded between the United States and Great Britain a harbinger and assurance of perpetual peace, insisted that the senate of the United States should, without dotting an "i" or crossing a "t," advise and consent to the convention commonly called "the arbitration treaty." The senate committee on foreign relations reported in favor of its adoption, with amendments which obviated the objections to which I shall call your attention.

The objections to the treaty in the form in which it was sent to the senate were briefly these:

First. It bound the United States not only to arbitrate all contentions then existing, but it also bound the United States to arbitrate every controversy that might arise

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in the future. This was an unprecedented proposition. Of course, as to anything that might arise in the future, it was impossible to anticipate what would be the subject of contention. The entire field of operation of that treaty as to the future was vague, shadowy, and incapable of formulation. It was asking too much to require the United States to enter into a covenant of litigious amity applicable to all possible future differences.

Second. The treaty bound the United States to arbitrate all pecuniary claims, or groups of claims, exceeding £100,000, existing or to exist, in respect of which either party shall have rights against the other, under treaty or otherwise. We would have bound ourselves to arbitrate under that provision the existence at the present time, and the effect of, the Clayton-Bulwer treaty, that sterile and useless compact, concluded in 1850, by which Great Britain has sought to hold us to the letter of a stale and unperformed bond, and by which she claims the right to a joint control with us of the Nicaragua canal when we shall have constructed that great work. We contend that the treaty has become inoperative. To determine

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whether a treaty has ceased to be operative is as much a function of sovereignty as it is to determine in the first instance whether a treaty shall be made. No such function of sovereignty should be submitted to the jurisdiction of any arbitral tribunal whatever.

Again, the arbitration treaty provided, thirdly, that all pecuniary claims shall be decided in two modes, the second of which conferred jurisdiction to adjudicate questions of much greater moment than that of damages. If it were simply pecuniary claims, to be decided without also deciding some great question of national policy, little objection could be made. But we have a dogma of international relations proclaimed by the statesmen of three generations, called "The Monroe Doctrine," which we have inscribed upon our records as an immutable policy, to the effect that no monarchical institutions shall be established upon the western hemisphere, and that the United States will, in any case where its safety requires it, resist the acquirement or colonization, by any European power, of territory on the American continents. It is not a doctrine of international law. It is an announced policy,

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for which the United States has at any time been ready to go to the extreme of war, and to sustain which all the majestic powers of our people have risen whenever any executive has asserted it. It is a declarative act of sovereignty; it is the doctrine of the balance of power for the western hemisphere; it is the equivalent here of the doctrine of the balance of power in Europe; and it has kept Europe out of the western hemisphere for nearly seventy-five years. England, France, Germany, and all the states of Europe deny that it has any force in international law. They say that it is a mere policy, and that we have not the right to assert it against them. They say: "Why should not we colonize South America as we are colonizing Africa? You have no right to dictate. Why should not Venezuela and the other states of Central and South America be allowed to make treaties with us to give us part of their territory? Why is this portion of the world barred against our acquisition by conquest or by any other process?" And this policy it was proposed to arbitrate before a tribunal constituted by this treaty, one-half of the members of which were nec-

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essarily to be subjects of foreign powers, and, certainly, as that half was to be nominated by Great Britain, would be subjects of one or more European powers.

The reasons against the ratification of a convention involving such consequences deserve careful consideration. I will discuss a few of them briefly, and show by what process our policy and sovereignty could thus be submitted to arbitration.

It is an ancient, axiomatic principle of the law of nations, indelibly written in its codes, text books, and decisions, that any nation has the right to extend its territory and dominion over any portion of the world, and that no neutral nation has any right to object, even if, by such extension, the power and resources of the acquiring state be inordinately increased. It is to check the consequences of this principle that such policies as the balance of power and the Monroe doctrine have been adopted.

Let us suppose that, proceeding under this sanction of right, Great Britain should acquire Cuba, St. Thomas, or territory in Central America or South America by war or peaceful cession. The United States objects,

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setting up the violation of the Monroe doctrine as the ground of protest. Great Britain would advance this "right" to extend her territorial possessions vested in her by this principle of international law, and claimed by her to be recognized in the treaty by the word "otherwise."

We must arbitrate this matter of difference, and obey the decision, if we are honorable. We set up as prohibitory of the right asserted by Great Britain the Monroe doctrine; to which the reply is that the doctrine is no right; that it is merely a policy; that international law does not recognize it as a right, while it does so recognize that immemorial right in Great Britain to acquire territory. To such a right the mere policy of an adversary nation is no defense. In other words, it would be insisted that this particular policy of the United States is unlawful. It would thus be submitted to the tribunal, and overruled as a defense, upon the very theory of the idolaters of the treaty, that the Monroe doctrine is a mere policy, and not a right. The dilemma would be this: The United States, in such a case, must either abandon the doctrine, or submit it to

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the certainty of a decision which would adjudge it to be unlawful, and thus annul it.

The Monroe doctrine could also be subjected to arbitration in a proceeding before this tribunal based upon pecuniary claims, which are specifically arbitrable without any limitation of the grounds upon which they may rest.

All civilized nations, and none more stoutly than Great Britain (and it is to her honor), resent personal injuries to their subjects perpetrated by or under the authority, or through the culpable negligence, of other nations, and they exact pecuniary reparation therefor, sometimes by negotiation, sometimes through arbitration, sometimes by war. In such reclamations, the prosecuting nation adopts the claims of its subjects, and becomes vested with them as matters of enforceable national right.

Let it be supposed that, after such an acquisition of territory by Great Britain as that instanced a few moments ago, the United States, asserting the Monroe doctrine, should remove the British colonists by force, or should subject them to any restraint or exaction whatever; for I assume that no one

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concedes that an abandonment of that doctrine was one of the latent designs and consequences of that treaty. Such an act would justify a declaration of war against us. But Great Britain would not be obliged to go to war. Another remedy was afforded her by that convention in its original conception and expression, and that remedy was arbitration of "all pecuniary claims or groups of claims;" "groups of claims" meaning "pecuniary claims by one or more persons arising out of the same transaction, or involving the same issues of law and of fact." This language is most critically exact to provide for such a case as I am now supposing. The parties would fail to adjust any such case by diplomatic negotiations. We would never surrender the Monroe doctrine, nor would Great Britain abandon her right of territorial acquisition. A case for arbitration by the tribunal would thus be raised. Great Britain would advance her right to acquire territory, her peaceful possession, the personal injuries inflicted by us upon her subjects (thereby creating pecuniary claims), our avowed nonclaim of territory or dominion. The Monroe doctrine would be the only defense possible for

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the United States. The tribunal would rule that the doctrine is not a "right," but a mere "policy." The opinions of those of our own people who maintain that the Monroe doctrine could not be brought into arbitration because it is a mere policy, and not a right, would be most persuasively cited against us. That doctrine would be overruled as a defense, and we would be held to be obtrusive violators of the law of nations in undertaking to enforce it.

The Clayton-Bulwer treaty and the Monroe doctrine pertain to the foreign policy of the United States. The arbitration treaty would have imposed a new restraint upon the sovereignty of this government, an indirect and ever-pressing control and a power of final decision by an arbitral tribunal upon these essential factors of our foreign policy.

By article 1 of the treaty of July 3, 1815, between the United States and Great Britain, it is agreed that there shall be between the territories of the contracting powers reciprocal liberty of commerce; that the inhabitants of the two countries respectively shall have liberty, freely and securely, to come with their ships and cargoes to all such

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places to which other foreigners are permitted to come; to enter into the same, and to remain and reside in any part of the said territories.

A reasonable apprehension might well be entertained of the operation of the proposed convention upon questions which might arise under our laws prohibiting the immigration of contract alien laborers. These statutes were enacted in the assertion of a determination to protect the wage earners of the United States against underbidding as to wages by alien immigrants brought here for that purpose. It is a wise policy. It is a matter of the most extreme domestic importance. Its beneficence extends to every community in the land.

By the act of February 26, 1885, the immigration or importation of contract alien laborers is forbidden. Every violation of its provisions by an importer subjects him to a fine of $1,000, and separate suits may be brought against him as to each alien imported by him. Every master of a vessel importing such an alien is guilty of a misdemeanor, and is liable to a fine of $500 for

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every such alien whom he imports. Every such alien may be imprisoned for six months.

By the act of March 3, 1891, it is provided that every such alien found within the United States shall be sent back immediately, at the cost of the owner of the vessel importing him, and this deportation may be enforced at any time within one year after the date when the alien landed on our shores.

It is to be remarked that these statutes were not enacted in the exercise of the police power by which diseased, mendicant, ignorant, or profligate aliens may be lawfully forbidden to come here to contaminate the mass of the American people. They were, on the contrary, enacted to carry out a most important domestic industrial policy. They apply to all contract alien laborers alike; to the hireling who accomplishes his day in the most menial employment; to the operative whose skill is artistic; to the musician; to the artisan who can cut the diamond, or who can chisel the statue under the sculptor's eye, or who can, with the cunning of his hand, produce the most elaborate forms of beauty or of use; even to him who can grind to its proper curvature the great telescopic ob-

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ject glass,—that crystalline lens of the eye of science, through which the profundities of the heavens are explored. These men who may come here, having so contracted, can be arrested, can be sent back, can be convicted of crime and imprisoned because they so came. The owners and masters of the ships that brought them are subject to onerous penalties.

It is not without reason that the apprehension arises that Great Britain, asserting a violation of the treaty of 1815, might adopt these acts of duress, violence, and punishment perpetrated upon her subjects, and assert them as pecuniary claims, either singly or "in groups," or as being violations of a right she "shall have" against the United States "under treaty or otherwise," as provided in article 4 of the proposed convention.

We have similar treaties with other nations, conferring upon aliens the rights of intercourse, commerce, and denization. In many instances, notably as to Germany and Italy, these rights are possibly more extensive than those which the treaty with Great Britain, strictly construed, confers.

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The same treaty of 1815, in article 2, provides that "no higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce, or manufacture of his Britannic majesty's territories in Europe, and no other or higher duties shall be imposed on the importation into the territories of his Britannic majesty of any articles the growth, produce, or manufacture of the United States than are or shall be payable on like articles being the growth, produce, or manufacture of any other foreign country."

This article goes on to provide, with great particularity, to the effect reciprocally, that duties on the vessels of either power in the ports of the other shall be the same; that duties on the products of either power shall be the same when imported in the vessels of either power; that drawbacks on re-exportations shall be the same. It is plain that, under the provisions of the treaty of 1815, and those of the proposed convention for arbitration, many questions may be brought into arbitration solely by the action of this government in the exercise of its policies respecting protection by tariff duties, or rais-

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ing revenues by duties on imports. No nation in this age goes to war because another nation contravenes its treaty obligation in such exercise of its policy. But any nation to whom such a treaty as this gives a right of litigation for such a proceeding will not hesitate to prosecute its lawsuit for the infraction, and the unsuccessful nation will be bound by that treaty to obey the judgment of the tribunal. Such issues will certainly be presented if the United States shall enter into relations of reciprocity as to duties with other countries than Great Britain, by which the produce of those countries shall be allowed to be imported into the United States under a less duty than is imposed on similar articles, the produce of Great Britain.

I am not here supposing an imaginary case. Such an issue actually exists today between the United States and Germany. Great Britain can raise such a question now, as Germany has raised it. By the treaty of 1828 between the United States and Prussia, it is agreed, reciprocally, that no higher or other duties shall be imposed upon the products of either country imported into the other than are payable on the like articles

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being the produce or manufacture of any other foreign country. Our tariff statute of 1894 enacted that any country admitting American salt free of duty shall be entitled to the free admission of its salt product into this country, and that the salt of any country which imposes a duty upon our salt shall be dutiable here. Germany imposes a duty upon salt exported to that country from the United States. Shortly after the enactment of our tariff statute of 1894, the German ambassador, asserting that the German tax on American salt was a mere excise, and not a duty, protested against the imposition of the duty on German salt, some other nation having made our salt free of duty and thereby having received a reciprocal equivalent in kind. Mr. Olney, who was then attorney general, held that the contention of Germany was not well founded. Germany has not acquiesced in this conclusion. The question still remains. It would be subject to arbitration under such a treaty with Germany at the proposed convention.

This government was not sustained by the ruling of Mr. Gresham, the secretary of state, upon another question raised by Germany,

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respecting the duty imposed by the same statute upon sugar. That duty was one-tenth of a cent per pound upon sugars which are imported from, or are the products of, any country which pays a bounty upon their exportation. Germany pays such a bounty; other countries do not, and consequently their sugars are imported into the United States free of the imposition of one-tenth of a cent per pound. Against the exaction of this duty on German sugar, the ambassador of that empire protested as a violation of the treaty of 1828. The secretary, by a decision utterly erroneous, sustained the validity of that contention, and so advised President Cleveland.

It was given out, in commendation of this arbitration treaty, that Germany was willing to enter into a similar convention with the United States, and that the other great powers of Europe were anxious to conclude such a general league of litigation with this government. I do not doubt it. If we should make such a treaty with one state, we could not refuse to enter into a similar one with other states. Such conventions with the six great powers of Europe might not be "en-

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tangling alliances," but they certainly would enmesh us in entangling relations.

It is to be remarked that the great powers of Europe have never proposed to enter into any such treaty with each other. The United States is the only nation whose hands are to be tied; the only nation which is to submit its sovereign powers to the decision of a mixed court in a great international lawsuit.

Every illustration which I have presented raises the question whether the United States could successfully defend before the arbitral tribunal these impeachments of its right to exercise its own sovereignty in the determination of matters of foreign and domestic policy. But whether it could successfully defend is not the question. The question is whether we ought to agree to submit any such controversy, great or small, to the decision of any tribunal; whether we ought to litigate the policies of our government, domestic and foreign, the functions of our sovereignty, especially respecting the raising of revenue, or the right to assert for their advancement or protection those powers of independent action, aggressive and defensive, by which states ensure their safety by compelling other

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nations to respect them. There are cases involving all these in which the only course consistent with national honor and safety is—

> "to ope
> The purple testament of bleeding War."

It has been ordained from the beginning that the freedom and existence of nations, and even of man as an individual, often depends upon the rightful exercise of offensive and defensive hostility. Why this is so we do not and cannot know. We accept this fiat, as we must, as a condition, limitation, and preservative of national and personal existence. It is the veriest commonplace of history that all the nations of times past and times present have come into being by war, have preserved their existence by war, and have become mere

> "crownless metaphors of empire"

when the power of war has departed from them. Our fathers created this nation by a sacred war, whose consequences have been of incalculable benefit to mankind. Their sons of this generation preserved this nation by a war no less just, which emancipated millions of men, which inscribed upon tables more

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enduring than brass the great guaranties of personal freedom, and which proved that a republic can by war exercise powers of self-preservation and regeneration to which the mightiest monarchy that ever reared its front in all the tide of time would have been inadequate, and which gave to our country an assurance of power and perpetuity which has never been vouchsafed to any other nation.

The senate committee on foreign relations proposed an amendment to article 1 of the treaty, which would have removed these objections:

"The high contracting parties agree to submit to arbitration, in accordance with the provisions and subject to the limitations of this treaty, all questions in difference between them which they may fail to adjust by diplomatic negotiation, and any agreement to submit, together with its formulations, shall, in every case, before it becomes final, be communicated by the president of the United States to the senate with his approval, and be concurred in by two-thirds of the senators present, and shall also be approved by Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland."

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The amendment is presented in all that follows the words "diplomatic negotiation."

But such was the feeling which had been excited, that the treaty was not advised and consented to. An arbitration treaty, with proper safeguards, will pass in due time; it is right that it should pass; it is right to arbitrate everything which does not concern the high self-preservative powers and policies of this government. Beyond that, we ought not to go.

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APPENDIX A.

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APPENDIX A.

THE TREATY OF WESTPHALIA.[1]

A treaty of peace between Philip IV., king of Spain, and the United Provinces of the Low Countries. Made at Munster the 30th of January, 1648.

"In the name and to the glory of God, be it known to all men, that after the long course of bloody wars which have so many years afflicted the people, subjects, kingdoms, and countries in the obedience of the lords, the king of Spain, and the states general of the United Provinces of the Low Countries, the said lords the king and states being touched with Christian compassion, and desirous to put an end to public calamities, and a stop to the deplorable consequences, in-

[1] There are seventy-nine articles in the treaty. The seventeen articles given here in full show the geographical divisions as settled by that treaty, and the privileges and immunities guarantied to each province and kingdom parties to the same. They also contain the provisions made for settlement of disputes between the parties.

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conveniences, damages, and dangers which the further continuance of the said war of the Low Countries might produce and draw after them, by extending even to other the most distant countries, states, lands and seas; and in order to change the pernicious effects thereof into those most desirable ones of a good and sincere pacification on both sides, and the sweet fruits of an entire and firm repose and quiet, for the comfort of the said people and states under their obedience, and the restitution of past damages, for the common good not only of the Low Countries, but even of all Christendom, praying and beseeching all other Christian princes and potentates to suffer themselves to be prevailed upon, by the grace of God, to have a compassion for, and aversion to, the miseries, ruins, and disorders which this present scourge of war has made us feel so long and so severely; in order to obtain so good an end, and so desirable an issue thereof, the said lords the king of Spain, Don Philip IV., and the states general of the said United Provinces of the Low Countries, have constituted and appointed, viz., the said king has deputed, etc., Don Gasper de Bracco-

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monte and de Guzman, count of Penaranda, segnor of Aldea, Seca la Fontera, knight of the order of Alcantara, perpetual administrator of the commandry of Daymiel, of the order of Calatrava, gentlemen of his majesty's bedchamber, ambassador extraordinary to his imperial majesty, and first plenipotentiary for the treaty of a general peace, and Messire Anthony Burn, knight of his Catholic majesty's council of state, the supreme counselor of the affairs of the Low Countries, and of Burgundy, and his plenipotentiary at the treaty of a general peace. And the said lords, the states of the United Provinces of the Low Countries have appointed and deputed the Sieur Baltot de Gent, lord of Loenen, and Meynerswick, Seneschal, and Diikgrave, of Bommel, Tieler, and Bommeler-Weerden, deputy from the nobility of Guelder to the assembly of the lords the states general; the Sieur John de Mathenesse, lord of Mathenesse, Riviere Oppmeer, Souteveen, etc., deputy in the ordinary council of Holland and West Friesland, and at the assembly of the lords the states general from the nobility of the said province, counselor and heemrade of Schie-

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land; Messire Adrian Paw, knight, lord of Heemstede, Hoogersmilde, and first president, counselor and master of the accounts of Holland and West Friesland, and deputy at the assembly of the lords the states general from the said province; Messire John de Knuyt, knight, lord of Old and New Vasmar, the first representative of the nobility in the states and councils of the country and admiralty of Zeeland, first counselor to his highness the Prince of Orange, deputy in ordinary at the assembly of the lords the states general; the Sieur Godart de Reede, lord of Neederhorst, Verdeland, Cortehoef, Overmeer, Hostwaert, etc., president in the assembly of the nobility of the province of Utrecht, and deputy on their part at the assembly of the lords the states general; the Sieur Francis de Donia, lord of Hinnema, Heilsun, deputy in the assembly of the lords of the states general from the province of Friesland; the Sieur William Ripperda, lord of Hengeloo, Boxbergin, Bobuloo, and Russenbergh, deputy from the nobility of the province of Over-Yssel, at the assembly of the lords the states general; the Sieur Adrian Kland van Stedum, lord of Nittersum,

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etc., deputy in ordinary from the province of the city of Groninghen and Ommelande to the assembly of the lords the states general; all of them ambassadors extraordinary in Germany, and plenipotentiaries from the said lords the states general at the treaties for a general peace; all warranted by sufficient powers, which shall be inserted at the end of these presents: Who, being assembled in the city of Munster, in Westphalia, by common consent appointed to be the place of treaty for the general peace of Christendom, by virtue of the said powers, and for and in the name of the said lords, the king and states, have made, concluded, and agreed to the following articles:

I. In the first place, the said lord the king declares and acknowledges that the said lords the states general of the Low Countries, and all the respective provinces thereof, together with all the associated countries, towns, and lands thereto belonging, are free and sovereign states, provinces, and countries, upon which, or their associated countries, towns, or lands above said, the said lord the king has no manner of pretentions, and that neither at this time, nor *in futurum*, he shall

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ever make any pretentions to them for himself, or for his heirs and successors, and that, in consequence hereof, he is content to treat with the said lords and states even as he does at present, and agree upon a perpetual peace, on the conditions after-written and declared, viz.:

II. That the said peace shall be good, firm, faithful, and inviolable, and that from henceforth shall cease all acts of hostility, of whatever nature they be, between the said lords the king and the states general, as well by sea and other waters as by land in all their kingdoms, countries, lands, and dominions, and for all their subjects and inhabitants, of what quality or condition soever they be, without any exception, either of places or persons.

III. Each shall remain effectively in the possession and enjoyment of the countries, towns, forts, lands, and dominions which he holds and possesses at present, without being troubled or molested therein, directly or indirectly, in any manner whatsoever; wherein the villages, burghs, hamlets, and flat countries thereupon depending are understood to be comprehended. And next the

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mayoralty of Boisleduc, as also all the lordships, cities, castles, towns, villages, hamlets, and flat country depending upon the said city and mayoralty of Boisleduc, the city and marquisate of Bergen-op-Zoom, the city and barony of Breda, the city and jurisdiction of Maestricht, as also the county of Vroonhoof, the town of Grave, the county of Kuyk, Hulst, and the bailiage of Hulst, and Hulster Ambacht, situated upon the south and north of Guelder; and likewise the forts which the said lords the states possess at present in the country of Waes, and all the other towns and places which the said lords and states hold in Brabant, Flanders, and elsewhere, shall remain to the said lords and states, in all the same rights and parts of sovereignty and superiority, just in the same manner that they hold the provinces of the United Low Countries. But then it must be observed that all the rest of the said country of Waes, excepting the said forts, shall belong to the said lord the king of Spain. As to the three-quarters of the Over-Maze, viz., Fauquemont, Dalem, and Roleduc, they shall remain in the state they are in at present; and in case of dispute or

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controversy, the matter shall be referred to the chambremy partie, or the indifferent and disinterested court, whereof mention shall be made afterwards.

IV. And the subjects and inhabitants of the countries of the said lords the king of Spain and the states shall entertain all good correspondence among themselves without showing any resentment of the offenses and damages they may have sustained heretofore. They may likewise remain in and frequent one another's countries, and there exercise their traffic and commerce in all safety, as well by sea and fresh waters as by land.

V. The navigation and trade to the East and West Indies shall be kept up according and conformably to the grants made or to be made for that effect; for the security whereof the present treaty shall serve, and the ratification thereof on both sides, which shall be obtained; and in the said treaty shall be comprehended all potentates, nations, and people with whom the said lords the states, or members of the East and West India Companies, in their name, within the limits of their said grants, are in friendship

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and alliance. And both the aforesaid lords, the king and the states, respectively, shall continue in possession of such lordships, cities, castles, towns, fortresses, countries, and commerce in the East and West Indies, as also in Brazil, upon the coasts of Asia, Africa, and America, respectively, as the said lords the king and the states respectively hold and possess, comprehending therein particularly the places and forts which the Portuguese have taken from the lords and states since the year 1641, as also the forts and places which the said lords and states shall chance to acquire after this without infraction of the present treaty. And the directors of the East and West India Companies of the United Provinces, as also the servants and officers, high and low, the soldiers and seamen actually in service of either of the said companies, or such as have been in their service, as such who, in this country, or within the district of the said two companies, continue yet out of the service, but who may be employed afterwards, shall be and remain to be free and unmolested in all the countries under the obedience of the said lord the king in Europe, and may sail,

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traffic, and resort, like all other inhabitants of the countries of the said lords and states. Moreover, it has been agreed and stipulated that the Spaniards shall keep their navigation to the East Indies, in the same manner they hold it at present, without being at liberty to go further; and the inhabitants of these Low Countries shall not frequent the places which the Castilians have in the East Indies.

VI. And as to the West Indies, the subjects and inhabitants of the kingdoms, provinces, and lands of the said lords the king and states, respectively, shall forbear sailing to and trading in any of the harbors, places, forts, lodgments, or castles, and all others possessed by one or the other party, viz.: The subjects of the said lord and king shall not sail to or trade in those held and possessed by the said lords and states, nor the subjects of the said lords and states sail to or trade in those held and possessed by the said lord the king; and among the places held by the said lords and states shall be comprehended the places in Brazil which the Portuguese took out of the hands of the states, and have been in possession of ever

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since the year 1641, as also all the other places which they possess at present, so long as they shall continue in the hands of the said Portuguese, anything contained in the preceding article notwithstanding.

VII. And because there will be required a pretty long time to give notice to those who are without or beyond the limits aforesaid, with their forces and ships, to desist from all acts of hostility, it has been agreed that within the limits of the grant formerly made to the East India Company of the Low Countries, or to be continued to them, the peace shall not commence sooner than a year after the date of the conclusion of the present treaty; and as to the limits of the grant formerly made by the states general, or to be continued to the West India Company, that in the said places the peace shall not commence sooner than six months after the aforesaid date; but then it must be observed that, if advice of the said peace shall have come from the public to those limits, respectively, earlier than the aforesaid time, from the minute of that advice, all hostilities shall cease in those parts; but if, after the terms of a year and of six months, re-

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spectively, any act of hostility shall be committed within the limits of the aforesaid grants, all damages occasioned thereby shall be repaired without delay.

VIII. The subjects and inhabitants of the countries of the aforesaid lords the king and the states trading to one another's countries shall not be obliged to pay greater duties and imposts than the respective subjects, natives of the countries, so that the inhabitants and subjects of the United Low Countries shall be and remain to be exempted from certain duties of twenty per cent., or from such lesser, greater, or any other duty as the said lord the king has raised and imposed during the twelve years' truce, or should endeavor or be inclined to raise or impose afterwards, directly or indirectly, upon the inhabitants and subjects of the United Low Countries, or lay upon them over and above what he does upon his own subjects.

IX. The said lords the king and states shall not, without their respective limits, impose any duties or gables for entry, parting, or on other account, upon the commodities in their carriage, either by land or water.

X. The subjects of the said lords the king

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and the states shall respectively, in one another's countries, enjoy the ancient privilege of the customs whereof they have been in peaceable possession before the commencement of the war.

XI. Society, conversation, and commerce among the respective subjects shall not be hindered, and if any hindrances or impediments happen, they shall be really and effectually removed.

XII. And from the day of the conclusion and ratification of this peace, the king shall cause the raising of all customs, which before the war were under the jurisdiction and within the district of the United Provinces, to cease upon the Rhine and upon the Maese, as also the customs of Zeeland; so that custom shall not be raised by his majesty, either in the city of Antwerp or elsewhere: provided, and on the condition that, from the aforesaid day, the states of Zeeland shall reciprocally take upon themselves, and first of all pay from that same day, the annual rents which were mortgaged upon the said customs before the year 1572 (whereof the proprietors have been in possession and received the rent thereof before the com-

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mencement of the said war), which the proprietors of the other customs abovesaid shall also do.

XIII. The white boiled salt coming from the United Provinces into those of his said majesty shall there be received and admitted without being charged with higher duties than bay salt, and the salt of the provinces of his said majesty shall likewise be admitted and received in those of the said lords and states, and shall be there sold without being charged with a higher duty than the salt of the said lords and states.

XIV. The rivers of the Escout, as also the canals of Sas, Zwyn, and other mouths of rivers disemboguing themselves there, shall be kept shut on the side of the lords and states.

XV. The ships and commodities entering into and coming out of the harbors of Flanders shall be respectively charged by the said lords with all such imposts and duties as are laid upon commodities going and coming along the Escout, and other canals mentioned in the preceding article. And the tax of the aforesaid equal duty shall be agreed afterwards betwixt the respective parties.

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XVI. The Hanse Towns, with all their citizens, inhabitants, and subjects, as to the navigation and traffic in Spain, the kingdoms and estates of Spain, shall enjoy all the same rights, franchises, privileges, and immunities which, by the present treaty, are granted, or shall afterwards be granted, for and with relation to the subjects and inhabitants of the United Provinces of the Low Countries. And the said subjects and inhabitants of the United Provinces of the Low Countries shall reciprocally enjoy all the same rights, franchises, immunities, and privileges, whether for the establishing of consuls in the capital and maritime towns of Spain and elsewhere, where it shall be needful, or likewise for merchants, factors, masters of ships, mariners, or others, and in the same sort as the said Hanse Towns in general or in particular have formerly obtained and enjoyed, or shall obtain and enjoy afterwards, for the security, benefit, and advantage of the navigation of their towns, merchants, factors, commissioners, and others thereupon depending.

XVII. The subjects and inhabitants of the countries of the said lords and states shall also have the same security and free-

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dom in the countries of the said lord the king that has been granted to the subjects of the king of Great Britain by the last treaty of peace and secret articles made with the constable of Castile."

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APPENDIX B.

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APPENDIX B.

AMERICAN DIPLOMACY.

A Lecture by Cushman K. Davis, May 27, 1895.

It was suggested to me, when your invitation was received, that the increasing frequency of questions involving our foreign relations would make acceptable a historical and practical discussion of that topic. The task is not an easy one. It must necessarily be imperfectly performed. The field is wide. Its features are intricate and often confusing. The questions presented are of growing importance. It must be admitted that during the last ten years the public mind has been agitated by them to an unprecedented extent.

Our foreign policy is always at last determined by the processes of popular opinion. For this reason, it is the duty of citizens to know as much as possible of the questions which they themselves must decide, of the

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history of our principal international events, and of the diplomatic policy of our country.

The diplomacy of the United States had its origin with the Revolution, by which our liberties were secured. Its principal representatives in Europe were Benjamin Franklin and John Adams. They were great men; but the latter was by disposition singularly unfit for a diplomatic position. Dogmatic, suspicious, turbulent, domineering, bluntly and inflexibly honest, burning with a love of country which sometimes set fire to and consumed the objects of his noblest efforts, Adams left little trace of his exertions upon our foreign relations except the traits of his character.

Franklin's mission to France.

Franklin went to France as our envoy in 1776. He was then seventy years of age. In less than two years he had negotiated a treaty by which the most absolute monarch in Europe, excepting the sultan and the czar, agreed to make common cause against England, with a republic which was itself a protest against his royal tenure by Divine right, and "to guaranty to the United States their

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liberty, sovereignty, and independence absolute and unlimited, with all their present possessions, or which they should have at the conclusion of the war."

This is the most momentous event in our diplomatic history. It made our independence unquestionably secure. It is more than doubtful whether our ancestors could have succeeded without it. It was also momentous for Europe in its consequences. The soldiers of France saw in the United States religion without an established church, a free press, a government by the people. When they returned, they set up their examples before the French people, whose thoughts had been liberalized, whose devoutness had been impaired, whose sense of allegiance had been weakened by the encyclopædists and their propagandists. The French Revolution came within ten years, and it is sad to read in its annals, as passing under the knife of the guillotine many a noble head which was crested with exaltation in the fleet of De Grasse, and in the army of Rochambeau, when Cornwallis surrendered at Yorktown.

Franklin was a born diplomatist, and he was much more. His genius for negotiation

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was but one face of his many-sided character. He was the Genius of the Practical. He was Mr. Worldly-Wise-Man, without the folly of Bunyan's creation. He had a sound, implicit faith as to the human soul and its future, but he never agitated matters which he knew he could not control, and so he let them alone.

This old man appeared in the gayest and most conventional court in Europe, in the midst of the most elaborately artificial society ever known to civilization, in plain coat, white hose, spectacles on nose. and wearing a soft white hat. And that court and society were at once charmed and subdued by his majestic and simple presence.

It is impossible to read the accounts of his transactions in Europe without realizing his patience, his method, his foresight, his knowledge of all kinds of human nature, his finesse, his righteous dissimulation, his impregnability to be overreached by anybody, his capacity to get the better of everybody who attempted to outwit him, his firmness, his integrity, his proud humility. All these are manifest throughout his entire career in Europe, and they are particularly plain in

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the negotiations of the treaty by which Great Britain recognized our independence.

He formed the model upon which American diplomacy has ever since generally been shaped,—plain dealing, plain speaking, simple dignity, adequate, but not superfluous, ceremonial, and unswerving fidelity to the interests of his country alone.

Conditions after the American Revolution.

The United States became a nation. It was not a being of slow growth, which, in the process of growing had become intertwined in function and interest with others who had grown with it. It was a new, an independent, creation. But it came into existence with the first physical manifestations of those causes which for twenty-five years convulsed Europe, broke up her thrones, dismembered her kingdoms, confined her boundaries, decimated her population, and vexed every sea with battle storms. As to that continent whose governments were in some respects our examples, and in others our warnings, it was of the highest importance that the policy of our relations should be determined upon. Our debt to monarchical

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France was recent and enormous, and revolutionary France was importunate that it should be paid in kind. The resentment of our people against Great Britain was also recent, and it was intense. Many of our citizens, including statesmen and soldiers who had been pre-eminent in achieving our independence, were bent that we should render to republican France some aid much more efficacious than sympathy. But there were others who looked into the very seeds of time. They remembered that the colonial system which they had lately overthrown was a vast and entangling foreign relation; that the tie which held it to the motherland was a tie that lacerated while it bound; that this country, by reason of that relation, had been invaded by enemies of the parent state. They saw that alliances with any European power, as to matters of European concern, were the same thing as their previous condition under another name, and that the consequences would be the same.

Washington's farewell address.

No one saw all this more clearly than Washington. In his farewell address,—that

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political testament by which he bequeathed to posterity an imperishable legacy of wisdom,—he determined our policy as to European nations by a few sentences which cannot be read too often, or reflected upon too deeply. He said:

"The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations, to have with them as little political connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop. Europe has a set of primary interests, which to us have none, or a very remote, relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities."

Departures from the precepts of Washington—The Samoan protectorate.

These opinions became the American policy. They have rarely been deviated from.

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The treaty between this nation and Germany and Great Britain provided for the joint protectorate by the three governments over the Samoan islands. This departure was for an object of comparative insignificance, but important enough to serve as a warning. Its perplexities and exasperating consequences have verified the predictions of Washington.

The Clayton-Bulwer treaty.

By the Clayton-Bulwer treaty, concluded in 1850 between the United States and Great Britain, each government stipulated never to exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America. They also agreed to give support and encouragement to persons who should first commence to construct the Nicaragua ship canal, and to protect the same, when finished, from intrusion, confiscation, or seizure. This treaty was also in disregard of Washington's warning, and it was also subversive of the Monroe doctrine that, though it contained a clause as to dominion and occupancy apparently in conformity with that declaration so far as Great Britain was affected, it nevertheless, by other stipu-

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lations, gave a contradictory right of intervention to Great Britain, and tied the hands of the United States as to dominion. That treaty is one of the most abortive misconceptions ever born of diplomacy. Changed conditions have made it inoperative. It was, moreover, violated by Great Britain shortly after its conclusion, and has been disregarded by her ever since, so that, in my opinion, it has not for many years been obligatory upon the United States. But it still formally exists as a spell to conjure with, and may at some time seriously embarrass us.

The treaty for the suppression of the slave trade.

Another instance was the treaty with Great Britain for the joint suppression of the African slave trade from the west coast of Africa. Abstractly the undertaking was most humane; but in the practical execution of the convention, Great Britain at once claimed the right of search, upon a most extensive scale, of vessels flying the American flag.

Thus the controversy which mainly caused the war of 1812 revisited the earth "clad in complete steel," and it was composed as to

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the African slave trade only by pitiable and undignified makeshifts.

General observance of Washington's advice.

But in every other instance that I can recall, the United States has been governed by Washington's counsels. Greece won against the Turk on every classic plain, mountain pass, and sea. The violated martyr of centuries stood transfigured, her classic beauty, cleared from the dust of servitude and shame, shining as erst it did at Marathon and Salamis, and the nations drew their swords to deliver the masters of philosophy, art, and song. Majestic words of sympathy came from the hearts of Webster and of Clay, but this government stood true to the larger view of the father of his country.

Hungary arose, and chased the Austrian eagle, "towering in his pride of place," and to us came her wondrous son, adoring freedom, and imploring us for aid in Shakespearean English, yet we stood firm against the incantations of that Circean eloquence. By this time, so well understood was our adherence to the advice of Washington, that Italy became free, and France became a republic, without asking our aid.

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It is better so. It leaves us untrammelled to shape the destinies of the western hemisphere. It preserves our international independence, that self-contained, omnipotent isolation as to Europe, out of which, when the spirit of the American people shall will it so to be, will come forces moral, intellectual, and physical, omnipotent to protect ourselves, and, if need be, to make good our declaration that the republics of North and South America shall never be supplanted, occupied, or colonized by any European power.

Washington as a statesman.

It has been too much the wont to consider Washington only in reference to his military services and their inestimable worth. But, standing amid the sheaves of peace at Mount Vernon, he is as great as he was at the crossing of the Delaware or at Yorktown. I have within the last two years re-examined his character as it has been given to us in his biographies and correspondence. I think that to him was given a larger prescience of the future of this country than to any of his cotemporaries. He foresaw the division of

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opinion between North and South, and warned against its consequences. He saw, one hundred years from then, the red flag of riot, insurrection, and anarchy flaming like a baleful portent over against the constellated and azure flag of the Union. More than all, he saw the West and Northwest as they have come to be, in larger outline than was given any other man to see. He insisted that the Mississippi must "roll unvexed to the sea." He measured as with his surveyor's chain, and also compassed with a statesman's vision, the region west of the Alleghenies, and he insisted upon the evacuation by the English of the ports in that territory after the peace, with a pertinacity that has been thought premature by some writers, but which was in reality the inspiration of consummate foresight. But among all his services, none have been more enduring than the fiat by which he ordained, as his last official act in civil life, the policy which has guided our relations with European powers.

Thomas Jefferson.

Franklin returned from France in 1785, and Thomas Jefferson succeeded him as

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minister. It is wonderful how diverse were the characters of the men who achieved our independence. There was a man for every function, for every mode of thought. Of them Thomas Jefferson was one of the most remarkable. He was an idealist in government. His intellect was at once vastly receptive and luxuriantly prolific. He was a good lawyer, and was probably the best scholar of his time. It is worth the day's labor to turn over his works simply to be instructed upon the variety of his attainments, and the suggestive and imparting power of his intellect. He discusses theology with Dr. Styles, of Yale, astronomy with Rittenhouse, natural history with Buffon, the classics with young men, agriculture with farmers, and problems of government with statesmen and theorists the world over. His controversy with Mr. Livingston, who was a great lawyer, caused the preparation by Jefferson of a brief on the Batture at New Orleans. I think it is the best law brief I ever read. I have my students study it as a model of learning and completeness. The question was as to the right of the riparian proprietors to the soil formed by

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alluvion on lots bounded by the Mississippi river. Jefferson in this paper discusses common law, civil law, French law, Spanish law, Gothic law, Byzantine and Greek law, with the supremacy of a master. He designs a mould board of least resistance for a plow; introduces the culture of the olive into the United States; against a penal statute brings in his saddle bags across the Alps a quantity of the choice rice of Lombardy, and sends it to the United States for planting; writes to Hopkinson with technical learning upon Krumholtz's foot-bass for the harpsichord; gives Melatiah Nash abstruse mathematical instructions for the improvement of his almanac respecting the equation of time; discusses Flouret's then recent discoveries of the thinking function of the nervous system; in 1787 anticipates the conclusions of geology as to the formation of the strata; prepares vocabularies of various languages of the American Indians, and endeavors to connect them by philological relation.

He had given his assent to Rousseau's theory of the social contract,—a theory older by centuries than Rousseau, but first by him made convincing to public opinion. This

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assent is plainly seen from that sentence in the Declaration of Independence that governments "derive their just powers from the consent of the governed." Physically he was a timid man, but intellectually and for a principle he was a hero. Shortly after his arrival in Paris he saw the tree of liberty planted throughout France, budding and branching with the foliage of Rousseau. He was captivated by the prospect. In the latter days of the monarchy he was the adviser of the reformers by the consent of the king, who supposed that he could moderate their desires. His correspondence is full upon the events of the early period of the French Revolution, but when the drama began to foreshadow the terrors of its catastrophe, when the leaves and the branches began to fall from the tree, and human heads were set upon it, this most timid and communicative of our statesmen became silent, where before he had been most communicative. His diplomatic history at Paris presents nothing remarkable. And yet he afterwards, in the conduct of our foreign relations while president, produced a result second only in importance to the establish-

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ment of the independence of the original thirteen states.

The Louisiana purchase.

By the cession of the province of Louisiana by France, he secured by treaty more territory to the United States than he had assisted to wrest from Great Britain by conquest. The conquest was of 830,000 square miles. The treaty gave us 1,182,752 square miles. As finally settled, that cession comprised all those portions of Alabama and Mississippi south of the thirty-first parallel of latitude, and all of what is now the states of Louisiana, Arkansas, Missouri, Iowa, Nebraska, all of Minnesota west of the Mississippi river, all of Kansas except a small portion west of the one-hundredth meridian and south of the Arkansas river, all of North Dakota and South Dakota, Montana, the Indian Territory, and most of Wyoming and Colorado. It cost $15,000,000. It thus comprehended the entire valleys of the Mississippi and its western affluents, great mining states and three-fourths of Minnesota. Think of being governed by the Code Napoleon, as you might have been but for Thomas Jefferson, instead of by that "perfection of human reason," the

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common law of England, as modified by the wisdom of twenty-nine legislatures of the state of Minnesota.

The history of the negotiations by which all this was accomplished is most interesting. Spain was the owner of all this territory in the year 1800, when she ceded it to France by the treaty of San Ildfonso. The convention was kept secret for a time, but it was eventually, though not designedly, disclosed. The statesmen of the United States were alarmed. The freedom of navigating the Mississippi river had already become an irritating question between us and Spain. New Orleans was the outlet to that great river system, and the strategic key to the immense territory which it watered. It was felt that we could deal with Spain,—amicably, if possible; forcibly, if necessary. But Napoleon Bonaparte was a different kind of proprietor. His vast civil and military capacity, his destructive and constructive ability, his far-reaching views of empire, the projects of that most gorgeous of imperial imaginations, made effectual by the most consummate executive powers ever possessed by man, were even then fully appre-

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ciated and dreaded. Mr. Jefferson, with the authority of congress, commissioned James Monroe to proceed to France and to offer $2,000,000 for New Orleans, and such a portion of the French territory on the eastern bank of the river as would make the United States a riparian coproprietor with France of the Mississippi river from its source to its mouth. The hope was faint that even this could be obtained. No one dreamed of the probability of acquiring the entire domain of France upon the North American continent. This was in 1803, and the deceptive peace of Amiens between France and England was about to be broken. Napoleon had ordered an army corps to embark for New Orleans under command of General, afterwards Marshal, Victor, and Rev-endotte, who at last became king of Sweden, was to go out as governor of the province. Napoleon knew that the struggle with England would be long and doubtful. He knew that it was not probable that he could overcome her maritime supremacy, and that her triumphant navies would blockade his colony, and might in time subjugate it. He knew that he could not spare from Europe a single

French soldier, for Russia, Austria, Prussia, and the minor states were in confederacy against him. He decided that he would not retain Louisiana, with that quick prescience with which he was so marvelously inspired. Mr. Livingston was then our minister at Paris, and while he was repining at the apparent impossibility of procuring the limited cession which President Jefferson desired, he was suddenly requested by Napoleon to make an offer for the whole of Louisiana,—for all that belonged to France in continental North America. Mr. Livingston had no authority to make an offer to this astonishing proposition. In the meantime, Mr. Monroe arrived. He had no more authority than Livingston had possessed; but the two ministers assumed responsibility. The cession was made. The United States was to pay for it 80,000,000 francs,—50,000,000 francs, or $12,000,000, cash, and for the balance it assumed to pay its own citizens their claims for recent spoliations by France on the merchant marine of the United States. Thus we obtained Louisiana. We have always retained it. We have also always retained the money we agreed to repay our own citizens, and their

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descendants are to this day, after the lapse of nearly one hundred years, clamoring to congress for payment. Within very recent years a small portion of these claims has been paid, and I suppose all will be paid some time, if the longevity of this government shall extend far enough.

This negotiation was conducted under Napoleon's immediate directions. Several of its incidents illustrate his astounding foresight. Marboin, his minister of the treasury, and Decies, his minister of marine, endeavored to dissuade him from making the cession. He listened to their arguments, and then replied: "I will not keep a possession which will not be safe in our hands; which will perhaps embroil us with the Americans, or produce a coldness between us. I will make use of it, on the contrary, to attach them to us, and to embroil them with the English, and raise up against the latter enemies who will some day avenge us if we shall not succeed in avenging ourselves. My resolution is taken. I will give Louisiana to the United States." To raise up in America a Nemesis against England, the foresight of Napoleon insisted upon a remarkable stip-

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ulation in the treaty of cession. It is the third article, and it is as follows: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted, as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States."

He intended by this provision to make the ceded territory inalienable by this government. He succeeded in this intention by providing for the admission of the cession into the Union. A sovereign state cannot be ceded by the United States. While awaiting statehood, no part of the cession could be alienated without violating the treaty. I asserted in debate in the senate, and believe it to be a valid argument, that the long delay in admitting South Dakota into the Union was a violation of the treaty with Napoleon.

A portion of the revenge which Napoleon planned came soon. In 1815 he was in Elba, and an English commissioner was watching him. All of the empire he had reared in Egyp-

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tian sands, on the plains of Palestine, in Spanish sierras, on Italian plains, in Germany, or among Russian snows, and in France itself, had shrunk to one little island, where the imperial eagle was preening his overshadowing wings for that flight through France from town to town, to fall at last and forever upon the plain of Waterloo. American Jackson stood upon the soil of Louisiana on the 8th day of January, 1815, and the flower of Wellington's Peninsular veterans were swept down like the grass of the field in the act of revenge which Napoleon planned when he sold us Louisiana for a pittance.

The wisdom of the foreign policy ordained by Washington has received the fullest justification. Had the United States, at the close of the last century, formed an alliance with Great Britain, we would never have obtained the entirety of Louisiana. Had an alliance been entered into with France, we would simply have defended it for Napoleon.

The Monroe doctrine.

The Monroe doctrine has recently been brought into general consideration by the action of Great Britain toward the republics of Venezuela and Nicaragua. It was ex-

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pressed by President Monroe in his annual message in 1823. It did not originate from any cause then operative in this hemisphere. It was a consequence of European aggression intended for the Spanish American republics. This fact should always be borne in mind in construing that famous declaration.

Immediately upon the expulsion of the Bourbons from Spain in 1807, and the accession of Joseph Bonaparte to the throne of that kingdom, the power of Spain over her dependencies in the New World ceased almost entirely. Allegiance was merely a matter of choice, and the consequence was that every Spanish colony declared its independence, and each instituted a republican form of government on the model of the United States. In 1814, the Bourbons returned to power in Spain. She or any other European power had never recognized these republics, and the consequence was that Spain made feeble efforts to reduce them to submission, and wars of atrocious cruelty were waged for a number of years. The final overthrow of Napoleon in 1815 enabled the allied sovereigns to complete the plans which they had begun at the congress of Vienna in the previous year.

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These plans were to dismember and repartition Europe, and by an alliance perpetuate the enforced repose of the chained people in the position in which the autocrats, who inveighed so loudly against the rapacity of Napoleon, had placed them. Accordingly at Paris, in September, 1815, the emperors of Russia, Austria, and the king of Prussia entered into a compact signed by themselves, and not by any ministers acting for them. It was called the "Holy Alliance," from the blasphemous assumption of its leading pretext. That pretext was the subordination of politics to the Christian religion. These despots incorporated themselves into the Christian religion. England did not formally join in this compact, signed, as it had been, by monarchs themselves, and not by diplomatic ministers, for the reason that the sovereign of England can act only through his ministers. But the prince regent approved it. He was represented at the several congresses of these apostolic tyrants. Castlereagh was their delight, confederate, counselor, and tool, and he was the tie which bound Great Britain to the confederacy. Castlereagh died, and Canning succeeded

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him as foreign secretary. In 1820, the patriots of Spain, by a successful revolution, compelled King Ferdinand to proclaim the constitution of 1812,—Napoleon's constitution, who was then dying at St. Helena, and who had left every government he ever administered better than it was when he took it. This enforced liberalism alarmed the tyrants. They assembled at Verona in 1822. France was preparing to invade Spain,—one Bourbon was to help another Bourbon to revoke Napoleon's constitution. Mr. Canning took high ground, and objected that the Spanish people ought not to be coerced into the deprivation of their regained constitution. This was plausible, but it was mere pretext. The true reason was that England was disturbed at the shifting balance of power in Europe. The members of the Holy Alliance were encouraging the Bourbons of France and Spain, and the question at London was, where was England under such conditions? France, having overrun Spain, proposed to assist her in reconquering her former possessions in the New World. This was another kicking of the beam of the balance of power. So Canning objected. He

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declared that if France should, in the course of the war, capture any of the colonies, it would be necessary for all parties to know that the British government considered the separation of the colonies from Spain to have been effected to such a degree that it would not tolerate for an instant any cession to France which Spain might make of colonies over which she did not exercise a direct and positive influence, and would not allow any third power to attack or reconquer them for Spain. In all this, England was wholly selfish. It was a mere struggle by her to preserve the equilibrium of power in Europe by weakening France and Spain. And when it was all over, and France and Spain had been thwarted in their designs of trans-Atlantic conquest, Canning said: "I sought materials of compensation in another hemisphere. * * * I called the new world into existence to redress the balance of the old."

In doing this, England needed aid. She stood alone. The great powers of Europe were against her. Canning resolved to appeal to the legitimate interests of the United States, who occupied a higher plane than

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England. He wrote to Mr. Rush, our minister at London, that the United States ought to take decided ground against the intervention of the Holy Alliance in South America. Before announcing his declaration, Mr. Monroe took the written advice of Thomas Jefferson and James Madison. They advised him to do what he did, and the letter of Jefferson plainly shows that he was counseling no paper fulmination, but meant that warlike force should be employed whenever necessary to enforce the doctrine which he recommended. President Monroe's message was sent to congress in December, 1823.

The doctrine is stated in the following words: "In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion has been deemed proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European powers. * * * We owe it, therefore, to candor and to the

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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 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, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of opposing 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 toward the United States."

The effect of this declaration was immediate. The designs of France, Spain, and the Holy Alliance collapsed. England had then fatally wounded the Alliance itself, and had restored the balance of European power to equilibrium. She cared nothing for republican institutions on the western hemisphere. In fact, Mr. Canning, while he was identifying American with English action, wrote to

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the British minister in Spain, referring to the ephemeral monarchy of Iturbide in Mexico, and to the empire recently established in Brazil by the house of Braganza, which fled from Portugal to its colonial possession when the army of Napoleon came in sight of Lisbon: "Monarchy in Mexico and monarchy in Brazil would cure the evils of universal democracy, and prevent the drawing of demarkation which I most dread,—America *versus* Europe."

With the notable exception of the invasion of Mexico by France, England, and Spain, and the further general exception of Great Britain, the Monroe declaration as it was plainly made, and is commonly understood, has been respected by the nations of Europe from the date of its promulgation. While it was called forth by the existing condition of a threatened invasion of the Spanish American republics by France and Spain, its terms are not limited to that occasion. They are general, and are thus applicable to similar conditions whenever they shall recur. They are expressed by the diplomatic formula by which nations notify each other of the consequences that may be expected when

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the provocation given is deemed to be, in the language of President Monroe, "dangerous to the peace and safety" of the notifying power. The question is whether this declaration was anything more than a mere *flatus vocis*—the breath of a word—when it was made, or at any time since, or whether it was and remains an announcement that the United States would consider itself free to judge of danger to its peace and safety in that present case, or any similar case thereafter, and, if it deemed necessary, to avert or quell the inimical acts by all its powers, including that of war. That it was the latter, I think cannot be reasonably doubted. That Mr. Jefferson so thought is very plain from his letter to President Monroe. The occasion which invoked it was a threatened war,—"war in procinct," as Milton expressed it. Monroe and Canning both threatened warlike resistance.

Mr. Webster thought the declaration meant force if necessary, for he said in 1826, in the debate upon the Panama congress: "It is doubtless true, as I took occasion to observe the other day, that this declaration must be considered as founded on our rights,

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and to spring mainly from a regard to their preservation. It did not commit us, at all events, to take up arms at any indication of hostile feeling by the powers of Europe towards South America. If, for example, all the states of Europe had refused to trade with South America until her states should return to her former allegiance, that would have furnished no cause of interference to us. Or if an armament had been furnished by the allies to act against provinces the most remote from us, as Chili or Argentine Republic, the distance of the scene of action diminishing our apprehensions of danger, or diminishing also our means of effective interposition, might still have left us to content ourselves with remonstrance. But a very different case would have arisen if an army equipped and maintained by these powers had been landed on the shores of the Gulf of Mexico, and commenced the war in our immediate neighborhood. Such an event might justly be regarded as dangerous to ourselves, and on that ground call for decided and immediate interference by us." When these words were spoken, steam or electricity had not begun the oceanic trans-

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ference of intelligence and matter. They were spoken nearly twenty-five years before we acquired California. Our interests on the coast of the Pacific were then slight, and as to them there was nothing to be feared. The Nicaraguan canal was deemed a chimera. But under existing conditions, it cannot be thought that Mr. Webster would use the illustration which he employed in case of an attack upon Chili or Argentine Republic, or that he would, at that day, consider Nicaragua or Venezuela as he then did the other states.

The Monroe doctrine was not a pledge that the United States would engage in hostilities whenever a Spanish American republic should be at war with a European power, and be invaded by it. Such a construction would enable any of the republics to involve the United States in any war which the former might provoke.

They who are pleased to consider this declaration a mere placatory piece of phraseology, with no action in it, say that the policy was never enacted by any statute of the United States, or declared by any resolution of congress. This is true, but the in-

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ference therefrom is not that the declaration has no force. It was the administrative act of the department which conducts our foreign relations. It has never been retracted or even qualified. It has been reasserted many times. More than all, it has been adopted by the American people, and held to by them for more than seventy years. Washington's principles as to our relations with European powers were never enacted into laws. I do not recall that they were ever adopted by congress. Yet who will doubt their validity and efficiency after the lapse of the many years during which they have guided presidents and cabinets and congress, and have been the settled convictions of three generations of the American people?

English attitude toward the Monroe doctrine.

Great Britain has never respected the Monroe doctrine except by abstaining when she thought it imprudent to violate it. She has expanded to a colony of 7,500 square miles what was, in 1850, when the Clayton-Bulwer treaty was signed, a mere squatter settlement of trespassing wood choppers on the coast of Honduras. The map will show

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the importance of this encroachment as regards the entire Gulf of Mexico and the Atlantic outlet of the proposed Nicaragua ship canal. This has been done by encroachments westward upon Honduras, and England still asserts that her western boundary has not yet been settled. This government should question her right to maintain that colony.

The events at Corinto in Nicaragua are recent and well-known. For a trifling offense to her dignity, which was either wholly denied or greatly palliated by the statement of Nicaragua, which was committed during a time of revolutionary excitement, Great Britain fined that weak and poverty stricken republic $75,000, and demanded immediate payment in gold. It was in vain that Nicaragua pleaded for arbitration. It was in vain that she asked for time to pay the money, arbitration having been refused. In default of immediate payment, the British ships of war appear in Corinto. British troops take possession of the town. The British flag floats over Nicaraguan soil, and this armed occupation continues until, it is said, Costa Rica, San Salvador, Guatemala, the little brothers of that family of republics, contribute what

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pocket money they have to get the burly, blustering intruder out of the house. Of course the pretext was that England has the right to make war upon Nicaragua, and that her seizure of a portion of its territory, to hold it and govern it until the fine is paid, is not an infraction of the Monroe doctrine. But, all things considered, the nature of the grievance, the brutality of the reprisal, the refusal to arbitrate or to give time to pay, the actual seizure of territory, the position of Great Britain on the Atlantic coast as to the Nicaragua canal, her position at Corinto, on the Pacific, as to the same work, the great investments of American capital in that enterprise, the successful continuation of which greatly depends upon political stability in Nicaragua; considering also what Great Britain is doing in Venezuela at the mouth of the Orinoco looking north to the canal, her possessions in Jamaica and the Windward islands completely commanding it,—it is my opinion that the seizure of Corinto was "dangerous to our peace and safety," and should have been prevented.

The Venezuela case.

The aggressions of Great Britain upon

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Venezuela have been continuously perpetrated for nearly fifty years. They have been so flagrant, imperious, and uncompromising that diplomatic relations have not existed between those countries since 1887. The story must be briefly sketched, for it is too long and complex to be given here in detail. As laid down in all American atlases, British Guiana is a narrow territory fronting north on the Atlantic ocean, bounded on the west by a line between it and Venezuela, which reaches the ocean at a point far east of the mouth of the Orinoco river, which for many hundreds of miles flows entirely through Venezuelan territory, and empties into the ocean within such territory. The Dutch held title to Guiana under cession from Spain, and in 1814 ceded to England that portion which is now British Guiana. There was then little or no question as to the boundary between the ceded country and Venezuela. About the year 1840, however, Great Britain began to assert claims, and to follow up such assertions by gradual occupancy, until at the present time she claims the territory for several hundred miles up to a line running with the south or east bank of

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the Orinoco, and a short distance from it. The two nations have been disputing as to various boundaries for more than fifty years, and during nearly every year of the contention Great Britain has changed and enlarged her claim, until she now stands upon her present exorbitant demand of about two-thirds of Venezuela south and east of the Orinoco. It reduces the area of Venezuela by about one-third, or by at least 70,000 square miles. A map showing the various boundary lines up to which England has claimed is perfectly bewildering in its number and changes of asserted boundary, but it is perfectly clear that her demands have been progressive and expansive. Venezuela has been powerless to resist, and has over and over again offered to submit the question to arbitration. The United States has requested Great Britain to consent to settle the question in that way. She has always refused, and has continued her encroachments.

The Orinoco is, with its affluents, one of the greatest systems of river navigation on the planet. A fort and naval station at its mouth will command the entire system. It reaches all of South America north of the

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Amazon and east of the Andes, and actually communicates with the navigable waters of the Amazon and thus with the entire system of that river. The mouth of the Orinoco river is the key to one-third of the entire South American continent, and England's hand is upon the key. In a military sense, Great Britain proposes to flank and take in reserve one-third of South America. The significance of this to our interests and safety cannot be doubted.

Venezuela is our nearest South American neighbor. Its capital is six days' journey from Washington. The mouth of the Orinoco is about five days' sail from New York. Our commercial relations with Venezuela are most encouraging, and are increasing in value. Her coast fronts towards the Gulf of Mexico, Jamaica, the Windward Islands, and the outlet of the proposed Nicaragua canal. Considering this situation and the other facts to which I adverted in relation to the seizure of Corinto, I say most confidently that the United States ought to interfere in this business, or formally and by proclamation abandon the Monroe doctrine as a scarecrow which will no longer frighten. Would

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that we could hear the opinions of James Monroe, John Quincy Adams, Thomas Jefferson, Daniel Webster, William H. Seward, and James G. Blaine upon our power, our right, and our duty in the present situation.

The Invasion of Mexico.

On the 31st day of October, 1861, England, France, and Spain entered into a treaty convention at London, by which these three powers agreed to invade the republic of Mexico. The pretext was to obtain reparation for certain pecuniary claims of their subjects, and to chastise Mexico for certain alleged diplomatic indignities. The real purpose was to overthrow the government of Mexico. It was the Holy Alliance come again. The time was thought to be propitious for such an undertaking. It was in the first onset of our Civil War, when the supporters of every monarchy in Europe excepting Russia hoped and believed that the United States was in process of dismemberment. Louis Napoleon had been rhapsodizing about the supremacy of the so-called Latin races. The statesmen of England, with the exception of John Bright and a few

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others, were expressing, with an exultation that they scarcely attempted to conceal, their conviction that the Union was a thing of the past. There was in plain sight much besides Mexico to tempt invasion. Texas was valuable, and was distant from the populous portions of the Southern Confederacy. California was 12,000 miles distant by way of Cape Horn from the capital of the United States, and was nearly equally divided on the question of loyalty to the Union. To the south was all Central and South America, vulnerable by way of both oceans to any great naval and military power that might hold both the coasts of Mexico.

The invasion took place. After a short time, by reason of disagreements among the powers, Spain and England withdrew their forces, and France proceeded alone in the invasion. The case supposed by Daniel Webster had happened. It proceeded in its development until the republic of Mexico ceased to exist, and a scion of the house of Hapsburgh became the emperor of that country. What was the United States to do? What could it do? Its navy was small and inefficient. Every man and every dollar it had

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were none too many for the domestic war in which it was engaged. There was Canada with her three millions of unfriendly people on our northern boundary. Great Britain had recently brought us to our knees in the affair of the seizure of the Trent by the San Jacinto, and the capture of the Confederate agents, Mason and Slidell. This country could do nothing but temporize, protest faintly, threaten timidly, and wait. The letters of Mr. Seward during this period are frequently casuistical, obscure in places, temporizing, yet covertly, and sometimes quite openly, significant of what did come to pass. We waited. The rebellion was finally quelled. We were then the paramount military and naval power on earth. Then, in terms that were bland, and at times superciliously courteous, and also by intimations that were unofficial, but were imperative, the French were notified that they must evacuate Mexico. A corps of United States volunteers was sent to the mouth of the Rio Grande and opposite Matamoras to expedite the departure by their presence. I am proud in saying that my own regiment, fresh from the capture of Mobile, was in that force.

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The French army lay at Matamoras, across the river, and the interchange of courtesies was frequent. There was a 4th of July celebration held by my regiment, to which many French officers were invited. They came in their most gorgeous uniforms, and the contrast with the plain and soiled attire of their hosts was most striking. The memories of Washington and LaFayette were duly commemorated. By the time the day was over, those French officers remembered little of what had taken place, but the next day's recovery brought a return of recollections, which, I venture to say, were abiding.

It has been sometimes asserted that the United States in the Mexican incident did not assert the Monroe doctrine. Nothing can be further from the fact. In our most adverse moments during the controversy, while Secretary Seward, like a blown pugilist, was sparring for wind, his language was at times very explicit, and wholly referable to the famous declaration. On March 3, 1862, he wrote to Mr. Adams, our minister at London, as follows: "The president, however, deems it his duty to express to the allies in all candor and frankness the opin-

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ion that no monarchical government which could be founded in Mexico, in the presence of foreign navies and armies in the waters and upon the soil of Mexico, would have any prospect of security or permanence." On September 26, 1863, he advised Louis Napoleon as follows: "Nor do the United States deny that, in their opinion, their own safety and the cheerful destiny to which they aspire are intimately dependent on the continuance of free republican institutions throughout America. They have submitted their opinions to the emperor of France, on proper occasions, as worthy of his serious consideration in determining how he would conduct and close what might prove a successful war in Mexico. Nor is it necessary to practice reserve upon the point that, if France should, upon due consideration, determine to adopt a policy in Mexico adverse to the American opinions and sentiments which I have described, that policy would probably scatter seeds which would be fruitful of jealousies which might ultimately ripen into collision between France and the United States and other American republics."

On April 4, 1864, it was resolved unan-

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imously by the house of representatives "that the congress of the United States are unwilling, by silence, to have the nations of the world under the impression that they are indifferent spectators of the deplorable events now transpiring in the republic of Mexico, and that they think it fit to declare that it does not accord with the policy of the United States to acknowledge any monarchical government erected on the ruins of any republican government in America under the auspices of any European power."

Enforcement of the Monroe doctrine.

It may be asked in what manner should this government assert the principles we have been discussing in cases where their infractions are deemed by it "dangerous to our peace and safety?" I answer, by all means within our power, exhausting first the resources of peace, and, these failing, an appeal to force. I do not apprehend the least danger of any war with England arising out of existing conditions, or out of anything which we can foresee. She is a prudent nation, with all her power. She has given in the Dominion of Canada a hostage of peace to

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the United States far outvaluing the utmost that she can hope to obtain by war. I think that firm remonstrance, an attitude so unyielding that it will demonstrate the certainty of warlike action as the last extremity, will repress aggression, assert our dignity, secure our safety, and vindicate our principles.

Settlement by arbitration of such matters as we have been discussing should be required by this government. England arbitrated with us, before the emperor of Germany, the water boundary near Puget sound. We arbitrated with her, before the Geneva commission, the most delicate questions of national offense and honor, and at the same time questions of enormous pecuniary demands. We arbitrated with her at Halifax concerning the fisheries, and at Paris concerning the seals in the Pacific ocean and in Bering Sea. She consented to these arbitrations because we are strong. She refused to arbitrate with Nicaragua and Venezuela because they are weak. Her conduct towards these republics is "dangerous to our peace and safety." The principle of arbitration as to such controversies ought to be declared by the United States as a principle in the same manner and to the same

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end that the principles of the Monroe doctrine were declared. I think that such a declaration would be self-efficient. It would commend itself to the approval of mankind. It conforms to the tendencies of the present age to avoid war, and to settle national controversies by other means than the sword.

Hawaii.

The Hawaiian question remains to perplex us. Those islands ought to be annexed to the United States. It has been the unbroken policy of this government for more than fifty years, under every administration excepting the present one, that such annexation must ultimately take place, and that meanwhile no foreign power shall acquire the islands.

Events which have occurred within a period comparatively recent justify the wisdom of the policy. We acquired Alaska and its peninsular range of islands stretching towards Asia, hung like a sword over the northeastern coast of that continent. At their western extremity they are opposite to and near the harbor of Petropanlovsk, the eastern terminus of Russia's transasiatic railway.

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The western islands of this group abound in great harbors. The middle islands are about 2,100 miles from San Francisco; San Francisco is about 2,100 miles from Hawaii, and Hawaii is about 2,100 miles from said Aleutian islands. The courses form an equilateral triangle. The map will demonstrate to the eye the importance—the indispensable importance—to us that we should possess Hawaii. All ships from Puget sound to Australasia must touch there. It lies in the courses of all ships sailing to China and Japan from around Cape Horn, from Callao and Valparaiso, from the proposed Nicaragua canal. Recent events tend to confirm Humboldt's prediction, made more than seventy years ago, that in time the greatest maritime commerce of the world would be over the Pacific ocean. Japan has demonstrated within the last few months that she is a great military and naval power. She has overrun northeastern China, and has knocked at the gates of Pekin. She has concluded a triumphant peace, which will tend to break down what remains of Chinese exclusiveness, will open that empire entirely to foreign trade. It will do more,—it will stimulate China to make

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herself powerful by adoption of the same methods that were employed by Japan. Within twenty years, China will be a modern nation in its army and navy. The consequences to western civilization are not pleasant to contemplate. Western civilization must prepare for them on the Pacific ocean and in northwestern Asia. To this end the construction by Russia of the railway across Asia to the shores of the Pacific ocean is an event of the greatest importance to European and American interests, security, and civilization.

The spirit and influence of international law.

In the beginning of international law, its function was to mitigate war. War was the normal status of nations. It was made for any cause, and often without cause. Besides, in the evolution of modern civilization and liberty, certain great and just wars were necessary to create that civilization and liberty. Those results achieved, wars have become less frequent. They cannot be declared now for causes which, in times comparatively recent, were deemed sufficient. In bringing about this result, the influence of

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international law has been most efficacious. From instigating war, it has gradually, in the course of the last three hundred years, so grown in power that it often makes it impossible. This is a wonderful result when we consider that its cause has no sanction, no force, except the moral sense of mankind. Out of this moral sense an awful, a commanding power has grown, before which warlike ambition pauses and armies halt. The present function of international law is to so regulate the peaceful intercourse of states as to make wars almost impossible. Grotius called each nation a college in the great university of nations. The analogy is more than fanciful. When civilized nationalities become in that sense one great unit of intelligence, moral influence, and physical power, yet containing that variety in unity which springs from differences of organization, subject-matter, and function, which nevertheless acts harmoniously and as a part of the vast unity which comprehends it, the world is distinctly seen to have been lifted on by some vast geologic process to a higher elevation than it occupied when the nations were a chaos of unconnected units, whose con-

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tact was hostility. I believe that the foreign policy of the United States has been most influential in producing this enormous increase of the power of international law. That policy, by example, may be said to have established arbitration as a solution of international difficulties to such an extent that the nation which refuses it is subjected to the overpowering effects of those moral sanctions of which I have spoken.

There still remains, and it will probably always remain, as a coercing force towards peace, that majestic influence of national warlike power, coercive even when latent, irresistible when provoked into just action. This power the United States possesses, and it is increasing every year. Its mere exhibition by the declaration of the Monroe doctrine undoubtedly saved our continent and part of another from most sanguinary and interminable wars, and preserved them forever for free government by the people.

Those principles are still vital, and should be maintained whenever the occasion recurs which called for their first assertion. For we can say of them, with Mamiani, the Italian publicist, in words of intranslatable

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beauty, asserting that such principles would some time fuse Italy into unity, although she was then the prey of the Austrian, and was divided into petty states:

"These principles which we maintain seem at present to have lost their application and efficacy. But they are never submerged completely beneath the storms of calamity. Ever above the tempestuous deep they float and hover like those stars that shone over the surface of the Ionian sea to beacon the spot where the lyre of Sappho sank."

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APPENDIX C.

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APPENDIX C.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.

SECTION I.

Martial law—Military jurisdiction—Military necessity—Retaliation.

1.

A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its martial law.

2.

Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander in chief; or by special mention in the treaty of peace

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concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3.

Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4.

Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is

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executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity,—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5.

Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected, and must be prepared for. Its most complete sway is allowed—even in the commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6.

All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupy-

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ing military power; but all the functions of the hostile government,—legislative, executive, or administrative,—whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation, of the occupier or invader.

7.

Martial law extends to property and to persons, whether they are subjects of the enemy, or aliens to that government.

8.

Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9.

The functions of ambassadors, ministers, or other diplomatic agents, accredited by neu-

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tral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10.

Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety, and the safety of its operations.

11.

The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offenses to the contrary shall be severely punished, and especially so if committed by officers.

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12.

Whenever feasible, martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13.

Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial, while cases which do not come within the "Rules and Articles of War," or the jurisdiction conferred

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by statute on courts-martial, are tried by military commissions.

14.

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15.

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agree-

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ments entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16.

Military necessity does not admit of cruelty,—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy. And, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17.

War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18.

When a commander of a besieged place ex-

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pels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19.

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20.

Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21.

The citizen or native of a hostile country is thus an enemy, as one of the constituents

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of the hostile state or nation, and as such is subjected to the hardships of the war.

22.

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

23.

Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24.

The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every pri-

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vation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25.

In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26.

Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance, or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27.

The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civil-

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ized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28.

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29.

Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

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The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

30.

Every since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.

Public and private property of the enemy—Protection of persons, and especially of women; of religion, the arts and sciences—Punishment of crimes against the inhabitants of hostile countries.

31.

A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit, or of that of its government, all the revenues of real property belonging to the hostile government or na-

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tion. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32.

A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33.

It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own, and make it a portion of its own country.

34.

As a general rule, the property belonging

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to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning, or observatories, museums of fine arts, or of a scientific character,—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35.

Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36.

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

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In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37.

The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and churches, for temporary and military uses.

38.

Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which

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may serve the spoliated owner to obtain indemnity.

39.

The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war,—such as judges, administrative or police officers, officers of city or communal governments,—are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40.

There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41.

All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

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42.

Slavery, complicating and confounding the ideas of property (that is of a thing) and of personality (that is of humanity), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that, "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villeins, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43.

Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person in-

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to slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or state can have, by the law of postliminy, no belligerent lien or claim of service.

44.

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45.

All captures and booty belong, according to

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the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46.

Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.

47.

Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

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SECTION III.

Deserters—Prisoners of war—Hostages—Booty on the battlefield.

48.

Deserters from the American army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American army; and if a deserter from the enemy, having taken service in the army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war requiring redress or retaliation.

49.

A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency, and promote directly the object of the war, except

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such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter,—are prisoners of war, and as such exposed to the inconveniences, as well as entitled to the privileges, of a prisoner of war.

50.

Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

51.

If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the ap-

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proach of a hostile army, rise, under a duly-authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

52.

No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53.

The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American army, are not prisoners of war, unless the commander has reasons to detain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54.

A hostage is a person accepted as a pledge

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for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55.

If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56.

A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57.

So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

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58.

The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59.

A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60.

It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salva-

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tion makes it impossible to cumber himself with prisoners.

61.

Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62.

All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

63.

Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64.

If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65.

The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is

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an act of perfidy by which they lose all claim to the protection of the laws of war.

66.

Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67.

The law of nations allows every sovereign government to make war upon another sovereign state, and therefore admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68.

Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

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69.

Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70.

The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71.

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States, or is an enemy captured after having committed his misdeed.

72.

Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

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Nevertheless, if large sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they have been placed in the private luggage of the prisoners.

73.

All officers, when captured, must surrender their side arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

74.

A prisoner of war, being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The government

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alone releases captives, according to rules prescribed by itself.

75.

Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76.

Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77.

A prisoner of war who escapes may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security

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shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punised, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow prisoners or other persons.

78.

If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79.

Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80.

Honorable men, when captured, will ab-

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stain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information, or to punish them for having given false information.

SECTION IV.

Partisans—Armed enemies not belonging to the hostile army—Scouts—Armed prowlers—War rebels.

81.

Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82.

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to

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their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers,—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83.

Scouts, or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84.

Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85.

War rebels are persons within an occupied

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territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.

SECTION V.

Safe-conduct—Spies—War traitors—Captured messengers—Abuse of the flag of truce.

86.

All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority.

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Contraventions of this rule are highly punishable.

87.

Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state, and not by subordinate officers.

88.

A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information, or in conveying it to the enemy.

89.

If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or

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civil officer, or a private citizen, he shall suffer death.

90.

A traitor under the law of war, or a war traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91.

The war traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

92.

If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war traitor, and death is the penalty of his offense.

93.

All armies in the field stand in need of

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guides, and impress them if they cannot obtain them otherwise.

94.

No person having been forced by the enemy to serve as guide is punishable for having done so.

95.

If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war traitor, and shall suffer death.

96.

A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97.

Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98.

All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same,

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can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99.

A messenger carrying written dispatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured, while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100.

A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

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101.

While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102.

The law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war traitor, or the war rebel.

103.

Spies, war traitors, and war rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

104.

A successful spy or war traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punish-

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ment for his acts as a spy or war traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.

Exchange of prisoners—Flags of truce—Flags of protection.

105.

Exchanges of prisoners take place—number for number—rank for rank—wounded for wounded—with added condition for added condition,—such, for instance, as not to serve for a certain period.

106.

In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the government, or of the commander of the army in the field.

107.

A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange, nor a higher rank, for the purpose of obtaining better treatment.

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Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108.

The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

109.

The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable as soon as either party has violated it.

110.

No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

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111.

The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112.

If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113.

If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114.

If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while

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its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115.

It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.

116.

Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117.

It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

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118.

The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII.

The Parole.

119.

Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120.

The term "parole" designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121.

The pledge of the parole is always an individual, but not a private, act.

122.

The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within

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the captor's country or territory, on conditions stated in the parole.

123.

Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124.

Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125.

When paroles are given and received, there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126.

Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127.

No noncommissioned officer or private can give his parole except through an officer. In-

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dividual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128.

No paroling on the battlefield, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

129.

In capitulations for the surrender of strong places or fortified camps, the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

130.

The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belliger-

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ent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131.

If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him, he is free of his parole.

132.

A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

133.

No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers, if it

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paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134.

The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and, upon their failure to give it, he may arrest, confine, or detain them.

SECTION VIII.

Armistice—Capitulation.

135.

An armistice is the cessation of active hostilities for a period agreed between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

136.

If an armistice be declared, without conditions, it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly ad-

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hered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137.

An armistice may be general, and valid for all points and lines of the belligerents; or special,—that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138.

The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, does in no way affect the character of the armistice itself.

139.

An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are re-

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sponsible from the day only when they receive official information of its existence.

140.

Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141.

It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

142.

An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

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143.

When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of defense within the place during an armistice, this point should be determined by express agreement between the parties.

144.

So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145.

When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

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146.

Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147.

Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice. In the latter case, the war is carried on without any abatement.

SECTION IX.

Assassination.

148.

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation

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should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism.

SECTION X.

Insurrection—Civil War—Rebellion.

149.

Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150.

Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

151.

The term "rebellion" is applied to an insurrection of large extent, and is usually a

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war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it, and set up a government of their own.

152.

When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153.

Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war taxes or forced loans,

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or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

154.

Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155.

All enemies in regular war are divided into two general classes,—that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.

The military commander of the legitimate

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government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion, without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

156.

Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war, as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the noncombatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance or by some other manifest act, declare his fidelity to the legitimate government, he may

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expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law, and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157.

Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.

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