to those damages which may arise from their carrying articles of the description above-mentioned,' Mr. Jefferson answered, 'Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace does not require from them such an internal derangement of their occupation [1].' Again, in 1855, President Pierce, speaking of articles contraband of war, laid down more plainly 'that the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government [2].'

1855, American statement of the law.

In unfortunate contrast with these frank expressions of the clear rule of law was the doctrine maintained by the United States during the civil war, and afterwards before the tribunal of arbitration at Geneva. It was then urged that though belligerents may not 'infringe upon the rights which neutrals have to manufacture and deal in military supplies in the ordinary course of commerce,' yet that 'a neutral ought not to permit a belligerent to use the neutral soil as the main if not the only base of its military supplies [3];' in other words, it was argued

The two branches of law confused; recently by the United States and Germany.

[1] Mr. Jefferson to Mr. Hammond, May 15, 1793.

[2] President Pierce's Message, 1st Session 34th Congress.—Among jurists Kent (Comm. lect. vii) and Ortolan (Dip. de la Mer, ii. 177) are distinguished by their clear recognition of the principle involved in the established practice. See also the judgment of Story in the case of the Santissima Trinidad, vii Wheaton (American Reports), 340.

[3] Case of the United States, part v.

that the character of contraband trade alters with the scale upon which it is carried on. In like manner, during the Franco-German war of 1870, Count Bismarck accused the British Government of not acting 'in conformity with the position of strict neutrality taken by it,' in permitting contracts to be entered into by the French Government with English houses for the supply of arms and ammunition[1]. These claims are reflected in the language of M. Bluntschli, who declares that while 'the neutral state cannot be asked to prevent the issue in small quantities of arms and munitions of war, it is altogether different with wholesale export. The latter gives a sensible advantage to one of the two parties, and in the larger number of cases is in fact a subsidy[2].'

In 1801, by England.

Sometimes an inverse confusion occurs to that which is made in the above instance. In 1801 an English frigate seized some Swedish vessels at Oster Risøer, within Norwegian waters. Lord Hawkesbury expressed the regret of the English Government that the Danish sovereignty had been violated, but failed to see that the international illegality of the capture required the application of an international remedy; and professing that the government had no power to restore the ships, referred the aggrieved parties to the courts[3].

In 1793, by France.

Again, in 1793, on the outbreak of war between Great Britain and France, the latter power endeavoured to use the territory of the United States as a base of operations against English commerce, and fitted out privateers in American ports. While measures were being taken to put a stop to these proceedings, the American Ministry had before it the question in what manner prizes

[1] Lord Augustus Loftus to Earl Granville, July 30, 1870; State Papers, lxx. 73. See also Lord Granville's despatch of August 3, id. 76.

[2] Droit International, § 766.

[3] Count Wedel-Jarlsberg, the Danish Minister of Foreign Affairs, declared that his sovereign 'would never consent that the open violation of his territory should be submitted under any pretext whatever to the decision of the courts.' In the end Lord Hawkesbury receded from his pretension, and the ships were given up. Ortolan, Dip. de la Mer, Annexe F. ii. 427–33, where the text of the correspondence is to be found.

should be dealt with which had been taken before the issue of commissions by the French Minister had been expressly prohibited. Mr. Hamilton thought that the prizes, having been taken in derogation of the sovereignty of the United States, the question of the restoration was a national one; but Mr. Jefferson contended that if the commissions issued by the French Minister were invalid, and the captures were therefore void, the courts would adjudge the property to remain in the former owners; and there being an appropriate remedy at law, it would be irregular for the Government to interfere[1]. It was finally decided to leave the British owner to such remedy as the courts might give him, and the United States only acknowledged an international liability in respect of vessels captured after formal notice to the French Minister that the equipment of cruisers would be looked upon as an infraction of neutrality.

[1] Marshall's Life of Washington, ii. 263-5.

PART II

CHAPTER I

COMMENCEMENT OF THE EXISTENCE OF A STATE, CHANGES IN THE STATE PERSON, AND EXTINCTION OF A STATE

Recognition of a state.

THEORETICALLY a politically organised community enters of right, as was before remarked, into the family of states and must be treated in accordance with law, so 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 conclude treaties with 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 recognised does really possess all the necessary marks, and especially whether it is likely to live. Thus although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired.

Whether the effects of recognition by a parent state and by third powers are different.

Apart from the rare instances in which a state is artificially formed, as was Liberia, upon territory not previously belonging to a civilised power, or in which a state is brought by increasing civilisation within the realm of law, new states generally come into existence by breaking off from an actually existing state. In the latter case recognition may be accorded either by the parent country or by a third power, and it is sometimes thought that there is a difference of kind between the recognition which is given by the one and that which proceeds from the other. Sir James Mackintosh, in his speech on the recognition of the Spanish American States, regarded the word 'recognition,' when

applied to the acts of the parent state and of other states respectively, as being 'used in two senses so different from each other as to have nothing very important in common,' and Canning held a similar view [1]. With all deference for such high authority, it is not easy to see in what the difference for legal purposes consists. Of course recognition by a parent state, by implying an abandonment of all pretensions over the insurgent community, is more conclusive evidence of independence than recognition by a third power, and it removes all doubt from the minds of other governments as to the propriety of recognition by themselves; but it is not a gift of independence; it is only an acknowledgment that the claim made by the community to have definitively established its independence, and consequently to be in possession of certain rights, is well founded. But recognition by a third power amounts also to this. Practically, no doubt, the difference in the value of the evidence furnished by recognition in the two cases is not unimportant. When a state has itself recognised the independence of a revolted province it cannot pretend that recognition by other states is premature. When it has not done so, it may often be possible for it to bring the conduct of other states into question, and to argue that recognition has not been justified by the facts; and where any colour exists for such an assertion, the state which has recognised an insurgent community is placed in a false position. Until independence is so consummated that it may reasonably be expected to be permanent, insurgents remain legally subject to the state from which they are trying to separate. Premature recognition therefore is a wrong done to the parent state; in effect indeed it amounts to an act of intervention. Hence great caution ought to be exercised by third powers in granting recognition; and, except where reasons of policy interfere to prevent strict attention to law, it is seldom given unless in circumstances which set its propriety beyond the reach of cavil.

[1] Mackintosh, Miscellaneous Works, 749 (ed. 1851); Hansard, New Series, xi. 1397.

Circumstances under which recognition may be accorded by third powers.

Most text writers are somewhat loose in their treatment of the circumstances in which recognition may be accorded by third powers. They either, like Klüber, bring in the question of the legitimacy of the origin of the new state, which must always be open to differences of opinion, or, like Wheaton, speak with a vagueness which renders it impossible to be sure of their meaning[1]. The true principles of action are best illustrated by the conduct of England and the United States with respect to the South American Republics, and in the debates which took place in Parliament when the question of their recognition was considered. In 1810 insurrections broke out over the whole of Spanish America. That which took place in Buenos Ayres was immediately successful, the efforts made by Spain to recover a footing in the country did not even lead to its invasion, and it formally declared its independence in 1816. Elsewhere a struggle was maintained for several years with various fortune, but already in 1815 onlookers could forecast its issue[2], and from 1818 Chile, which declared its independence in that year, remained unmolested. Things being in this state, Mr. Clay in the latter year laid before Congress a motion in favour of recognition. Notwithstanding that several provinces were completely freed from the Spaniards, and that they had enjoyed undisturbed independence during a considerable time, the permanence of the existing order was not thought to be sufficiently assured in any part of the continent, so long as the mother country had a reasonable chance of success in places which, if subdued, would serve as bases of operations against the remainder, or the recovery of which would liberate her forces for use else where. The motion was consequently rejected by a large majority. It was not till 1822, when Colombia had expelled the Spaniards, with the exception of the small garrisons of two blockaded forts, while the position of Chile and Buenos Ayres remained unchanged, that President Monroe felt that he could

Case of the South American Republics.

[1] Klüber, § 23; Wheaton, Elem. pt. i. ch. ii. §§ 7, 10.
[2] Annual Register for that year, p. 128.

disregard the continuance of the struggle in Peru, and declared in his message to Congress that the 'contest had reached such a stage, and been attended with such decisive success on the part of the provinces, that it merits the most profound consideration whether their right to the rank of independent states is not complete.' On the matter being referred to the Committee of the Senate on Foreign Affairs, a report in favour of recognition was drawn up, in which, it may be noticed, the principle was affirmed that 'the political right of the United States to acknowledge the independence of the Spanish American Republics, without offending others, does not depend upon the justice but on the actual establishment' of that independence. Recognition followed shortly afterwards[1]. By England still greater deliberation was displayed. It was only in 1824, when it could be asked, 'What is Spanish strength?'—and the answer was, 'A single castle in Mexico, an island on the coast of Chile, and a small army in Upper Peru,' that the question of recognition was considered ripe to be seriously taken in hand. Even then

[1] Mr. Adams, Secretary of State, writing to President Monroe in 1816, pointed out admirably the considerations of law, of morals, and of expediency which are involved in recognition. 'There is a stage,' he said, 'in revolutionary contests when the party struggling for independence has, I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when the independence is established as a matter of fact, so as to leave the chance of the opposite party to recover their dominion utterly desperate. The neutral nation must of course judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral, and to make it a cause or pretext for war, as Great Britain did expressly against France in our revolution, and substantially against Holland. If war results in point of fact from the measure of recognising a contested independence, the moral right or wrong of the war depends on the justice and sincerity and prudence with which the recognising nation took the step. I am satisfied that the cause of the South Americans, so far as it consists in the assertion of independence against Spain, is just. But the justice of a cause, however it may enlist individual feelings in its favour, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorise a neutral to acknowledge a new and disputed sovereignty.' MS. quoted by Wharton, Digest of the International Law of the United States, § 70.

Lord Liverpool and Mr. Canning were hardly prepared to entertain it; and the debates of the spring of that year were not followed by the recognition of Buenos Ayres, Colombia, and Mexico till the beginning of 1825. The recognition of Chile was postponed because of the instability of its internal condition. The British Government may perhaps have been unduly slow to be convinced that the South American Republics had in fact definitely achieved their independence; but whether they were right or wrong upon the question of fact, and whatever differences of opinion upon this point may have shown themselves during the debate, the government and the opposition were thoroughly at one upon the question of principle. The language of Lord Liverpool, as being more concise than that used by other speakers, may be quoted to show the views of Mr. Canning, of Lord Lansdowne, and of Sir J. Mackintosh, as well as of himself. 'He had no difficulty,' he said, 'in declaring what had been his conviction during the years that the struggle had been going on between Spain and the South American provinces—that there was no right while the contest was actually going on ... The question ought to be—was the contest going on? He, for one, could not reconcile it to his mind to take any such step so long as the struggle in arms continued undecided. And while he made that declaration he meant that it should be a *bona fide* contest[1].'

[1] De Martens, Nouv. Rec. vi. 148, 154; Hansard, New Series, x. 974 and 999, xi. 1344; Annual Register. The principle upon which the British and American governments acted in the case of the South American Republics was reaffirmed by Lord Russell in refusing an application for recognition made by the Confederate States in 1862. Lord Russell to Mr. Mason, Aug. 2, 1862. State Papers, North America, No. 2, 1863.

Sir W. Harcourt (Letters of Historicus, Nos. i, ii and iii) examines the doctrine of recognition, and analyses the precedents in detail, with reference to the question whether it would have been proper to recognise the Confederate States during their struggle for independence. He shows that several cases, such as those of Belgium and Greece, which are often spoken of as instances of mere recognition, are in fact instances of intervention. The recent recognition of the independence of Servia and Roumania by the Great Powers may be placed in the same category. Recognition in the case of these states was only a part of arrangements made and imposed by the

Summary of conditions under which independence cannot and can be recognised.

Assuming that the recognition of the Spanish American Republics by the United States and England may be taken as a typical example of recognition given upon unimpeachable grounds, and bearing in mind the principle that recognition cannot be withheld when it has been earned, it may be said generally that—

1. Definitive independence cannot be held to be established, and recognition is consequently not legitimate, so long as a substantial struggle is being maintained by the formerly sovereign state for the recovery of its authority; and that

2. A mere pretension on the part of the formerly sovereign state, or a struggle so inadequate as to offer no reasonable ground for supposing that success may ultimately be obtained, is not enough to keep alive the rights of the state, and so to prevent foreign countries from falling under an obligation to recognise as a state the community claiming to have become one.

Modes in which recognition is effected.

Recognition may be effected in very various ways. The most formal mode is by express declaration, issued separately, and addressed to the new state, or by a like declaration included in a convention made with it. The former was the method adopted by the British government in recognising the Congo state; the latter was that preferred for the same purpose by the German government. But any act is sufficient which clearly indicates intention. The independence of Greece was recognised by Great Britain, France, and Russia in a protocol, dealing besides with other matters; and the empire of Germany was also recognised by a protocol of the 24th January, 1871, signed by the plenipotentiaries of Great Britain, Austria, France, Italy, North Germany (Germany), Russia and Turkey, accredited to the Conference of London. Belgium received recognition by being admitted as a party to a treaty of which the Great Powers were the other

Great Powers for the general settlement of the South-East of Europe. It was this fact which justified those powers in making the recognition of Roumania dependent on changes being made in its municipal laws, and in postponing it until those changes had been effected. For the circumstances in which intervention is permissible, see pt. ii. ch. viii.

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signatories. Again the official reception of diplomatic agents accredited by the new state, the dispatch of a minister to it, or even the grant of an exequatur to its consul, affords recognition by necessary implication [1].

The formation of the Congo state.

The formation of the Congo state deserves separate notice as a curious case of abnormal birth. In 1879 a body was formed calling itself the International Association of the Congo, which was presided over by the King of the Belgians acting as a private individual, and of which the members and officials were subjects of civilised states. It founded establishments; it occupied territory; it obtained cessions of sovereignty and suzerainty from native chiefs. Yet it was neither legally dependent upon any state, nor did its members reject the authority of their respective governments, and establish themselves permanently on the soil as a *de facto* independent community. At first the Association held itself out as a sort of agency for erecting, fostering, and apparently superintending, free states in the Congo basin; and while claiming only to exercise these transitory functions its flag was recognised in April 1884 by the United

[1] Hertslet's Map of Europe by Treaty, Nos. 149, 152 and 441; Wharton's Digest, iii. § 115; Parl. Papers, Africa, No. 4, 1885. The treaty to which Belgium was a party was that through which its boundaries were defined and its position as a neutral state established by the Great Powers, but its admission as an independent party must be regarded as an act prior, from the legal point of view, to the adoption of agreements which would otherwise have conferred recognition. Holtzendorff (Handbuch, i. § 8) gives the surrender of criminals to a new state as an act sufficient to effect recognition; it does not however seem quite clear why the surrender of an ordinary criminal to a *de facto* government, in the possession of regular courts, need more necessarily constitute recognition, than does recognition of belligerency. Both acts imply recognition that jurisdiction is being in fact exercised, and acknowledge it as a matter of political or social convenience. Neither act need mean more.

The appointment of consuls to a community claiming to be independent does not constitute recognition. In 1823 consuls were appointed by Great Britain to the South American Republics, and the various governments were informed that the appointments had been made for the protection of British subjects, and for the acquisition of information which might lead to the establishment of friendly relations. The various consuls took up their appointments and acted, but were not gazetted. The earliest recognition took place in 1825.

States as that of a 'friendly government.' Germany concluded a convention with it in November, 1884, in which the Association appears as itself definitively exercising sovereignty, and is recognised as a 'friendly state.' In December of the same year, in an exchange of Declarations with Great Britain, it asserted that by virtue of treaties with native '"sovereigns," the administration of the interests of free states established or being established in the basin of the Congo and in adjacent territories was vested in the Association,' and Great Britain recognised its flag as that of a friendly government. Within the next two months Italy, the Netherlands, Spain, France, Russia, and Portugal had recognised the Association as a government; Austria, Sweden and Norway, and Denmark had acknowledged it to be a state; and Belgium placed 'its flag on an equality with that of a friendly state.' Finally, on the 26th February, 1885, Col. Strauch, acting under full powers conferred upon him by the King of the Belgians, was permitted by the states represented at the Conference of Berlin to signify the adhesion of the Association, as an independent state, to the general act of the Conference.

Subsequent occurrences have invested the state, thus strangely brought into the world, with a more regular form. In April 1885, the King of the Belgians, who by the constitution of his country is incapable of being the chief of another state without the consent of the Belgian Chambers, was duly authorised to assume the sovereignty of the Congo state, on condition that its union with Belgium should be merely personal; and shortly afterwards he proclaimed by royal decree the existence of an independent Congo state, and his own accession to the throne[1].

[1] Parl. Papers, Africa, No. 4, 1885; Moynier, La Fondation de l'État Indépendant du Congo au point de vue juridique.

It may be worth while to notice here a somewhat curious incident, which offers points of interest, but which does not conveniently fall under any of the heads which will present themselves for discussion in the text. In 1894 an Agreement was entered into between Great Britain and the Congo state by which a strip of territory twenty-five kilometres in breadth, extending from Lake Tanganika to Lake Albert Edward, and running close to the

PART II CHAP. I [Of late years the King has shown every disposition to facilitate the union of the two countries. In 1889 he executed a will by

German frontier for the greater part of its length, was granted by the Congo state to Great Britain upon lease and to be subject to British administration, so long as the Congo territory remained under the sovereignty of the King of the Belgians either as an independent state or as a colony; it was declared that Great Britain neither had nor sought to acquire any further political rights in the leased territory than those which were in conformity with the Agreement. To this arrangement the German Government objected on the ground that an indefinite lease is equivalent to a cession, and that therefore 'her political position would be deteriorated and her direct trade communication with the Congo state would be interrupted.' It was more important to Great Britain to avoid disagreement with Germany than to maintain a right to the leased territory; the agreement with the Congo state was consequently rescinded; but the abstract question of the validity of the objection taken by the German Government remains open.

That the direct trade communication between the German protectorate and the Congo state would in a geographical sense be interrupted is undeniable; but the fact was immaterial. Great Britain could only receive a lease of the territory subject to the provisions of antecedent treaties made between the Congo state and Germany, and notwithstanding a slight ambiguity in the language of the treaty made in 1884 between the two states, there can be no doubt that she would have been precluded from levying duties upon goods imported from German sources. As regards the general 'political position,' the Congo state is neutral, and the treaty provides that in the event of cession of any part of its territory 'the obligations contracted by the Association' (i. e. the Congo state) 'towards the German Empire shall be transferred to the occupier.' Assuming then for a moment that a lease of indefinite duration is equivalent to a cession, the territory leased to Great Britain would have remained affected by the duties of neutrality, and could not have been used to prejudice the position of Germany. The treaty, it should be added, contains no stipulation, express or implied, that transfer of territory in any form should be dependent on German consent. It is difficult therefore to understand the conventional basis of the objection taken, and of legal basis in a wider sense it is evidently destitute. The Congo state has all rights of a neutral state, of which it has not been deprived by express compact. Those rights beyond question include the right to do all state acts which neither compromise, nor tend to compromise, neutrality. In the particular case the Congo state was clearly competent to grant a lease, because the lease carried with it of necessity the obligations of neutrality. Although a lease for an indefinite time may in certain aspects be the equivalent of a cession, in law it is not so; a state may be able to make a cession of territory freed from its own obligations, but in granting a lease it cannot give wider powers than it possesses itself, and consequently, altogether apart from the treaty with Germany, the Congo state could not disengage territory from neutral obligations by letting it out upon a subordinate title.

It may be remarked that the Congo state is equally competent to acquire

which he bequeathed the Congo state to Belgium and let it become known, that if it suited the latter power to enter, during his lifetime, into closer relations with his Congo possessions, he should offer no opposition. In 1895 a Treaty of Cession was drawn up between Representatives of Belgium and the Congo state, but the Bill seeking the sanction of the Legislature for this arrangement was abruptly withdrawn and the question of annexation remains indefinitely postponed.]

Relation of a new state to the contract rights and obligations, &c. of the parent state.

When a new state splits off from one already existing, it necessarily steps into the enjoyment of all rights which are conferred upon it by international law in virtue of its existence as an international person, and it becomes subject to all obligations which are imposed upon it in the same way. No question therefore presents itself with respect to the general rights and duties of a new state. What however is its relation to the contract obligations of the state from which it has been separated, to property belonging to and privileges enjoyed by the latter, and to property belonging in common, before the occurrence of the separation, to subjects of the original state in virtue of their status as such, when some of them after the separation become subjects of the new state?

Personal rights and obligations, &c. adhere to the parent state.

The fact of the personality of a state is the key to the answer. 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 fulfil 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

by way of lease, because the territory so acquired can at least be invested with a neutral character at the will of the Congo state, and probably must of necessity be considered, for such time as the connexion lasts, to be a temporary extension of the neutral territory.

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 the 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 possesses 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.

Local rights and obligations, &c. are transferred to the new state.

On the other hand, rights possessed in respect of 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 has therefore a local character, or which, though not within it, belongs to state institutions localised there, transfer themselves to the new state 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 guarantee, or 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 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 sections respectively; they must therefore be proportionately divided. Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the state, and the like. When a portion of the lands belonging to a commune or to an endowment lies without the boundary of the new state it is only considered that a right to the value of the property is transferred. Convenience may dictate expropriation from the property itself, and it is only then necessary to pay its full value by way of compensation [1].

[1] Bluntschli, §§ 47, 55–60; Fiore, Trattato di Diritto Internazionale Pubblico, §§ 346–56.

The subject is one upon which writers on international law are generally unsatisfactory. They are incomplete, and they tend to copy one another. Grotius, for example, says that if a state is split up 'anything which may have been held in common by the parts separating from each other must either be administered in common or be rateably divided;' De Jure Belli et Pacis, lib. ii. c. ix. § 10. Kent (Comm. i. 25) does little more than paraphrase this in laying down that 'if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common.' Phillimore quotes Grotius and Kent, and adds, 'if a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, rateably binding upon the different parts.' i. § cxxxvii. It is difficult to be sure whether these writers only contemplate the rare case of a state so splitting up that the original state person is represented by no one of the fractions into which it is divided, or whether they refer also to the more common case of the loss of such portion of the state territory and population by secession that the continuity of the life of the state is not broken. If the former is their meaning, their doctrine is correct so far as property and monetary obligations are concerned; if not, it would be hard to justify their language even to this extent. No doubt the debt of a state from which another separates itself ought generally to be divided between the two proportionately to their respective resources as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by a diminution of the state indebted to them; but the obligation is a moral, not a legal one. The fact remains that the general debt of a state is a personal obligation. The case also of the creation of a new state out of part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one state to another. When the latter occurs, at least as the result of conquest, it is not usual to take over any part

PART II
CHAP. I
Case of British American fisheries.

Some controversies have occurred which illustrate the forms in which questions arising out of the application of the above principles may present themselves. Of these the following may be instanced. Upon the separation of the United States from England the treaty of 1783 secured to the subjects of the former certain fishery privileges upon the coasts of Newfoundland, Nova Scotia, and Labrador. After the war of 1812 it was a matter of dispute whether the article dealing with these privileges was merely regulatory, or whether it operated by way of grant, its effect being in the one case merely suspended by war, while in the other the article was altogether abrogated. On the part of the United States it was argued that the treaty of 1783 recognised the right of fishery, of which it is the subject, as a right which, having before the independence of the United States been enjoyed in common by all the inhabitants of the British possessions in North America as attendant on the territory, remained attendant after the acquisition of independence upon the portion of that territory which became the United States, in common with that which still lay under the dominion of England. In other words, it was denied that the separation of a new state from an old one involves the loss, on the part of the inhabitants of the territory of the new state, of local rights of property within the territory remaining to the old state. On the contrary, the right to a common enjoyment by the two states, after

of the general debt of the state ceding territory. The case of Belgium, which took over a portion of the Netherlands debt, is scarcely in point. The treaty of 1839 (De Martens, Nouv. Rec. xvi. 782), by which the division of the debt was effected, was part of a general settlement of the countries in question, made at the dictation of Europe with the view of dealing with all the interests concerned in the most equitable and advantageous manner, and not with the bare object of enforcing law. The true rule is recognised by Halleck (i. 76), who distinguishes the case of a state which is so split up as to lose its identity from that of a state which suffers dismemberment without losing its identity. 'Such a change,' he says, 'no more affects its rights and duties, than a change in its internal organisation, 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 treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.'

separation, of property, irrespectively of its local position, which had previously been enjoyed in common by the subjects of the original state, was expressly asserted. By England, on the other hand, it was as distinctly maintained 'that the claim of an independent state to occupy and use at its discretion any part of the territory of another without compensation or corresponding indulgence, cannot rest on any other foundation than conventional stipulation[1].' The controversy was put an end to by a treaty in 1818, in which the indefensible American pretension was abandoned, and fishery rights were accepted by the United States as having been acquired by contract[2].

Of the Mosquito protectorate.

A like collision of opinion incidentally occurred in 1854 during the disputes between England and the United States with reference to the protectorate exercised by the former power over the Mosquito shore. It was at issue whether a protectorate exercised during part of the eighteenth century could be re-established after the separation of Nicaragua from Spain, or whether Nicaragua inherited certain rights stipulated for in treaties with Spain. In illustration of the arguments of the United States reference was made to a treaty between Great Britain and Mexico, and it was urged generally that 'it would be a work of supererogation to attempt to prove, at this period of the world's history, that these provinces having, by a successful revolution, become independent states, succeeded within their respective limits to all the territorial rights of Spain.' Lord Clarendon on his part replied that the clause in the treaty with Mexico stipulating that British subjects shall not be disturbed in the 'enjoyment and exercise of the rights, privileges, and immunities' previously enjoyed within certain limits laid down in a convention with Spain of the year 1786, which had been

[1] British and Foreign State Papers, vii. 79–97.

[2] This was frankly admitted by Mr. Dana, as agent for the United States, before the Halifax Fishery Commission in 1878. 'The meaning of the treaty,' he said, is 'that having claimed "the right of fishing" as a right inherent in us, we no longer claimed it as a right which cannot be taken away from us but at the point of the bayonet.' Parl. Papers, North America, No. 1, 1878, p. 183.

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referred to by Mr. Buchanan as proving the adhesion of Great Britain to the above principle, proves on the contrary that 'Mexico was not considered as inheriting the obligations or rights of Spain,' as otherwise a special stipulation would not be necessary[1]. The contention of Lord Clarendon was evidently well founded. Mr. Buchanan's general statement was accurate; but the very fact that Mexico succeeded to all the territorial rights of Spain, and consequently to full sovereignty within the territory of the Republic, shows that it could not be burdened by limitations on sovereignty to which Spain had chosen to consent. It possessed all the rights appertaining to an independent state, disencumbered from personal contracts entered into by the state from which it had severed itself.

A war which results in the formation of a new state may be terminated either with or without a treaty of partition and boundary. In the latter case the territory of the newly erected state community is defined by the space which it actually possesses and administers. In the former case the limits indicated by the treaty, if distinctly laid down, become of course the indisputable frontiers. Sometimes however the treaty is indeterminate, either from faults of expression or from imperfect knowledge, on the part of the negotiators, of the country through which the line of demarcation is run; disputes thus arise as to the ownership of portions of territory; and it becomes a question which, or whether either, of the two shall occupy and administer the disputed lands until their respective rights shall have been ascertained or some arrangement shall have been come to. When in such cases one of the parties is in actual possession at the date of the conclusion of the treaty it must be allowed so far to exercise sovereignty within the territory as is requisite for the due government of the latter, the two states being in the same position relatively to one another, to the extent that the meaning of the treaty is doubtful, as if no treaty existed. When, on the other hand, neither party is in actual possession at

Rights of the parent and the new state respectively in cases of disputed boundary.

[1] De Martens, Nouv. Rec. Gén. ii. 210–6.

the date of the conclusion of the treaty, no rights of sovereignty can be exercised by one of the two except with the consent of the other. A treaty of partition and boundary made between a mother country and a seceding part operates, not as a treaty of cession, but as an acknowledgment that certain territory is in fact in the possession of the state which has succeeded in establishing itself. Were it otherwise, the absurdity would present itself that a new state community would have no title to its territory until a treaty of partition and boundary was made, notwithstanding that the conclusion of a treaty with it involves a previous acknowledgment that it is a state, and consequently that it is already in legal possession of its territory. Hence disputed territory is not attributed to the mother country up to the moment at which it is shown to have been conveyed to the seceded state; the two states have equal rights as thoroughly as if they were of independent origin.

The Maine boundary.

Much of the above doctrine came under discussion during the Maine boundary dispute between England and the United States. At the peace of 1783 the limits of Maine were inadequately fixed, and a considerable tract of country was claimed under the terms of the treaty by both the signatory powers. Part of this may have been settled before 1783, part remained unoccupied in 1827 when the discussion in question arose, and part was settled at different times from 1790 onwards. It was admitted by the American government that Great Britain had a right to a 'de facto jurisdiction' over territory, if any such existed, which was inhabited before 1783; and the English government refrained, though evidently as a matter of concession and not of duty, from exercising proprietary or sovereign rights within the unoccupied territory; the discussion consequently turned only on the proper mode of dealing with the portion settled later than 1790. It was argued by Lord Aberdeen that before the independence of the United States the country in dispute was under British sovereignty as well as the adjoining province, to which by the contention of England it was attached;

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and that as the claim of the United States rested on a cession followed by no actual delivery, the national character of the territory could not have undergone any change since a period antecedent to the treaty of 1783. 'It is consistent,' he added, 'with an acknowledged rule of law that when a doubt' as to the right of sovereignty 'exists, the party who has once clearly had a right and who has retained actual possession shall continue to hold it until the question at issue may be decided.' On behalf of the United States it was denied that the title to such territory as might be found to have been indicated by the treaty of 1783 was given by that treaty; the treaty confirmed but did not create; the title of the United States was pre-existent and, it was alleged, was based upon anterior rights possessed 'by that portion of His Majesty's subjects which had established itself' in the country comprised within the territory of the United States [1]. The latter part of the American position was untenable; but it was unnecessary; and the United States were certainly justified in their general contention that territory which was only constructively in possession of England before the treaty of 1783 could not be brought under its actual sovereignty so long as the validity of its title was in litigation.

Effects of cession upon the rights, &c. of the state ceding,

When part of a state is separated from it by way of cession, the state itself is in the same position with respect to rights, obligations, and property as in the case of acquisition of independence by the separated portion [2].

[1] British and Foreign State Papers, 1827–8, 490–585.

[2] There are one or two instances in which a conquering state has taken over a part of the general debt of the state from which it has seized territory. Thus in 1866 the debt of Denmark was divided between that country and Slesvig-Holstein (De Martens, Nouv. Rec. Gén. xvii. ii. 477); and in the same year Italy, by convention with France, took upon itself so much of the Papal debt as was proportionate to the revenues of the Papal provinces which it had appropriated. Lawrence, Commentaires sur les Éléments, &c. de Wheaton, i. 214. It may be doubted whether any other like cases have occurred. [After the war of 1898 the United States refused to assume any part of the Cuban debt or give up the Government Funds in the Cuban State Banks.]

Fiore (§ 351 and note) and other writers confuse local with general debt,

To a certain extent also the situation of the separated part is identical with that which it would possess in the case of independence. It carries over to the state which it enters the local obligations by which it would under such circumstances have been bound, and the local rights and property which it would have enjoyed. In other respects it is differently placed. In becoming incorporated with the state to which it is ceded it acquires a share in all the rights which the former has as a state person, and it is bound by the parallel obligations. Thus, for instance, the provisions of treaties between a state and foreign powers, including among the latter the state which has ceded territory acquired by the former, are extended to provinces obtained by cession.

Effects of absorption of a state.

When a state ceases to exist by absorption in another state, the latter in the same way is the inheritor of all local rights, obligations, and property; and in the same way also the provisions of treaties which it has concluded are extended to affect the annexed territory. Thus after the incorporation of Naples in the kingdom of Italy it was decided by the Courts both of Italy and France that a treaty of 1760 between France and Sardinia relative to the execution of judgments of the tribunals of the one power within the territory of the other was applicable to the whole Italian state. There is this difference however between the effect of acquisition by cession and by absorption of an entire state, that in the latter case, the annexing power being heir to the whole property of the incorporated state, it is liable for the whole debts of the latter, and not merely for those contracted for local objects or secured upon special revenues; unless indeed it is considered that local debt and general debt are only different words for the same thing when a state loses its separate existence and is taken bodily in to form a member of another state.

and elevate into a legal rule the admitted moral propriety of taking over, under treaty, the general debt in the proportion of the value of the territory acquired.

CHAPTER II

TERRITORIAL PROPERTY OF A STATE

In what the territorial property of a state consists.

THE territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and, when such area abuts upon the sea, together with a certain margin of water.

Modes of acquiring it.

A state may acquire territory through a unilateral act of its own by occupation, by cession consequent upon contract with another state or with a community or single owner, by gift, by prescription through the operation of time, or by accretion through the operation of nature.

Occupation.

When a state does some act with reference to territory unappropriated by a civilised or semi-civilised state, which amounts to an actual taking of possession, and at the same time indicates an intention to keep the territory seized, it is held that a right is gained as against other states, which are bound to recognise the intention to acquire property, accompanied by the fact of possession, as a sufficient ground of proprietary right. The title which is thus obtained, and which is called title by occupation, being based solely upon the fact of appropriation, would in strictness come into existence with the commencement of effective control, and would last only while it continued, unless the territory occupied had been so long held that title by occupation had become merged in title by prescription. Hence occupation in its perfect form would suppose an act equivalent to a declaration that a particular territory had been seized as property, and a

subsequent continuous use of it either by residence or by taking from it its natural products.

States have not however been content to assert a right of property over territory actually occupied at a given moment, and consequently to extend their dominion *pari passu* with the settlement of unappropriated lands. The earth-hunger of colonising nations has not been so readily satisfied; and it would besides be often inconvenient and sometimes fatal to the growth or perilous to the safety of a colony to confine the property of an occupying state within these narrow limits. Hence it has been common, with a view to future effective appropriation, to endeavour to obtain an exclusive right to territory by acts which indicate intention and show momentary possession, but which do not amount to continued enjoyment or control; and it has become the practice in making settlements upon continents or large islands to regard vast tracts of country in which no act of ownership has been done as attendant upon the appropriated land [1].

Effect of discovery and appropriation without settlement.

In the early days of European exploration it was held, or at least every state maintained with respect to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that the bare fact of discovery is an insufficient ground of proprietary right. It is only so far useful that it gives additional value to acts in themselves doubtful or inadequate. Thus when an unoccupied country is formally annexed an inchoate title is acquired, whether it has or has not been discovered by the state annexing it; but when the formal act of taking possession is not shortly succeeded by further acts of ownership, the claim of a discoverer to exclude other states is looked upon with more respect than that of a mere appropriator, and when discovery

[1] Some writers (e.g. Klüber, § 126; Ortolan, Domaine International, 45–7; Bluntschli, §§ 278, 281) refuse to acknowledge that title can be acquired without continuous occupation, but their doctrine is independent of the facts of universal practice.

has been made by persons competent to act as agents of a state for the purpose of annexation, it will be presumed that they have used their powers, so that in an indirect manner discovery may be alone enough to set up an inchoate title.

How an inchoate title so acquired may be kept alive.

An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definitive title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim. What acts are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effect of acts and of the lapse of time must be judged by the light of the circumstances of each case as a whole. It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title. On the other hand, when discovery, coupled with the public assertion of ownership, has been followed up from time to time by further exploration or by temporary lodgments in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time, unless more definite acts of appropriation by another state are effected without protest or opposition.

Occupation must be a state act.

In order that occupation shall be legally effected it is necessary, either that the person or persons appropriating territory shall be furnished with a general or specific authority to take possession of unappropriated lands on behalf of the state, or

else that the occupation shall subsequently be ratified by the state. In the latter case it would seem that something more than the mere act of taking possession must be done in the first instance by the unauthorised occupants. If, for example, colonists establishing themselves in an unappropriated country declare it to belong to the state of which they are members, a simple adoption of their act by the state is enough to complete its title, because by such adoption the fact of possession and the assertion of intention to possess, upon which the right of property by occupation is grounded, are brought fully together. But if an uncommissioned navigator takes possession of lands in the name of his sovereign, and then sails away without forming a settlement, the fact of possession has ceased, and a confirmation of his act only amounts to a bare assertion of intention to possess, which, being neither declared upon the spot nor supported by local acts, is of no legal value. A declaration by a commissioned officer that he takes possession of territory for his state is a state act which shows at least a momentary conjunction of fact and intention; where land is occupied by unauthorised colonists, ratification, as has been seen, is able permanently to unite the two; but the act of the uncommissioned navigator is not a state act at the moment of performance, and not being permanent in its local effects it cannot be made one afterwards, so that the two conditions of the existence of property by occupation, the presence of both of which is necessary in some degree, can never co-exist [1].

[1] On the conditions of effective occupation, see Vattel, liv. i. ch. xviii. §§ 207, 208; De Martens, Précis, § 37; Phillimore, i. §§ ccxxvi–viii; Twiss, i. §§ 111, 114, 120; Twiss, The Oregon Question, 165 and 334; Bluntschli, §§ 278–9; and especially the documents containing the arguments used internationally in the controversies mentioned below.

Obviously the acts of a mercantile company, such, e. g. as the East African Company, acting under a charter enabling it to form establishments and exercise jurisdiction in an uncivilised country are to be classed in point of competence with those of commissioned agents of the state.

It must depend upon circumstances whether the effect of such acts is to set up full rights of property and sovereignty, or only those which are involved in a protectorate.

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Area affected by an act of occupation.

There is no difference of opinion as to the general rule under which the area affected by an act of occupation should be determined. A settlement is entitled, not only to the lands actually inhabited or brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them. When an island of moderate size is in question it is not difficult to see that this rule involves the attribution of property over the whole to a state taking possession of any one part. But its application to continents or large islands is less readily made. Settlements are usually first established upon the coast, and behind them stretch long spaces of unoccupied country, from access to which other nations may be cut off by the appropriation of the shore lands, and which, with reference to a population creeping inwards from the sea must be looked upon as more or less attendant upon the coast. What then in this case is involved in the occupation of a given portion of shore? It may be regarded as a settled usage that the interior limit shall not extend further than the crest of the watershed[1]; but the lateral frontiers are less certain. It has been generally admitted that occupation of the coast carries with it a right to the whole territory drained by the rivers which empty their waters within

[1] A right of indefinite interior extension is sometimes said to have been asserted by the different nations who colonised North America. According to Mr. Calhoun they 'claimed for their settlements usually specific limits along the coast, and generally a region of corresponding width extending across the entire continent to the Pacific Ocean,' and England is alleged to have maintained the pretension against France before the Peace of 1763. Mr. Calhoun's allegation was however made, as was a like statement by Mr. Gallatin, in order to fortify the claim of the United States to the country west of the Rocky Mountains; the original papers connected with the negotiations of 1761–2, in so far as they are printed in Jenkinson's Treaties (vol. iii), give no indication that any such claim as that mentioned was made by England; and Sir Travers Twiss (The Oregon Question, 249) says that 'it does not appear that any conflicting principles of international law were advanced by the two parties.' I am not aware that any other dispute had occurred in the course of which the principle could have been affirmed. Probably therefore the statement has no better ground than the fact that English colonial grants were made without interior limits—a fact which by itself is of no international value.

its line; but the admission of this right is perhaps accompanied by the tacit reservation that the extent of coast must bear some reasonable proportion to the territory which is claimed in virtue of its possession. It has been maintained, but it can hardly be conceded, that the whole of a large river basin is so attendant upon the land in the immediate neighbourhood of its outlet that property in it is acquired by merely holding a fort or settlement at the mouth of the river without also holding lands to any distance on either side. Again, it is not considered that occupation of one bank of a river necessarily confers a right to the opposite bank, still less to extensive territory beyond it, so that if a state appropriates up to a river and stops there, its presence will not debar other states from occupying that portion of the basin which lies on the further side; nor even, though there is a presumption against them, will they be debarred as of course from occupying the opposite shore. When two states have settlements on the same coast, and the extent along it of their respective territories is uncertain, it seems to be agreed that the proper line of demarcation is midway between the last posts on either side, irrespectively of the natural features of the country [1].

Necessary adaptation of the old rule to modern circumstances.

Restrictive custom goes no further than this; but in the circumstances of the present day, it is plain that custom is not needed to uphold a further limitation in the right of appropriating territory as attendant upon a settlement. During the older days of colonial occupation, in countries where questions of boundary arose, waterways were not merely the most convenient, they were the necessary, means of penetrating into the interior. It was reasonable therefore that the power which could deny access to them should, as a general rule, have preferential rights over the lands which they traversed. But in Africa, which is the only portion of the earth's surface where this part of the law of occupation still finds room to assert itself, large tracts of country can be more easily reached over land, especially by

[1] Phillimore, i. §§ ccxxxii–viii; Twiss, i. §§ 115–9, 124; and The Oregon Question, 249.

means of railways, than along the river courses, and the great river basins are so arranged that a final division of the continent could hardly be made in accordance with their boundaries. When the third edition of this work was passing through the press in the end of 1889, it already seemed safe to point out as a certainty 'that the tide of commerce, carrying with it trading posts, belonging here to one nation and there to another, and probably even a tide of European settlement, will have swept over vast spaces of the interior by roads independent of states holding the nearest coasts, or mouths of river basins, long before these states have been able to extend their jurisdiction over the territory thus brought under European influence or control. There is no probability that the interests of trade and colonisation will be subordinated to a pedantic adherence to the letter of the ancient rule.' The forecast of 1889 was not long in becoming an accomplished fact. Many of the recent appropriations have been carried out in the anticipated manner; and if the little which remains to be seized is divided in conformity with the outlines of river basins, it will rather be because those basins happen to lend themselves to effective occupation by a given power, than from respect to a principle of law.

Illustrations of the foregoing doctrines.

The manner in which the foregoing doctrines have been used in international controversies may be illustrated by the following examples.

Texas.

After the cession of Louisiana to the United States by France in 1803 a dispute arose between the former power and Spain as to the boundaries of the ceded territory, which according to the United States extended in a westerly direction to the Rio Grande, and in the opinion of Spain reached only to a line drawn between the Red River and the Sabine. The facts of the case were as follows. Between the years 1518 and 1561 the northern shores of the Gulf of Mexico were gradually explored by Spanish officers, but no settlements were made upon them, and they were very imperfectly known, when in 1681–2 [a] French officer named La Salle succeeded in descending the Ohio

and the Mississippi to the ocean, and took formal possession of the country at the mouth of the latter river in the name of his sovereign. On his return it was determined to make a permanent settlement, and in 1685 he was sent out in command of an expedition for the purpose. Being unable to find the entrance to the Mississippi he coasted along to the Bay of Espiritu Santo [1], about four hundred miles further to the west, where a fort was erected, and held until the garrison was massacred by the Indians in 1689. In the course of the next year the Spaniards appeared in the Bay and founded a settlement, which remained from that time in continuous existence. Gradually, scattered posts were pushed eastwards and northwards into Texas. The French on their part did nothing further until 1712, when Louis XIV, relying on the acts of discovery and appropriation which had been done by La Salle, granted to Anthony Crozat, by letters patent, the exclusive commerce of the territory which was claimed by the French Crown in virtue of those acts, declaring it to comprehend 'all the lands, coasts, and islands which are situated in the Gulf of Mexico, between Carolina on the east and Old and New Mexico on the west, with all the streams which empty into the ocean within those limits, and the interior country dependent on the same.' A settlement was then made near the site of New Orleans, and outlying posts were established, none of which however seem to have been placed in a westerly direction at a more advanced point than Natchitoches on the Red River. To watch the post which existed there a Spanish fort was established in 1714 at a distance of only seven leagues, and it was kept garrisoned until Louisiana came into the hands of Spain [2], when, being no longer required, it was abandoned. No colonisation appears to have taken place to the east of the Rio Colorado, but a line of settlements, of which some were of considerable size, was formed between the Bay of Espiritu Santo and the Province of Sonora. The United States, as assignees of

[1] Called the Bay of St. Bernard by La Salle.
[2] Louisiana was ceded to Spain in 1762, and re-ceded to France in 1800.

the French title, claimed to possess the basin of the Mississippi by right of discovery and of settlement at its mouth, and the province of Texas in virtue of occupation of the coast, which, it was asserted, had been definitively appropriated by the acts of La Salle at the mouth of the Mississippi and at the Bay of Espiritu Santo, and to which a title had been kept alive by the subsequent establishment of the French posts upon the river. It was further argued that as the French title became definitive in 1685 the boundary should run along the Rio Grande, that river being half-way between Espiritu Santo and the then nearest Spanish settlement, which, it was argued, lay in the Province of Panuco. All acts, it was alleged, which had been done by the Spaniards east of the Rio Grande were acts of usurpation, and consequently incapable of giving title. The claim of the United States to the basin of the Mississippi was not seriously contested, but with respect to Texas it was urged that the discoveries of Spanish navigators had put Spain in possession of its coasts before the French landed in the Bay of Espiritu Santo, that the lodgment effected there by the latter was merely temporary, and that the long-continued and uninterrupted subsequent possession of the whole country by Spain was a better root of title than a prior unsuccessful attempt to establish herself on the part of France. It was therefore demanded that the frontier between the two states should be fixed half-way between the posts which had been permanently occupied by the French and the Spaniards respectively. Ultimately the boundary was settled very nearly along the line suggested by Spain, as part of a general scheme of boundary settlement, under which that country made sacrifices elsewhere [1].

Oregon Territory.

Another controversy of considerable interest is that which arose between England and the United States with reference to the Oregon Territory. In this case the negotiations passed through two distinct phases, during the earlier of which the

[1] British and Foreign State Papers, 1817–18.

United States claimed the river basin of the Columbia, while during the latter they claimed in addition the whole country northwards to the parallel of 50° 40′. The original claim rested upon discovery and settlement. In 1792 an American trader named Gray discovered the mouth of the river Columbia, and sailed up twelve or fifteen miles, until the channel by which he entered ceased to be navigable. Some years before, Heçeta, a Spanish navigator, in passing across the entrance had observed a strong outflow, and had come to the conclusion that a river debouched at the spot. A few weeks before Gray entered it, Captain Vancouver, who was engaged in surveying the coast for the English government, had noticed the existence of a river, but thought it too small for his vessels to go into. On hearing of Gray's success in entering he returned, and an officer under his command, after finding the true channel, explored the river for a hundred miles, and formally took possession of the country in the King's name. Gray was uncommissioned; he made no attempt to take possession of the country on behalf of the United States, and his discovery, which was only known to his government through Captain Vancouver's account, was not followed up by any act which could give it a national value. In 1811 a trading company of New York established near the mouth of the river a commercial post, which in 1813 was sold to the English North-West Company[1]. Upon these facts it was argued by the American negotiators that Gray effected a discovery, the completeness of which was not diminished by anything which occurred before or after; that his predecessors had failed to ascertain the existence of a great river, and that the subsequent English exploration was simply a mechanical extension of what had been essentially done by him; that his discovery vested the basin of the Columbia in the United States; and that, the land having thus become national property, the

[1] Some explorations made by both English and Americans of the various head waters of the Columbia may be allowed to balance one another. They were of little importance from a legal point of view.

establishment of a trading post formed a substantive act of possession on their part. The English negotiators on the other hand, besides putting forward a claim by discovery to the whole coast as against the United States, maintained that the discovery of the river was a progressive one, and objected that, even were it not so, the acts of an uncommissioned discoverer, if taken alone, are incapable of giving title, and that the discovery was not supported by national acts. In such circumstances the establishment of a trading post ceased to be of importance.

The negotiations entered upon their second phase after the conclusion of a boundary treaty between the United States and Spain in 1819, by which the former power acquired by cession whatever rights were possessed by the latter to country north of the forty-second parallel. From the point of view of the law of occupation this is of minor interest, because the force of the respective claims depended upon the relative value of two sets of acts of discovery purporting to be of identical character. The question at issue was rather one of fact than of law. It was alleged by the United States that Spain, until it ceded its rights, had possessed a title to the whole coast through discoveries gradually perfected during two centuries[1], and by occupation at various points: while on the part of England it was contended that the real discovery of the coast had been effected by Sir Francis Drake in 1579, by Captain Cook in 1778, and during the systematic survey of Vancouver in 1792–4, and that the two latter officers had taken actual possession. It need only be remarked that the later contention of the United States was inconsistent with its original claim. To affirm the Spanish title was to proclaim the nullity of the title said to have been conferred by the discoveries of Gray. If the title through Gray was good, the coast up to the fifty-fourth parallel did not

[1] There is great reason to doubt whether some of the Spanish navigators who are alleged to have made discoveries along the north-west coast of America ever existed, and it is certain that the accounts supplied by others are untruthful. See Twiss's Oregon Question, chap. iv.

belong to Spain; if it did belong to Spain, Gray's discovery was evidently worthless [1].

The Venezuela Hinterland.

[Since the last edition of this book an important case involving the question of discovery and effective occupation has been submitted to a Court of International Arbitration. Territory comprising 60,000 square miles to the south of the Orinoco and west of the Essequibo rivers had for upwards of fifty years been a bone of contention between Great Britain and the Republic of Venezuela. The latter power claimed as the inheritor of the Spanish monarchy, from which it had revolted in 1810; while Great Britain, to whom British Guiana was transferred by Holland in 1814, had succeeded to all the rights of the Dutch. The boundaries of the territory thus acquired had never been delimited until 1841, when the British Government employed a Prussian engineer, Sir Robert Schomburgk, for that purpose. The 'Schomburgk line' was the consequence, extending westward and southward from the entry of the Barima river into the Orinoco, along the banks of the Amocura, Cuyuni, Cotinga, and Takutu rivers, and following their course down to the basin of the Essequibo and the northern frontier of Brazil. It was based on an examination of the historical evidence as to occupation, and of the extent to which the Indian population had been effected by Dutch influence, together with a consideration of the natural features existing on the edge of the disputed territory. Venezuela, alarmed at the prospect of losing control over the mouth of the Orinoco, revived the Spanish claim to the whole territory

[1] Parl. Papers, lii. 1846, Oregon Correspondence. In the latter part of the discussion the English government relied also upon the Convention of the Escorial, usually called the Nootka Sound Convention, by which it maintained that Spain had made an acknowledgment of the existence of a joint right of occupancy on the part of England in those portions of North-West America which were not already occupied. The United States contested the accuracy of the construction placed upon the Convention by England. As the dispute so far as it turned upon this point has no bearing upon the law of occupation, it is unnecessary to go into it. For the facts of the case in its later aspects and for the English and American views, see De Garden, Histoire des Traités de Paix, v. 95; Parl. Papers, lii. 1846, Oregon Corresp. 34 and 39; Twiss, Oregon Question, 379. For the Convention, see De Martens, Rec. iv. 493.

of Guiana so far as it had not been directly ceded to Holland by treaty.

The controversy was allowed to drag on till the sudden intervention of the United States in December 1895, on the plea that the Monroe doctrine was involved, brought matters to a crisis. In 1897 a treaty of arbitration was concluded between Great Britain and Venezuela, but the United States assumed the conduct of the case on behalf of the latter, choosing her counsel and arbitrators from their own Bar and Bench exclusively.

It was urged before the Arbitration Court, on behalf of the prior claim of Spain, that Columbus was alleged to have sighted the mainland off the mouths of the Orinoco in 1498, and that in 1591 Antonio de Berrio, in his quest for the fabled El Dorado, had certainly sailed down that river from west to east, founding Santo Thomé on his way: from this date it was contended that the whole of Guiana—which, owing to the intercommunication of tributaries of the Amazon and Orinoco, was treated by the early explorer as an island—had been incorporated in the Spanish Empire. It could not be shown that during the 17th century any Spaniard had set foot within the territory claimed for Venezuela, but between 1724 and 1750 a certain number of Capuchin Mission stations had been founded to the north-west of the Cuyuni river, from which occasional raiding expeditions were made against the Dutch and the Indians, while it was admitted that Spanish traders had journeyed down the Cuyuni and along the waterways within the coast line. The Spanish title thus rested on the original discovery of Guiana, perfected by the intention to occupy the whole, and actual occupation of a part of the country discovered. Of effective or permanent occupation to the east of Schomburgk's line no instance could be made out.

On the other hand it was alleged that the Dutch since the end of the 16th century had maintained their right to trade to the coast of Guiana between the Orinoco and the Amazon, occupying the coast from the Corentin to the Orinoco, and exercising control on all the rivers flowing into the Atlantic from the Corentin to the

Amakuru. As early as 1623 they began to establish settlements between the Corentin and the Orinoco, which were formally confirmed to them by the Treaty of Munster. From that time down to the cession of British Guiana to Great Britain the Dutch had continually extended their settlements into the interior. They exercised a protectorate over the Caribs and other warlike Indian tribes, while their trade, under the direction of the West India Company, was pushed to the banks of the Cuyuni and to the Orinoco east of Santo Thomé. On these facts Great Britain claimed that the whole of the disputed territory had been in law and in fact for more than 200 years in the occupation and under the control of the Dutch and the British.

The decision of the Court, published on the 3rd of October 1899, was favourable to Great Britain, and the bulk of the disputed territory was declared to belong to British Guiana. At two points, however, 'Schomburgk's line' was varied: Barima Point and the actual mouth of the Barima River were given to Venezuela, and a deviation was made in favour of the same country by which the boundary line, after reaching the Cuyuni, was made to stop short before running to the head of that river and turned down the Wenamu.

The Court, which was unanimous, did not assign the grounds of its award, and it is unknown what were the exact conclusions of fact on which it was based. Speaking generally, Great Britain secured the territory over which Dutch influence and commerce had extended, though a line was drawn across the Barima in order to ensure to Venezuela the south shore of the Orinoco to its mouth.]

Recent tendency to change in the law of occupation.

It will have been observed in these cases, and it will be found in most of the older cases in which title rests upon occupation, that the acts relied upon as giving title, previously to the actual plantation of a colony, have been scattered at somewhat wide intervals over a long space of time. Until recently this has been natural, and indeed inevitable. When voyages of discovery extended over years, when the coasts and archipelagos lying open

to occupation seemed inexhaustible in their vastness, when states knew little of what their own agents or the agents of other countries might be doing, and when communication with established posts was rare and slow, isolated and imperfect acts were properly held to have meaning and value. When therefore it first became worth while to question rights to a given area, or to dispute over its boundaries, the tests of effective occupation were necessarily lax. But of late years a marked change has occurred. Except in some parts of the interior of Africa, there are few patches of the earth's surface the ownership of which can be placed in doubt. With the restriction of the area of possible occupation the desire to secure what remains has become keener. At the same time the difficulties which often stood in the way of continuity of occupation have vanished before improved means of communication. A tendency has consequently declared itself to exact that more solid grounds of title shall be shown than used to be accepted as sufficient.

Declaration adopted at the Berlin Conference.

The most notable evidence of this tendency is afforded by the declaration adopted at the Berlin Conference of 1885. By that declaration Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey, and the United States agreed that 'any power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which being hitherto without such possessions shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification[1] thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own,' and that 'the Signatory Powers of the present Act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Con-

[1] At least eleven notifications, dealing in eight cases with new acquisitions, and in the remaining three cases with delimitations of territory or of spheres of influence, have been made in accordance with this provision.

tinent sufficient to protect existing rights, and as the case may be, freedom of trade and transit under the conditions agreed upon [1].' In other words, while ancient grounds of title are left to be dealt with under the old customary law, old claims of title if not fully established under that law, and new titles, whether acquired by occupation of unclaimed territory, or through the inability of another state to justify a competing claim, must for the future be supported by substantial and continuous acts of jurisdiction. The declaration, it is true, affects only the coasts of the Continent of Africa; and the representatives of France and Russia were careful to make formal reservations directing attention to this fact; the former, especially, placing it on record that the island of Madagascar was excluded. Nevertheless an agreement, made between all the states which are likely to endeavour to occupy territory, and covering much the largest spaces of coast which, at the date of the declaration, remained unoccupied in the world, cannot but have great influence upon the development of a generally binding rule [2].

It is to be noted that as the declaration applies only to the coasts of Africa, all questions arising out of interior extensions have to be decided, even as regards that continent, by the help of the customary law. Elsewhere that law naturally remains for the present in full force [3].

[1] General Act of the Berlin Conference, Arts. 34, 35. Parl. Papers, Africa, No. 4, 1885.

[2] France on taking possession of the Comino Islands, and England with regard to Bechuana Land, have already made notifications which were not obligatory under the Berlin Declaration. These notifications were however evidently made from motives of convenience and not with a view of establishing a principle; France having placed upon record the reservations mentioned above, and England not having notified, at a later date, her assumption of a protectorate over the Island of Socotra.

[3] Holtzendorff (1887, Handbuch, ii. § 55) is at least premature in saying that 'Der grundsätzlich entscheidende Gesichtspunkt ist dieser: kein Staat kann durch einen Occupationsact mehr Gebiet ergreifen, als er mit seinen effectiven Herrschaftsmitteln an Ort und Stelle ständig in Friedenszeiten zu regieren vermag.' The strict application of this principle would deprive Germany of the larger part of the territory which she claims in South-Western Africa and New Guinea. Prince Bismarck's conception of the customary law is shown by an expression of wish uttered by him at the

Abandonment of territory acquired by occupation.

When an occupied territory is definitively abandoned, either voluntarily or in consequence of expulsion by savages or by a power which does not attempt to set up a title for itself by conquest, the right to its possession is lost, and it remains open to occupation by other states than that which originally occupied it. But when occupation has not only been duly effected, but has been maintained for some time, abandonment is not immediately supposed to be definitive. If it has been voluntary, the title of the occupant may be kept alive by acts, such as the assertion of claim by inscriptions, which would be insufficient to confirm the mere act of taking possession; and even where the abandonment is complete, an intention to return must be presumed during a reasonable time. If it has been involuntary, the question whether the absence of the possessors shall or shall not extinguish their title depends upon whether the circumstances attendant upon and following the withdrawal suggest the intention, or give grounds for reasonable hope, of return. Where intention in this case is relied upon, it is evident that, as abandonment was caused by the superior strength of others who might interfere with return, a stronger proof of effective intention must be afforded than on an occasion of voluntary abandonment, and that the effect of a mere claim, based upon the former possession, if valid at all, will soon cease.

Case of Santa Lucia;

In 1639 Santa Lucia was occupied by an English colony, which was massacred by the Caribs in the course of 1640. No attempt was made to recolonise the island during the following ten years. In 1650 consequently the French took possession of

opening of the Berlin Conference. 'Pour qu'une occupation soit considérée comme effective, il est à désirer que l'acquéreur manifeste, dans un délai raisonnable, par des institutions positives, la volonté et le pouvoir d'y exercer ses droits et de remplir les devoirs qui en résultent' (Parl. Papers, Africa, No. 4, 1885, p. 3). What M. Holtzendorff lays down as the existing law is to him an object of aspiration.

Since the signature of the Berlin Declaration the governments of Great Britain and Germany by a Convention of the 5th March, 1885 (Parl. Papers, Spain, No. 1, 1885), have expressly recognised the sovereignty of Spain 'over the places effectively occupied, as well as over those places not yet occupied, of the Archipelago of Sulu.'

it as unappropriated territory. In 1664 they were attacked by Lord Willoughby and driven into the mountains, where they remained until he retired three years later, when they came down and reoccupied their lands. Whether they died out does not appear, though probably this was the case, for at the Treaty of Utrecht Santa Lucia was viewed as a 'neutral island' in the possession of the Caribs. The French however seem to have considered their honour as being involved in the ultimate establishment of their claim. During the negotiations which led to the peace of 1763 they attached importance to the acquisition of the island, and by the terms of that peace it was ultimately assigned to them. There can be little doubt, considering the shortness of the time during which the English colony had existed, and the length of the period during which no attempt was made to re-establish it, that the French were justified in supposing England to have acquiesced in the results of the massacre, and that their occupation consequently was good in law [1].

of Delagoa Bay.

A somewhat recent controversy to which title by occupation has given rise turned mainly upon the effect of a temporary cessation of the authority of the occupying state. From 1823 to 1875, when the matter was settled by arbitration, a dispute existed between England and Portugal as to some territory at Delagoa Bay, which was claimed by the former under a cession by native chiefs in the first-mentioned year, and by the latter on the grounds, amongst others, of continuous occupation. It was admitted that Portuguese territory reached to the northern bank of the Rio de Espiritu Santo or English River, which flows into the bay, and that a port and village had long been established there. The question was whether the sovereignty of Portugal extended south of the river, or whether the lands on that side had remained in the possession of their original owners. England relied upon the facts that the natives professed to be independent in 1823, that they acted as such, and that the commandant of the fort repudiated the possession of authority over them. In

[1] Jenkinson's Treaties, iii. 118, 157, 170.

the memorials which were submitted on behalf of Portugal, amidst much which had no special reference to the territory in dispute, there was enough to show that posts had been maintained within it from time to time, and that authority had probably been exercised intermittently over the natives. The area of the territory being small, and all of it being within easy reach of a force in possession of the Portuguese settlement, there could be little difficulty in keeping up sufficient control to prevent a title by occupation from dying out. There was therefore a presumption in favour of the Portuguese claim. The French government, which acted as arbitrator, took the view that the interruption of occupation, which undoubtedly took place in 1823, was not sufficient to oust a title supported by occasional acts of sovereignty done through nearly three centuries, and adjudged the territory in question to Portugal [1].

Cession.

Cessions of territory, whether by way of sale or exchange, and gifts, whether made by testament or during the lifetime of the donor, call for no special remark, the alienation effected by their means being within the general scope of the powers of alienation which have been already mentioned as belonging to a state [2], and the questions of competence on the part of the individuals contracting or giving which may arise being matters which, in so far as they belong to international law and not to the public law of the particular state, will find their proper place in a later chapter [3].

Prescription.

Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so. The principle upon which it rests is essentially the same as that of the doctrine of prescription which finds a place in every municipal law, although in its application

[1] Parl. Papers, xlii. 1875.

[2] Antea, p. 45.

[3] Instances of alienation by sale, exchange, gift, and will, may be found in Phillimore, i. §§ cclxviii–lxx, and cclxxv ; and in Calvo, §§ 225–8.

to beings for whose disputes no tribunals are open, some modifications are necessarily introduced. Instead of being directed to guard the interests of persons believing themselves to be lawful owners, though unable to prove their title, or of persons purchasing in good faith from others not in fact in legal possession, the object of prescription as between states is mainly to assist in creating a stability of international order which is of more practical advantage than the bare possibility of an ultimate victory of right. In both cases the admission of a proprietary right grounded upon the mere efflux of time is intended to give security to property and to diminish litigation, but while under the conditions of civil life it is possible so to regulate its operation as to render it the handmaid of justice, it must be frankly recognised that internationally it is allowed, for the sake of interests which have hitherto been looked upon as supreme, to lend itself as a sanction for wrong, when wrong has shown itself strong enough not only to triumph for a moment, but to establish itself permanently and solidly. Internationally therefore prescription must be understood not only to confer rights when, as is the case with several European countries, the original title of the community to the lands which form the territory of the state or its nucleus is too mixed or doubtful to be appealed to with certainty; or, as has sometimes occurred, when settlements have been made and enjoyed without interference within lands claimed, and perhaps originally claimed with right, by states other than that forming the settlement; but also to give title where an immoral act of appropriation, such as that of the partition of Poland, has been effected, so soon as it has become evident by lapse of time that the appropriation promises to be permanent, in the qualified sense which the word permanent can bear in international matters, and that other states acquiesce in the prospect of such permanence. It is not of course meant that a title so acquired is good as against any rights which the inhabitants of the appropriated country may have to free themselves from a foreign yoke, but merely that it

is good internationally, and that neither the state originally wronged nor other states deriving title from it have a right to attack the intruding state on the ground of deficient title, when once possession has been consolidated by time, whether the title was bad in its inception, or whether, having been founded on an obsolete or extinguished treaty, it has become open, in the absence of prescription, to question on the ground of the rights of nationality or of former possession [1].

[1] A denial of title by prescription has as yet been rarely formulated in international law, but there can be little doubt that the sense of its value has diminished of late years, mainly under the influence of the sentiment of nationality. In the acquiescence with which the annexation of Alsace and Lorraine to Germany in 1871 was in some cases received, and the mildness of the disapproval with which it was elsewhere met, it is impossible not to recognise the want of a due appreciation of the importance of prescription as a check upon unnecessary territorial disturbance. If the severance from France of Alsace and Lorraine had been looked upon as an instance of naked conquest, it is probable that European public opinion would have been gravely shocked by the measure. It is eminently doubtful whether respect for title by prescription, altogether apart from its tranquillising tendency, does not lead to better results than are likely to be offered by the views which are dominant at present in the popular mind throughout Europe. The principle of nationality is at any rate associated with a good deal of crude thought; it includes more than one distinctly retrogressive idea; it could not be logically applied without an amount of disturbance for which the mere enforcement of a principle would afford but poor compensation; and finally it is impossible to imagine that arrangements, so divorced from the practical needs of communities as those to which the doctrine of nationality would give rise, could contain any element of permanence. That there have been certain cases in which it was just and for the common good to give free scope to the principle is not even a sufficient justification for the prominence which it has been allowed to assume in politics; and it is nothing short of extraordinary that a doctrine which can so little bear strict examination should be permitted to intrude into the domain of legal ideas so often as is the case.

The tendency to import the political notion of nationality into law has been especially marked in Italy; and if the brilliant essay of Mamiani (D'un nuovo diritto Europeo) may be accounted for and excused by the epoch of its publication (1860), it was unfortunate that the work of Fiore (Nouveau Droit International) should continue after the unification of the country to perpetuate a doctrine as law, which ought to have been seen, when the eager feelings of the period of liberation had subsided, to have nothing to do with it. In his rewritten Trattato di Diritto Internazionale Pubblico (vol. i. 1879, §§ 267-97) M. Fiore has greatly modified his doctrine. He acknowledges that 'gli stati sono le persone giuridiche del diritto

Accretion by the operation of nature.

By the action of water new formations of land may come into existence in the neighbourhood of the territory occupied by a state, either in the open sea, or in waters lying between the territory of the state and that of a neighbour, or in actual contact with land already appropriated, or changes may take place in the course of rivers, by which channels are dried up, and appropriated land is covered with water. Out of such cases questions of proprietorship spring, to deal with which the provisions of Roman law, in this matter the simple embodiment of common sense, have been adopted into international law. When the frontier of a state is formed by a natural water boundary, and not by a line indicated by fixed marks which happen to coincide with the waters' edge, accretions received by the land from gradual fluvial deposit become the property of the state to the territory of which they attach themselves, even though when the deposits take place in the bed of a river, its course may in the lapse of time be so diverted that the land receiving accretion occupies part of the original emplacement of the neighbouring territory. If however the boundary is a fixed line, the results of accretion naturally fall to the owner of whatever lies on the further side of the line. When the bed of the river belongs equally to two states, islands formed wholly on one side of the centre of the deepest channel belong to the state owning the nearer shore; while those that form in mid-stream

internazionale, tuttochè ad essi non possa sempre essere attribuita la personalità legittima.'

Lampredi (Jur. Pub. Univ. Theorem. p. iii. cap. viii), De Martens (Précis, §§ 70–1), and Klüber (§ 6), deny the existence of prescription as between states, on the ground that prescription is not a principle of natural law, and that there being no fixed term for the creation of international title by it, it cannot be said to have been adopted into international positive law. Mamiani (p. 24) denies the existence of international prescription, because it cannot exist 'in faccia ai diritti essenziali ed irremovibili della persona umana,' but, as the words quoted may suggest, he is thinking only of the relations of a dominant state to a subject population.

For the views ordinarily held upon the subject, see e. g. Grotius (De Jure Belli et Pacis, lib. ii. c. iv); Wolff (Jus Gent. §§ 358–9); Vattel (liv. ii. ch. xi. §§ 147, 50); Wheaton (Elem. pt. ii. ch. iv. § 4); Riquelme (i. 28); Heffter (§ 12); Phillimore (i. §§ cclv–viii); Bluntschli (§ 290); Calvo (§ 212).

are divided by a line following the original centre of the channel. Analogously, islands formed in the sea out of the alluvium brought down by a river become, as they grow into existence, appendages of the state to which the coast belongs, so that though they may be beyond the distance from shore within which the sea is territorial, they cannot be occupied by foreign states, and even while still composed of mud and of insufficient consistency for any useful purpose, they are so fully part of the state territory that the waters around them become territorial to the same radius as if they were solid ground. On occasions of sudden change, as when a river breaks into a new course entirely within the territory of one of the riparian states, or when a lake, of which the bed belongs wholly to one state, overflows into low-lying lands belonging to another state and transforms them into a lagoon, no alteration of property takes place; and the boundary between the states is considered to lie in the one case along the old bed of the river, and in the other along the former edge of the lake[1].

Boundaries of state territory.

The boundaries of state territory may consist either in arbitrary lines drawn from one definite natural or artificial point to another, or they may be defined by such natural features of a country as rivers or ranges of hills. In the latter case more than one principle of demarcation is possible; certain general rules therefore have been accepted which provide for instances in which from the absence of express agreement or for other reasons there is doubt or ignorance as to the frontier which may justly be claimed. Where a boundary follows mountains or hills, the water-divide constitutes the frontier. Where it follows a river, and it is not proved that either of the riparian states possesses a good title to the whole bed, their territories are separated by

[1] Grotius, De Jure Belli et Pacis, lib. ii. c. iii. §§ 16, 17; Vattel, liv. i. ch. xxii. §§ 267–77; Phillimore, i. §§ ccxxxviii–ix; Halleck, i. 146; Calvo, § 294; Bluntschli, §§ 295–99. Mud islands at the mouth of the Mississippi, some of which seem to have been outside the three-mile limit, were held by Lord Stowell to be in the territory of the United States in the case of the Anna, v. Rob. 373.

a line running down the middle, except where the stream is navigable, in which case the centre of the deepest channel, or, as it is usually called, the Thalweg, is taken as the boundary. In lakes, there being no necessary track of navigation, the line of demarcation is drawn in the middle. When a state occupies the lands upon one side of a river or lake before those on the opposite bank have been appropriated by another power, it can establish property by occupation in the whole of the bordering waters, as its right to occupy is not limited by the rights of any other state; and as it must be supposed to wish to have all the advantages to be derived from sole possession, it is a presumption of law that occupation has taken place. If, on the other hand, opposite shores have been occupied at the same time, or if priority of occupation can be proved by neither of the riparian states, there is a presumption in favour of equal rights, and a state claiming to hold the entirety of a stream or lake must give evidence of its title, either by producing treaties, or by showing that it has exercised continuous ownership over the waters claimed. Upon whatever grounds property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream, and perhaps it even gives a right to a sufficient margin for defensive or revenue purposes, when the title is derived from occupation, or from a treaty of which the object is to mark out a political frontier. In 1648 Sweden, by receiving a cession of the river Oder from the Empire under the Treaty of Osnabrück, was held to have acquired territory to the exaggerated extent of two German miles from its bank as an inseparable accessory to the stream; and in the more recent case of the Netze in 1773 Prussia claimed with success that the cession of the stream should be interpreted to mean a cession of its shore. Where however the property in a river is vested by agreement in one of two riparian states for the purpose of bringing to an end disputes arising out of the use of its waters for mills and factories, as in the case of a treaty concluded in

1816 between Sardinia and the Republic of Geneva by which the Foron was handed over to the latter, it would be unreasonable to interpret a convention as granting more than what is barely necessary for its object[1].

Apart from questions connected with the extent of territorial waters, which will be dealt with later, certain physical peculiarities of coasts in various parts of the world, where land impinges on the sea in an unusual manner, require to be noticed as affecting the territorial boundary. Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water. To take a specific case, on the south coast of Cuba the Archipiélago de los Canarios stretches from sixty to eighty miles from the mainland to La Isla de Piños, its length from the Jardines Bank to Cape Frances is over a hundred miles. It is enclosed partly by some islands, mainly by banks, which are always awash, but upon which as the tides are very slight, the depth of water is at no time sufficient to permit of navigation. Spaces along these banks, many miles in length, are unbroken by a single inlet; the water is uninterrupted, but access to the interior gulf or sea is impossible. At the western end there is a strait, twenty miles or so in width, but not more than six miles of channel intervene between two banks, which rise to within

[1] Grotius, lib. ii. c. iii. § 18; Wolff, Jus Gentium, §§ 106–7; Vattel, liv. i. ch. xxii. § 266; De Martens, Précis, § 39; The Twee Gebroeders, iii. Rob. 339–40; Bluntschli, §§ 297–8, 301; Twiss, i. §§ 143–4. An instance of property by occupation is afforded by the appropriation of the river Paraguay, between the territory of the Republic of Paraguay and the Gran Chaco, which was effected by the Republic, and maintained until after its war with Brazil and the Argentine Confederation.

Sir Travers Twiss points out with justice that the doctrine which regards

seven or eight feet from the surface, and which do not consequently admit of the passage of sea-going vessels. In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipiélago de los Canarios is a mere salt-water lake, and that the boundary of the land of Cuba runs along the exterior edge of the banks.

Protectorates over uncivilised and semi-civilised peoples.

States may acquire rights by way of protectorate over barbarous or imperfectly civilised countries, which do not amount to full rights of property or sovereignty, but which are good as against other civilised states, so as to prevent occupation or conquest by them, and so as to debar them from maintaining relations with the protected states or peoples. Protectorates of this kind differ from colonies in that the protected territory is not an integral portion of the territory of the protecting state, and differ both from colonies and protectorates of the type existing within the Indian Empire[1] in that the protected community retains, as of right, all powers of internal sovereignty which have not been expressly surrendered by treaty, or which

the shore as attendant upon the river, when the latter is owned wholly by one power, might lead, if generally applied, to great complications; and indicates that when it is wished to keep the control of a river in the hands of one only of the riparian powers, it is better to make stipulations such as those contained with respect to the southern channel of the Danube in the Treaty of Adrianople, than to allow the common law of the matter to operate. By that treaty it was agreed that the right bank of the Danube from the confluence of the Pruth to the St. George's mouth should continue to belong to Turkey, but that it should remain uninhabited for a distance inland of about six miles, and that no establishments of any kind should be formed within the belt of land thus marked out. Stipulations of such severity could rarely be needed, and in most cases could not be carried out; but the end aimed at, viz. the prevention of any use of the borders of the river for offensive or defensive purposes, and of any interference with navigation, could be obtained by prohibiting the erection of forts within a certain distance of the banks, and if necessary by specifying the places to which highroads or railways might be brought down.

[1] Cf. antea, p. 27, note.

are not needed for the due fulfilment of the external obligations which the protecting state has directly or implicitly undertaken by the act of assuming the protectorate.

International law touches protectorates of this kind by one side only. The protected states or communities are not subject to a law of which they never heard; their relations to the protecting state are not therefore determined by international law. It steps in so far only as the assumption of the protectorate affects the protecting country with responsibilities towards the rest of the civilised states of the world. They are barred by the presence of the protecting state from exacting redress by force for any wrongs which their subjects may suffer at the hands of the native rulers or people; that state must consequently be bound to see that a reasonable measure of security is afforded to foreign subjects and property within the protected territory, and to prevent acts of depredation or hostility being done by its inhabitants. Correlatively to this responsibility the protecting state must have rights over foreign subjects enabling it to guard other foreigners, its own subjects, and the protected natives from harm and wrong doing[1].

[1] It is believed that all the states represented at the Berlin Conference of 1884–5, with the exception of Great Britain, maintained that the normal jurisdiction of a protectorate includes the right of administering justice over the subjects of other civilised states; and the General Act of the Brussels Conference of July, 1890, to which Great Britain assented, contemplates the adoption of measures in protectorates which could hardly, if at all, be carried out compatibly with the exemption of European traders and adventurers from the local civilised jurisdiction. The law regulating jurisdiction in the German protectorates, as modified by imperial decree of March 15, 1888, in fact declares that it is competent to the imperial authority to extend jurisdiction over all persons irrespectively of their nationality (Reichs-Gesetzblatt of March 15, 1888), and it may be inferred from a recent decision of the Cour de Cassation (Affaire Magny et autres; Cour de Cassation, Oct. 27, 1893) that jurisdiction will be exercised as a matter of course in all French protectorates. Great Britain, which until lately supposed that a protecting state only possesses delegated powers, and that an eastern state or community cannot grant jurisdiction over persons who are neither its own subjects nor subjects of the country to which powers are delegated, has now altered her views, and by the Pacific Order in Council of 1893, and the South Africa Orders in Council of 1891 and 1894, has asserted jurisdiction over both natives and the subjects of foreign states irrespectively of consent.

It may be taken that, with the exception perhaps of some small territories occupied for strategic reasons, the countries which states are tempted to bring under their protection are generally inhabited by a population of some magnitude, more or less barbarous, but governed by petty sovereigns according to a distinct polity. Whether a protectorate is imposed upon them, or whether chiefs and people alike welcome protection as a safeguard against exterminating feuds among themselves and against the danger of being overrun by European adventurers, they are in neither case ready to go so far as to abandon their polity; they are not ripe for the administration of European law as between themselves; and full sovereignty on the part of the protecting power, and such obedience to law as is rendered in India, could only be enforced at the point of the sword with an amount of difficulty and violence disproportionate to the result which could be obtained. In such circumstances it is evident that practice must be extremely elastic; different peoples and the same people at different times are susceptible of very various degrees of control; the social order which can be maintained among the tribes on the Niger cannot well be compared with that which exists in the Malay Peninsula; and the authority exercised, and the safety which can be secured to foreigners, both in that Peninsula [and in Nigeria] at the present moment is vastly greater than would have been possible in the early years of the protectorates exercised there. A foreign government then can have no right to ask that any definite amount of control shall be exercised in its interest, or that any definite organisation

In the Niger territories [until they were transferred to the Imperial Government in August, 1899] like jurisdiction was exercised by the Royal Niger Company in virtue of its charter; and in all protectorates which are covered by the Africa Order in Council of 1889 jurisdiction can be taken over subjects of the powers which adhered to the General Acts of the Conferences of Berlin and Brussels.

On the head of the powers which have been assumed by European States, and especially of Great Britain, in protectorates I may be permitted to refer to my 'Treatise on the Foreign Powers and Jurisdiction of the British Crown' (Part iii. chap. iii), where the subject is treated at large.

shall be established. Objection may be taken to an illusory protectorate, in which the mere shadow of a state name is thrown over the protected territory; but so long as a protecting state honestly endeavours to use its authority and influence through resident agents, it must be left to judge how far it can go at a given time, and through what form of organisation it is best to work. It may set up a complete hierarchy of officials and judges; or, if it prefers, it may spare the susceptibilities of the natives and exercise its authority informally by means of residents or consuls. Two requirements only need be satisfied; an amount of security must be offered, which in the circumstances shall be reasonable, and the administration of justice must in some way be provided for as between Europeans, and as between Europeans and natives [1].

[1] Protectorates are of course by no means new facts, but they may be said to be new international facts. Until lately they have been exercised in places practically beyond the sphere of contact with civilised powers. In this respect things are now totally changed, and very many questions arising out of such contact will undoubtedly, before long, press for settlement. To take but one example: are the native inhabitants of a protectorate to be regarded as subjects of the protecting state when temporarily within the territory or the protectorate of another civilised state? There can be no doubt that Germany will take the view that they are so: German law goes even so far as to allow them to be put by Imperial Ordinance on the same footing as German subjects with regard to the right of flying the Imperial flag. That other states will take a like view is practically certain. From the solution of such questions as this must come a tendency to fuller control. Indeed protection must be looked upon merely as a transitional form of relation between civilised and uncivilised states, destined, in course of time, to develop and harden into effective sovereignty. In the meantime practice is chaotic, and not always well considered. For instance, Great Britain has assumed a protectorate in North Borneo over the State of Sarawak, the Sultanate of Brunei, and the territories of the North Borneo Company, and in doing so has gratuitously embarrassed herself by expressly recognising their independence, and by specific limitations upon her own freedom of action, which, especially in the case of Brunei, are exceedingly likely to lead to difficulties with foreign powers. Germany has provided by law for her protectorates an elaborate organisation, which is practically identical in those directly administered by the crown, and in those managed through Colonial Companies, and which is based on the unrestricted sovereignty of the Emperor. It is, however, to be noted that German protectorates are probably only intended to be protectorates in name. The territories of the German Empire are enumerated by the second article of the Imperial

It may be worth while to notice, though the fact is an obvious result of the position occupied by a protecting state, that the territorial waters of the protected territory are, as between the protecting state and foreign countries, under the control of the former in the same manner as are its own waters, to the extent and within the scope that are consequent upon the powers assumed by it within the protected territory.

Spheres of influence.

The term 'Sphere of Influence' is one to which no very definite meaning is as yet attached. Perhaps in its indefiniteness consists its international value. It indicates the regions which geographically are adjacent to or politically group themselves naturally with, possessions or protectorates, but which have not actually been so reduced into control that the minimum of the powers which are implied in a protectorate can be exercised with tolerable regularity. It represents an understanding which enables a state to reserve to itself a right of excluding other European powers from territories that are of importance to it politically as affording means of future expansion to its existing dominions or protectorates, or strategically as preventing civilised neighbours from occupying a dominant military position.

The business of a European power within its sphere of influence is to act as a restraining and directing force. It endeavours to foster commerce, to secure the safety of traders and travellers, and without interfering with the native government, or with native habits or customs, to prepare the way for acceptance of more organised guidance. No jurisdiction is assumed, no internal or external sovereign power is taken out of the hands of the tribal chief; no definite responsibility consequently is incurred. Foreigners enter the country with knowledge of these circumstances, and therefore to a great extent at their peril. While then the European state is morally bound to exercise in their favour such influence as it has, there is no specific amount of good

Constitution, and the article can only be varied with the consent of the Imperial Legislature. There would be obvious inconveniences in meddling with the terms of the Constitution on the formation of each successive Colony.

order, however small, which it can be expected to secure. The position of a European power within its sphere of influence being so vague, the questions suggest themselves, whether any exclusive rights can be acquired as against other civilised countries through the establishment of a sphere, and in what way its geographical extent is to be ascertained.

The answer to both these questions lies in the fact that the phrase 'Sphere of Influence,' taken by itself, rather implies a moral claim than a true right. If international agreements are made with other European powers, such as those between Great Britain and Germany and Italy, the states entering into them are of course bound to common respect of the limits to which they have consented; and if treaties are entered into with native chiefs which without conveying any of the rights of sovereignty involved in a protectorate confer exclusive privileges or give advantages of a commercial nature, evidence is at least afforded that influence is existent, and it would be an obviously unfriendly act within a region where any influence is exercised to try to supplant the country which had succeeded in establishing its influence. But agreements only bind the parties to them; and no such legal results are produced by the unilateral assertion of a sphere of influence as those which flow from conquest or cession, or even from the erection of a protectorate. The understanding that a territory is within a sphere of influence warns off friendly powers; it constitutes no barrier to covert hostility. The limit of effective political influence is practically the limit of the sphere, if another European state is in waiting to seize what is not firmly held; and an aggressive state is not likely to consider itself excluded, until the state exercising influence is ready, if her legal situation be challenged, to take upon herself the responsibility of a protectorate. Even as between an influencing state and powers which are friendly in the full sense of the words, it has to be remembered that the exercise of influence is not in its nature a permanent relation between the European country and the native tribes; it is assented to as a temporary

phase in the belief, and on the understanding, that within a reasonable time a more solid form will be imparted to the civilised authority. It is not likely therefore that an influencing government will find itself able for any length of time to avoid the adoption of means for securing the safety of foreigners, and consequently of subjecting the native chiefs to steady interference and pressure. Duty towards friendly countries, and self-protection against rival powers, will alike compel a rapid hardening of control; and probably before long spheres of influence are destined to be merged into some unorganised form of protectorate analogous to that which exists in the Malay Peninsula.

Whether rights of navigation are possessed by states over rivers, or portions of rivers, not within their territory.

The general principle that a state possesses absolute proprietary rights over the whole area included within its frontier might be supposed to lead inevitably to the admission of a right on the part of every country to deal as it chooses with its navigable rivers, and consequently to prevent other states from navigating them, or to subject navigation to conditions dictated by its real or imagined interests, whether the navigable portion of a particular river is wholly included within its own boundaries, or whether the river begins to be navigable before they are reached. Conversely it might be supposed that neither foreign states in general nor co-riparian states could have any rights over waters contained within a specific territory, except through prescription or express agreement in the case of a particular river, or through an express agreement between the whole body of states with reference to all rivers.

It is generally asserted however that co-riparian states, and it is frequently said that states entirely unconnected with a river, have a right of navigation for commercial purposes, which sometimes is represented as imperfect, but sometimes also is declared to be dominant. Grotius alleged that on the establishment of separate property, which he imagined to have supervened upon an original community of goods as the result of convention, certain of the pre-existing natural rights were reserved for the

general advantage, of which one was a right to use things which had become the subject of separate property in any manner not injurious to their owners. Passage over territory, whether by land or water, whether in the form of navigation of rivers for commercial purposes or of the march of an army over neutral ground to attack an enemy, was regarded by him as an innoxious use, and consequently as a privilege the concession of which it is not competent to a nation to refuse [1]. Whatever may be the value of this doctrine, it is the root of such legal authority as is now possessed by the principle of the freedom of river navigation. It was echoed with slight variations by most of the writers of the seventeenth and eighteenth centuries [2], and when states have been engaged in the endeavour to open a closed section of river to the trade of their subjects, the weapons of international controversy have been drawn in the main from the arsenal provided by the assumptions of Grotius and his successors.

Controversy with respect to the Mississippi,

After the Treaty of Paris in 1783, for example, both banks of the lower portion of the Mississippi having fallen under the dominion of Spain, and that power having closed the navigation of the part belonging to it to the inhabitants of the upper shores, a dispute took place on the subject between it and the United States. On behalf of the latter it was pointed out with truth that the passage of merchandise to and from the higher waters of the river would be not only innocent, but of positive advantage to the subjects of Spain; and it was argued with more questionable force that the freedom of 'the ocean to all men and of its rivers to all the riparian inhabitants' is a 'sentiment written in deep characters on the heart of man,' and that though the right

[1] Lib. ii. ch. ii. §§ 2, 10, and 13.

[2] e. g. Loccenius, De Jure Maritimo, lib. i. c. 6 (written in 1653); Rutherforth, Institutes of Natural Law, bk. ii. ch. ix (written in 1754); Wolff, Jus Gent. § 343; Vattel, liv. ii. ch. ix. §§ 117, 128-9, and ch. x. § 134.

Gronovius (1613-1671) and Barbeyrac (1674-1729) on the other hand, in their notes to Grotius, imply the right to prohibit navigation by conceding that of levying dues for the simple permission to navigate.

of passage thus evidenced may be so far imperfect as to be 'dependent to a considerable degree on the conveniency of the nation through which' persons using it were to pass, it was yet a right so real that an injury would be inflicted, for which it would be proper to exact redress, if passage were 'refused, or so shackled by regulations not necessary for the peace or safety of the inhabitants as to render its use impracticable[1].' Again, in 1824, a series of negotiations were commenced between the United States and Great Britain with reference to the St. Lawrence, a right of navigating which was asserted by the former country as a riparian state of the upper waters of the river, and of the lakes which feed it. The arguments employed in support of the American contention were essentially the same as those which had been put forward in the case of the Mississippi. 'The right of the upper inhabitants,' it was said, 'to the full use of a stream rests upon the same imperious want as that of the lower, upon the same inherent necessity of participating in the benefit of the flowing element;' it is therefore 'a right of nature,' its existence is testified by the 'most revered authorities of ancient and modern times,' and when it has been disregarded, the interdiction of a stream to the upper inhabitants 'has been an act of force by a stronger against a weaker party.' Proprietary rights, on the other hand, 'could at best be supposed to spring from the social compact[2].'

the St. Lawrence.

Putting aside the assumption that an original convention as to several property was made between mankind, under which a right to use navigable waters was expressly reserved, as a

Examination of the doctrine that rights of navigation exist.

[1] Wheaton's History of the Law of Nations, 508–9; see also Jefferson's Instructions to the Commissioners appointed to negotiate with the Court of Spain, Am. State Papers, x. 135.

The dispute was ended in 1795 by the Treaty of San Lorenzo el Real, which opened the portion of the Mississippi belonging to Spain to the navigation of the United States.

[2] British and Foreign State Papers, 1830–1, pp. 1067–75. The proprietary rights exercised until after the Congress of Vienna by some of the petty German States, as for instance by Anhalt-Coethen and Anhalt-Bernburg, to the prejudice of Austria and Saxony, offer singular examples of 'acts of force done by a stronger against a weaker party.'

theory which can no longer be taken by any one as an argumentative starting-point; part of the foregoing reasoning, and the doctrine of writers who maintain the right of access and passage on the part of all states, depend upon the principle that the proprietary rights of individual states ought to be subordinated to the general interests of mankind, as the proprietary rights of individuals in organised societies are governed by the requirements of the general good; and the reasoning and doctrine in question involve the broad assertion that the opening of all water-ways to the general commerce of nations is an end which the human race has declared to be as important to it as those ends, to which the rights of the individual are sacrificed by civil communities, are to the latter. Put in this form the doctrine has a rational basis, whether the assumption of fact by which it is accompanied is correct or not. But part of the foregoing reasoning on the other hand, and the opinion of writers who accord the right of navigation to co-riparian states, seem to imply the supposition that the fact of the use of a section of river belonging to a particular community being highly advantageous to the inhabitants of lands traversed by another portion of the stream in some way confers upon them a special right of use. The erroneousness of this view, when once it is plainly stated, can hardly require to be proved. The mere wants, or even the necessities, of an individual can give rise to no legal right as against the already existing rights of others. To infringe these rights remains legally a wrong, however slight in some cases may be the moral impropriety of the action. If a state forces the opening of a water-way between itself and the sea, on the ground that it has a right to its use as a riparian state, it simply commits a trespass upon its neighbour's property, which may or may not be morally justified, but by which it violates the law as distinctly, though not so noxiously, as an individual would violate it by making a track through a neighbour's field to obtain access to a high road. Some writers, who appear to be embarrassed with the difficulties with which the

claim of a right to navigate private waters is beset, envelop their assertion of it with an indistinctness of language through which it is hard to penetrate to the real meaning. A right, it is alleged, exists; but it is an imperfect one, and therefore its enjoyment may always be subjected to such conditions as are required in the judgment of the state whose property is affected, and for sufficient cause it may be denied altogether. Whatever may be thought of the consistency of one part of this doctrine with another, there is in effect little to choose between it and the opinion of those who consider that the rights of property in navigable rivers have not as a matter of fact been modified with a view to the general good, and that they are independent of the wants of individuals other than the owners, but who recognise that it has become usual as a matter of comity to permit navigation by co-riparian states, and that it would be a vexatious act to refuse the privilege without serious cause [1].

[1] The opinions of writers belonging to the present century are singularly varied, and are not always internally consistent. Bluntschli (§ 314) roundly alleges that 'les fleuves et rivières navigables qui sont en communication avec une mer libre sont ouverts en temps de paix aux navires de toutes les nations.' Calvo (§§ 259, 290–1) says that where a river traverses more than one territory 'le droit de naviguer et de commercer est commun à tous les riverains;' when it is wholly within the territory of a single state, 'il est considéré comme se trouvant sous la souveraineté exclusive de ce même état;' it is however to be understood that 'les réglements particuliers ne doivent pas assumer un caractère de fiscalité, et que l'autorité ne saurait intervenir que pour faciliter la navigation et faire respecter les droits de tous,' so that the right of property seems in the end to be subordinated to the right of navigation. Fiore (§§ 758, 768) in the main follows M. Calvo. He declares that 'il carattere nazionale della navigazione fluviale,' in the case of a river flowing through more than one state, 'deriva necessariamente e giuridicamente dalla natura delle cose, cioè dall' indivisibilità del fiume, dal diritto naturale di libertà, e dal carattere internazionale del commercio;' but he holds that in the case of a river flowing through one state only 'questo colla più completa libertà e indipendenza può communicare e non communicare cogli altri stati;'—in other words, it may close the river if it chooses. Heffter (§ 77) declares on the one hand that each of the proprietors of a river flowing through several states, 'de même que le propriétaire unique d'un fleuve, pourrait, stricto jure, affecter les eaux à ses propres usages et à ceux de ses régnicoles, et en exclure les autres,' and on the other hand that 'on reconnaît avec Grotius, Pufendorf, et Vattel, au moins en principe, un droit beaucoup plus étendu, celui d'usage et de passage innocent, lequel ne peut être refusé

The question remains with what views the practice of states is most in accordance. Down to the commencement of the present century there can be no doubt that the paramount character of the rights of property was both recognised and acted upon. Although none of the European rivers running through more than one state seem at any part of their course to have been entirely closed to the riparian states, except the Scheldt which was closed by treaty, their navigation by foreign vessels was burdened with passage tolls and dues levied in commutation

absolument à aucune nation amie et à ses sujets dans l'intérêt du commerce universel.' Wheaton (Elem. pt. ii. ch. iv. § 11) considers that 'the right of navigating for commercial purposes a river which flows through the territories of different states is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text writers call an imperfect right, its exercise is necessarily modified by the safety and convenience of the state affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.' Halleck (i. 147-8) says that 'the right of navigation for commercial purposes is common to all the nations inhabiting the banks' of a navigable river, subject to such provisions as are necessary to secure 'the safety and convenience' of the several states affected. De Martens (Précis, § 84) thinks that as a general rule the exclusive right of each nation to its territory authorises a country to close its entry to strangers, and though it is wrong to refuse them innocent passage, it is for the state itself to judge what passage is innocent, but at the same time the geographical position of another state may give it a right to demand and in case of need to force a passage for the sake of its commerce. Woolsey (§ 62) says, 'When a river rises within the bounds of one state and empties into the sea in another, international law allows to the inhabitants of the upper waters only a moral claim or imperfect right to its navigation. We see in this a decision based on strict views of territorial right, which does not take into account the necessities of mankind and their destination to hold intercourse with one another.' Phillimore (i. § clxx), in speaking of the refusal of England to open the St. Lawrence unconditionally to the United States, says that 'it seems difficult to deny that Great Britain may ground her refusal upon strict law, but it is equally difficult to deny that in doing so she exercises harshly an extreme and hard law.' Klüber (§ 76) considers that 'l'indépendance des états se fait particulièrement remarquer dans l'usage libre et exclusif du droit des eaux, tant dans le territoire maritime de l'état, que dans ses rivières, fleuves, canaux, lacs et étangs. . . . On ne pourrait l'accuser d'injustice s'il défendait tout passage de bateaux étrangers sur les fleuves, rivières, canaux ou lacs de son territoire.' Finally, Twiss (i. § 141) lays down that 'a nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream while it is passing through its territory.'

of the right of compulsory transhipment of cargoes. The first step towards freeing traffic was made in 1804, when the various Rhine tolls were abolished at the Congress of Rastadt by convention at the instance of the French government. In 1814 it was declared by the Treaty of Paris that the navigation of the Rhine should be free to all the world, and that the then coming Congress should examine and determine in what manner the navigation of other rivers might be opened and regulated. By an annex to the Act of the Congress of Vienna it was consequently agreed by the powers that navigable rivers separating or passing through more than one state should for the future be open to general navigation, subject only to moderate navigation dues. But neither at the Congress of Vienna nor in the Treaty of Paris was the right of co-riparian or of other foreign states to navigate territorial waters asserted as an existing principle, and effect was given to the intention of the powers in a series of conventions made between the states concerned. The Congress of Vienna therefore, though it intended to establish the principle of free navigation with regard to European rivers, respected the right of property in its mode of action, and it stopped short of applying the principle to rivers lying wholly within one state [1]. It would be difficult to show that any European country has admitted the propriety of the latter application; and the riparian states of the Elbe and the Rhine, by fresh arrangements entered into in 1880,

[1] De Martens, Rec. viii. 261 and Nouv. Rec. ii. 427 and 434. A list of the conventions dealing with the navigation of rivers separating or passing through different states is given by Heffter, Appendix viii.

In the text the intention of the Treaties of Paris and Vienna has been taken to be that which has been generally assumed and which is most in accordance with their language, but M. Engelhardt in the Revue de Droit International (xi. 363-81) gives reason to doubt whether it was intended at the time to give so complete a liberty of navigation as has been supposed, and shows that many of the regulations, to which the navigation of various European rivers passing through more than one state has been and is subjected, are inconsistent with the principle which was apparently laid down. M. Engelhardt is a warm advocate of the freedom of river navigation, but he is too accurate to regard it as legally established, and he admits that 'les libertés fluviales, telles qu'on les pratique aujourd'hui, sont essentiellement conventionnelles.'

have made a distinct retrogression with respect to the conditions of international transport on those rivers. Under the rules of 1815, a vessel, after the manifest of its cargo had been examined at the office where the navigation dues were paid, was free from further inspection until arrival at its destination. The river was regarded as being, and was expressly stated to be, to that extent, ex-territorial by convention. By the late arrangements river traffic has been assimilated to that upon land; a vessel is obliged to present itself at the custom-house on each frontier that it passes; and the qualified ex-territoriality of the river-waters is totally destroyed[1].

In America, although the navigation of the great rivers of the United States is as a matter of fact open to foreign vessels for foreign trade, the government of that country appears to deny expressly that any right of such navigation exists. England again has always steadily refused to concede the navigation of the St. Lawrence to the United States as of right, and a controversy which existed for many years upon the subject was only put an end to in 1854 by a treaty which granted its navigation as a revocable privilege, and as part of a bargain in which other things were given and obtained on the two sides[2].

In South America the rivers of the Argentine Confederation were closed to foreign ships until 1853, when the Parana and Paraguay, in so far as they lie within Argentine territory, were opened for external trade to the commercial ships of all nations by treaties made between the Confederation and England, France, and the United States; subsequently in 1857 in a treaty with Brazil the navigation of those portions of both rivers, as well as the part of the Uruguay belonging to the two countries, was declared free, except for local traffic; but the navigation of their affluents was expressly reserved. The Republic of Uruguay had already by decree opened its internal waters to foreign commerce in 1853. Finally, the navigation of the Amazons, though

[1] Engelhardt, Rev. de Droit Int. xiii. 191.
[2] De Martens, Nouv. Rec. Gén. xvi. i. 498.

partially opened by Brazil in 1851 to the co-riparian state of Peru, remained closed, not only to non-riparian states, but to Ecuador, until 1867, when an imperial decree admitted all foreign vessels to the navigation of the Amazon, the Tocantins, and the San Francisco [1].

[The equivocal position occupied by China with regard to International Law renders her example of comparatively little moment or value as a precedent. Her notorious policy has been to exclude the foreigner from her inland waters, but in 1862 modified access to the Yangtse-Kiang was conferred upon British shipping, a privilege which was gradually extended to other Powers under 'most favoured nation' clauses. In August 1898 revised regulations of trade came into operation by which the merchant vessels of the Treaty Powers were authorised to trade on the Yangtse-Kiang at eight Treaty Ports, and to land and ship goods in accordance with special conditions at five Non-treaty Ports [2].]

Conclusions.

From the foregoing facts it appears that there are few cases in which rivers wholly within one state have been opened; that where rivers flowing through more than one state are now open, they have usually at some time either been closed, or their navigation has been subjected to restrictions or tolls of a kind implying that navigation by foreigners was not a right but a privilege; that there are still cases in which local traffic is forbidden to non-riparians; and that the opening of a river, when it has taken place, having been effected either by convention or decree has always been consistent with, and has some-

[1] Calvo, §§ 280–9. In opening the West African Conference of Berlin, Prince Bismarck committed himself to the statement that 'le Congrès de Vienne, en proclamant la liberté de la navigation sur les fleuves qui parcourent les territoires de plusieurs états, a voulu empêcher la séquestration des avantages inhérents à un cours d'eau. Ce principe a passé dans le droit public, en Europe et en Amérique.' Protocol of the Meeting of Nov. 15, 1884; Parl. Papers, Africa, No. 4, 1885, p. 9. Prince Bismarck's views did not commend themselves to the other members of the Conference: see ib. pp. 84–6.

[2] Hertslet, Commercial Treaties, xxi. p. 296.

times itself formed, an assertion of the paramount right of property, or in other words of the right of the owner of navigable waters to open or close them at will. It is clear therefore that the principle of the freedom of territorial waters, communicating with the sea, to the navigation of foreign powers has not been established either by usage or by agreements binding all or most nations to its recognition as a right. It is not less clear from the analysis of the views of its advocates that, if not so established, it has not been established at all; because the only reasonable basis on which it can be founded requires mankind to have declared that in the case of navigable rivers the ordinary rules of accepted law must be overridden for the sake of the general good. A marked tendency has no doubt shown itself during the present century to do away with prohibition, or to lessen restrictions, of river navigation by foreigners as a needless embarrassment to trade, but this has been the result, not of obedience to law, but of enlightened policy; and it may be said without hesitation that so far as international law is concerned a state may close or open its rivers at will, that it may tax or regulate transit over them as it chooses, and that though it would be as wrong in a moral sense as it would generally be foolish to use these powers needlessly or in an arbitrary manner, it is morally as well as legally permissible to retain them, so as to be able when necessary to exercise pressure by their means, or so as to have something to exchange against concessions by another power.

To what extent the sea can be appropriated.

It has become an uncontested principle of modern international law that the sea as a general rule cannot be subjected to appropriation. It is at the same time almost universally considered that portions of it are affected by proprietary rights on the part of the states of which the territory is washed by it; but no distinct understanding has yet been come to as to the extent which may be appropriated, or which may be considered to be attendant on the bordering land. In order to comprehend the uncertain application which the rights of appropriation and of retention as property thus receive in re-

lation to the sea, it is necessary to form a clear conception of the manner in which the views now commonly held have been gradually arrived at.

History of practice and opinion. Early usage.

At the beginning of the seventeenth century it is probable that no part of the seas which surround Europe was looked upon as free from a claim of proprietary rights on the part of some power, and over most of them such rights were exercised to a greater or less degree. In the basin of the Mediterranean the Adriatic was treated as part of the dominion of Venice; the Ligurian sea belonged to Genoa, and France still claimed to some not very well defined extent the waters stretching outwardly from her coast. England not only asserted her dominion over the Channel, the North Sea, and the seas outside Ireland, but more vaguely claimed the Bay of Biscay and the ocean to the north of Scotland. The latter was disputed by Denmark, which considered the whole space between Iceland and Norway to belong to her. Finally, the Baltic was shared between Denmark and Sweden[1]. In their origin these claims were no doubt founded upon services rendered to commerce. It was to the advantage of a state to secure the approaches to its shores from the attacks of pirates, who everywhere swarmed during the Middle Ages; but it was not less to the advantage of foreign traders to be protected. A right of control became established and recognised; and in attendance upon it naturally came that of levying tolls and dues to recompense the protecting state for

[1] Daru, Hist. de Venise (written in 1819), liv. v. § 21; Selden, Mare Clausum, lib. ii. cc. 30–2; Loccenius, De Jure Marit. lib. i. c. 4. In 1485 it was agreed in a treaty between John II of Denmark and Henry VII that English vessels should fish in and sail over the seas between Norway and Iceland on taking out licences, which required to be renewed every seven years (Selden, loc. cit. c. 32). In the sixteenth century intestine wars in Scandinavia led to so long an enjoyment of the fisheries of the northern seas without licence by the English, that the latter set up a title to their use by prescription, in addition as it would seem to the claim of exclusive sovereignty over the seas in which they lay. Denmark maintained her pretensions, and some ill-treatment of English fishermen by the Danes gave rise to a serious dispute between the two countries (Justice, Dominion and Laws of the Sea, written in 1705, p. 168; and Rymer, Fœdera, xvi. 395).

the cost and trouble to which it was put. From this, as a dissociation of the ideas of control and property was not then intelligible, the step to the assertion of complete rights of property was almost inevitable. The acts of control, it must be remembered, apart from those required for the protection of commerce, were often not only very real, but quite as solid as those upon which a right of feudal superiority was frequently supported. In 1269, for example, Venice began to exact a heavy toll from all vessels navigating the Northern Adriatic. After paying the impost for a few years, Bologna and Ancona took up arms to free themselves from the burden, but the issue of their wars being unfortunate, they were compelled formally to acknowledge the sovereignty of Venice over the Adriatic, and to consent to pay the dues which she demanded. In 1299, it appears from a memorial presented to certain commissioners sitting in Paris to redress damages done to merchants of various nations by a French Admiral within the English seas, that procurators of the merchants and mariners of Genoa, Catalonia, Spain, Germany, Zeeland, Holland, Friesland, Denmark, and Norway, acknowledged that exclusive dominion over the English seas, and the right of 'making and establishing laws and statutes and restraints of arms' and 'all other things which may appertain to the exercise of sovereign dominion' over them, were possessed by England. For nearly three centuries afterwards England kept the peace of the British seas either by cruisers in constant employment, or by vessels sent out from time to time[1].

Sixteenth century.

At the period, then, when international law came into existence, the common European practice with respect to the sea was founded upon the possibility of the acquisition of property in it, and it was customary to look upon most seas as being in fact appro-

[1] Daru, Hist. de Venise, loc. cit.; Boroughs, The Sovereignty of the British Seas (1633), p. 28, and Justice, 134. The narrow seas were 'constantly kept' in the time of Boroughs, but at that date the ships so employed seem to have been stationed mainly for the purpose of receiving the salute. He however expressly says that within his memory ships were sent out to keep the peace of the seas, p. 61.

priated. But during the preceding century the exorbitant pretensions of Spain and Portugal had been preparing a reaction against this view. The former asserted dominion over the Pacific and the Gulf of Mexico, the latter declared the Indian Ocean and all the Atlantic south of Morocco to belong to it; while both pushed the exercise of proprietary rights to the extent of prohibiting all foreigners from navigating or entering their waters [1]. The claims of Portugal and Spain received a practical answer in the predatory voyages of Drake and Cavendish, and the commerce of Holland with the East; and in the region of argument they were met by the affirmation of the freedom of the seas. When Mendoza, the Spanish envoy at the English court, complained to Queen Elizabeth of the intrusion of English vessels in the waters of the Indies, she refused to admit any right in Spain to debar her subjects from trade, or from 'freely navigating that vast ocean, seeing the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permitteth any possession thereof [2].' Elizabeth was indifferent to consistency. If the principle which she enunciated was correct, it applied as fully to the British seas as to those of the Indies. It was essentially the same as that on which Grotius relied in his attack upon the Portuguese in the 'Mare Liberum.' All property, he says, is grounded upon occupation, which requires that moveables shall be seized and that immoveable things shall be enclosed; whatever therefore cannot be so seized or enclosed is incapable of being made a subject of property. The vagrant waters of the ocean are thus necessarily

[1] Charles V styled himself 'Insularum Canariae, necnon insularum Indiarum et terrae firmae, maris oceani, &c. rex.' Selden, Mare Clausum, cap. 17. Ortolan (Dip. de la Mer, i. 121) gives the text of a Portuguese Ordonnance of pains and penalties: 'Assi natural como estrangeiro, ditas partes, terras, mares, de Guinea et Indias, et qualsquer outras terras et mares et lugares de nossa conquista, tratar, resgatar, nem guerrear, sem nossa licença et autoridade sob pena que fazendo o contrario moura por ello morte natural et por esso mesmo feito percão para nos todos seus beens moveis et de rays.'

[2] Camden, Hist. of Eliz., year 1580.

free. The right of occupation, again, rests upon the fact that most things become exhausted by promiscuous use, and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, that is to say in neither of the two ways in which it can be used [1].

Seventeenth century.

The doctrine with which the pretensions of Spain and Portugal was met went further than was necessary for the destruction of those pretensions, and it went further than any nation except Holland, which was imprisoned within the British seas, cared much to go. The world was anxious to secure the right of navigation, but it was willing that states should enjoy the minor rights of property and the general rights of sovereignty which accompany national ownership. Selden combated the views of Grotius in the interests of England; but while he maintained the right of appropriation in principle and as a customary fact, he declared that a state could not forbid the navigation of its seas by other peoples without being wanting to the duties of humanity [2]. The remaining jurists of the seventeenth century are in agreement with him. Molloy may be exposed to suspicion as an Englishman, but the opinion of Loccenius and Pufendorf is independent [3]. The latter argues that fluidity is not in itself a bar to property, as is proved by the case of rivers; that though the sea is inexhaustible for some purposes, its fish, and the pearls, the coral, and the amber that it yields, are not inexhaustible, and that 'there is no reason why the borderers should not rather challenge to themselves the happiness of a wealthy shore or sea than those who are seated at

[1] Mare Liberum, cap. 5. The treatise was first published in 1609. In his subsequent work, De Jure Belli, the doctrine is repeated (lib. ii. cap. ii. § 3), but with the illogical qualification (cap. iii. § 8) that gulfs and straits of which both shores belong to the same power can be occupied, because of their analogy to rivers, provided that the area of water is small in comparison with that of the land upon which it is attendant.

[2] Mare Clausum, lib. i. c. 20.

[3] Molloy (1646–1690), De Jure Marit. cap. v; Loccenius, lib. i. cap. iv; Pufendorf, bk. iv. ch. iv. §§ 6–9.

a distance from it;' finally, that the sea is a defence, 'for which reason it must be a disadvantage to any people that other nations should have free access to their shores with ships of war without asking their leave, or without giving security for their peaceful and inoffensive passage.' The extent over which dominion exists in any particular case is to be determined from the facts of effective possession or from treaties; and in cases which, after the application of these tests, are doubtful, it is to be presumed that the sea belongs to the states bordering on it so far as may be necessary for their defence, and that they also own all gulfs and arms.

In practice there was no radical change during the earlier part of the seventeenth century, except that as the seas had become safer, it was no longer necessary to keep their peace. Those consequences of the existence of property which made for the common good disappeared, while those which were onerous remained. Venice preserved her control over the Adriatic, and so jealous was she even of the semblance of a derogation from it, that in 1630 the Infanta Maria, when about to marry the King of Hungary and son of the Emperor, was not allowed to go to Triest on board her brother's fleet, but was obliged unwillingly to accept the hospitality and the escort of Venetian vessels [1]. In 1637 Denmark seized vessels placed outside Dantzig by the King of Poland to levy duties on merchantmen entering; she also increased the dues payable on passing the Sound, apparently to an excessive point, since wars with Sweden, Holland, and the Hanse Towns followed, which resulted in the exemption of Swedish ships, and in the regulation of the amount to be paid by the Dutch; and there can be little doubt that Danish pretensions in the northern seas were maintained, since the disputes with England which occurred in the sixteenth century were renewed, as will be seen presently, in the eighteenth [2]. England continued to require that foreigners intending to fish in the

[1] Daru, Hist. de Venise, loc. cit.

[2] Treaty of Christianopel, 1645 (Dumont, Corps Universel Diplomatique du Droit des Gens, vi. i. 312), and of Bromsebro in the same year (id. 314).

German ocean should take out English licences, and when the Dutch attempted in 1636 to fish without them, they were attacked and compelled to pay £30,000 for leave to remain[1]. Though a refusal to accord the honours of the flag, by which maritime sovereignty was symbolised, in part caused the war of 1652 between England and Holland, and furnished a pretext for that of 1672, the latter power in the first instance only endeavoured to escape from performing a humiliating ceremony as due to a commonwealth which it admitted would have been due to an English king; and in the end it acknowledged its obligation in the Treaties of Westminster of 1654, of Breda, and of Westminster of 1674, in the last of which it was expressly recognised that the British seas extended from Cape Finisterre to Stadland in Norway[2].

[1] Proclamation of 1609 and 'The Proclamation for restraint of Fishing upon His Majesties Seas and Coasts without Licence' of May 10, 1636, ap. translation of the 'Mare Clausum' by J. H. Gent. 1663. Hume, Hist. of England, ch. lii.

[2] Lingard, Hist. of England, vol. xi. ch. ii; Hume, Hist. of England, ch. lxv; Dumont, vi. ii. 74, vii. i. 44 and 253. It was stipulated in the Treaty of Westminster that 'praedicti Ordines generales Unitarum Provinciarum debite, ex parte sua agnoscentes jus supra memorati Serenissimi Domini Magnae Britanniae Regis, ut vexillo suo in maribus infra nominandis honos habeatur, declarabunt et declarant, concordabunt et concordant, quod quaecunque naves et navigia ad praefatas Unitas Provincias spectantia, sive naves bellicae, sive aliae eaeque vel singulae, vel in classibus junctae, in ullis maribus a Promontorio Finis Terrae dicto usque ad medium punctum terrae van Staten dictae in Norwegia quibuslibet navibus aut navigiis ad Serenissimum Dominum Magnae Britanniae Regem spectantibus, obviam dederint, sive illae naves singulae sint, vel in numero majori, si majestatis Britannicae, sive aplustrum, sive vexillum Jack appellatum gerant, praedictae Unitarum Provinciarum naves aut navigia vexillum suum e mali vertice detrahentes supremum velum demittent, eodem modo parique honoris testimonio, quo ullo unquam tempore, aut in alio loco antehac usitatum fuit, versus ullas Majestatis Britannicae suae aut antecessorum suorum naves ab ullis Ordinum Generalium suorumve antecessorum navibus.'

Even crowned heads in person were expected to make practical acknowledgment of the dominion of England. Philip II of Spain, when coming to marry Queen Mary, was fired into by the English Admiral who met him for flying his own royal flag within the British seas; and in 1606 the King of Denmark, when returning from a visit to James I, was met off the mouth of the Thames by an English captain, who forced him to strike his flag (Admiralty Records).

Between the beginning and the end of the seventeenth century however, notwithstanding the strenuousness with which England upheld her title to the British seas, so far as the salute due to her flag was concerned, there was on the whole a marked difference in the degree to which proprietary rights over the open sea were maintained. At the latter time they were everywhere dwindling away. By the commencement of the nineteenth century they had almost disappeared. England was embarrassed by the shadow of her claims, but she made no serious attempt to preserve the substance. The negotiations with the United States for a settlement of the question of the right of search, which had almost been brought to a satisfactory conclusion in 1803, were broken off at the last moment because the English government could not make up its mind to concede freedom from search within the British seas[1]; and so late as 1805 the Admiralty Regulations contained an order to the effect that 'when any of His Majesty's ships shall meet with the ships of any foreign power within His Majesty's seas (which extend to Cape Finisterre) it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonour to be done to His Majesty.' Since no controversies arose with respect to the salute at a time when opinion had become little favourable to the retention of such a right, it may be doubted whether the order was not allowed to remain a dead letter; and from that time, at any rate, nothing has been heard of the last remnant of the English claims. The pretensions of Denmark to the northern seas shrank in the course of the eighteenth century into a prohibition of fishery within sixty-nine miles of Greenland and Iceland; but the seamen of England and Holland disregarded the Danish ordinances; when their vessels were captured they

[1] Mr. King to Mr. Madison, British and Foreign State Papers, 1812–14, p. 1404.

were supported by their governments; and though some threats of war were uttered, in the end the fishing-grounds were tacitly opened [1]. The Baltic was the only other of the larger seas in which any endeavour was made to keep in existence the old proprietary rights. Denmark and Sweden tried to shut it against hostilities between powers not possessing territory on its shores, but the attempt failed before the maritime predominance of England, and the claim may be considered to have been abandoned with the commencement of the last century [2].

A new claim subsequently sprang up in the Pacific, but it was abandoned in a very short time. The Russian government published an Ukase in 1821 prohibiting foreign vessels from approaching within a hundred Italian miles of the coasts and islands bordering upon or included in that ocean north of the 51st degree of latitude on its American, and of the 45th degree on its Asiatic, shore; and it appears from a despatch addressed by the Russian Representative in the United States to the American Government that Russia conceived herself to be at liberty to regard the whole extent of sea north of the points indicated as being territorial. The pretension was, however, resisted by the United States and Great Britain, and was entirely given up by Conventions made between Russia and the former powers in 1824 and 1825 [3]. More recently the United

[1] Denmark nominally continued to claim a breadth of twenty miles off the coasts of Iceland until 1872; by the fishing regulations of that year she voluntarily accepted the ordinary three-mile limit.

[2] In 1780 Denmark declared that 'le Roi a résolu pour entretenir la libre et tranquille communication entre ses Provinces de déclarer que la mer Baltique étant une mer fermée, incontestablement telle par sa situation locale,' &c. (De Martens, Rec. iii. 175); and in 1794 Sweden and Denmark agreed by a convention that 'la Baltique devant toujours être regardée comme une mer fermée et inaccessible à des vaisseaux armés des parties en guerre éloignées est encore déclarée telle de nouveau par les parties contractantes décidées à en préserver la tranquillité la plus parfaite' (id. v. 608).

[3] De Martens, Nouv. Rec. v. ii. 358, and vi. 684; Behring Sea Arbitration, British Case, p. 48. So late as 1875 Russia seems to have made a claim elsewhere to property in some considerable extent of water, for in that year Mr. Fish, the American Secretary of State, wrote 'There was reason to hope that the practice which formerly prevailed with powerful nations of regarding

States, since acquiring possession of the Russian territories in America, has endeavoured to separate the Behring Sea in its legal aspect from the Pacific Ocean, and has claimed as attendant upon Alaska, by virtue of cession from Russia, about two-thirds of its waters,—a space 1,500 miles long and 600 miles wide. The disputes with Great Britain which ensued, and the fact that they were submitted to the decision of a Court of Arbitration, are too well known to call for more than the barest reference. It is sufficient to note that the proprietary or territorial claim was tacitly dropped at an early stage of the proceedings, and that a pretension to jurisdictional rights of control for certain purposes, resting on a totally different basis, was substituted for it, or was at least insisted upon in its place[1].

2. Opinion of writers.

If we turn from history to the treatises of the eighteenth century the tendency to narrow the range of maritime occupation is perhaps still more strongly pronounced, though from the principles laid down being much too large to allow of admitted positive rules being brought into harmony with them, there is often some difficulty in knowing how far the writers who profess them would go. It is commonly stated that the sea cannot be occupied; it is indivisible, inexhaustible, and productive, in so far as it is productive at all, irrespectively of the labour of man; it is neither physically susceptible of allotment and appropriation; nor is there the reason for its appropriation which induced men to abandon the original community of goods[2]. If these

seas and bays usually of large extent near their coast as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past, and that no nation would claim exemption from the general rule of public law which limits maritime jurisdiction to a marine league from its coasts. We should particularly regret if Russia should insist on any such pretension.' Wharton's Digest, i. 106.

[1] [The award was published on the 15th of August, 1893. The full text is printed in the *Times* of the following day, and is also contained in De Martens, Nouveau Recueil Général, 2ème sér. xxi. 439.]

[2] Wolff, Jus Gentium, § 127, &c.; Vattel, liv. i. ch. xxiii. § 281; De Martens, Précis, § 43. Bynkershoek (1673–1743), De Dominio Maris, c. ii, Lampredi (Jur. Pub. Univ. Theorem. p. ii. cap. ii. §§ 8, 9), Azuni (1766–1827), Droit Maritime de l'Europe, pt. i. ch. ii. art. 1, all affirm the principle that the sea can be occupied in so far as it is used and guarded.

objections to proprietary rights over the sea are sound they apply as much to one portion of it as to another. It might be expected therefore that the right of maritime occupation would be wholly denied. But it is not so. Enclosed seas, straits, and littoral seas were regarded as susceptible of occupation. The right of Sweden to the Gulf of Bothnia, of the Turks to the Archipelago, of England to St. George's Channel, of Holland to the Zuyder Zee, and of Denmark to both the Belts and to the Sound, was, it seems, 'uncontested[1];' and a margin varying in width from gunshot or a marine league from the shore to a space bounded by the horizon, or even according to one authority by a line a hundred miles from the coast, was universally conceded[2]. The parts of the sea which are thus excepted are large, so large indeed that they bring down the doctrines of jurists to very nearly the same results as are given by usage. It is evident that the minds of writers were still influenced by the traditional view that occupation is permitted in principle. Their word-play about the fluidity of water was really only intended to limit appropriation of the sea to those parts of it which could in fact be kept under the control of a state. It was admitted, even by those who most uncompromisingly assert the sea to be insusceptible of appropriation, that such parts of it as may be necessary to the safety of a state may be controlled. No one in truth was prepared unqualifiedly to abandon the view that the sea may be subjected to proprietary rights; still less was any one prepared

[1] De Martens, Précis, § 42.

[2] Bynkershoek (De Dominio Maris, c. ii), Valin (Commentaire sur l'Ordonnance de la Marine, ii. 688), Vattel (liv. i. ch. xxii. § 289), Moser (Versuch des neuesten Europäischen Völker-Rechts, v. 486), Lampredi (Jur. Pub. Univ. Theorem. p. iii. cap. ii. § 8), De Martens (Précis, § 153), and Lord Stowell in the Twee Gebroeders, iii Rob. 339, considered that the range of a cannon-shot, which was supposed to be a marine league, measured the breadth of territorial waters along the open coast. Rayneval thought the horizon was the boundary. Casaregis (De Commercio Disc. 136, i) pronounced for a hundred miles. Galiani, according to Azuni, and Azuni himself regarded the extent of permissible marginal appropriation to be an open question, which should be settled by treaties in each particular case. Azuni, Droit Maritime de l'Europe, pt. i. ch. ii. art. ii. § 14.

definitely to accept the opposite doctrine with all its consequences. It was universally felt that states cannot maintain effective occupation at a distance from their shores, and that free commercial navigation had become necessary to the modern world. There was therefore a general willingness to declare the ocean to be free, and to consider states as holding waters, which might fairly be looked upon as territorial, subject to a right of navigation on the part of other states. But acceptance of the freedom of the open seas merely marked a stage in a gradual settlement of the conditions under which occupation, when applied to the sea, may be held to be valid; and recognition of the right of passage only saddled private property with a kind of servitude for the general good.

Summary of the course of opinion and practice down to the beginning of the nineteenth century.

Down to the beginning of the present century then, the course of opinion and practice with respect to the sea had been as follows. Originally it was taken for granted that the sea could be appropriated. It was effectively appropriated in some instances; and in others extravagant pretensions were put forward, supported by wholly insufficient acts. Gradually, as appropriation of the larger areas was found to be generally unreal, to be burdensome to strangers, and to be unattended by compensating advantages, a disinclination to submit to it arose, and partly through insensible abandonment, partly through opposition to the exercise of inadequate or intermittent control, the larger claims disappeared, and those only continued at last to be recognised which affected waters the possession of which was supposed to be necessary to the safety of a state, or which were thought to be within its power to command. Upon this modification of practice it may be doubted whether theories affirming that the sea is insusceptible of occupation had any serious influence. They no doubt accelerated the restrictive movement which took place, but outside the realm of books they never succeeded in establishing predominant authority. The true key to the development of the law is to be sought in the principle that maritime occupation must be effective in order to be valid.

This principle may be taken as the formal expression of the results of the experience of the last two hundred and fifty years, and when coupled with the rule that the proprietor of territorial waters may not deny their navigation to foreigners, it reconciles the interests of a particular state with those of the body of states. As a matter of history, in proportion as the due limits of these conflicting interests were ascertained, the practical rule which represented the principle became insensibly consolidated, until at the beginning of the present century it may fairly be said that though its application was still rough it was definitively settled as law.

Present state of the question as to

It remains to see whether the rule is now applied more precisely, or, in the absence of sufficient precision, what would be a reasonable application of it.

1. Marginal seas;

Of the marginal seas, straits, and enclosed waters which were regarded at the beginning of the present century as being susceptible of appropriation, the case of the first is the simplest. In claiming its marginal seas as property a state is able to satisfy the condition of valid appropriation, because a narrow belt of water along a coast can be effectively commanded from the coast itself either by guns or by means of a coast-guard. In fact also such a belt is always appropriated, because states reserve to their own subjects the enjoyment of its fisheries, or, in other words, take from it the natural products which it is capable of yielding. It may be added that, unless the right to exercise control were admitted, no sufficient security would exist for the lives and property of the subjects of the state upon land; they would be exposed without recognised means of redress to the intended or accidental effects of acts of violence directed against themselves or others by persons of whose nationality, in the absence of a right to pursue and capture, it would often be impossible to get proof, and whose state consequently could not be made responsible for their deeds. Accordingly, on the assumption that any part of the sea is susceptible of appropriation, no serious question can arise as to the existence of property in marginal

waters [1]. Their precise extent however is not so certain. Generally their limit is fixed at a marine league from the shore; but this distance was defined by the supposed range of a gun of position, and the effect of the recent increase in the power of artillery has not yet been taken into consideration, either as

[1] In addition to the earlier writers previously quoted with reference to marginal waters, see Klüber, §§ 128–30; Wheaton, Elem. pt. ii. ch. iv. §§ 6 and 10, Halleck, i. 134; Phillimore, i. §§ cxcvi–vii; Bluntschli, § 302; Fiore, § 787.

Some modern writers deny that states can have property in any part of the sea, but admit the existence either of sovereignty and jurisdiction, or of some measure of the latter only. Heffter (§ 74) supposes that 'la police et la surveillance de certains districts maritimes, dans un intérêt de commerce et de navigation, ont été confiées à l'état le plus voisin,' and that 'l'intérêt de la sûreté peut en outre conférer à un état certains droits sur un district maritime.' Ortolan (Dip. de la Mer, liv. ii. ch. 7 and 8), repeating the old arguments in favour of the view that the sea is insusceptible of appropriation, says, 'ainsi, le droit qui existe sur la mer territoriale n'est pas un droit de propriété; on ne peut pas dire que l'état propriétaire des côtes soit propriétaire de cette mer. . . . En un mot, l'état a sur cet espace non la propriété, mais un droit d'empire; un pouvoir de législation, de surveillance et de juridiction.' Calvo (§ 244) alleges that 'pour résoudre la question (of the extent of territorial waters) d'une manière à la fois rationnelle et pratique, il faut d'abord, ce nous semble, ne pas perdre de vue que les états n'ont pas sur la mer territoriale un droit de propriété, mais seulement un droit de surveillance et de juridiction dans l'intérêt de leur défense propre ou de la protection de leurs intérêts fiscaux.' Twiss (i. § 173) seems implicitly to adopt the same doctrine by saying that as 'the term territory in its proper sense is used to denote a district within which a nation has an absolute and exclusive right to set law, some risk of confusion may ensue if we speak of any part of the open sea over which a nation has only a concurrent right to set law, as its maritime territory.'

If a correct impression is given by the historical sketch in the text, it is obvious that the doctrine of these writers is erroneous. It is besides open to the objections that—

1. It does not account for the fact that a state has admittedly an exclusive right to the enjoyment of the fisheries in its marginal waters.

2. As the rights of sovereignty or jurisdiction belonging to a state are in all other cases except that of piracy, which in every way stands wholly apart, indissolubly connected with the possession of international property, a solitary instance of their existence independently of such property requires to be proved, like all other exceptions to a general rule, by reference to a distinct usage, which in this case cannot be shown.

Sir Travers Twiss appears to be unduly affected by the existence of certain immunities from local jurisdiction which there is no difficulty in regarding as exceptional.

Grotius (De Jure Belli et Pacis, lib. ii. c. iii. § 13) is the source of the doctrine.

supplying a new measure of the space over which control may be efficiently exercised, or as enlarging that within which acts of violence may be dangerous to persons and property on shore. It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent to which marginal seas may be appropriated, of the lateness of the time at which much more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of territorial water has come into international question, whether the three-mile limit has ever been unequivocally settled; but in any case, as it has been determined, if determined at all, upon an assumption which has ceased to hold good, it would be pedantry to adhere to the rule in its present form; and perhaps it may be said without impropriety that a state has theoretically the right to extend its territorial waters from time to time at its will with the increased range of guns. Whether it would in practice be judicious to do so; whether it would be politic for a country, which wished to avoid dangerous friction between itself and other nations, to act in this direction without having secured the concurrence of the more important maritime states, either by the negotiation of separate treaties, or through the acceptance of the principle in a conference of the powers, is a widely different matter, and one which is outside the purview of law. In any case the custom of regarding a line three miles from land as defining the boundary of marginal territorial waters is so far fixed that a state must be supposed to accept it in the absence of express notice that a larger extent is claimed [1].

[1] The question of the principle upon which the extent of marginal waters should be founded, and of the breadth of water that should be included, has of late attracted a considerable amount of attention. It is felt, and growingly felt, not only that the width of three miles is insufficient for the safety of the territory, but that it is desirable for a state to have control over a larger space of water for the purpose of regulating and preserving the fisheries in it, the productiveness of sea fisheries being seriously threatened by the destructive methods of fishing which are commonly employed, and in many places by the greatly increased number of fishing-vessels frequenting the grounds.

After being carefully studied and reported upon by a Committee of the

It seems to be generally thought that straits are subject to the same rule as the open sea; so that when they are more than six miles wide the space in the centre which lies outside the limit of a marine league is free, and that when they are less than six miles wide they are wholly within the territory of the state or states to which their shores belong. This doctrine however is scarcely consistent with the view, which is also generally taken, that gulfs, of a greater or less size in the opinion of different writers, when running into the territory of a single state, can be included within its territorial waters; perhaps also it is not in harmony with the actual practice with respect to waters of the latter kind. France perhaps claims 'baies fermées' and other inlets or recesses the entrance of which is not more than ten miles wide[1]. Germany regards as territorial the waters within

Institut de Droit International, the subject was exhaustively discussed by the Institut at its meeting in Paris, in 1894, the exceptionally large number of thirty-nine members being present. With regard to the necessity of ascribing a greater breadth than three miles of territorial water to the littoral state there was no difference of opinion. As to the extent to which the marginal belt should be enlarged, and the principle upon which enlargement should be based, the same unanimity was not manifested; but ultimately it was resolved by a large majority that a zone of six marine miles from low water mark ought to be considered territorial for all purposes, and that in time of war a neutral state should have the right to extend this zone, by declaration of neutrality or by notification, for all purposes of neutrality, to a distance from the shore corresponding to the extreme range of cannon.

The decision of the Behring Sea Arbitral Tribunal does not constitute an addition to authority upon the question of the due extent of territorial waters. The award recognised the 'ordinary three-mile limit' as that outside of which the United States had no right of protection or property in the fur seals frequenting the Behring Sea. But M. de Courcel has since explained that the tribunal 's'est borné à constater que les parties étaient d'accord pour admettre que l'étendue de trois milles à partir de la côte comme formant dans l'espèce qui lui était soumise la limite ordinaire des eaux territoriales' (M. de Courcel to M. Aubert, ap. Ann. de l'Inst. de Droit Int., for 1894, p. 282). The tribunal therefore not only refused to legislate, to do which would of course have been beyond its province; it also refused to affirm that it found the three-mile limit to be, as a matter of fact, universally accepted. So far as it is concerned, the question of authoritative custom remains open.

[1] The latter at least was the general reservation made by the Fishery Treaty of 1839 with England (De Martens, Nouv. Rec. xvi. 954), but the

bays or incurvations of the coast, which are less than ten sea miles in breadth reckoned from the extremest points of the land, and doubtless includes all the water within three miles outwards from the line joining such headlands. England would, no doubt, not attempt any longer to assert a right of property over the Queen's Chambers, which include the waters within lines drawn from headland to headland, as from Orfordness to the Foreland and from Beachy Head to Dunnose Point; but some writers seem to admit that they belong to her, and a recent decision of the Privy Council has affirmed her jurisdiction over the Bay of Conception in Newfoundland, which penetrates forty miles into the land and is fifteen miles in mean breadth. Authors also so little favourable to maritime property as Ortolan and De Cussy class the Zuyder Zee amongst appropriated waters. The United States probably regard as territorial the Chesapeake and Delaware Bays and other inlets of the same kind[1]. Many claims to gulfs and bays still find their place in the books, but there is nothing to show what proportion of these are more than nominally alive. In principle it is difficult to separate gulfs and straits from one another; the reason which is given for conceding a larger right of appropriation in the case of the

convention did not profess to be an expression of the law on the subject. The whole of the oyster-beds in the Bay of Cancale, the entrance of which is seventeen miles wide, were regarded as French, and the enjoyment of them is reserved to the local fishermen, but, again, the cultivation of the beds by the local French fishermen renders the case exceptional.

[1] Klüber, § 130; De Martens, Précis, § 42; Wheaton, Elem. pt. ii. ch. iv. §§ 7, 9; Heffter, § 76; Ortolan, Dip. de la Mer, liv. ii. ch. viii; Phillimore, i. §§ clxxxviii, cxcix; Halleck, i. 140; Bluntschli, § 309; Direct United States Cable Company Limited *v.* Anglo-American Telegraph Company Limited, 1877, L. R. ii. App. Cases, 394. It was apparently decided by the Queen's Bench in Reg. *v.* Cunningham (Bell's Crown Cases, 86) that the whole of the Bristol Channel between Somerset and Glamorgan is British territory; possibly, however, the Court intended to refer only to that portion of the channel which lies within Steepholm and Flatholm.

Whether the government of the United States would or would not now claim Delaware Bay, it at least did so in 1793, when the English ship Grange, captured in it by a French vessel, was restored on the ground of the territoriality of its waters. Am. State Papers, i. 73.

former than of the latter, viz. that all nations are interested in the freedom of straits, being meaningless unless it be granted that a state can prohibit the innocent navigation of such of its territorial waters as vessels may pass over in going from one foreign place to another. If that could be done, it might be necessary to impose a special restriction upon the appropriation of waters which by their position are likely to be used. Such however not being the case in fact, it is the power of control and the safety of the state which have alone to be looked to. The power of exercising control is not less when water of a given breadth is terminated at both ends by water than when it merely runs into the land, and the safety of the state may be more deeply involved in the maintenance of property and of consequent jurisdiction in the case of straits than in that of gulfs. Of practice there is a curious deficiency; but there is one recent case from which it would appear that both Great Britain and the United States continue to claim as territorial the waters of a strait, which is much more than six miles in width. By the treaty of Washington of 1846 it was stipulated that the boundary between the United States and British North America should follow the forty-ninth parallel of latitude to the middle of the strait separating Vancouver's Island from the continent, and from there should run down the middle of the Strait of Fuca to the Pacific. Disputes involving the title to various islands having arisen, the boundary question at issue between the two nations was submitted to the arbitration of the Emperor of Germany, and in 1873 a protocol was signed at Washington for the purpose of marking out the frontier in accordance with his arbitral decision. Under this protocol, the boundary, after passing the islands which had given rise to dispute, is carried across a space of water thirty-five miles long by twenty miles broad, and is then continued for fifty miles down the middle of a strait fifteen miles broad, until it touches the Pacific Ocean midway between Bonilla Point on Vancouver's Island and Tatooch Island lighthouse on the

American shore, the waterway being there ten and a half miles in width [1].

On the whole question it is scarcely possible to say anything more definite than that, while on the one hand it may be doubted whether any state would now seriously assert a right of property over broad straits or gulfs of considerable size and wide entrance, there is on the other hand nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as Delaware Bay, or still more to small bays, such as that of Cancale. If the width of marginal seas were extended to six miles, to the extreme range of cannon, or to any other specific limit, there could of course be no question as to the territorial character of straits or gulfs not more than double the breadth of the marginal limit [2].

Right of foreign states to the innocent use of the territorial seas of a state.

In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation [3]. The general consent of nations, which was seen to be wanting to the alleged right of navigation of rivers, may fairly be said to have been given to that of the sea. Even the earlier and more uncompromising advocates of the right of appropriation reserved a general right of innocent navigation; for more than two hundred and fifty years no European territorial marine waters which could be used as a

[1] Parl. Papers, North Am., No. 10, 1873.

[2] An interesting discussion bearing upon the subject of the above section took place in the course of the arguments before the Behring Sea Tribunal of Arbitration. Report of the Proceedings, pp. 1284–91.

[3] The case of gulfs or other inlets would seem to be upon a different footing, except in so far as they are used for purposes of refuge. Any right to their navigation must be founded on a right of access to the state itself.

thoroughfare, or into which vessels could accidentally stray or be driven, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the civilised world. The right therefore must be considered to be established in the most complete manner[1].

This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all states. But no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war. Such a privilege is to the advantage only of the individual state; it may often be injurious to third states; and it may sometimes be dangerous to the proprietor of the waters used. A state has therefore always the right to refuse access to its territorial waters to the armed vessels of other states, if it wishes to do so.

Servitudes.

It is usual in works on International Law to enumerate a list of servitudes to which the territory of a state may be subjected. Amongst them are the reception of foreign garrisons in fortresses, fishery rights in territorial waters, telegraphic and railway privileges, the use of a port by a foreign power as a coaling station, an obligation not to maintain fortifications in particular places, and other derogations of like kind from the full enforcement of sovereignty over parts of the national territory. These and such like privileges or disabilities must however be set up by treaty or equivalent agreement; they are the creatures not of law but of compact. The only servitudes which have a general or particular customary basis are, the above-mentioned right of innocent use of territorial seas, customary rights over forests, pastures, and waters for the benefit of persons living

[1] Klüber (§ 76) is probably the only writer who denies the existence of the right. He says, 'on ne pourrait accuser un état d'injustice s'il défendait . . . le passage des vaisseaux sur mer sous le canon de ses côtes.'

near a frontier, which seem to exist in some places, and possibly a right to military passage through a foreign state to outlying territory[1]. In their legal aspects there is only one point upon which international servitudes call for notice. They conform to the universal rule applicable to 'jura in re aliena.' Whether they be customary or contractual in their origin, they must be construed strictly. If therefore a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question.

[1] It is somewhat more than doubtful whether any instances of a right to military passage have survived the simplification of the map of Central Europe.

CHAPTER III

NON-TERRITORIAL PROPERTY OF A STATE

A STATE may own property as a private individual within the jurisdiction of another state; it may possess the immediate as well as the ultimate property in moveables, land, and buildings within its own territory; and it may hold property in its state capacity in places not belonging to its own territory, whether within or outside the jurisdiction of other states. With property held in the first of these ways international law has evidently nothing to do; that, on the other hand, which is held in the two latter ways falls within its scope; but the usages affecting property of which the immediate as well as the ultimate ownership is in the state, and which is within its own territory, are entirely included in the laws of war[1]; it is therefore only the last-mentioned kind of property which requires to be mentioned here, and this consists in—

In what non-territorial property of the state consists.

1. Public vessels of the state.
2. Private vessels covered by the national flag.
3. Goods owned by subjects of the state, but embarked in foreign ships.

Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or store ships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law[2]. The character of a vessel professing to be public is

Public vessels of the state.

[1] See Pt. iii. ch. iii.

[2] Ortolan, Dip. de la Mer, i. 181–6; Calvo, §§ 876–84.

usually evidenced by the flag and pendant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimateness of her claim, the statement of the commander on his word of honour that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. On the other hand, subject to an exception which will be indicated directly, the commission under which the commander acts must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by the competent authority within the state itself[1]. *À fortiori* attestation made by the government itself is a bar to all further enquiry[2].

The above rules are those which apply to the ordinary circumstance that a vessel, professing to be a public vessel of the state, enters a foreign country from the outside, or is met with on the high seas. But there are occasions when a vessel changes, or affects to change, her character while within foreign territory. Upon these other considerations must be brought to bear than those upon which the rules are founded. The vessel

[1] The Santissima Trinidad, vii Wheaton, 335-7; Ortolan, Dip. de la Mer, i. 181; Phillimore, i. § cccxlviii.

The admission of the word of the commander is sometimes regarded as obligatory. When the Sumter was allowed to enter the port of Çuraçao, the Dutch government answered the complaints of the United States by pointing out that the commander had declared the vessel to be commissioned, adding that 'le gouverneur néerlandais devait se contenter de la parole du commandant, couchée par écrit.' Ortolan, loc. cit. i. 183.

[2] This is the case even where on the acknowledged facts there may be reasonable doubt as to whether the vessel is so employed as to be in the public service of the state in a proper sense of the term.

As recently as 1879 the English Court of Appeal decided in the above sense, reversing a judgment of Sir R. Phillimore. A Belgian mail packet, commanded by officers of the royal Belgian navy, but carrying merchandise and passengers, was sued in a claim for damage. On behalf of the King of the Belgians the facts were not contested, but it was declared that the vessel was in his possession as sovereign, and was a public vessel of the state. Behind this declaration the Court considered itself to be unable to go: it refused consequently to enquire into the effect which the fact that the vessel was partly employed in carrying merchandise and passengers might have upon her character. The Parlement Belge, L. R. 5 P. D. 197.

is bought, or she is built and fitted out to order, as a piece of mere merchandise; she is only private property owned by the state which has acquired her. Subsequently a commissioned officer arrives and takes command; but the act of commissioning a vessel is an act of sovereignty, and no act of sovereignty can be done within the dominions of another sovereign without his express or tacit permission. Without such leave a commission can only acquire value as against the state in which a vessel has been bought, or has been built and fitted out, at the moment when she issues from the territorial waters. Up to that time, though invested with minor privileges[1], she is far, if she be a ship of war, from enjoying the full advantages of a public character. It is needless to say that on the other hand if the vessel re-enters the territorial waters five minutes after she has left them she does so with all the privileges of a public vessel of her state. It is to be noted that tacit leave to commission a ship cannot be lightly supposed. A state must always be presumed to be jealous of its rights of sovereignty, and either strong circumstances implying recognition in the particular case, or the general practice of the state itself, must be adduced before the presumption can be displaced.

Instances also may, and occasionally do, occur in which the usual tests are not available, and in which it might be a question whether a vessel had not become a public vessel of a state, notwithstanding that the state in question refused to regard it as such. Though attestation by a government that a ship belongs to it is final, it does not follow that denial of public character is equally final; assumption and repudiation of responsibility stand upon a different footing. A foreign vessel of commerce, for example, flying the mercantile flag of its country, in entering a British port comes into collision with another vessel, and inflicts damage. It is found that the ship is engaged in the transport of soldiers, and that a naval officer is in command, but is not commissioned to the ship. Is this vessel to be

[1] Cf. postea, p. 198.

considered to have been so taken up into the service of its state as to have become a public vessel, and is her government therefore liable for the damage done; or are the soldiers passengers, and has the naval officer become the agent of the owners? The question is a somewhat delicate one. Probably the answer to it would depend upon whether the crew had, or had not, been placed under military law. Again, a British vessel is hired to act as tender to a foreign squadron engaged in naval operations; she leaves England with an English crew, in charge of her own master; on arrival she is put under the command of a naval officer, and flies the naval flag of his state with the distinctive mark of a chartered vessel; but the admiral in command of the squadron engages not to enforce military law on the crew. In this case the conclusion would seem to be more easy to arrive at. The flag is in itself sufficient to afford evidence of public character; its use is a public profession; it is unnecessary to go further and draw inferences from the whole circumstances of the case; the exemption from military law sinks into a disciplinary arrangement without international consequences. For determining cases of this kind it is evident that no general rules can be laid down; in each one the circumstances will more or less differ. All that can be said is, that the public character of a vessel may be inferentially shown from facts proving continued control by the state for state purposes, and that if the inference of public character is fairly drawn, a state is affected by responsibility for the acts of the vessel which is attributed to it.

Private vessels covered by the national flag.

Private vessels belonging to a state are those which, belonging to private owners, satisfy such conditions of nationality as may be imposed by the state laws with reference to ownership, to place of construction, the nationality of the captain, or the composition of the crew[1]. In common with vessels of war the flag is the apparent sign of the nationality of the ship, but as a merchant vessel is not in the same close relation to the state as a public vessel, and its commander, unlike the commander of the

[1] See Ortolan, Dip. de la Mer, pp. 746–52 (ed. 1864).

latter, is not an agent of the state, recourse is not had to his affirmation in proof of its character, which must be shown by papers giving full information as to its identity and as to its right to carry the flag displayed by it, or, in other words, as to whether it has conformed to the laws of its state[1].

Goods owned by subjects of the state, but embarked in foreign ships.

The conditions under which goods owned by subjects of a state, but embarked in foreign ships, are part of the property of the state are merely, that the owners must not have acquired a foreign character by domicil or service in another country. It will be seen later that it is possible for a person, without ceasing to be a subject of his state of origin, to be so intimately associated with a foreign state that the national character of property belonging to him may be affected by such association. It is for the competent courts to determine by what evidence the necessary facts must be proved, if disputed.

[1] See postea, pt. iv. ch. x.

CHAPTER IV

SOVEREIGNTY IN RELATION TO THE TERRITORY OF THE STATE

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Enumeration of the points requiring notice.

It has been seen that a state possesses jurisdiction within certain limits, in virtue of its territorial sovereignty, over the person and property of foreigners found upon its land and waters, and that it is responsible, also within certain limits, for acts done within its boundaries by which foreign states or their subjects are affected[1]. The broad statement of the rights which a state possesses, and of the duties by which it is affected, in these respects in a time of general peace, which has already been made, sufficiently indicates the law upon most points connected with them; but there are some special rules, and practices claiming to be legal, which have not been touched upon, and there are others of which the applications require to be examined in detail. These may be referred to the following heads:—

1. Exceptions, real or alleged, to the general right of exercising jurisdiction over foreign persons and property.

2. Extent of the right of a state to require aid from foreigners within its territory in maintaining the public safety or social order.

3. An alleged right to take cognizance of acts done by foreigners beyond the limits of a state if the persons who have done them subsequently enter its territorial jurisdiction.

4. The right of asylum and of adopting a foreigner into the state community.

5. Responsibility of a state.

It is universally agreed that sovereigns and the armies of a

[1] See antea, pp. 47 et seq. For a particular limitation upon the free action of a state within its territory in time of civil war, see p. 35 n.

state, when in foreign territory, and that diplomatic agents, when within the country to which they are accredited, possess immunities from local jurisdiction in respect of their persons, and in the case of sovereigns and diplomatic agents with respect to their retinue, that these immunities generally carry with them local effects within the dwelling or place occupied by the individuals enjoying them, and that public ships of the state confer some measure of immunity upon persons on board of them. The relation created by these immunities is usually indicated by the metaphorical term exterritoriality, the persons and things in enjoyment of them being regarded as detached portions of the state to which they belong, moving about on the surface of foreign territory and remaining separate from it. The term is picturesque; it brings vividly before the mind one aspect at least of the relation in which an exempted person or thing stands to a foreign state; but it may be doubted whether its picturesqueness has not enabled it to seize too strongly upon the imagination. Exterritoriality has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law outside the state in which they are. In this form there is evidently a danger lest the significance of the conception should be exaggerated. If exterritoriality is taken, not merely as a rough way of describing the effect of certain immunities, but as a principle of law, it becomes, or at any rate it is ready to become, an independent source of legal rule, displacing the principle of the exclusiveness of territorial sovereignty within the range of its possible operation in all cases in which practice is unsettled or contested. This of course is conceivably its actual position. But the exclusiveness of territorial sovereignty is so important to international law and lies so near its root, that no doctrine which rests upon a mere fiction can be lightly assumed to have been accepted as controlling it. In examining the immunities in question, therefore, it will be best to put aside for the present the idea of exterritoriality, and to view them solely by the light

of the reasons for which they have been conceded, and of the usage which has prevailed with respect to them.

Origin of the immunities usually classed under the head of exterritoriality.

The immunities which have been conceded to the persons and things above mentioned are prompted by considerations partly of courtesy and partly of convenience so great as to be almost equivalent to necessity. The head of the state, its armed forces, and its diplomatic agents are regarded as embodying or representing its sovereignty, or in other words, its character of an equal and independent being. They symbolise something to which deference and respect are due, and they are consequently treated with deference and respect themselves. Supposing reasons of courtesy to be disregarded, immunities would still be required upon the ground of practical necessity. If a sovereign, while in a foreign state, were subjected to its jurisdiction, the interests of his own state might readily be jeopardised by the consequences of his position. In like manner the armed forces of a country must be at the disposal of that country alone. They must not be liable either to be so locked up as to be incapable of being used at will, or to be so affected by foreign interference as to lose their efficiency; and submission to local jurisdiction would open the door sometimes to loss of freedom, and sometimes to a supersession of the authority of the officer in command. Finally, it is for the interest of the state accrediting a diplomatic agent, and in the long run in the interest also of the state to which he is accredited, that he shall have such liberty as will enable him, at all times and in all circumstances, to conduct the business with which he is charged; and liberty to this extent is incompatible with full subjection to the jurisdiction of the country with the government of which he negotiates. The first of these sets of considerations was perhaps that which formerly had the greater influence. When states were identified with their sovereigns, and the relations of states were in great measure personal relations of individuals, considerations of courtesy were naturally prominent; and to them must still be referred such established immunities as are not necessary

to the free exercise of the functions of the exempted person or thing. Those immunities, on the other hand, which may claim to exist on the score of necessary convenience, though in many cases they may have in fact owed their birth to courtesy, can now be more properly referred to convenience, both because it is a less artificial origin, and because it corresponds better with the present temper of states, and so with the reasons by which they would be likely to be guided in making any modifications of actual custom, or in defining unsettled practice.

Immunities of a foreign sovereign.

A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary civil or criminal tribunals, he is exempted from payment of all dues and taxes, he is not subjected to police or other administrative regulations, his house cannot be entered by the authorities of the state, and the members of his suite enjoy the same personal immunity as himself. If he commits acts against the safety or the good order of the community, or permits them to be done by his attendants, the state can only expel him from its territory, putting him under such restraint as is necessary for the purpose. In doing this it uses means for its protection analogous to those which one state sometimes employs against another, when it commits acts of violence for reasons of self-preservation without intending to go to war. The privileges of a sovereign consequently secure his freedom from all assertion of sovereignty over him or over anything or anybody attached to him in his sovereign capacity. On the other hand, he cannot set up an active exercise of his functions as a sovereign in derogation of the exclusive territorial rights of the state in which he is. If a crime is committed by a member of his suite, the accused person cannot be tried and punished within the precincts occupied by him; neither he nor his judges are able to take cognizance of an action brought by a foreigner against persons in attendance on him, and if there is nothing to prevent judgment being given

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in questions arising between the latter alone, the decision cannot at any rate be enforced. Criminals belonging to his suite must be sent home to be tried, and civil causes, whether between them or between subjects of other powers and them, must equally be reserved for the courts sitting within his actual territory. Again, a sovereign cannot protect in his house an accused person, not a member of his suite, who takes refuge from the pursuit of the local authorities. They cannot enter; but he is bound to surrender the refugee; and a refusal to give him up would justify the authorities in expelling the sovereign and in preventing the accused person by force from being carried off in his retinue[1].

Position of a sovereign who 1. assumes the character of a private individual for certain purposes;

Where, as occasionally happens, a sovereign has a double personality, where, that is to say, he for some purposes assumes the position of a private individual, or where, while remaining sovereign in his own country, he is a subject elsewhere, he is amenable to foreign jurisdiction in so far as he is clothed with

[1] Bynkershoek, De Foro Legatorum, c. iii; Bluntschli, §§ 129, 136-42, 150-3; Phillimore, ii. §§ civ-viii; Heffter, §§ 42 and 53-4; Calvo, §§ 530-2; Fœlix, Droit Int. Privé, liv. ii. tit. ii. c. ii. sect. 4 (ed. 1847); Klüber, § 49; De Martens, Précis, § 172. Phillimore and Klüber consider that a sovereign within foreign territory has civil jurisdiction over his suite, and De Martens seems to concede to him both civil and criminal jurisdiction.

The immunity of a sovereign as the representative of his state for anything done or omitted to be done by him in his public capacity has been affirmed by the English courts in De Haber *v.* the Queen of Portugal (xx Law Journal, Q. B. 488), and the French courts gave effect to the same principle in the cases of actions brought by a M^e^ Masser against the Emperor of Russia, and by a M. Solon against the Viceroy of Egypt. [In the recent case of Mighell *v.* Sultan of Johore, L. R. 1894 i Q. B. 149, it was held by the Court of Appeal that a certificate from the Foreign or Colonial Office is conclusive evidence as to the status of an independent foreign sovereign temporarily resident in this country.]

If however a sovereign appeals to the courts of a foreign state or accepts their jurisdiction 'he brings with him no privileges that can displace the practice as applying to other suitors.' The King of Spain *v.* Hullett and Widder, i Clark and Finelly, H. of L. 333; the Newbattle, L. R. x P. D. 33; Calvo, § 549. [In the South African Republic *v.* La Compagnie Franco-Belge du Chemin de fer de Nord, L. R. 1893, i Ch. 90, it was held that a foreign sovereign suing in the courts of this country submits to the jurisdiction only to the extent that (1) he must give discovery, (2) cross proceedings in mitigation of the relief claimed by him can be taken against him.]

a private or subject character. Thus if he enters the military service of a foreign country he submits to its sovereignty in his capacity of a military officer, and if he travels incognito he is treated as the private individual whom he appears to be; as however in such cases he is only accidentally or temporarily a private person, and as he properly remains the organ of his country, he has the right of taking up his public position whenever the exercise of jurisdiction over him becomes inconsistent in his view with the interests of his state. He recovers the privileges of a sovereign at will by resigning his commission or declaring his identity. Whether his power of throwing off foreign jurisdiction is equally great when he is a subject, and as such is invested with permanent privileges, which the state cannot refuse to accord to him, may perhaps be open to question. If, for example, as occurred in the case of the Duke of Cumberland after his accession to the throne of Hanover, a foreign sovereign takes an oath of allegiance in England, and sits as an English peer by hereditary title, he may do acts in the exercise of his rights which lay him open to impeachment; and it would be at least anomalous and inconvenient that he should be able, whenever he may choose, to take up or lay down his privileges and responsibilities, and to protect himself at will against the consequences of the latter by putting on a mantle of inviolability.

2. is a subject in a foreign country.

When a sovereign holds property in a foreign country, which clearly belongs to him as a private individual, the courts of the state may take cognizance of all questions relating to the property, and the property itself is affected by the result of the proceedings taken in them [1].

[1] Bynkershoek, De Foro Legatorum, c. xvi; De Martens, Précis, §§ 172-3; Klüber, § 49; Heffter, §§ 53-4; Phillimore, ii. §§ cviii-ix; Bluntschli, §§ 131-4, 140; Calvo, §§ 547-9; Fiore, §§ 492 and 498-9.

It is considered by many writers that real property held by a sovereign in a foreign country as a private individual is alone subject to the local jurisdiction, and that personal property is exempt. The distinction appears also to be sometimes made in practice. It is however irrational in itself, and it is difficult to see, in view of the complex relations which in the present day grow out of the possession of personalty, how it would be possible to maintain

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Immunities of diplomatic agents:

The immunities of diplomatic agents are in outline the same as those of sovereigns. But the comparative shortness and rarity of the visits of the latter to foreign countries, and still more the circumstances in which they usually take place, have caused the law affecting the heads of states to remain a general doctrine, which there has been little, if any, opportunity of applying contentiously. With regard to diplomatic agents, on the other hand, it has become gradually settled through application in a large number of instances, about which questions have arisen. In the course of this settlement some of the immunities of ambassadors have perhaps been pared down below the point which would have been fixed for the privileges of sovereigns had like cases brought them into question.

1. from the criminal jurisdiction of the state;

A diplomatic agent cannot be tried for a criminal offence by the courts of the state to which he is accredited, and cannot as a rule be arrested. It is nevertheless a nice question whether he can be said to be wholly free from the local jurisdiction in respect of criminal acts done by him. If he commits a crime, whether against individuals or the state, application must ordinarily be made to the state which he represents to recall him, or if the case is serious he may be ordered to leave the country at once, without communication being previously made to his government. But if the alleged act is one of extreme gravity, he can be arrested and kept in custody while application for redress is being made, and can even be retained for other purposes than that of restraining his freedom of action pending the result of the application[1]. In 1717, for instance, Count Gyllenborg, the Swedish ambassador to England, was arrested for complicity in a plot against the Hanoverian dynasty, and instead of being immediately sent out of the kingdom, was kept for a time, of which part may be accounted for by the retention of the English

the exemption. It would be less inconvenient to relieve real property for certain purposes from the local laws than to allow personal property to escape their operation.

[1] Vattel, liv. iv. ch. vii. §§ 94–5; Klüber, § 211; Wheaton, Elem. pt. iii. ch. i. § 15; Heffter, § 42; Phillimore, ii. §§ cliv–viii; Bluntschli, §§ 209–10.

minister in Sweden, but of which part must have elapsed before the action of the Swedish government was known. In 1718 the Prince of Cellamare, the Spanish ambassador in Paris, having organised a conspiracy against the government of the Duke of Orleans, was arrested and retained in custody until news came of the safe arrival in France of the French ambassador at Madrid. No protest was made by the resident ambassadors from other courts in the latter case, and though dissatisfaction at the arrest of Count Gyllenborg was at first felt by some of the ministers accredited to England, the expression which had been given to it was withdrawn when the facts justifying the arrest were made known [1]. Arrests of this kind may be regarded, either, upon the analogy already applied in the case of sovereigns, as acts of violence done in self-defence against the state the representative of which is subjected to them, or as acts done in pursuance of a right of exercising jurisdiction upon sufficient emergency, which has not been abandoned in conceding immunities to diplomatic agents. The former mode of accounting for them seems forced because, though a diplomatic agent is representative of his state, he is not so identified with it that his acts are necessarily its acts; because in such cases as those cited the ambassador of a friendly power must *primâ facie* be supposed to be exceeding his instructions in doing acts inimical to the government to which he is accredited; and finally because such acts as those done in the instances mentioned, in going beyond the point of an arrest followed by immediate expulsion from the country, exceed what in strict necessity is required for self-protection. It appears to be the more reasonable course therefore to adopt the latter of the two modes of explaining them.

2. from the civil jurisdiction of the state.

The immunities from civil jurisdiction possessed by a diplomatic agent, though up to a certain point they are open to no question, are not altogether ascertained with thorough clearness. The

[1] De Martens, Causes Célèbres, i. 101 and 149. He omits to notice that the complaints made with respect to the case of Count Gyllenborg by the ministers accredited to England were afterwards withdrawn.

local jurisdiction cannot be exercised in such manner as to interfere however remotely with the freedom of diplomatic action, or with the property belonging to a diplomatic agent as representative of his sovereign; a diplomatic agent cannot therefore be arrested, and the contents of his house, his carriages, and like property necessary to his official position, cannot be seized. For some purposes also he is distinctly conceived of as being not so much privileged as outside the jurisdiction. Thus children born to him within the state to which he is accredited are not its subjects, notwithstanding that all persons born of foreigners within its territories may be declared by its laws to be so. On the other hand, the jurisdiction of the state extends over real property held by him as a private individual, and he is subject to such administrative and police regulations as are necessary for the health or the safety of the community.

Difference of opinion as to its extent.

Beyond these limits there is considerable difference of opinion. Some writers consider that, except for the purposes of the regulations mentioned and in respect of his real property, his consent is required for the exercise of all local jurisdiction, and that consequently it can only assert itself in so far as he is willing to conform to its rules in non-contentious matters, or when he has chosen to plead to an action, or to bring one himself. In cases of the latter kind he consents to the effects of an action in so far as they do not interfere with his personal liberty or with the property exempted in virtue of his office; he makes his property liable, for example, to payment of costs and damages, and when he himself takes proceedings he obliges himself to plead to a cross action. In other matters, according to this view, he is subject to the laws of his own state, and satisfaction of claims upon him, of whatever kind they may be, can only be obtained, either by application to his sovereign through the government to which he is accredited, or by having recourse to the courts of his country [1]. Other authorities hold that in matters unconnected

[1] Vattel, liv. iv. ch. viii. §§ 110–6; Fœlix, liv. ii. tit. ii. ch. ii. sect. iv; Twiss, i. 305; Riquelme, i. 482; Halleck, i. 280, 284–6. Vattel, with whom

with his official position he is liable to suits of every kind brought in the courts of the country where he is resident, that the effects of such suits are only limited by the undisputed immunities above mentioned, and that consequently all property within the jurisdiction, other than that necessary to his official position, is subjected to the operation of the local laws. Thus he is exposed, for example, to actions for damages or breach of contract; if he engages in mercantile ventures, whether as a partner in a firm or as a shareholder in a company, his property is liable to seizure and condemnation at the suit of his creditors; if he acts as executor he must plead to suits brought against him in that capacity [1].

Wheaton (pt. iii. ch. i. § 17) seems to agree, admits that if a diplomatic agent engages in commerce, his property so employed is subject to the local jurisdiction, but to the extent only, it would appear, of the merchandise, cash, debts due to him, and other assets, if any, representing the capital actually used by him in the business. Heffter (§ 42) considers that exemption from jurisdiction, except by consent, though usual, is not obligatory.

It has been questioned whether the local courts become authorised to exercise jurisdiction by the mere renunciation of privilege by a diplomatic agent, or whether his renunciation is invalid unless it has been made with the consent of his government. In the United States it appears to have been decided that the permission of his government is necessary. It is, however, difficult to see why the courts should go out of their way to require that a condition shall be satisfied which is of importance only as between the diplomatic agent and his own state, and the fulfilment of which they have no means of ascertaining except through the agent himself. Nor is it easy to see what right they have to ask for any assurance beyond the profession of sufficient authority which is implied by the minister when he submits or appeals to them.

[1] De Martens, Précis, §§ 216–7; Klüber, § 210; Woolsey, § 92; Calvo, § 592. See also Bynkershoek, De Foro Legatorum, c. xvi.

Bluntschli (§§ 139–40 and 218) admits the competence of the civil tribunals in all cases in which an action could have been brought, supposing the diplomatic agent to be in fact in his own country, and in so far as he occupies in the foreign state 'une position spéciale, en qualité de simple particulier (négociant par exemple).' This view, which accommodates the competence of the tribunals to the fiction of exterritoriality, excludes the local jurisdiction in several directions with respect to which it is recognised under the above doctrine; but it may be assumed that the whole of the private property of the diplomatic agent is contemplated as being subject to the jurisdiction for the purpose of those cases of which cognizance can be taken.

The precise effect of the language of the authors cited in this and the foregoing note is in some cases very difficult to seize. The extremes of opinion

PART II
CHAP. IV
Practice.

Of these two opinions the former is that which is the more in agreement with practice. In England it is declared by statute that 'all writs and processes whereby the goods or chattels' of a diplomatic agent 'may be distrained, seized or attached shall be deemed and adjudged to be utterly null and void to all intents, constructions and purposes whatsoever[1].' The law of the United States is similar. In France, during the last century, it was held that the only object of the immunity of an ambassador was to prevent him from being embarrassed in the exercise of his functions, and that, as his property can be seized or otherwise dealt with without preventing him from fulfilling his public duties, whatever he possesses in the country to which he is accredited is subjected to the local jurisdiction. From a wish, however, to avoid as much as possible any act derogating from the courtesy due to the ambassador as representative of his state, it was considered best to exert the territorial jurisdiction by means less openly offensive than that of allowing suits against him to be thrown into the courts. Accordingly when Baron Von Wrech, minister of Hesse-Cassel, endeavoured to leave France without paying his debts, his passport was refused until his creditors were satisfied. In the present century a change of view appears to have taken place, and the exemption of a diplomatic agent from the control of the ordinary tribunals is treated rather as a matter of right than of courtesy. An article

are easily distinguished; but many writers are either doubtful, or fail to express themselves clearly.

[1] 7 Anne, c. 12. The decisions upon this statute have been carried to the point of determining that the public minister of a foreign state accredited to England may not be sued against his will in the courts of that country, neither his person nor his goods being touched by the suit, while he remains such public minister. The decision was given with express reference to the contention of counsel that 'the action could be prosecuted to the stage of judgment, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister.' Magdalena Steam Navigation Company *v.* Martin, ii Ellis and Ellis, 111. [And in Musurus Bey *v.* Gadban, L. R. 1894, i Q. B. 535, following that case it was decided that so long as the ambassador of a foreign state is in this country and accredited to the sovereign the Statute of Limitations does not begin to run against his creditors.]