expressly conceding immunity was inserted in the original project of the civil code, and though it was expunged on the ground that it had no place in a code of municipal law, the courts have always treated it as giving expression to international law, and have acted in conformity with it. In Austria the civil code merely declares that diplomatic agents enjoy the immunities established by international law. In Germany the code in like manner provides that an ambassador or resident of a foreign power shall retain his immunities in conformity with international law; and the space which they are understood to cover may perhaps be inferred from the language used in 1844 by Baron von Bülow, who in writing to Mr. Wheaton with reference to a question then at issue between the governments of Prussia and the United States, said that 'the state cannot exercise against a diplomatic agent any act of jurisdiction whatever, and as a natural consequence of this principle, the tribunals of the country have, in general, no right to take cognizance of controversies in which foreign ministers are concerned.' But for the use of the words 'in general' this statement of the views then entertained by the Prussian government would be perfectly clear, and considering the breadth with which the incapacity of a state to exercise jurisdiction is laid down, it seems reasonable to look upon them only as intended to except cases in which a diplomatic agent voluntarily appeals to the courts. In Spain the curious regulation exists that an ambassador is exempt from being sued in respect of debts contracted before the commencement of his mission, but that he is liable in respect of those incurred during its continuance. In Portugal the same distinction is made, but in a converse sense, an ambassador being exposed to proceedings in the courts in respect of such debts only as he has incurred antecedently to his mission. In Russia the ministry of foreign affairs is the sole medium for reclamations against a diplomatic agent[1].

[1] Fœlix, liv. ii. tit. ii. ch. ii. sect. iv; Phillimore, ii. §§ cxciv–ix; De Martens, Causes Cél. ii. 282; Wheaton, Elem. pt. iii. ch. i. § 17; Riquelme, i. 491.

Custom is thus apparently nearly all one way; but the accepted practice is an arbitrary one, conceding immunities which are not necessary to the due fulfilment of the duties of a diplomatic agent; and in a few countries it is either not fully complied with or there may at least be some little doubt whether it would certainly be followed in all cases or not. The views expressed by so competent an authority as M. Bluntschli suggest that courts, at least in Germany, might take cognizance of a considerable number of cases affecting a diplomatic agent by looking upon his private personality as separable from his diplomatic character[1].

Immunities of the family and suite of a diplomatic agent.

The immunities of a diplomatic agent are extended to his family living with him, because of their relationship to him, to secretaries and attachés, whether civil or military, forming part of the mission but not personally accredited, because of their necessity to him in his official relations, and perhaps also to domestics and other persons in his service not possessing a diplomatic character, because of their necessity to his dignity or comfort. These classes of persons have thus no independent immunity. That which they have, they claim, not as sharing in the representation of their state, nor as being necessary for its service, but solely through, and because of, the diplomatic agent himself. Hence in practice the immunity of servants and of other persons whose connexion with the minister is comparatively remote, is very incomplete; and it may even be questioned if they possess it at all in strict right, except with regard to matters occurring between them and other members or servants of the mission. It is no doubt generally held that they cannot be arrested on a criminal charge and that a civil suit cannot be brought against them, without the leave of their master, and that it rests in his discretion whether he will allow them to be

[1] The employment as diplomatic agent of a subject of the state to which he is accredited, is extremely rare; but it is scarcely necessary to say that, when once such a person is accepted by a state as the representative of a foreign country, his character as a subject is effaced in that of the diplomat. [See MacCartney *v.* Garbutt, L. R. xxiv. Q. B. D. 363, cited postea, p. 300 n.]

dealt with by the local authorities, or whether he will reserve the case or action for trial in his own country. But in England, at any rate, this extent of immunity is not recognised. Under the statute of Anne, the privilege of exemption from being sued, possessed by the servant of an ambassador, is lost by 'the circumstance of trading;' and when the coachman of Mr. Gallatin, the United States minister in London, committed an assault outside the house occupied by the mission the local authorities claimed to exercise jurisdiction in the case[1]. The English practice is exceptional; but it is not unreasonable. The inconvenience would be great of withdrawing cases or causes from the tribunals of the country in which the facts giving rise to them have occurred; and at the same time it cannot be seriously contended that either the convenience or the dignity of a minister is so affected by the exercise of jurisdiction over non-diplomatic members of the suite, and it might perhaps even be said, over non-accredited members of the mission, as to render exemption from it, except when such exemption is permitted by the diplomatic agent, an imperative necessity. Happily there is little difference in effect between the received and the exceptional doctrine. No minister wishes to shield a criminal, and there is no reason to believe that permission to exercise jurisdiction is refused upon sufficient cause being shown.

In order that a person in non-diplomatic employment shall be exempt from the direct action of the territorial jurisdiction it is

[1] In 1790 it was attempted at Munich to make a distinction between the members of a mission and the persons in attendance on them, and to assert local jurisdiction over the latter as of right. De Martens (Précis, 219 n., and Causes Cél. iv. 20) thought the distinction inadmissible, and it seems not to have been consistent with usage.

Vattel, liv. iv. ch. ix. §§ 121–4; De Martens, Précis, § 219; Klüber, §§ 212–3; Wheaton, Elem. pt. iii. ch. i. § 16, and Dana's note, No. 129; Halleck, i. 291; Bluntschli, §§ 211–15; Calvo, § 611.

It was formerly customary for ambassadors to exercise criminal jurisdiction over their suite, and there have been cases, as for example that of a servant of the Duc de Sully, French ambassador in England in 1603, in which capital punishment has been inflicted. But it has long been universally recognised that a diplomatic agent, of whatever rank, has no such power.

always necessary that he shall be engaged permanently and as his regular business in the service of the minister. Residence in the house of the latter, on the other hand, is not required. Questions consequently may arise as to whether a particular person is or is not in his service in the sense intended; they have even sometimes arisen as to whether a person has been colourably admitted into it for the sake of giving him protection. With the view of obviating such disputes it is the usage to furnish the local authorities with a list of the persons for whom immunity is claimed, and to acquaint them with the changes which may be made in it as they occur.

Immunities of the house of a diplomatic agent.

It is agreed that the house of a diplomatic agent is so far exempted from the operation of the territorial jurisdiction as is necessary to secure the free exercise of his functions. It is equally agreed that this immunity ceases to hold in those cases in which a government is justified in arresting an ambassador and in searching his papers;—an immunity which exists for the purpose of securing the enjoyment of a privilege comes naturally to an end when a right of disregarding the privilege has arisen. Whether, except in this extreme case, the possibility of embarrassment to the minister is so jealously guarded against as to deprive the local authorities of all right of entry irrespectively of his leave, or whether a right of entry exists whenever the occasion of it is so remote from diplomatic interests as to render it unlikely that they will be endangered, can hardly be looked upon as settled. Most writers regard the permission of the minister as being always required; and Vattel refers to a case which occurred in Russia where two servants of the Swedish ambassador having been arrested in his house for contravening a local law, the Empress felt obliged to atone for the affront by punishing the person who had ordered the arrest, and by addressing an apologetic circular to the members of the diplomatic body[1]. In England however, in the case of Mr. Gallatin's coachman, the government claimed the right of arresting him

[1] Vattel, liv. iv. ch. ix. § 117; Klüber, § 207; Phillimore, ii. § cciv.

within the house of the minister, admitting only that as a matter of courtesy notice should be given of the intention to arrest, so that either the culprit might be handed over or that arrangements might be made for his seizure at a time convenient to the minister. In France it has been held by the courts that the privileges of an ambassador's house do not cover acts affecting the inhabitants of the country to which he is accredited; and when in 1867 a Russian subject, not in the employment of the ambassador, attacked and wounded an attaché within the walls of the embassy, the French government refused to surrender the criminal, as much upon the general ground that the fiction of exterritoriality could not be stretched to embrace his case, as upon the more special one, which was also taken up, that by calling in the assistance of the police the immunities of the house had been waived, if any in fact existed in the particular instance[1]. It does not appear whether the French government, in denying that the fiction of exterritoriality applied to the case in question, intended to imply the assertion of a right to do all acts necessary to give effect to its jurisdiction, and whether consequently it claimed that it would have had a right to enter the ambassador's house to arrest the criminal, or whether it merely meant that, if the criminal had been kept within the embassy and the ambassador had refused to give him up, a violation of the local jurisdiction would have taken place for which the appropriate remedy would have been a demand addressed to the Russian government to recall their ambassador and to surrender the accused person. Whether or not, however, the immunities of the house of a diplomatic agent protect it in all cases from entry by the local authorities, and if so whatever may be the most appropriate means for enforcing jurisdiction, it is difficult to resist the belief that there are cases in which the

[1] Dana, note to Wheaton, No. 129; Calvo, §§ 569-71. The latter writer is opposed to so large an assertion of the privileges of an ambassador's house as is found in most books. His opinion, as he was himself for some time minister at Paris, is peculiarly valuable on the point.

territorial jurisdiction cannot be excluded by the immunities of the house. If an assault is committed within an embassy by one of two workmen upon the other, both being in casual employment, and both being subjects of the state to which the mission is accredited, it would be little less than absurd to allow the consequences of a fiction to be pushed so far as to render it even theoretically possible that the culprit, with the witnesses for and against him, should be sent before the courts in another country for a trivial matter in which the interests of that country are not even distantly touched.

In one class of cases the territorial jurisdiction has asserted itself clearly by a special usage. If the house of a diplomatic agent were really in a legal sense outside the territory of the state in which it is placed, a subject of that state committing a crime within the state territory and taking refuge in the minister's residence could only be claimed as of right by the authorities of his country if the surrender of persons accused of the crime laid to his charge were stipulated for in an extradition treaty. In Europe, however, it has been completely established that the house of a diplomatic agent gives no protection either to ordinary criminals, or to persons accused of crimes against the state[1]. A minister must refuse to harbour applicants for refuge, or if he allows them to enter he must give them up on demand. In

[1] Vattel, liv. iv. ch. ix. § 118; De Martens, Précis, § 220; Klüber, § 208; Phillimore, ii. §§ cciv–v; Bluntschli, § 200. Calvo (§ 585) still thinks that 'au milieu des troubles civils qui surviennent dans un pays, l'hôtel d'une légation puisse et doive même offrir un abri assuré aux hommes politiques qu'un danger de vie force à s'y réfugier momentanément.'

The European usage practically became fixed in the course of last century. The question was still open in 1726 when the Duke of Ripperda was taken by force from the house of the English ambassador at Madrid, with whom he had sought refuge; but by the time of Vattel it seems to have been settled that political offenders must be given up, though ordinary criminals might be sheltered; the right to receive the latter died gradually away with the growth of respect for public order, but De Martens, even in the later editions of his Précis, mentions it as being still recognised at some courts. For the details of the leading cases of the Duke of Ripperda and of Springer, a merchant accused of high treason, who took refuge in the English embassy at Stockholm in 1747, see De Martens, Causes Cél. i. 178, and ii. 52.

Central and Southern America matters are different. It is an instance of how large a margin of indefiniteness runs along the border of diplomatic privilege that the custom of granting asylum to political refugees in the houses of diplomatic and even of consular agents still exists in the Spanish-American Republics [1]. In 1870 the government of the United States suggested, without success, that the chief powers should combine in instructing their agents to refuse asylum for the future; but during the Chilean civil war of 1891 no less than eighty refugees were received into the American legation. A large number were given asylum by the ministers of several other states [2].

[1] Like reasons with those, which accounted for the maintenance of the custom of asylum in the South American Republics, revived it in Spain for a considerable time. During the Christino-Carlist war and the various subsequent troubles, to grant asylum was rather thought obligatory than permissible. Every politician and soldier had an interest in the continuance of a practice to the existence of which he might before long owe his life. The most notable example occurred in 1841, when the Danish Minister in Madrid, in sheltering a large number of conspirators against the government, and probably the person, of Espartero, rendered so essential a service to the party to which they belonged, that when it afterwards succeeded in grasping power, it expressed its gratitude by conferring on him the title of 'Baron del Asilo.' Asylum was granted at Madrid in 1848, in the houses of several of the ministers of Foreign Powers; and the practice was resumed during the revolutionary period between 1865 and 1875. In 1873 Marshal Serrano was sheltered by the British minister, and the minister of the United States promised asylum to another person, who however was not driven to claim fulfilment of the promise. An isolated instance occurred in Greece in 1862, when during the revolution of that date refuge was granted to persons in danger of their lives.

[2] Mr. Moore, in a series of exhaustive papers in the New York Political Science Quarterly (vol. vii, Nos. 1, 2, and 3), has accumulated a very large number of instances in which asylum has been granted in the various Central and South American States. The exercise of the custom seems generally to have been accompanied with more or less of friction between the foreign diplomatic agent and the local government.

Mr. Moore, while holding that the practice of giving asylum is not sanctioned by international law, thinks that I have asserted 'in terms too sweeping and absolute that the right to grant such asylum has long ceased to be recognised in European countries.' I do not however feel, after careful reconsideration of the matter by the light of Mr. Moore's able papers, that any modification of the opinion that I have expressed is called for. The exceptional survival or recrudescence of the practice in Spain, and the isolated case of Greece in 1862, do not seem to me to be sufficient to impart vitality to the custom elsewhere.

PART II CHAP. IV

Mode in which the evidence of a diplomatic agent is obtained for the courts.

When a crime has been committed in the house of a diplomatic agent, or by a person in his employment, it may occur that his evidence or that of one of his family or suite is necessary for the purposes of justice. In such cases the state has no power to compel the person invested with immunity to give evidence, and still less to make him appear before the courts for the purpose of doing so. It is customary therefore for the minister of foreign affairs to apply to the diplomatic agent for the required depositions, and though the latter may in strictness refuse to make them himself, or to allow persons under his control to make them, it is the usage not to take advantage of the right. Generally the evidence wanted is taken before the secretary of legation or some official whom the minister consents to receive for the purpose. When so taken it is of course communicated to the court in writing. But where by the laws of the country evidence must be given orally before the court, and in the presence of the accused, it is proper for the minister or the member of the mission whose testimony is needed to submit himself for examination in the usual manner. In 1856, a homicide having been committed at Washington in presence of the Dutch minister, he was requested to appear and to give evidence in the matter. He refused; offering however to make a deposition in writing upon oath, if his government should consent to his doing so. As the Dutch government supported him in the course which he took, his evidence was not given, and the affair ended by his recall being demanded by the government of the United States[1].

Immunities from taxation.

The person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation. Otherwise he enjoys no exemption from taxes or duties as of right. By courtesy however, most, if not all, nations permit the entry free of duty of goods intended for his private use[2].

[1] Calvo, §§ 583–4 and n.; Halleck, i. 294.

[2] Calvo, § 594; Bluntschli, § 222; Halleck, i. 298. But for the intolerance of religious feeling, which has always been ready to repress freedom at any cost of inconsistency, it would never have been necessary whether with or

Domicil of a diplomatic agent.

Two particulars only remain to be noted with respect to the legal position of a diplomatic agent. Of these the first is that he preserves his domicil in his own country, as a natural consequence of the fact that his functions are determinable at the will of his sovereign, and that he has therefore no intention of residence.

His power to legalise acts done according to the forms prescribed in his own country.

The second is that notwithstanding the general rule that acts intended to have legal effect, in order to have such effect in the country where they are done, must conform to the territorial law, a diplomatic agent may legalise wills and other unilateral acts, and contracts, including perhaps contracts of marriage, made by or between members of his suite. It is said by some writers that a diplomatic agent may also legalise marriages between subjects of his state, other than members of his suite, if specially authorised to do so by his sovereign; but this view is unquestionably erroneous. There is no general custom which places a state under an obligation to recognise such marriages, and in some states they certainly will not be recognised [1].

without the assumption of exterritoriality to lay down expressly that a diplomatic agent has a right to the exercise of his religion in a chapel within his own house, provided that he does not provoke attention by the use of bells. As the local authorities have no right of entry, except for the reasons mentioned above, they ought to be officially ignorant of everything occurring in the house, so long as it is not accompanied by external manifestations. Most writers are, however, careful to state that the privilege exists. Its possession is now happily too much a matter of course to make it worth while to notice it in the text.

[1] The French courts would probably recognise the marriage of any two foreigners performed in the Embassy of their country; but Germany, for example, refuses to admit the validity of a marriage between two foreigners who are not members of the ambassadorial suite.

Even in countries where the marriage of two foreigners may be permitted, it is to be remembered that the marriage of a subject of the state with a foreigner in the house of the ambassador of the state to which the foreigner belongs, and according to the laws of the state, would not generally be held to be good, and in some cases decisions to this effect have been given. See for example Morgan *v.* French, in which the Tribunal Civil de la Seine pronounced null a marriage between an Englishman and a French subject, performed at the English Embassy (Journal de Droit Int. Privé, 1874, p. 72), and the case of a marriage between an Austrian and an Englishwoman, celebrated in English form at the English Embassy in Vienna, which was held null by the Supreme Court of Austria, 17th Aug. 1880

PART II CHAP. IV

Immunities of armed forces of the state.

The law with respect to the immunities of armed forces of the state in foreign territory has undergone so much change, or at least has become so much hardened in a particular direction, with the progress of time, and so much confusion might be imported into it, at any rate in England, by insufficient attention to the date of precedents and authorities, that the safest way of approaching the subject will be by sketching its history.

History of opinion and usage.

Either from oversight or, as perhaps is more probable, because the exercise of exclusive control by military and naval officers not only over the internal economy of the forces under their command, but over them as against external jurisdiction, was formerly too much taken for granted to be worth mentioning, the older writers on international law rarely give any attention to the matter. Zouche is the only jurist of the seventeenth century who notices it, and the paragraph which he devotes to the immunities of armies and fleets is scarcely sufficient to give a clear idea of his views as to their extent[1]. Casaregis, in the

(note to Gillespie's translation of Von Bar, p. 493). Belgium allows the marriage of a Belgian man with a foreign woman in a foreign country on express permission being obtained from the Minister of Foreign Affairs, but it does not recognise a like marriage in Belgium; Germany, while rigidly maintaining her own territorial jurisdiction, permits marriage by her diplomatic agent between foreigners and German subjects of either sex. [It should be noted that under the Civil Code of the German Empire (Jan. 1, 1900) domicil is no longer the ruling principle, as regards *status* and capacity, its place having been taken by nationality or allegiance.] Practice in the matter is in a state of discreditable confusion and uncertainty, the effects of which have been painfully felt by not a few women. On the whole subject cf. Lawrence, Commentaire, iii. 357–78 and Stocquardt in the Rev. de Dr. Int. 1888, pp. 260–300. [See also the same author's most recent summary of the Continental Laws of Marriage in his studies on Private International Law (1900), and Rev. de Dr. Int. 1899, pp. 357–8, for a suggested international codification of the conditions necessary to give validity to marriages contracted abroad.]

[1] Dissertation concerning the punishment of Ambassadors, Trans. by D. J. p. 26 (1717). [The original was published in 1657.] It is curious and interesting to find, as appears from a quotation in Zouche (1590–1661), that the fiction of the exterritoriality of an army had come into existence, and seems to have been recognised, in the time of Baldus (circa 1400). Bartolus (1313–1356) also said, according to Casaregis (circa 1670), 'quod licet quis non habet territorium si tamen habeat potestatem in certas personas, propter illas personas dicitur habere territorium.'

eighteenth century, concedes exclusive jurisdiction to a sovereign over the persons composing his naval and military forces and over his ships, wherever they may be, on the ground that the exercise of such jurisdiction is necessary to the existence of a fleet or army [1]. Lampredi, on the other hand, asserts it to be the admitted doctrine that an army in foreign territory is subject to the local jurisdiction in all matters unconnected with military command; he maintains that the crew of a vessel of war in a foreign harbour is subjected to the same extent as land forces to the jurisdiction of the sovereign of the port, and that the vessel itself is part of his territory; he expressly adds that a criminal who has found refuge on board can be taken out of the ship by force. Such jurisdiction as he permits to be exercised on behalf of the sovereign of the military or naval force he rests, like Casaregis, upon the necessities of military command [2]. In 1794

[1] Discursus de Commercio, 136, 9: 'Quum vero de exercitu, vel bellica classe, seu militaribus navibus, agitur, tunc tota jurisdictio super exercitum vel classem residet penes principem, aut ejus ducem, quamvis exercitus vel bellica classis existat super alieno territorio vel mari, quia ex belli consuetudine illa jurisdictio quam habet rex, seu princeps, aut illorum duces super exercitum prorogatur de suo ad aliorum territorium; tum quia absque tali jurisdictione, exercitus vel classis conservari et consistere non posset tum etiam ex aliis rationibus de quibus apud infra scriptos doctores;' of whom he gives a long list. 'Quamobrem omnes et quoscunque, militiae suae, vel terrestris, vel maritimae, milites et homines, etiam in alieno territorio delinquentes, princeps, vel illius dux, qualibet poena, etiam capitali plectere valet, vel quoscunque alios jurisdictionis actus erga eos exercere, ac si in proprio territorio maneret.'

Upon the above passages Sir A. Cockburn, in his Memorandum appended to the Report of the Fugitive Slave Commission, 1876 (p. xxxiii), argues that there is in it 'no express assertion as to exterritoriality in the sense in which that term is now used, namely, as excluding the local jurisdiction.' There is no doubt no such express assertion, but exclusive jurisdiction is necessarily implied in the language which gives a sovereign the same jurisdiction over his troops and naval forces in foreign countries as he has over them at home. In his own dominions he does not admit concurrent jurisdiction.

[2] The illusion of exterritoriality, he says, 'sparisce subito chè si rifletta che questo esercizio di giurisdizione non è fondato sul gius del territorio, ma sulla natura del comando militare, il quale s'intende restare intatto e nel suo pieno vigore ogni volta che il sovrano del luogo si contenta di ricevere una nave di guerra come tale. . . . Escluso questo comando militare, che per la qualità e natura della nave da guerra resta intatto, per ogni altro riguardo e la nave s'intende territorio del sovrano del porto, e gli uomini di essa

a similar view was taken by the Attorney-General of the United States. An English sloop of war had entered the harbour of Newport in Rhode Island. While she was there it was reported that several American citizens were detained on board against their will. The General Assembly of the State having taken the matter into consideration resolved that five persons should go on board to ascertain whether the alleged facts were true, and the captain, who was on shore, acting apparently under some personal constraint, furnished the deputation with a letter requiring the officer in temporary command to afford them every assistance. On an investigation being made on board it was found that six men were Americans. These were discharged by order of the captain, and the vessel was then allowed to take in provisions, of which she was in want, and which she had until then been prevented from obtaining. The British Minister at Washington complained that 'the insult' was 'unparalleled, since the measures pursued were directly contrary to the principles which in all civilised states regulate cases of this nature; for if on the arrival of a ship of war in a European port, information be given that the ship of war has on board subjects of the sovereign of that port, application is made to the officer commanding her, who himself conducts the investigation, and if he discovers that any subjects be on board of his vessel, he immediately releases them; but if he be not satisfied that there be any such, his declaration to that effect, on his word of honour, is universally credited.' The question being referred to the Attorney-General by his government, he says

sottoposti alla sua giurisdizione. Lo che è tanto vero che è dottrina comune che anche un esercito straniero, che passa e dimora sopra l'altrui territorio, è sottoposto alla giurisdizione del luogo, escluso l'esercizio del comando militare, che resta intatto appresso il suo comandante per il consenso tacito del sovrano medesimo, il quale avendo concesso il passo o la dimora all' esercito forestiero s'intende aver concesso anche il comando militare, senza di cui esercito esser non può per la nota regola di ragione che concesso un diritto, s'intende concesso tutto ciò senza cui quel diritto esercitare non si potrebbe.' Del Commercio dei Popoli Neutrali in Tempo di Guerra, p^te i^ma, § x. Azuni (pt. i. ch. iii. art. vii) appropriates the language of Lampredi without alteration.

that 'the laws of nations invest the commander of a foreign ship of war with no exemption from the jurisdiction of the country into which he comes,' and 'conceives that a writ of habeas corpus might be legally awarded in such a case, although the respect due to the foreign sovereign may require that a clear case be made out before the writ may be directed to issue[1].' A few years later an opinion to the same effect was given by a subsequent Attorney-General. In a case which arose in connexion with the English packet Chesterfield he advised that 'it is lawful to serve civil or criminal process upon a person on board a British ship of war lying in the harbour of New York;' in coming to this conclusion he relied partly upon general considerations and partly upon an Act of Congress, of June 5, 1794, which enacted 'that in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of the subjects or citizens of such prince or state, it shall be lawful for the President of the United States to employ such part of the land and naval force of the United States or of the militia thereof as shall be judged necessary[2].' It is said that the same doctrine

[1] Report of the Commission on Fugitive Slaves, p. lxxiii. Mr. Rothery argues with reference to this case that the British minister 'nowhere complains of the illegal character of these proceedings, or that the local authorities had no right to demand the delivery up of American subjects held on board against their will; there is here no claim of exterritoriality; no pretence that a ship of war is exempt from interference by the local authorities.' The word 'illegal' is no doubt not used; but it is not commonly used in diplomatic notes. In stating a custom as universal, and stigmatising action at variance with it as being contrary to the 'principles' guiding nations in such matters, the minister clearly indicates that the measures complained of were in his view illegal. In his opinion the law probably was this:—The captain of a ship of war has no right to keep subjects of a foreign state on board against their will within the territorial waters of their own country; the authorities of the state have no right to enter the ship or to employ measures of constraint; if they have reason to believe that subjects of the state are improperly kept on board, and they are unable to procure their release from the commander, their remedy is by complaint to his sovereign.

[2] Report of Commission on Fugitive Slaves, p. lxxv. The act must of

as that laid down by the Attorney-General of the United States in 1794 would probably be held by the courts of Great Britain[1]; it is certain that the pretension to search vessels of war, so long made by England, was incompatible with an acknowledgment that they possess a territorial character; and Lord Stowell, on being consulted by his government in 1820, with reference to the case of an Englishman who took refuge on board a man of war at Callao after escaping from prison, into which he had been thrown for political reasons, answers the question, 'whether any British subject coming on board one of his Majesty's ships of war in a foreign port escaping from civil or criminal process in such port, and from the jurisdiction of the state within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the kingdom of Great Britain and Ireland,' by saying that he had 'no hesitation in declaring that he knew of no such right of protection belonging to the British flag, and that he thought such a pretension unfounded in point of principle, injurious to the rights of other countries, and inconsistent with those of our own;' and added that 'the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking' the person whose case was under discussion 'out of the British vessel[2].'

So far the opinion of Casaregis and the statement made by the British minister at Washington in 1794 with respect to the then custom of nations has to be weighed against the opinion of Lampredi and the views which, there is strong reason to believe, were predominant in the United States and England. But the doctrines held in the United States have changed, and the practice of England has not been uniform. In 1810 Chief Justice Marshall took occasion, in delivering judgment in a case turning upon the competence of the judicial tribunals of a state

course be read subject to whatever may be the ascertained rules of international law from time to time.

[1] Phillimore, i. § cccxlvi.

[2] Report of Commission on Fugitive Slaves, p lxxvi.

to entertain a question as to the title to or ownership of a public armed ship in the service of a foreign country, to lay down the principles of law which in the opinion of the Supreme Court were applicable to a vessel of war in the territorial waters of another state. According to him the 'purposes for which a passage is granted' to the troops or ships of a foreign power 'would be defeated, and a portion of the military force of a foreign, independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force' unless the exercise of jurisdiction were abandoned by the territorial sovereign; 'the grant of a free passage' or the permission to enter ports 'therefore implies a waiver of all jurisdiction.' The immunity thus conceded rested no doubt upon a consent to the usage, which might be withdrawn by any particular state, but it could only be withdrawn by notice given before the entry of the force over which it might be attempted to exercise jurisdiction, and 'certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.' The doctrine is afterwards qualified by the proviso that a ship entering the ports of a foreign power shall 'demean herself in a friendly manner[1].' The expression is somewhat vague, and may possibly leave a vessel subject to the ordinary

[1] The Schooner Exchange *v.* M'Faddon, vii Cranch, 141–6. The view taken by Justice Story (La Santissima Trinidad, vii Wheaton, 353) of the intention of Chief Justice Marshall seems to be different from that which is taken above. It is to be noticed, however, that in paraphrasing the language of the Chief Justice he uses the expression 'according to law and in a friendly manner' instead of the words 'in a friendly manner' alone, thus wholly changing the effect of the clause. As also he puts sovereigns and public vessels of war on the same footing, he either gives larger immunities to ships than he would appear at first sight to be willing to concede, or he rejects the universally received doctrine as to the immunities of sovereigns. Wheaton (pt. ii. ch. ii. § 9) evidently regards the language of the Chief Justice as referring only to 'acts of hostility,' and as merely sanctioning the use by 'the local tribunals and authorities' of such 'measures of self-defence as the security of the state may require.'

jurisdiction of the courts in so far as a state act of which it is the vehicle renders it obnoxious to the territorial law. Such a construction would however be forced, and in any case the vessel is evidently regarded as covering the persons on board her from both civil and criminal jurisdiction in respect of all matters affecting them only as individuals. The opinion of Wheaton and Halleck concurs with that of Chief Justice Marshall, upon whose judgment indeed it may be regarded as founded. Dr. Woolsey goes further, and adopts the doctrine of exterritoriality, which was also asserted by Mr. Cushing, when Attorney-General of the United States. In 1856 a vessel called the Sitka, captured by the English from the Russians, entered the harbour of San Francisco with a prize crew and some Russian prisoners on board. Application being made to the Californian courts on behalf of the latter a writ of habeas corpus was issued, upon service of which the Sitka set sail without obeying its order. The government of the United States being doubtful whether a cause of complaint had arisen against England, referred the question to their Attorney-General, who advised that the courts of the United States, have 'adopted unequivocally the doctrine that a public ship of war of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign. . . . The ship' which the captain of the Sitka 'commanded was a part of the territory of his country; it was threatened with invasion from the local courts; and perhaps it was not only lawful, but highly discreet, in him to depart and avoid unprofitable controversy[1].' Turning to England, it is no doubt true that under the Customs Acts foreign ships of war are liable to be searched, and that it has been the practice to surrender slaves who have taken refuge on board English war-vessels lying in the waters of the states where slavery exists

[1] Wheaton, Elem. pt. ii. ch. ii. § 9; Halleck, i. 176; Woolsey, § 58 and 68; Report of Commission on Fugitive Slaves, p. xl.

under sanction of the territorial law; but, on the other hand, political refugees have often been received on board British men of war, the Admiralty Instructions inform officers in command that 'during political disturbances or popular tumults refuge may be afforded to persons flying from immediate personal danger,' and in a letter, written by order of Lord Palmerston in 1849 with reference to the occurrences then taking place in Naples and Sicily, it is stated that 'it would not be right to receive and harbour on board a British ship of war any person flying from justice on a criminal charge, or who was escaping from the sentence of a court of law; but a British ship of war has always and everywhere been considered as a safe place of refuge for persons of whatever country or party who have sought shelter under the British flag from persecution on account of their political conduct or opinions.' As persons who are in danger of their life because of their political acts are usually looked upon as criminals by the successful party in the state, the distinction here drawn is clearly one of mere propriety. In law, the right of asylum is upheld. Again, the most recent instructions with regard to slaves assert theoretically the right of granting asylum, and leave a very wide discretion to commanding officers as to its exercise. Finally, so far as England is concerned, Sir R. Phillimore, Sir Travers Twiss, Sir W. Harcourt, and Mr. Bernard are agreed in holding that the laws of a state cannot be forcibly executed on board a foreign vessel of war lying in its waters unless by the order or permission of the commanding officer[1].

There not being indications that opinion has varied in other countries to the same extent as in England and the United

[1] 16 and 17 Vict. c. 107, sect. 52; Mundy's H.M.S. *Hannibal* at Palermo, p. 76; Opinion of Sir R. Phillimore and Mr. Bernard, Rep. of Fugitive Slave Commission, p. xxvi; Letter of Historicus to the *Times* of Nov. 4, 1875, quoted ib. p. lxii; Law Magazine and Review, No. ccxix. The majority of the Fugitive Slave Commission appear to have adopted views which would reduce the immunities of vessels of war to a shadow; but in the special matter of International Law their authority cannot be regarded as equal to that of the four jurists above mentioned.

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States, the views at present entertained on the continent of Europe may be dismissed more quickly. In France the territoriality of a vessel of war is distinctly asserted by most writers, and the practice of the courts with regard to mercantile ships raises a strong presumption that public vessels would be considered by them to possess immunity in the highest degree[1]. In Germany and Italy it appears, from information given by the governments of those countries to the English Commission on Fugitive Slaves, that a ship of war is regarded as part of the national territory, and by the latter state it is expressly declared that 'a slave who might take refuge on an Italian ship, considered by the government as a continuance of the national territory, whether on the high seas or in territorial waters, must be considered as perfectly free.' The works of MM. Heffter and Bluntschli show that the jurists of Germany are in agreement with their government. That the doctrine accepted in Spain is similar may be inferred from its occurrence in the text-book which is used by royal order in the naval academies[2].

Immunities of public vessels.

From what has been said it is clear that there is now a great preponderance of authority in favour of the view that a vessel of war in foreign waters is to be regarded as not subject to the

[1] Ortolan, who was himself a naval officer, says 'la coutume internationale est constante; ces navires restent régis uniquement par la souveraineté de leur pays; les lois, les autorités et les jurisdictions de l'état dans les eaux duquel ils sont mouillés leur restent étrangères; ils n'ont avec cet état que des relations internationales, par la voie des fonctionnaires de la localité compétents pour de pareilles relations' (Dip. de la Mer, liv. ii. ch. x). Fœlix, liv. ii. tit. ix. ch. i. § 544, in effect says that a vessel of war remains 'a continuation of the territory' when in foreign waters. See also Hautefeuille, tit. vi. ch. i. sect. 1.

[2] Report of the Fugitive Slave Commission, p. viii. Heffter, § 79, dismisses the subject in a few words, but the scope of his views may be judged from his references; Bluntschli, § 321—this section must be read by the light of the previous sections on exterritoriality; Negrin, Tratado de Derecho Internacional Maritimo, tit. i. cap. iv. See also Riquelme, i. 228. Fiore (§§ 532–9) in some respects reduces the privileges of a man of war below the point at which they are supposed to stand by the majority of the Fugitive Slave Commission. He would give a right, in certain circumstances, of arresting the officer commanding on his own quarterdeck.

territorial jurisdiction. This being the case the law may probably be stated as follows:—

A vessel of war, or other public vessel of the state, when in foreign waters is exempt from the territorial jurisdiction; but her crew and other persons on board of her cannot ignore the laws of the country in which she is lying, as if she constituted a territorial enclave. On the contrary, those laws must as a general rule be respected. Exceptions to this obligation exist, in the case of acts beginning and ending on board the ship and taking no effect externally to her, firstly in all matters in which the economy of the ship or the relations of persons on board to each other are exclusively touched[1], and secondly to the extent that any special custom derogating from the territorial law may have been established,—perhaps also in so far as the territorial law is contrary to what may be called the public policy of the civilised world. In the case of acts done on board the vessel, which take effect externally to her, the range of exception is narrower. The territorial law, including administrative rules, such as quarantine regulations and rules of the port, must be respected, to the exception, it is probable, of instances only in which there is a special custom to the contrary. When persons on board a vessel protected by the immunity under consideration fail to respect the territorial law within proper limits the aggrieved state must as a rule apply for redress to the government of the country to which the vessel belongs,—all ordinary remedies for, or restraints upon, the commission by persons so protected of wrongful acts affecting the territory of a state being forbidden. In extreme cases, however, as where the peace of a country is seriously threatened or its sovereignty is infringed, measures may be taken against the ship itself, analogous to those which in like circumstances may be taken against a sovereign; it may be summarily

[1] The case, which however would be extremely rare on board a ship of war, of a crime committed by a subject of the state within which the vessel is lying against a fellow-subject, would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal.

ordered out of the territory, and it may if necessary be forcibly expelled.

Thus—to illustrate some of the foregoing doctrines—under the general rule of respect for the laws of a state it is wrong for a ship to harbour a criminal or a person charged with non-political crimes. If, however, such a person succeeds in getting on board, and is afforded refuge, he cannot be taken out of the vessel. No entry can be made upon her for any purpose whatever. His surrender, which is required by due respect for the territorial law, must be obtained diplomatically. In like manner, if an offence is committed on board which takes effect externally, and the captain refuses to make reparation—if, for example, he were to refuse to give up or to punish a person who while within the vessel had shot another person outside,—application for redress must be made to the government to which the ship belongs. If, on the other hand, the captain of a vessel were to allow political refugees to maintain communication with the shore and to make the ship a focus of intrigue, or if he were to send a party of marines to arrest a deserter, an extreme case would arise, in which the imminence of danger in the one instance, and in the other the disregard of the sovereign rights of the state, would justify the exceptional measure of expulsion. The case is again different if a political refugee is granted simple hospitality. The right to protect him has been acquired by custom. He ought not to be sought out or invited, but if he appears at the side of the ship and asks admittance he need not be turned away, and so long as he is innoxious the territorial government has no right either to demand his surrender or to expel the ship on account of his reception[1]. It is a more delicate matter to indicate cases in

[1] Something more may be permitted, or may even be due, in the case of the chiefs, or of prominent members, of a government overturned by revolution. They retain a certain odour of legitimacy. In 1848 the admiral commanding the British Mediterranean squadron detached a vessel to take the Pope on board in case the refuge were needed; and in 1862, on the outbreak of revolution in Greece, a British frigate escorted a Greek man of

which the local law may be disregarded on the ground of its repugnance to the public policy of the civilised world. It may indeed be doubtful whether any municipal law now existing in civilised or semi-civilised states has been so settled to be repugnant to public policy that a fair right to disregard it has arisen. It can only be said that it may be open to argument whether the reception of slaves might not be so justified.

When acts are done on board a ship which take effect outside it, and which if done on board an unprivileged vessel would give a right of action in the civil tribunals, proceedings in the form of a suit may perhaps be taken, provided that the court is able and willing to sit as a mere court of enquiry, and provided consequently that no attempt is made to enforce the judgment. In at least one case the British Admiralty has paid damages awarded by a foreign court against the captain of a ship of war in respect of a collision between his vessel and a merchant vessel in the port. It must, however, be clearly understood that the judgment of the court can have no operative force; the proceedings taken can only be a means of establishing the facts which have occurred; and the judgment given can only be used in support of a claim diplomatically urged when its justice is not voluntarily recognised by the foreign government[1].

war, with the King and Queen on board, out of Greek waters and received them so soon as some slight danger of mutiny appeared. [In September, 1898, Kang-yu-Wei the Chinese Reformer, who had escaped from Tien-tsin in a steamer belonging to Messrs. Jardine Mathieson, was placed on board a P. and O. at Wu-Sung and thence escorted to Hong-Kong by H. M. S. *Benaventure*.]

[1] As the language of Lord Stowell in the case of the Prinz Frederik (ii Dodson, 484) suggests that under his guidance the English Courts might have asserted jurisdiction over a ship of war, to which salvage services have been rendered, for remuneration in respect of such services, and as, in 1873, Sir R. Phillimore, in the case of the Charkieh (L. R. iv Admiralty and Ecclesiastical cases, pp. 93, 96, expressed a strong doubt upon the point, and at any rate was 'disposed' to hold that 'within the ebb and flow of the sea the obligatio ex quasi contractu attaches jure gentium upon the ship to which the service has been rendered,' it may be worth while to notice that in a more recent case the latter judge decided that proceedings for salvage could not be taken against a foreign public vessel. In January, 1879, the United States frigate Constitution, laden with machinery which was

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The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew she is merely property; if members of her crew go outside the ship or her tenders or boats they are liable in every respect to the territorial jurisdiction. Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his state. Possessing his ship, in which he is not only protected, but in which he has entire freedom of movement, he lies under no necessity of exposing himself to the exercise of the jurisdiction of the country, and if he does so voluntarily he may fairly be expected to take the consequences of his act.

Immunities of military forces.

Military forces enter the territory of a state in amity with that to which they belong, either when crossing to and fro between the main part of their country and an isolated piece of it, or as allies passing through for the purposes of a campaign, or furnishing garrisons for protection. In cases of the former kind, the passage of soldiers being frequent, it is usual to conclude conventions, specifying the line of road to be followed by them, and regulating their transit so as to make it as little

being taken back to New York from the Paris Exhibition at the expense of the American government, went aground upon the English coast near Swanage. Assistance was rendered by a tug; and a disagreement having taken place between its owner and the agents of the American government as to the amount of the remuneration to which the former was fairly entitled, application was made for a warrant to issue for the arrest of the Constitution and her cargo. The American government objected to the exercise of jurisdiction by the court; the objection was supported by counsel on behalf of the crown; and the application was refused on the ground that the vessel 'being a war frigate of the United States navy, and having on board a cargo for national purposes, was not amenable to the civil jurisdiction of this country.' The Constitution, L. R. iv P. D. 156. The principle upon which this case was decided does not conflict with that of the judgment in the case of the Newbattle (L. R. x P. D. 33), where a foreign government was itself the plaintiff. In this the principle of the King of Spain *v.* Hallet and Widder was simply reaffirmed. Cf. antea, p. 170 n.

onerous as possible to the population among whom they are. Under such conventions offences committed by soldiers against the inhabitants are dealt with by the military authorities of the state to which the former belong; and as their general object in other respects is simply regulatory of details, it is not necessary to look upon them as intended in any respect to modify the rights of jurisdiction possessed by the parties to them respectively[1]. There can be no question that the concession of jurisdiction over passing troops to the local authorities would be extremely inconvenient; and it is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offences committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow of the case being watched. The existence of a double jurisdiction in a foreign country being scarcely compatible with the discipline of an army, it is evident that there would be some difficulty in carrying out any other arrangement[2].

[1] See for example the Etappen Convention between Prussia and Hanover in 1816, or that between Prussia and Brunswick in 1835 (De Martens, Nouv. Rec. iv. 321, and Nouv. Rec. Gén. vii. i. 60).

[2] Von Bar (Das Internationale Privat- und Strafrecht, § 145) thinks that 'Verbrechen und Vergehen welche von den fremden Soldaten gegen Cameraden und Vorgesetzte oder gegen die Heeresordnung oder gegen den eigenen Staat begangen werden, fallen vorzugsweise der inneren Disciplin anheim und sind, da die Disciplinargewalt einem fremden Heere, welchem man den Eintritt in das Staatsgebiet erlaubt, nothwendig zugestanden werden muss, lediglich den Strafgesetzen und Gerichten des Staats unterworfen, dem die Truppen angehören. Bei Verbrechen dagegen, welche entweder andere nicht zur fremden Armee gehörige Personen oder die öffentliche Ruhe gefährden, kann die Strafgewalt des Staats, in dessen Gebiete die Truppen sich befinden, als ipso jure ausgeschlossen wohl nicht angesehen werden: es wird daher in Ermangelung eines besondern Vertrags die Prävention entscheiden.' Fiore (§§ 513–14) considers that within the lines of the army the jurisdiction of the country reigns to which the army belongs; but that any member of the force found outside its lines may be subjected to the local jurisdiction.

Reasons for discarding the fiction of exterritoriality.

If the view that has been presented of the extent and nature of the immunities which have been hitherto discussed be correct, it is clear that the fiction of exterritoriality is not needed to explain them, and even that its use is inconvenient. It is not needed, because the immunities possessed by different persons and things can be accounted for by referring their origin to motives of simple convenience or necessity, and because there is a reasonable correspondence between their present extent and that which would be expected on the supposition of such an origin. The only immunities, in fact, upon the scope of which the fiction of exterritoriality has probably had much effect, are those of a vessel of war, which seem undoubtedly to owe some of the consolidation which they have received during the present century to its influence. The fiction is moreover inconvenient, because it gives a false notion of identity between immunities which are really distinct both in object and extent, and because no set of immunities fully corresponds with what is implied in the doctrine. Nothing in any case is gained by introducing the complexity of fiction when a practice can be sufficiently explained by simple reference to requirements of national life which have given rise to it; where the fiction fails even to correspond with usage, its adoption is indefensible.

Immunities of foreign public property other than public vessels of the state.

Besides public vessels of the state properly so called, other vessels employed in the public service, and property possessed by the state within foreign jurisdiction, are exempted from the operation of the local sovereignty to the extent, but to the extent only, that is required for the service of the state owning such vessels or property. Thus to take an illustration from a case which, though municipal, was decided on the analogy of international law; a lien cannot be enforced upon a light ship, built for a state in a foreign country. It must be allowed to issue from the territory without impediment. But there its privileges end. Unlike a ship of war its efficiency is not interfered with by the exercise of local jurisdiction over the crew. The mercantile crew which navigates it can be replaced,

if necessary; and there is no reason why, if a crime is committed on board which interests the local authority, entry should not be made and the criminal apprehended, as in the case of an ordinary merchant ship. Practically immunity to this extent amounts to a complete immunity of property, whenever no question of jurisdiction over persons arises. If in a question with respect to property coming before the courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state[1].

Merchant vessels in the ports of a foreign state.

Merchant vessels lying in the ports of a foreign state enjoy a varying amount of immunity from the local jurisdiction by the practice of most, and perhaps of all, states, and there are some writers who pretend that the practice has been incorporated into international law. The notion that merchant vessels have a right to immunity is closely connected with the doctrine, which with reference to them will be discussed in a later chapter, that ships are floating portions of the country upon which they depend; and perhaps apart from this doctrine it would not have acquired the influence which it possesses; but the two are not inseparable, and so far as appears from a judgment of the Court of Cassation, which settled the French law upon the subject, the practice in France, where attention was probably first drawn to the matter, did not originally found itself on the doctrine. It may therefore be considered independently, and it will not lose by dissociation from an inadmissible fiction.

[1] Briggs *v.* Light Boats, xi Allen, 157. In England, the Courts have refused to allow the seizure by state creditors of bonds and moneys in London belonging to the Queen of Portugal as sovereign (De Haber *v.* the Queen of Portugal, xx Law Journal, Q. B. 488), and to order shells bought by the Mikado of Japan in Germany to be destroyed, because of an infringement of an English patent, on coming within English jurisdiction (Vavasseur *v.* Krupp, L. R. ix Ch. D. 351).

A claim of immunity for goods sent to an industrial exhibition has recently been made on two occasions in the French Courts, and has been refused by them. It is scarcely necessary to say that the claim is wholly destitute of foundation. It is not worth while to state the arguments in support of it; they can be found reported in Calvo, § 628.

According to the view held by the writers in question, the crew of a merchant ship lying in a foreign port is unlike a collection of isolated strangers travelling in the country; it is an organised body of men, governed internally in conformity with the laws of their state, enrolled under its control, and subordinated to an officer who is recognised by the public authority; although therefore the vessel which they occupy is not altogether a public vessel, yet it carries about a sort of atmosphere of the national government which still surrounds it when in the waters of another state[1]. Taking this view,

[1] Like views were urged by Mr. Webster in the correspondence on the Creole case. 'The rule of law,' he says, 'and the comity and practice of nations allow a merchant vessel coming into any open port of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent the jurisdiction and authority of the laws of her own country. A ship, say the publicists, though at anchor in a foreign harbour, possesses its jurisdiction and its laws. . . . It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider, or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must doubtless be answerable to the laws of the place. Nor if the master and crew while on board in such port break the peace of the community by the commission of crimes can exemption be claimed for them. But nevertheless the law of nations as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations in modern times do clearly hold that the jurisdiction and laws of a nation accompany her ships, not only over the high seas, but into ports and harbours, or wheresoever else they may be water borne, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof; and that to the extent of the exercise of this jurisdiction they are considered as parts of the territory of the nation itself.' He went on to argue that slaves, so long as they remained on board an American vessel in English waters, did not fall under the operation of English law. Mr. Webster to Lord Ashburton, Aug. 1, 1842, State Papers, 1843, lxi. 35. Mr. Webster would have been embarrassed if he had been compelled to prove the legal value of all that he above states to be law by reference to sufficient authority. The amount of authority which could be adduced in favour of his doctrine at that time was distinctly less than that by which it is now supported.

Wheaton, though not originally in favour of these views, is said to have subsequently adopted them [Elements, 3rd English edition, p. 151]; they are apparently thought by Halleck (i. 191) to be authoritative, and are broadly laid down as being so by Negrin (104). Massé (Droit Commercial, § 527) and Calvo (§§ 1110–11 and 1121) approve of the practice without seeming to

the French government and courts have concluded that 'there is a distinction between acts relating solely to the internal discipline of the vessel, or even crimes and lesser offences committed by one of the crew against another, when the peace of the port is not affected, on the one hand; and on the other, crimes or lesser offences committed upon or by persons not belonging to the crew, or even by members of it upon each other, provided in the latter case that the peace of the port is compromised.' In two instances it has been held by the superior courts that in cases of the former kind the local authorities have not jurisdiction, and in another, the court of Rennes having some doubt as to the applicability of the principle upon which the earlier cases were decided, the government, on being consulted, directed that the offender should be given into the custody of the authorities on board his own ship[1].

Many states profess to follow the example of France in their own ports; and in a considerable number of recent consular conventions it is stipulated that consuls shall have exclusive charge of the purely internal order of the merchant vessels of their nation, and that the local authorities shall only have a right of interference when either the peace or public order of the port or its neighbourhood is disturbed, or when persons other than the officers and crew of a ship are mixed up in the breach of order which is committed[2]. Practice however, even in France, is by no means consistent, and consular conventions seem occasionally to be subjected to very elastic interpretation. When the second mate of an American vessel lying in the port

regard it as strictly authoritative. It is difficult to combine Bluntschli's 320th with his 319th section. Heffter (§ 79), Twiss (i. § 159), and Phillimore (i. § cccxlviii) simply state the existing law.

[1] Ortolan, Dip. de la Mer, liv. ii. ch. x. and xiii, and Append., Annexe J.

[2] In the treaties of commerce between the United States and the Two Sicilies in 1855 (Nouv. Rec. Gén. xvi. i. 521) and between the Zollverein and Mexico in the same year (ib. xvi. ii. 265), and in some consular conventions, e.g. between Bolivia and Venezuela in 1883 (Nouv. Rec. Gén. 2e sér. xv. 762), consuls are given power to judge differences arising between masters and crews of vessels of their state 'as arbitrators.'

of Havre killed one sailor and wounded another, the Cour de Cassation delivered a judgment which in effect asserted that merchant vessels were fully under the local jurisdiction whenever the state saw fit to exercise it; and in the United States the Supreme Court has held that a local court rightly took cognizance of a case, in which one man was stabbed by another during an affray that occurred between decks on a Belgian vessel and was unknown outside, notwithstanding that a consular convention existed between Belgium and the United States under which the local authorities were forbidden to interfere except where disorder arose of such nature as to disturb tranquillity or public order on shore or in the port [1].

To whatever extent the view that merchant ships possess an immunity from the local jurisdiction is in course of imposing itself upon the conduct of states, it cannot as yet claim to be of compulsory international authority. It is far from being supported by the long continuance and generality of usage which, in the absence of consent, are needed to give legal value to a doctrine derogating from so fundamental a principle as is that of sovereignty. At the same time the numerous conventions, and the voluntary abstention from the exercise of jurisdiction which everywhere more or less prevails, point towards the proximate formation of a uniform custom which would be reasonable in the abstract, and singularly little open to practical objections.

Passing vessels.

There is the more reason for acceding to what may be called the French opinion as to the limits within which local jurisdiction over vessels lying in the ports of a country ought to be put in force, that its adoption would render the measure of jurisdiction in their case identical with that which must ultimately be agreed

[1] Case of the Tempest, Dalloz, Jurisprudence Générale, Année 1859, p. 92; Wildenhus' Case, U. S. Reps. cxx, p. 1.

The practice of the Courts of the United States, apart from consular conventions, seems to be to take cognizance of all cases except those involving acts of mere interior discipline of the vessel. Wharton, Digest, § 35 a.

upon as applicable to merchant vessels passing through territorial waters in the course of a voyage.

The position in which the latter ought to be placed has hitherto been little attended to, and few cases have arisen tending to define it; but with the constantly increasing traffic of ships questions are more and more likely to present themselves, and it would be convenient that the broad and obvious line of conduct which is marked out by the circumstances of the case should be followed by all nations in common. It would also be convenient that the amount of jurisdiction to be exercised by a state in its ports and in its territorial waters in general should be made the same under a practice or understanding sufficiently wide to become authoritative. There is no reason for any distinction between the immunities of a ship in the act of using its right of innocent passage, and of a ship at rest in the harbours of the state; and if there were any reason, it would still be difficult to settle the point at which a distinction should be made. Suppose, for example, a difference to be established between the extent of the jurisdiction to which a passing vessel and a vessel remaining within the territory, or entering a port, is subjected; is a vessel which from stress of weather casts anchor for a few hours in a bay within the legal limits of a port, though perhaps twenty miles from the actual harbour, to be brought within the fuller jurisdiction; and if not, in what is entering a port to consist?

Limits within which the territorial jurisdiction ought to be exercised over them.

Looking at the case of passing vessels by itself, there being at present no clear usage in the matter, a state must be held to preserve territorial jurisdiction, in so far as it may choose to exercise it, over the ships and the persons on board, as fully as over ships and persons within other parts of its territory[1]. At

[1] Casaregis, De Commercio, disc. 136. 1; Wolff, Jus Gent. cap. i. § 131; Lampredi, Pub. Jur. Theorem. pt. iii. cap. ii. § ix. 8; Wheaton, Elem. pt. ii. ch. iv. § 6; Heffter, § 75. Much learning on the subject of the sovereignty of a state over non-territorial waters, in its bearing on passing vessels, is to be found in the judgment in Reg. *v.* Keyn—Franconia Case—(L. R.

the same time it is evident that the interests of the state are confined to acts taking effect outside the ship. The state is interested in preventing its shore fisheries from being poached, in repressing smuggling, and in being able to punish reckless conduct endangering the lives of persons on shore, negligent navigation by which the death of persons in other ships or boats may have been caused, and crimes of violence committed by persons on board upon others outside; and not only is it interested in such cases, not only may it reasonably be unwilling to trust to justice being done with respect to them by another state, it is also more favourably placed for arriving at the truth when they occur, and consequently for administering justice, than the country to which the vessel belongs can be. On the other hand, the state is both indifferent to, and unfavourably placed for learning, what happens among a knot of foreigners so passing through her territory as not to come in contact with the population. To attempt to exercise jurisdiction in respect of acts producing no effect beyond the vessel, and not tending to do so [1], is of advantage to no one.

It seems then reasonable to conclude that states, besides exercising such jurisdiction as is necessary for their safety and for the fulfilment of their international duties, ought to reserve to themselves such ordinary jurisdiction as is necessary to maintain customs and other public regulations within their territorial waters, and to provide, both administratively and by way of

ii Exchequer Div. 63); but the case was decided adversely to the jurisdiction of the state upon grounds of municipal and not of international law. The statute 41 and 42 Vict. c. 73 (the Territorial Waters Jurisdiction Act, 1878), has since been enacted, which asserts sovereignty over British territorial waters, by conferring upon the Court of Queen's Bench, &c., jurisdiction in respect of acts done within a marine league of the shore, subject to the proviso that such jurisdiction shall only be exercised in England with the consent of a secretary of state, and in a Colony with the consent of the governor.

[1] Of course in the case of infectious disease the mere anchorage of a vessel in places where there is a risk of the disease spreading may be prevented, although nothing has been done, and nothing has occurred, actually producing effect beyond the vessel.

civil and criminal justice, for the safety of persons and property upon them and the adjacent coasts [1].

Freedom of a vessel entering a state from its jurisdiction in respect of acts done outside it by or upon its subjects.

A merchant vessel while on non-territorial waters being subject, as will be seen later [2], to the sovereignty of that country only to which she belongs, all acts done on board her while on such waters are cognizable primarily by the courts of her own state, unless they be acts of piracy [3]. The effects of this rule extend, as indeed is reasonable, to cases in which, after a crime has been committed by or upon a native of a country other than that to which the ship belongs, she enters a port of that state with the criminal on board. The territorial authorities will not interfere with his being kept in custody on board, nor with his being transferred to another vessel for conveyance to a place within the local jurisdiction of the sovereign to which the ship belongs [4].

How far a state can compel foreigners to help in maintaining the public safety.

The broad rule has already been mentioned that as an alien has not the privileges, so on the other hand he has not the responsibilities, attached to membership of the foreign political society in the territory of which he may happen to be. In return however for the protection which he receives, and the opportunities of profit or pleasure which he enjoys, he is liable

[1] The Institut de Droit International in 1894 expressed the view that 'Les crimes et délits commis à bord de navires étrangers de passage dans la mer territoriale par des personnes qui se trouvent à bord de ces navires, sur des personnes ou des choses à bord de ces mêmes navires, sont, comme tels, en dehors de la juridiction de l'état riverain, à moins qu'ils n'impliquent une violation des droits ou des intérêts de l'état riverain, ou de ses ressortissants ne faisant partie ni de l'équipage ni des passagers.'

[2] See postea, p. 253.

[3] See postea, p. 257.

[4] Ortolan, Dip. de la Mer, liv. ii. ch. viii; Twiss, i. 230. Some countries, e.g. the United States, maintain that the competent tribunals of the nation to which a vessel belongs have exclusive jurisdiction in respect of crimes committed on board her upon the high seas. Theoretically, however, a state has the right to attach whatever consequences it chooses, within its own territory, to acts of its subjects, wherever those acts may be done; and practically the maintenance of a right to more or less of concurrent jurisdiction offers in some cases the means of dealing with crime which might otherwise remain unpunished. Cf. postea, p. 255 n.; also Hall's Foreign Jurisdiction of the British Crown, p. 81 n., and p. 241, n. 2.

to a certain extent, at any rate in moments of emergency, to contribute by his personal service to the maintenance of order in the state from which he is deriving advantage, and in some circumstances it may even be permissible to require him to help in protecting it against external dangers.

During the civil war in the United States the British government showed itself willing that foreign countries should assume to themselves a very liberal measure of rights in this direction over its subjects. Lord Lyons was instructed 'that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the Militia or Police of the country or to contribute to the support of such establishments;' and though objection was afterwards taken to English subjects being compelled 'to serve in the armies in a civil war, where besides the ordinary incidents of battle they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern,' it was at the same time said that the government 'might well be content to leave British subjects voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicil, including, when imposed by the municipal law of such country, service in the Militia or National Guard, or Local Police, for the maintenance of internal peace and order, or even, to a limited extent, for the defence of the territory from foreign invasion[1].' The case of persons domiciled or at least temporarily settled in the country seems to have been the only one contemplated in these instructions, and it is not probable that the English government would have regarded persons, who could not be called residents in any sense of the word, as being affected by such extended liabilities. But whether the latter was the case or not, and whether if it were so, there is any sufficient reason for making a distinction between residents and sojourners, the concession made to local authority seems unnecessarily large. If it be once admitted

[1] Naturalisation Commission, Append. to the Report, 42.

that aliens may be enrolled in a militia independently of their own consent, or that they may be used for the defence of the territory from invasion by a civilised power, it becomes impossible to have any security that their lives will not be sacrificed in internal disturbances producing the effects pointed out by Lord Russell as objectionable, or in quarrels with other states for the sake of interests which may even be at variance with those of their own country. It is more reasonable, and more in accordance with general principle, to say, as is in effect said by M. Bluntschli[1], that—

1. It is not permissible to enrol aliens, except with their own consent, in a force intended to be used for ordinary national or political objects.

2. Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action.

3. They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilised nations[2].

[1] Le Droit International codifié, § 391.

[2] In some treaties the compulsory enrolment of foreign subjects in state forces liable to be used for other than police purposes is expressly guarded against. In the majority of recent commercial treaties the subjects of each of the contracting states are exempted from service in the army, militia, or national guard of the other party to the treaty. In the treaty of 1855 between the Zollverein and Mexico (Nouv. Rec. Gén. xvi. ii. 257) exemption of their respective subjects from forced military service is stipulated, 'mas no del de policia en los casos, en que para seguridad de las propriedades y personas fuere necesario su auxilio, y por solo el tiempo di esa urgente necesidad.' In some cases exemption from military service only is stipulated, perhaps leaving open the question of the extent to which foreigners may be used in case of internal disturbance.

[In May, 1894, the now defunct South African Republic made war against Malaboch, the paramount chief in Zoutspanberg. By no stretch of the imagination could it be contended that a savage invasion was threatened, but the Transvaal government forcibly 'commandeered' some twenty British subjects to join the local forces, and placed five others under arrest for refusing to serve, eventually sending them compulsorily to the front. This

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Crimes committed by foreigners in territory foreign to the state exercising jurisdiction.

The municipal law of the larger number of European countries enables the tribunals of the state to take cognizance of crimes committed by foreigners in foreign jurisdiction. Sometimes their competence is limited to cases in which the crime has been directed against the safety or high prerogatives of the state inflicting punishment, but it is sometimes extended over a greater or less number of crimes directed against individuals. In France foreigners are punished who, when in another country, have rendered themselves guilty of offences against the safety of the French state, of counterfeiting the state seal or coin having actual currency, and of forgery of paper money; they cannot however be proceeded against *par contumace*. In Belgium the law is identical; in Spain and Switzerland it is the same in principle, but differs somewhat in the list of punishable offences[1]. Greece includes offences committed abroad against Greek subjects. In Germany the tribunals take cognizance of all acts committed abroad by foreigners which would constitute high treason if done by subjects of the German state, as well as of coining, of forging bank notes and other state obligations, and of uttering false coin and notes or other instruments the forging of which brings the foreigner under the jurisdiction of the German courts. In Austria the tribunals can take cognizance of all crimes committed by foreigners in another state, provided that, except in the case of like crimes to those punishable by French law, an offer has

conduct was defended on the ground that British subjects were not exempt by treaty from military service—an exemption possessed by Germany, France, and other nations. Sir Henry Loch, the High Commissioner, does not seem to have been instructed to demand the release of the pressed men as of right; and though his negotiations with President Kruger resulted in an agreement not to 'commandeer' any more British subjects, the latter refused to ratify a draft convention by which Great Britain should be placed on an equality with other nations as regards exemption from military service. The abnormal relations then subsisting between the Transvaal Republic and this country are sufficient to deprive this incident of any value as a precedent.]

[1] [For the provisions of the draft Swiss penal code in this respect, see Rev. de Droit Int. 1897, vol. xxix. p. 33. The code still remains in suspended animation as an 'avant-projet.']

been first made to surrender the accused person to the state in which the crime has been committed, and has been refused by it. As the refusal of an offer to surrender is the equivalent of consent to the trial of a prisoner by the state making the offer, when a municipal law providing for his punishment exists there, the jurisdiction afterwards exercised does not take the form of a jurisdiction exercised as of right; the claim therefore to punish as of right is only made in the case of crimes against the safety or high prerogatives of the state. Under the new Italian penal code, foreigners are subjected to punishment for acts done outside Italy of the same nature as those punishable under the French code, provided that the penalty which can be inflicted amounts to imprisonment for more than five years; and it is also possible to proceed against a foreigner for such offences committed outside Italian jurisdiction to the prejudice of Italians as can be punished with imprisonment of not less than three years, as well as for certain offences directed against foreigners, provided that extradition shall have been offered to, and refused by, the government of the state within which the act has been done. In the Netherlands the list of punishable crimes, besides those contemplated by French law, includes murder, arson, burglary, and forgery of bills of exchange. In Sweden and Norway proceedings may be taken against any person accused of a crime against the state, or Norwegian subjects, or foreigners on board Norwegian vessels, if the king orders the prosecution. Finally, in Russia foreigners can be punished for taking part in plots against the existing government, the emperor, or the imperial family, and for acts directed against 'the rights of person or property of Russian subjects[1].'

[1] Fœlix, liv. ii. tit. ix. ch. iii; Strafgesetzbuch für das Deutsche Reich, einleitende Bestimmungen; Progetto del Codice Penale del Regno d'Italia, p. 263; Fiore, Délits commis à l'étranger, Rev. de Droit Int. xi. 302; Von Bar, § 138. Fœlix gives the older authorities for and against the validity of the laws in question, but without stating his own opinion. Dr. Woolsey (§ 76) says 'that states are far from universally admitting the territoriality of crime;' he adds that 'the principle' of its territoriality 'is not founded on reason, and that, as intercourse grows closer in the world, nations will

Whether laws of this nature are good internationally; whether, in other words, they can be enforced adversely to a state which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported. Putting aside the theory of the non-territoriality of crime as one which unquestionably is not at present accepted either universally or so generally as to be in a sense authoritative, it would seem that their theoretical justification, as against an objecting country, if any is alleged at all, must be that the exclusive territorial jurisdiction of a state gives complete control over all foreigners, not protected by special immunities, while they remain on its soil. But to assert that this right of jurisdiction covers acts done before the arrival of the foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other states as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged rights must appeal for support. It is at least as doubtful whether the voluntary concession of such a right would be expedient except under

more readily aid general justice.' The latter remark seems to connect him with De Martens (Précis, § 100), who, in conceding the power of criminal jurisdiction over foreigners in respect of acts done outside the state, contemplates its exercise rather by way of neighbourly duty, and in the interests of the foreign state, than as a privilege. Wheaton (Elem. pt. ii. § 19), with a truer appreciation of the nature of the practice, says that 'it cannot be reconciled with the principles of international justice.' See also Phillimore, i. § cccxxxiii. Massé (§ 524) defends the practice by urging that 's'il est vrai que les lois répressives reçues dans un état ne peuvent avoir d'autorité hors de cet état, cependant, lorsqu'un étranger s'est rendu coupable en pays étranger d'un crime qui viole les principes mêmes sur lesquels est fondée la société, qui porte atteinte aux personnes et aux propriétés, ne semble-t-il pas qu'en réprimant cet attentat et en punissant le coupable trouvé en France, les tribunaux ne feraient que remplir un devoir social qui rentre dans les limites de leur compétence naturelle?'

An exhaustive collection and an able examination of the facts and opinions connected with the subject will be found in Mr. Moore's Report on Extra-territorial Crime and the Cutting case, issued by the Department of State of the United States in 1887. The Report is made the basis of an article by M. Albéric Rolin in the Rev. de Droit Int. 1888, p. 559.

On the various theories held as to the ground of criminal jurisdiction, see also Wharton, On the Conflict of Laws, 2nd ed. §§ 809–13.

the safeguard of a treaty. In cases of ordinary crimes it would be useless, because the act would be punishable under the laws of the country where it was done, and it would only be necessary to surrender the criminal to the latter. It might, on the other hand, be dangerous where offences against the national safety are concerned. The category of such acts is a variable one; and many acts are ranked in it by some states, to the punishment of which other countries might with propriety refuse to lend their indirect aid, by allowing a state to assume to itself jurisdiction in excess of that possessed by it in strict law [1].

Rights of giving and refusing hospitality.

A state being at liberty to do whatever it chooses within its own territory, without reference to the wishes of other states, so long as its acts are not directly injurious to them, it has the right of receiving and giving hospitality or asylum to emigrants or refugees, whether or not the former have violated the laws of their country in leaving it, and whether the latter are accused of political or of ordinary crimes. So soon as an individual, not being at the moment in custody, asks to be permitted to enter

[1] In 1879 the Institut de Droit International resolved, by nineteen votes to seven, that 'tout état a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'état en cause et compromettent sa sécurité, et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu.' As thus restricted, the scope of the assumed right of punishing foreigners for acts done out of the jurisdiction of the state inflicting punishment, falls far below that of many of the municipal laws above mentioned. The assumption of the right might even be accounted for with considerable plausibility by the existence of the right of self-preservation. But precisely the class of acts remains subject to exceptional jurisdiction which there is most danger in abandoning to it. Probably as between civilised states political acts are the only acts, satisfying the above description, which would not be punishable by the law of the state where they are committed. The question presents itself therefore whether self-preservation is really involved to so serious an extent as to override the rights of sovereignty. It would be rash to say that it never is so deeply involved; but it is not rash to say that the occasions are rare, and that it is doubtful whether it would be possible to allow such exceptional crimes to be dealt with without in practice permitting ordinary political acts to be also struck at. Of course nothing that is here said militates against the propriety or advisability of concluding treaties directed to repress particular crimes.

the territory of a state, the state alone decides whether permission shall be given; and when he has been received the state is only bound, under its general responsibility for acts done within its jurisdiction, to take such precautions as may be necessary to prevent him from doing harm, by placing him for instance under surveillance or by interning him at a distance from the frontier, if there is reason to believe that his presence is causing serious danger to the country from which he has fled. On the failure of measures of this kind a right arises on the part of the threatened state to require his expulsion, so that it may be freed from danger; but in no circumstances can it exact his surrender.

How far a state ought to allow its right of granting asylum to be subordinated to the common interest which all societies have in the punishment of criminals, and with or without special agreement should yield them up to be dealt with by the laws of their country, has been already considered [1].

For the reason also that a state may do what it chooses within its own territory so long as its conduct is not actively injurious to other states, it must be granted that in strict law a country can refuse the hospitality of its soil to any, or to all, foreigners; but the exercise of the right is necessarily tempered by the facts of modern civilisation. For a state to exclude all foreigners would be to withdraw from the brotherhood of civilised peoples; to exclude any without reasonable or at least plausible cause is regarded as so vexatious and oppressive, that a government is thought to have the right of interfering in favour of its subjects in cases where sufficient cause does not in its judgment exist. The limits of the power of a state to exclude foreigners are thus plain enough theoretically, and up to a certain point they can be laid down fairly well for practical purposes. If a country decides that certain classes of foreigners are dangerous to its tranquillity, or are inconvenient to it socially or economically or morally, and if it passes general laws forbidding the access of such persons,

[1] See antea, p. 56.

its conduct affords no ground for complaint. Its fears may be idle; its legislation may be harsh; but its action is equal. The matter is different where for identical reasons individual foreigners, or whole classes of foreigners, who have already been admitted into the country, or who are resident there, are subjected to expulsion. In such cases the propriety of the conduct of the expelling government must be judged with reference to the circumstances of the moment[1].

Right of admitting foreigners to the status of subjects.

A state has necessarily the right in virtue of its territorial jurisdiction of conferring such privileges as it may choose to grant upon foreigners residing within it. It may therefore admit them to the status of subjects or citizens. But it is evident that the effects of such admission, in so far as they flow from the territorial rights of a state, make themselves felt only within the state territory. Outside places under the territorial jurisdiction of the state, they can only hold as long as they do not conflict with prior rights on the part of another state to the allegiance of the adopted subject or citizen. A state which has granted privileges to a stranger cannot insist upon his enjoyment of them, and cannot claim the obedience which is correlative to that enjoyment, outside its own jurisdiction as against another state, after the latter has shown that it had exclusive rights to the obedience of the person in question at the moment when he professed to contract to yield obedience to another government. If therefore the adoption of a foreigner into a state community

[1] M. Rolin Jaequemyns (Rev. de Droit Int. xx. 498) endeavours to formulate a scheme of restrictions upon the right of expulsion which might be conventionally accepted. It is to be feared that any scheme of the kind must, as a whole, be too general in its terms. One clause of his proposal however states with precision what ought to be the law: 'En l'absence d'un état de guerre,' he says 'l'expulsion en masse de tous les étrangers appartenant à une ou plusieurs nationalités déterminées ne se justifierait qu'à titre de représailles.' In 1888 the Institut de Droit International adopted a project of International Declaration of which the object was, while recognising the right of expulsion to the full, to temper its practical application (Annuaire de l'Institut, 1888–9, p. 245). It is to be feared that no government wishing to do a harsh act would find its hands much fettered by the Declaration.

frees him from allegiance to his former state, he must owe his emancipation either to an agreement between nations that freedom from antecedent ties shall be the effect of naturalisation, or to the existence of a right on his part to cast off his allegiance at will. Whether, or to what extent, such an agreement or right exists will be discussed elsewhere. For the moment it is only necessary to point out that such power as a state may possess, of asserting rights with reference to an adopted subject in derogation of rights claimed by his original sovereign, is not consequent upon the right to adopt him into the state community [1].

Naturalisation by operation of law.

Whatever be the effect of giving to a foreigner the status of a subject or citizen with his own consent, a country has no right to impose the obligations of nationality, still less to insist that this foreign subject shall abandon in its favour his nationality of origin. Consent no doubt may be a matter of inference: and if the individual does acts of a political, or even, possibly, of a municipal nature, without inquiry whether the law regards the performance of such acts as an expression of desire on his part to identify himself with the state, he has no ground for complaint if his consent is inferred, and if he finds himself burdened upon the state territory with obligations correlative to the privileges which he has assumed. But apart from acts which can reasonably be supposed to indicate intention, his national character may with propriety be considered to remain unaltered. It is unquestionably not within the competence of a state to impose its nationality in virtue of mere residence, of marriage with a native, of the acquisition of landed property, and other such acts, which lie wholly within the range of the personal life, or which may be necessities of commercial or industrial business. The line of cleavage is distinct between the personal and the public life. Several South American states have unfortunately conceived themselves to be at liberty to

[1] See postea, p. 230.

force strangers within their embrace by laws giving operative effects to acts of a purely personal nature [1].

Responsibility of a state,

Primâ facie a state is of course responsible for all acts or omissions taking place within its territory by which another state or the subjects of the latter are injuriously affected. To escape responsibility it must be able to show that its failure to prevent the commission of the acts in question, if not intended to be injurious, or its omission to do acts incumbent upon it, have been within the reasonable limits of error in practical matters, or if the acts or omissions have been intended to be injurious, that they could not have been prevented by the use of a watchfulness proportioned to the apparent nature of the circumstances, or by means at the disposal of a community well ordered to an average extent; or else it must be able to show that the injury resulting from the acts or omissions has been either accidental or independent of any act done within the territory which could have been prevented as being injurious.

The foregoing general principle requires to be applied with the help of certain considerations suggested by the facts of state existence.

in respect of acts done by 1. administrative, and naval and military agents,

Although theoretically a state is responsible indifferently for all acts or omissions taking place within its territory, it is evident that its real responsibility varies much with the persons concerned. Its administrative officials and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. Presumably therefore acts done by them are acts sanctioned by the state, and until such acts are disavowed, and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them. Where consequently acts or omissions, which are productive of injury

[1] Nationality and Naturalisation, Parl. Papers, Miscell. No. 3 (1893) [No. 1 (1894), No. 1 (1895)]; Cogordan, La Nationalité, Annexes, 2e partie, O and H-H; Calvo, liv. viii, sect. 1.

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in reasonable measure to a foreign state or its subjects, are committed by persons of the classes mentioned, their government is bound to disavow them, and to inflict punishment and give reparation when necessary.

2. judicial functionaries,

Judicial functionaries are less closely connected with the state. There are no well-regulated states in which the judiciary is not so independent of the executive that the latter has no immediate means of checking the acts of the former; judicial acts may be municipally right, as being according to law, although they may effect an international wrong; and even where they are flagrantly improper no power of punishment may exist. All therefore that can be expected of a government in the case of wrongs inflicted by the courts is that compensation shall be made, and if the wrong has been caused by an imperfection in the law of such kind as to prevent a foreigner from getting equal justice with a native of the country, that a recurrence of the wrong shall be prevented by legislation.

3. private persons.

With private persons the connexion of the state is still less close. It only concerns itself with their acts to the extent of the general control exercised over everything within its territories for the purpose of carrying out the common objects of government; and it can only therefore be held responsible for such of them as it may reasonably be expected to have knowledge of and to prevent. If the acts done are undisguisedly open or of common notoriety, the state, when they are of sufficient importance, is obviously responsible for not using proper means to repress them; if they are effectually concealed or if for sufficient reason the state has failed to repress them, it as obviously becomes responsible, by way of complicity after the act, if its government does not inflict punishment to the extent of its legal powers[1]. If however attempts are made to disguise

[1] In 1838 a body of men invaded Canada from the United States, after supplying themselves with artillery and other arms from a United States arsenal. Their proceedings were not of the nature of a surprise, and some of their preparations and acts of open hostility were carried on in the

the true character of noxious acts, what amount of care to obtain knowledge of them beforehand, and to prevent their occurrence, may reasonably be expected? And is the legal power actually

presence of a regiment of militia, which made no attempt to interfere (cf. postea, p. 270). In 1866, the Fenians in the United States held public meetings at which an intention of invading Canada was avowed, and made preparations which lasted for several months, uniformed bodies of men being even drilled openly in many of the large cities. For so long was an attack imminent that the Canadian government found itself compelled to call out 10,000 volunteers three months before the invasion was actually made. In the end of May the Fenians made an irruption into Canada without opposition from the authorities of the United States. On being driven back their arms were taken from them; and some of the leaders were arrested, a prosecution being commenced against them in the district court of Buffalo. Six weeks afterwards it was resolved by the House of Representatives that 'this House respectfully request the President to cause the prosecutions instituted in the United States Courts against the Fenians to be discontinued if compatible with the public interests,' and the prosecutions were accordingly abandoned. In October the arms taken from the Fenians were restored.

It would be difficult to find more typical instances of responsibility assumed by a state through the permission of open acts and of notorious acts, and by way of complicity after the acts. Of course in gross cases like these a right of immediate war accrues to the injured nation.

However little the United States are alive to their duties in respect of such acts as those described, they showed a disposition in 1879 to press state responsibility to the utmost possible extreme as against Great Britain. A body of Indians under Sitting Bull took refuge from United States troops in the then very remote and inaccessible British territory lying north of Montana. There was apparently reason to expect that they might make incursions into American territory. Mr. Grant in a despatch to Sir E. Thornton called 'the attention of Her Majesty's government to the gravity of the situation which may thus be produced,' and expressed 'a confident hope' that Great Britain would be 'prepared on the frontier with a sufficient force either to compel the surrender of the Indians to our forces as prisoners of war, or to disarm and disable them from further hostilities, and subject them to such constraint of surveillance and subjection as will preclude any further disturbance of peace on the frontier.' (Wharton, Digest, § 18.) In other words the country which had been guilty of direct complicity with raids on a friendly state from settled country close to the seat of government, did not hesitate when its own interests were involved to ask that state to undertake a distant and difficult expedition into wild and almost uninhabited regions.

The attitude assumed by the American government in 1891 with reference to the lynching of the Italians at New Orleans does not suggest that it is even yet willing to recognise as applying to itself, in the most rudimentary form, those duties the performance of which by others it expects in an exaggerated degree.

possessed by the government of a state the measure of the legal power which it can be expected to possess whether for purposes of prevention or of punishment?

Both these questions assumed considerable prominence during the proceedings of the tribunal of Arbitration at Geneva. With respect to the first it was urged by the United States that the 'diligence' which is due from one state to another is a diligence 'commensurate with the emergency or with the magnitude of the results of negligence.' Whether this doctrine represents the deliberate views of its authors, or whether it was merely put forward for the immediate purposes of argument, it is impossible to reprobate it too strongly. The true nature of an emergency is often only discovered when it has passed, and no one can say what results may not follow from the most trivial acts of negligence. To fail in preventing the escape of an interned subaltern might involve the loss of an empire. To make responsibility at a given moment depend upon an indeterminate something in the future is simply preposterous. The only measure of the responsibility arising out of a particular occurrence, which can be obtained from the occurrence itself, is supplied by its apparent nature and importance at the moment. If a government honestly gives so much care as may seem to an average intelligence to be proportioned to the state of things existing at the time, it does all it can be asked to do, and it cannot be saddled with responsibility for consequences of unexpected gravity. In no case moreover can it be reasonably asked in the first instance to use a care or to take means which it does not habitually employ in its own interests. In a great many cases of the prevention of injury to foreign states care signifies the putting in operation of means of inquiry, and subsequently of administrative and judicial powers, with which a government is invested primarily for internal purposes. If these agencies have been found strong enough for their primary objects a state cannot be held responsible because they have failed when applied to analogous

international uses, provided that the application is honestly made. Whether on the occurrence of such failure a case arises for an alteration of the law or for an improvement in administrative organisation is a matter which falls under the second question.

How far a state must provide itself with the means of preventing acts injurious to other states.

That a state must in a general sense provide itself with the means of fulfilling its international obligations is indisputable. If its laws are such that it is incapable of preventing armed bodies of men from collecting within it, and issuing from it to invade a neighbouring state, it must alter them. If its judiciary is so corrupt or prejudiced that serious and patent injustice is done frequently to foreigners, it ought to reform the courts, and in isolated cases it is responsible for the injustice done and must compensate the sufferers. On the other hand, it is impossible to maintain that a government must be provided with the most efficient means that can be devised for performing its international duties. A completely despotic government can make its will felt immediately for any purpose. It is better able than a less despotic government, and every government in so far as it is able to exercise arbitrary power is better able than one which must use every power in strict subordination to the law, to give prompt and full effect to its international obligations. It has never been pretended however that a state is bound to alter the form of polity under which it chooses to live in order to give the highest possible protection to the interests of foreign states. To do so would be to call upon it to sacrifice the greater to the less, and to disregard one of the primary rights of independence—the right, that is to say, of a community to regulate its life in its own way. All that can be asked is that the best provision for the fulfilment of international duties shall be made which is consistent with the character of the national institutions, it being of course understood that those institutions are such that the state can be described as well ordered to an average extent. A community has a right to choose between all forms of polity through which

the ends of state existence can be attained, but it cannot avoid international responsibility on the plea of a deliberate preference for anarchy [1].

Although in a considerable number of cases questions have arisen out of conduct which has been, or which has been alleged to be, improper or inadequate as a fulfilment of the duties of a state in respect of its responsibility, it is not worth while to give examples here. It will be necessary in discussing the duties of neutrality to indicate for what acts, affecting the safety of a foreign country, a state may be held responsible, and what is there said may be taken as applicable to states in times of peace, subject only to the qualification that somewhat more forethought in the prevention of noxious acts should be shown during war, when their commission is not improbable, than during peace, when their commission may come by surprise upon the state within the territory of which they are done [2]. To give cases illustrating the circumstances under which a state is responsible for injuries or injustice suffered by foreign individuals would involve the statement of a mass of details disproportioned to the amount of information that could be afforded.

Effect of civil commotion upon responsibility.

When a government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority, or

[1] The subject of the responsibility of a state is not usually discussed adequately in works upon international law. It is treated more or less completely, or portions of it are commented on, in Bluntschli, §§ 466–9 bis; Halleck, i. 397; Phillimore, i. § ccxviii, and Preface to 2nd ed. pp. xxi–ii; Reasons of Sir A. Cockburn for dissenting from the Award of the Tribunal of Arb. at Geneva, Parl. Papers, North Am. No. 2, 1873, pp. 31–8; Hansard, cci. 1123. M. Calvo in his third edition (§§ 357–8) and M. Fiore in his second edition (§§ 390–4 and §§ 646–64) go into the question much more fully than in the earlier editions of their respective works.

[2] See pt. iv. ch. iii.

through acts done by the part of the population which has broken loose from control. When strangers enter a state they must be prepared for the risks of intestine war, because the occurrence is one over which from the nature of the case the government can have no control; and they cannot demand compensation for losses or injuries received, both because, unless it can be shown that a state is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state[1].

Foreigners must in the same way be prepared to take the consequences of international war.

[1] Bluntschli, § 380 bis. In the work of M. Calvo (§§ 292–5) the subject is dwelt upon with great detail.

During the American Civil War the British Government refused to procure compensation for injuries inflicted by the forces of the United States on the property of British subjects. The claimants were informed that they must have recourse to such remedies as were open to citizens of the United States.

CHAPTER V

SOVEREIGNTY IN RELATION TO THE SUBJECTS OF THE STATE

It follows from the independence of a state that it may grant or refuse the privileges of political membership, in so far as such privileges have reference to the status of the person invested with them within the country itself, and it may accept responsibility or facts done by any person elsewhere which affect other states or their subjects. Primarily therefore it is a question for municipal law to decide whether a given individual is to be considered a subject or citizen of a particular state. But the right to give protection to subjects abroad, and the continuance of obligation on the part of subjects towards their state notwithstanding absence from its jurisdiction, brings the question, under what circumstances a person shall or shall not be held to possess a given nationality, within the scope of international law. Hitherto nevertheless it has refrained, except upon one point, from laying down any principles, and still more from sanctioning specific usages in the matter. It declares that the quality of a subject must not be imposed upon certain persons with regard to whose position as members of another sovereign community it is considered that there is no room for the existence of doubt, the imposition of that quality upon an acknowledged foreigner being evidently inconsistent with a due recognition of the independence of the state to which he belongs; but where a difference of legal theory can exist international law has made no choice, and it is left open to states to act as they like.

Persons as to whose nationality

The persons as to whose nationality no room for difference of opinion exists are in the main those who have been born

within a state territory of parents belonging to the community, and whose connexion with their state has not been severed through any act done by it or by themselves. To these may be added foundlings because, their father and mother being unknown, there is no state to which they can be attributed except that upon the territory of which they have been discovered.

1. no difference of opinion can exist;

The persons as to whose nationality a difference of legal theory is possible are children born of the subjects of one power within the territory of another, illegitimate children born of a foreign mother, foreign women who have married a subject of the state, and persons adopted into the state community by naturalisation, or losing their nationality by emigration, and the children of such persons born before naturalisation or loss of nationality.

2. difference of opinion can exist.

Under a custom, which was formerly so general as to be called by an eminent French authority 'the rule of Europe[1],' and of which traces still exist in the legislation of many countries, the nationality of children born of the subjects of one power within the territory of another was dictated by the place of their birth, in the eye at least of the state of which they were natives. The rule was the natural outcome of the intimate connexion in feudalism between the individual and the soil upon which he lived, but it survived the ideas with which it was originally connected, and probably until the establishment of the Code Napoléon by France no nation regarded the children of foreigners born upon its territory as aliens. In that Code however a principle was applied in favour of strangers, by which states had long been induced to guide themselves in dealing with their own subjects, owing to the inconvenience of looking upon the children of natives born abroad as foreigners. It was provided that a child should follow the nationality of his parents[2], and most civilised states,

Children born of the subjects of one power within the territory of another.

[1] Demolombe, Cours de Code Napoléon, liv. i. tit. i. chap. i. No. 146.

[2] The adoption of this principle was almost accidental. By the draft code it was proposed to be enacted, and the proposal was temporarily adopted,

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either in remodelling their system of law upon the lines of the Code Napoléon, or by special laws, have since adopted the principle simply, or with modifications giving a power of choice to the child, or else, while keeping to the ancient rule in principle, have offered the means of avoiding its effects. In Germany, Austria, Hungary, Belgium, Denmark, Greece, Roumania, Servia, Sweden[1], Norway, Switzerland, Salvador, and Costa Rica national character follows parentage alone, and all these states claim the children of their subjects as being themselves subjects, wherever they may be born. The laws of Spain and Belgium, while regarding the child of an alien as an alien, give him the right, on attaining his majority, of electing to be a citizen of the country in which he resides. Russia makes nationality depend in principle on descent, but reserves a right of claiming Russian nationality to every one who has been born and educated on Russian territory. In all these cases the state regards as its subjects the children of subjects born abroad.

that 'tout individu né en France est Français.' It was urged against the article that a child might e. g. be born during the passage of its parents through France, and would follow them out of it. What would attach him to France? Not feudality, for it did not exist on the territory of the Republic; nor intention, because the child could have none; nor the fact of residence, because he would not remain. (Conférence du Code Civil, i. 36-52.) These reasonings seem to have prevailed. In any case the article was changed. But M. Demolombe points out that after all 'une sorte de transaction entre le système romain de la nationalité jure sanguinis et le système français de la nationalité jure soli' was effected by the provision which makes the naturalisation of the child of a foreigner born in France, who, during the year following the attainment of his majority, elects to be French, date back to the time of his birth. (Cours de Code Nap. liv. i. tit. i. chap. i. Nos. 146, 163.)

For the old law of France, see Pothier, Des Personnes et des Choses, partie i. tit. ii. sect. i; for that of England, Naturalisation Commission Report, Appendix. All 'children inheritors' born abroad were given the same benefits as like persons born in England by an Act of 25 Ed. III; but the children born abroad of all natural-born subjects were not reckoned as English subjects until after the statute of 7 Anne c. 5.

[1] [But under the Swedish law of Oct. 1894 the children of aliens who are born in Sweden become Swedish citizens on attaining the age of twenty-two if they have been domiciled in that country from birth without interruption. They can, however, avoid such naturalisation by proving that they possess civil rights in another country. Martens, N. R. G. 2me Sér. xx. 823.]

In Italy the law is so far tinged with the ancient principle, that while all children of aliens may elect to be Italian citizens, they are such as of course if the father has been domiciled in the kingdom for ten years, unless they declare their wish to be considered as strangers. In Europe, England and Portugal adhere in principle to the old rule; the child of an alien is English or Portuguese, but he may elect to recur to his nationality of parentage. In the Netherlands children of foreigners not domiciled in the kingdom are themselves foreigners; those that are born of domiciled parents are *primâ facie* Netherland subjects, but all claim to them is relinquished so soon as it is shown that, by the law of their country of origin, they remain foreign subjects. In France the law has been so modified by recent enactments that its only apparent principle seems to be supplied by a desire to ascribe French national character to as large a number of persons as possible[1]. In the United States it would seem that the children of foreigners in transient residence are not citizens, but that the

[1] The laws of June 26, 1889, and July 23, 1893, determine to be French :—

(1) Persons who, not having reached their majority before the former date, are children born in France to a foreign father not himself born in France, and who are domiciled there (the word 'domicile' being used 'dans le sens le plus large de résidence') at the time of attaining their majority according to French law. These persons may elect for their foreign nationality in the year following the attainment of their majority, but are regarded as French until the required formalities have been carried out, and may consequently be obliged to go through the usual service in the army.

(2) Persons who have been born in France at a later date than June 26, 1867, of a foreign parent not himself or herself born there, and who not being domiciled at the date of their majority, shall have applied before the age of twenty-two years to fix their domicile in France, and having fixed it accordingly, have claimed French nationality within a year of the date of application.

(3) Persons who have been born in France later than the above date of a foreign parent, whether father or mother, who has been born in France, except that if it be the mother who has been born in France, they shall be permitted, in the year following their majority, to declare for retention of their foreign nationality in the same manner as is prescribed for the first class of persons above mentioned. Parl. Papers, Miscell. Nos. 3 and 4, 1893; Rev. de Droit Int. Privé, xvii. 563; Trib. Civil de Bordeaux, 11 juillet 1892, ap. id. xix. 997.

children of foreigners, who are in more prolonged residence, fall provisionally within the category of American citizens, though they lose their American character if they leave the United States during their minority[1]. The larger number of South American States regard as citizens all children of foreigners born within their territory. From the foregoing sketch of the various laws of nationality it may be concluded that the more important states recognise, with a very near approach to unanimity, that the child of a foreigner ought to be allowed to be himself a foreigner, unless he manifests a wish to assume or retain the nationality of the state in which he has been born. There can be no question that this principle corresponds better than any other with the needs of a time when a large floating population of aliens exists in most places, and when in every country many are to be found the permanence of whose establishment there depends upon the course taken by their private affairs from time to time. It is only to be wished that the rule in its simplest form were everywhere adopted[2].

Illegitimate children.

If children are illegitimate, their father being necessarily uncertain in law, the nationality of the mother is their only possible root of nationality where national character is derived from personal and not from local origin. Accordingly, it is almost everywhere the rule that they belong to the state of

[1] By the fourteenth amendment to the Constitution 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States'; and by section 1992 of the Revised Statutes 'all persons born in the United States and not subject to any foreign power are declared to be citizens of the United States.' It might be somewhat difficult to seize the intended effect of these provisions if it were necessary to interpret them without external assistance. Happily an administrative gloss has been provided which seems—if I rightly understand it—to afford a very reasonable and convenient sense. Starting from the judicially ascertained circumstance that Indians are not citizens of the United States because they are not, in a full sense, 'subject to the jurisdiction' of the United States, it is considered that à fortiori the children of foreigners in transient residence are not citizens, their fathers being subject to the jurisdiction less completely than Indians. Wharton's Digest, § 183.

[2] Naturalisation Com. Rep., Append.; Calvo, §§ 742–50; Bluntschli in Rev. de Droit International, ii. 107–9; 33 Vict. ch. 14.

which the mother is a subject[1]. English law forms an exception. By it illegitimate issue of Englishwomen abroad are considered to have the nationality of their place of birth, because it is by statute only that children born beyond the kingdom are admitted to the privilege of being English subjects, and no statute exists which applies to children produced out of wedlock. At the same time, as the old law of England imposing allegiance upon the issue of strangers in virtue of the soil has not been abrogated with respect to illegitimate children, the illegitimate children of foreign mothers, who have given birth to them in England, are considered to be English[2].

Married women.

Except in some American countries the nationality of a wife is merged in that of her husband, so that when a woman marries a foreigner she loses her own nationality and acquires his, and a subsequent change of nationality on his part carries with it as of course a like change on her side[3]. By the law of the United States a native woman marrying a foreigner perhaps remains a subject of her state, though an alien woman marrying an American citizen becomes herself naturalised[4]; by that of

[1] In Brazil, Ecuador, Guatemala, Paraguay, and Uruguay they acquire the nationality of the mother conditionally upon taking up residence or being domiciled in the territory. In Portugal they obtain nationality in this way or by declaration of choice.

[2] Bluntschli, § 366. It is sometimes provided, e. g. in France and Italy, that when a natural child is recognised by his father or mother in the former case, or by his father in the latter case, he follows the nationality of the parent recognising him. Art. 8 of the Law of 1889; Mazzoni, Ist. di diritto italiano, § 104. [In Sweden, under the law of 1894, illegitimate children whose parents marry while the former are still minors acquire the nationality of the father.]

[3] The wife of a French citizen, upon the acquisition of a new nationality by her husband, may however, if she chooses, retain the nationality possessed by him at the date of the marriage.

[4] American law on the subject is not quite clear; cf. Hall, Foreign Jurisd. of the British Crown, p. 41. Until 1870 the same rule held in England. It was altered by the Naturalisation Act of that year. The application of the principle of the merger of the nationality of the wife in that of the husband is sometimes carried to excess. By the French law, for example, if a Frenchman makes a bigamous marriage with a foreigner in a foreign country, the woman with whom he goes through the ceremony of marriage acquires a French nationality, it being held that 'elle est devenue Française

Ecuador a native woman retains her nationality so long as she stays in the country; and in Venezuela and Haiti she keeps it in all circumstances.

Naturalisation.

It was observed in the last chapter that a state can only confer the quality of a citizen or subject in virtue of its sovereignty as within its own jurisdiction, and that the assertion of control, or the exercise of protection, over naturalised persons when outside its jurisdiction must be accounted for either by a general consent on the part of states that the acquisition of a new nationality shall extinguish a previously existing one, or by the recognition of a right in every individual to assume the nationality of any state which may choose to receive him. It will be seen by analysing practice, which so far from being uniform is greatly confused, that no general understanding on the matter has as yet been arrived at. With regard to the question whether a right of changing their nationality is possessed by individuals; as individuals have no place in international law, any such right as that indicated, if binding upon states, must be so through the possession of a right by the individual as against his state which is prior to and above those possessed by the state as against its members. Whether or not such a right exists international law is obviously not competent to decide. It could only have adopted the right from without as being one of which the public law of all states had admitted the existence; and the absence of uniform custom shows that public law has not so pronounced as to enable international law to act upon its dictates. International law must either maintain the principle of the permanence of original ties until they are broken with the consent of the state to which a person belongs who desires to be naturalised elsewhere, or it must recognise that the force of this principle has been destroyed by diversity of opinions and practice, and that each state is free to act as may seem best to it. There can be no doubt that the latter view

par le mariage, même frappé de nullité.' Sirey, Les Codes Annotés, ed. 1855, iii. 18.

is more in harmony with the facts of practice than the former. For the purposes of international law therefore the due relation of a naturalised person to the state which he has abandoned is outside the scope of accepted principle; it is a question of convenience only; and it is either to be settled by an individual state in accordance with its own interests, or by treaty between states for the common interests of the contracting parties.

Practice of states with regard to subjects naturalised abroad. England.

The practice of the more important states may be summarised as follows[1]:—

That of England was based until 1870 upon the principles of the indelibility of natural allegiance and of liberty of emigration. Every one was free to leave his country; but whatever form he went through elsewhere, and whatever his intention to change his nationality, he still remained an Englishman in the eye of the law; wherever therefore English laws could run he had the privileges and was liable to the obligations imposed by them; if he returned to British territory he was not under the disabilities of an alien, and he was not entitled to the protection of his adopted country; if he was met with on the high seas in a foreign merchantman he could be taken out of it, the territoriality of such ships not being recognised by English law. On the other hand, so long as he stayed within foreign jurisdiction he was bound by his own professions; he had chosen to renounce his English character, and he could not demand the protection of the state towards which he acknowledged no duties. In the beginning of the present century this doctrine was rigidly enforced. Englishmen naturalised in the United States were impressed from on board American vessels for service in the English navy; and the government of the day entered upon the war of 1812 rather than mitigate the severity of its usages. In the peace which followed the treaties of Ghent and Vienna no occasion presented itself for giving effect upon the high seas

[1] The facts bearing on this subject are collected in the Appendix to the Report of the Royal Commission on the Laws of Naturalisation and Allegiance, 1869.

to the doctrine maintained by Great Britain, and with the abandonment of impressment as a means of manning the navy the chief source of possible collision with other nations was removed; but successive English governments rejected the advances made by the United States for coming to a definite understanding on the question, and so late as 1842 Lord Ashburton, during his negotiations with Mr. Webster, put it aside as touching a principle which could not be subjected to discussion. In other applications the doctrine came more immediately within the scope of practice. In 1848, during the Irish disturbances of that year, an Irishman, naturalised in America, was arrested on suspicion of treason. Mr. Bancroft, the minister accredited by the United States to the Court of St. James, having remonstrated against the treatment of the arrested person as a subject of Great Britain, Lord Palmerston in his answer upheld the traditional view in precise and decided language. On a like occasion in 1866 Lord Clarendon declared that 'of course the point of allegiance could not be conceded.' But at both times proceedings were pushed as little as possible to extremes; the earliest opportunity was taken of setting arrested persons free on condition of their leaving the country; and the question was only twice fairly raised on applications by two naturalised persons for a mixed jury at their trial in 1867. Thus for more than half a century the assertion of the indelibility of allegiance was little else than nominal. It had become an anachronism, and its consistent practical assertion was impossible. In 1868 consequently a commission was appointed to report upon what alterations of the laws of naturalisation it might be expedient to make; and in 1870 an Act was passed providing that a British subject on becoming naturalised in a foreign state shall lose his British national character. Persons naturalised in a foreign state before the passing of the Act were permitted to make a declaration within two years stating their wish to remain subjects, in which case they were deemed to be such except within the state in which they were naturalised. The latter

qualification was little more than a formal sanction given to the practice which had already been followed. In 1858 it was stated by Lord Malmesbury, with reference to the children of British subjects born in the Argentine Confederation, who by the law of the Confederation were regarded as its subjects, that their quality of British subjects in England did not prevent them from being treated as subjects in the Confederation; and during the Civil War in the United States the English government refused to protect naturalised persons, their minor children although born in England, and persons who though not formally naturalised had exercised privileges reserved to citizens of the United States[1].

United States.

In the United States a certain confusion exists, the policy of the country having varied at different times, and the opinions entertained in the courts not being perfectly identical with those which have inspired political action. In the controversies which took place between the United States and England in the opening years of the century the government of the former country contended that it had a right to protect persons who had been received as citizens by naturalisation, notwithstanding that domestic regulations of their state might forbid renunciation of allegiance or might subject it to restrictions, and broadly declared 'expatriation' to be 'a natural right.' Mr. Justice Story, on the other hand, laid down 'the general doctrine' to be 'that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens;' Kent adhered to the same opinion; and in an exhaustive review

[1] Naturalisation Commission Report, Appendix, pp. 31–48; Naturalisation Act, 1870, 33 Vict. ch. 14. In consequence of claims for protection having been made by persons naturalised in England, it has been the practice since 1854 to insert a clause in naturalisation certificates excepting from the rights granted any 'rights and capacities of a natural-born British subject out of and beyond the dominions of the British crown, other than such as may be conferred on him by the grant of a passport from the Secretary of State to enable him to travel in foreign parts.' [The case of R. *v.* Lynch, L. R. (1903) 1 K. B. 444, decided the point which scarcely seemed to require judicial sanction that the Naturalisation Act does not empower a British subject to become naturalised in an enemy state during time of war.]

of the practice of the courts of the United States made by Mr. Cushing in 1856 it is remarked that on the 'many occasions when the question presented itself, not one of the judges of the Supreme Court has affirmed, while others have emphatically denied, the unlimited right of expatriation from the United States.' Of these inconsistent views the influence of the latter seems to have predominated during the greater part of the time which has elapsed since the war of 1812. In 1840 a Prussian naturalised in the United States, who had been required on returning to his country to undergo military service, and who had applied for protection to Mr. Wheaton, then American minister at Berlin, was informed by the latter that 'had you remained in the United States or visited any other foreign country except Prussia on your lawful business, you would have been protected by the American authorities at home and abroad in the enjoyment of all your rights and privileges as a naturalised citizen of the United States. But having returned to the country of your birth, your native domicil and natural character revert, so long as you remain in the Prussian dominions, and you are bound in all respects to obey the laws exactly as if you had never emigrated.' In several subsequent cases of the like kind the same line of conduct was pursued, and in 1853 the then minister at Berlin was instructed that 'the doctrine of inalienable allegiance is no doubt attended with great practical difficulties. It has been affirmed by the Supreme Court of the United States, and by more than one of the State Courts; but the naturalisation laws of the United States certainly assume that a person can by his own acts divest himself of the allegiance under which he was born and contract a new allegiance to a foreign power. But until this new allegiance is contracted he must be considered as bound by his allegiance to the government under which he was born and subject to its laws; and this undoubted principle seems to have its direct application in the present cases. . . . If then a Prussian subject, born and living under this state of law of military service, chooses to emigrate to a foreign country without

obtaining the "certificate" which alone can discharge him from the obligation of military service, he does so at his own risk;' and if such a person after being naturalised in the United States 'goes back to Prussia for any purposes whatever, it is not competent for the United States to protect him from the operation of the Prussian law.' Virtually, these instructions surrendered the right of expatriation. Verbally, no doubt, it is asserted; but a right of expatriation at the will of the individual ceases to exist when it is so subordinated to the duty of fulfilling conditions, to be dictated by the state from which the individual desires to separate, that non-fulfilment of them nullifies the effect of naturalisation as between him and it. A few years later American policy underwent another change. In 1859, questions having arisen between the United States and Prussia with reference to the conscription laws, Mr. Cass wrote that 'the moment a foreigner becomes naturalised his allegiance to his native country is severed for ever. He experiences a new political birth. A broad and impassable line separates him from his native country. . . . Should he return to his native country he returns as an American citizen, and in no other character.' From that time onwards the successive governments of the United States have shown a disposition to carry the right of expatriation to the furthest practicable point. Its acceptance was continually urged upon Prussia in the further negotiations which took place with that power; it was asserted in the correspondence between the United States and England; and in 1868 an Act passed both houses of Congress affirming that 'the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness,' and enacting that 'all naturalised citizens of the United States while in foreign states shall be entitled to and shall receive from their government the same protection of persons and property that is accorded to native-born citizens in like situation and circumstances[1].'

[1] Naturalisation Commission Report, 52-4 and 82. Story's and Kent's

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The laws of Prussia [extended first to the North German Confederation, and since 1871 to the whole German Empire] regard the state as possessing the right of imposing conditions upon expatriation, and consequently of refusing it unless these conditions are satisfied. By the regulations in force no person lying under any liability to military service can leave the kingdom without permission, and any one doing so is punished on his return with fine or imprisonment. Persons naturalised in the United States are excepted from the operation of these regulations by the treaty of 1868 between that country and the North German Confederation, which provides that a naturalised person can only be tried on returning to his country of origin for acts done before emigration, and thus excludes punishment for the act of emigration without consent of the state or in avoidance of its regulations [1].

France. In France the quality of a Frenchman is lost by naturalisation abroad, provided that he has attained the age of thirty or thirty-one years, and has consequently fulfilled his obligation to service in the active army.

Italy. In Italy naturalisation in a foreign country carries with it loss of citizenship, but does not exonerate from the obligations of military service, nor from the penalty inflicted on any one who bears arms against his native country.

Spain. Spain takes up the position that loss of nationality by naturalisation abroad is not accompanied with freedom from obligations to the state, unless it shall have been obtained with the knowledge and authorisation of the Spanish government [2].

Sweden. [Swedish citizenship is forfeited by any one who becomes a citizen of another country. But the consent of the king is

expressions of opinion may also be referred to in Shanks *v.* Dupont, Peters' Supreme Court Cases, iii. 246, and Commentaries, ii. 49.

[1] De Martens, Nouv. Rec. Gén. xix. 78.

[2] Dana (Note to Wheaton, No. 49) says that 'Spain contends for an unlimited right over returned subjects for subsequent as well as past obligations.' He does not however mention his authority, and the statement hardly seems to be consonant with the text of the Spanish law.

necessary before foreign naturalisation can be acquired. Men and unmarried women of Swedish nationality also lose their nationality if domiciled abroad for ten consecutive years, unless they have made a declaration before the expiration of that period of their intention to remain Swedish subjects.]

Norway.

By Norwegian law 'a state citizen loses his rights as such when he becomes a subject of a foreign state, and when he leaves the kingdom for ever,' except that he may within a year of his departure make a declaration before a Norwegian Consul of his intention to retain his nationality. The declaration is valid for ten years, and can be renewed.

Switzerland.

The law of Switzerland allows a Swiss citizen to renounce his nationality, if he has ceased to be domiciled in the country, if he is in actual enjoyment of civil rights in the country of his residence, and if he has acquired, or is 'assured of acquiring,' nationalisation there for himself, his wife, and his children under age [1].

Austria.

In Austria emigration is not permitted without consent of the authorities; persons emigrating or taking up a foreign national character with consent become foreigners; persons doing so without consent equally lose their Austrian nationality, and are punished by sequestration of any property which they may possess within the empire.

Russia.

The practice of Russia is not clear. There appears to be reason to suppose that a Pole naturalised in America was seized and forced to serve in the army in 1866; but in the same year another Pole was deprived of the rights of Russian citizenship and banished for ever for being naturalised in the United States without leave of the emperor. It is at any rate fair to conclude that the acquisition of foreign nationality is not regarded as *ipso facto* releasing a subject from his allegiance [2].

[1] Federal Law of 1876, in Rev. de Droit Int. xii. 318.

[2] Naturalisation Commission Report, Appendix. It would appear from several state papers quoted by Mr. Wharton (Digest, §§ 131 and 172) that the government of the United States were not in possession of distinct information as to the effect of Russian law up to the time of the publication of the Digest in 1886.

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Practice of states with regard to foreigners naturalised by them.

Turning from the views taken by states as to the position of their own subjects when naturalised abroad, to their practice with respect to the protection of foreigners who have been received into their own community; the naturalisation law of Russia is found to place strangers admitted to Russian nationality 'on a perfect equality in respect to their rights with born Russians.' [In Spain it seems that 'aliens,' who have obtained certificates of naturalisation, are not held to be freed from the obligations imposed by their nationality of origin, unless their naturalisation has taken place with the permission of their state.] In France it appears, from a correspondence which took place in 1848 between M. Crémieux, then Minister of Justice, and Lord Brougham, that the acquisition of French nationality is considered to involve of necessity the severance of all bonds between the naturalised person and his former state, and his absorption for all purposes into the French nation. In the other states above mentioned it does not appear to have been distinctly laid down as a general principle, or to have been shown by state action in particular instances, whether a foreigner, on receiving naturalisation, would be regarded as having acquired a right to protection as against his former country[1]. Judging from the analogy of their laws with respect to their own natural-born subjects, it may however be presumed that in Germany and Italy the right of a state would be recognised to look upon naturalisation of its subjects as conferring the quality of foreigner upon the persons naturalised to such extent only as it might itself choose. In each of these countries a subject naturalised abroad may be held responsible upon his return within their jurisdiction for contraventions of

[1] By the Swiss Law of 1876 it is provided that naturalisation shall not be granted unless 'les rapports' of the persons seeking naturalisation 'avec l'état auquel ils ressortissent sont tels, qu'il est à prévoir que leur admission à la nationalité suisse n'entraînera pour la confédération aucun préjudice.' But it does not appear what the effect of naturalisation, if granted, would be understood to be as against the state to which the naturalised persons before belonged.

municipal law committed after or simultaneously with naturalisation. That the number of punishable acts is small is of course unimportant. The fact that any acts done after or simultaneously with naturalisation are punishable affirms the principle that naturalisation does not of itself destroy the authority of the original sovereign [1]. In the case of Austria no inference can probably be safely drawn either from the law affecting its own subjects or that regulating the conditions of the naturalisation of foreigners [2].

Conclusions.

It may be taken that the practice of the foregoing states gives a fair impression of practice as a whole; and it may be assumed that when a state makes the recognition of a change of nationality by a subject dependent on his fulfilment of certain conditions determined by itself, or when it concedes a right of expatriation by express law, it in effect affirms the doctrine of an allegiance indissoluble except by consent of the state [3]. Such being the case, the doctrine in question, disguised though it may be, is still the groundwork of a vastly preponderant custom. It may be

[1] Where naturalisation is used to escape from liability to *future* military service the offence is only committed by the completion of the act of naturalisation; but the latter, if it be effective to substitute an entirely new nationality for that previously existing, must obliterate the criminal character of the act at the moment of its performance.

[2] Naturalisation Commission Report, Appendix; Calvo, §§ 765–71; Lawrence, Commentaire, iii. 299.

[3] Notwithstanding that M. Bluntschli holds the liberty of emigration not to be absolute, and to be subject to 'l'accomplissement préalable des obligations indispensables envers l'état,' such as military service, he thinks that 'contrairement à l'ancienne opinion qui considérait le sujet comme perpétuellement obligé envers son prince ou envers son pays, et qui ne lui permettait pas de briser ce lien de son autorité privée, on en est arrivé peu à peu à reconnaître le principe de la liberté d'émigration. Nul état civilisé ne pourra à la longue se soustraire à l'application de cette nouvelle et libérale maxime.' Rev. de Droit Int. ii. 115–6. It is difficult to understand how liberty of emigration as a principle can be consistent with a regulatory power in the state. Who but the state is to define the 'obligations indispensables' which must be satisfied? And if the state may draw up a list of these obligations, and may insert among them obligations stretching over a lifetime, liberty of emigration becomes illusory. Incompatible principles cannot occupy an equal position. In the long run one must yield to the other, and it is evident, as must inevitably be the case, that the principle of free emigration yields with M. Bluntschli to that of the supremacy of the state.

hoped, both for reasons of theory and convenience, that it will continue to be so. An absolute right of expatriation involves the anarchical principle that an individual, as such, has other rights as against his state in things connected with the organisation of the state society than the right not to be dealt with arbitrarily, or dissimilarly from others circumstanced like himself, which is implied in the conception of a duly ordered political community; it supposes that the individual will is not necessarily subordinated to the common will in matters of general concernment. As a question of convenience, the objections to admitting a right of expatriation are fully as strong. The right, if it exists, is absolute; it can therefore only be curtailed with the consent of each individual. But if the doctrine of permanent allegiance be admitted, there is nothing to prevent the state from tempering its application to any extent that may be proper. Action upon it in its crude form is obviously incompatible with the needs of modern life; but it is consistent with any terms of international agreement which the respective interests of contracting parties may demand, and if recognised in principle and taken as an interim rule where special agreements have not been made, it would do away with practical inconveniences which frequently occur, and which as between certain countries might in some circumstances give rise to international dangers. It would be a distinct gain if it were universally acknowledged that it is the right of every state to lay down under what conditions its subjects may escape from their nationality of origin, and that the acquisition of a foreign nationality must not be considered good by the state granting it as against the country of origin, unless the conditions have been satisfied. It may at the present day be reasonably expected that the good sense of states will soon do away with such rules as are either vexatious or unnecessary for the safeguarding of the national welfare[1].

[1] For the naturalisation laws of various states see Reports of Her Majesty's Representatives abroad upon the Laws of Foreign Countries, Parl. Papers, Miscell. No 3, 1893; and Cogordan, La Nationalité, Annexes.

In the meantime, and until an agreement is come to upon the question of principle, it may be said that though a state has in strictness full right to admit foreigners to membership, and to protect them as members, it is scarcely consistent with the comity which ought to exist between nations to render so easy the acquisition of a national character, which may be used against the mother state, as to make the state admitting the foreigner a sort of accomplice in an avoidance by him of obligations due to his original country. When naturalisation laws are so lax as to lend themselves to an avoidance of reasonable obligations, the state possessing them can have no right to complain if exceptional measures, such as expulsion from the mother country, are resorted to at the expense of its adopted subjects. After the annexation of Frankfort to Prussia, a number of young men of that town, taking advantage of the looseness of Swiss naturalisation laws, obtained naturalisation in Switzerland in order to avoid the incidence of the conscription laws, and returned to Frankfort intending to live there as Swiss subjects. The Prussian government expelled them, and the Swiss government admitted that its conduct was fully justified.

Impropriety, on the part of a state granting nationality, of making the conditions of acquisition too easy.

A difference of practice exists with respect to the effects of the naturalisation of a father upon children born before his naturalisation, but minors at the moment when it is effected. The laws of some countries, as for example of the United States and Switzerland, provide that the child of a foreigner who is naturalised, becomes himself naturalised, if he be a minor, by the naturalisation of his father. In other cases, as in that of France, a child retains his nationality of birth notwithstanding that the nationality of his father is changed. The latter doctrine is a strict but reasonable deduction from the principle of sovereignty; the former is certainly the more convenient. It would probably be still more convenient to adopt as a rule the provisions of a convention made between France and Switzerland in 1879; and to give a right of choice to the child on attaining his majority, he being freed up to that time, with respect to

Effects of the naturalisation of parents on children who are minors at the date of naturalisation.

both countries, from military and other special obligations flowing from allegiance.

Claims on the part of states to treat unnaturalised foreigners as subjects.

Questions have sometimes occurred, both with regard to the privileges and the responsibilities of the individual, as to the effect of domicil or of a partial completion of formalities required for the acquisition of nationality, and as to that of doing acts the right to perform which is reserved as a privilege to the citizens or subjects of a state.

A question of the former kind, which attracted much attention at the time, was given rise to by Martin Koszta, an Hungarian insurgent of 1848–9. The merits of the case as a whole were somewhat complicated; but the facts bearing on the present point were few and simple. At the end of the rebellion Koszta escaped to Turkey, whence he ultimately went to the United States. He stayed in the latter country less than two years, and then returned to Turkey upon business, after having made a statutory declaration of his intention to become an American citizen. While at Smyrna he was arrested by Austrian authorities claiming to have the right to do so under the capitulations between their state and Turkey, and he was put on board an Austrian war brig, the Hussar, for conveyance to Triest. Before the vessel got under weigh however an American frigate arrived, and threatened to sink the Hussar unless Koszta was at once delivered up. As the Austrian commander refused, and as from the position of the ships a conflict would have endangered the town, the matter was momentarily settled by the delivery of the prisoner to the French Consul to be kept until the two governments concerned should have an opportunity of arriving at a decision. In the end the affair was compromised by Austria consenting to Koszta being shipped off to the United States, the right to proceed against him in case he returned to Turkey being reserved. By the naturalisation law of the United States the conditions requiring to be fulfilled before admission to citizenship could take place were a residence of five years in the country, and a declaration of intention to become

a citizen made before a court of justice at least three years prior to application for admission. It could not therefore be pretended, and was not pretended, that Koszta was naturalised. The original action of the representatives of the United States seems nevertheless to have been suggested by the impression that a right to protection was acquired by the declaration of intention to be naturalised; the government at first went even further. President Pierce, in a message to Congress, declared that 'at the time of his seizure Koszta was clothed with the nationality of the United States.' Ultimately other ground was taken up. 'It is a maxim of International law,' wrote Mr. Marcy, 'that domicil confers a national character; it does not allow any one who has a domicil to decline the national character thus conferred; it forces it upon him often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect. . . . . As the national character, according to the law of nations, depends upon the domicil, it remains as long as the domicil is retained, and is changed with it. Koszta was therefore invested with the nationality of an American citizen at Smyrna, if he in contemplation of law had a domicil in the United States[1].' Domicil no doubt imparts national character

[1] Mr. Marcy's doctrine was strangely inconsistent with the law of the United States at the period when he wrote. It was no doubt open to him to argue that a person might be entitled to the protection of the United States as a member of the state community without being in possession of those privileges of citizenship which naturalisation would give him, because under the constitution of the Union several classes of persons are in that position; as for example Indians and the inhabitants of conquered country, the latter of whom, as was the case with the inhabitants of California after its conquest from Mexico, are aliens until they are admitted to citizenship by an act of Congress, but are nevertheless 'subjects' as between the United States and foreign powers (Halleck, ii. 456). But at the time in question persons of foreign nationality who had declared their intention of becoming citizens were incapable of receiving United States passports, and consequently could not have been regarded as subjects. Since then, by an act of 1863, such of them as were liable to military service were rendered capable of receiving passports; but in 1866 this act was repealed and it was provided that for the future passports should be issued to citizens only (Lawrence, Commentaire, iii. 193). Dr. Woolsey seems to think that the merits of the

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for certain purposes; but those purposes, so far as they have to do with public international law, are connected with the rules of war alone, and Mr. Marcy's contention was wholly destitute of legal foundation. The ideas to which he gave expression were not however peculiar to himself; they seem to have been commonly held in America, and the action of the Confederate States with reference to conscription in 1862 rendered it necessary for the English government to urge the rudimentary doctrine, 'That a domicil established by length of residence only, without naturalisation or any other formal act whereby the domiciled person has, so to speak, incorporated himself into the state in which he resides, does not "for the time convert him into a subject of the domicil in all respects save the allegiance he owes his native sovereign." Such a domiciled person is not a *civis*, but a temporary subject, *subditus temporarius*, of the state in which he is resident.' Later, when the Northern States were in serious want of men in 1863, an act was passed subjecting foreigners to military service who had expressed their intention to become citizens. On this occasion Lord Russell, while apparently admitting that the scope of the act was not beyond the legitimate powers of a state over foreigners, represented that persons affected by it ought to be allowed a reasonable time to withdraw from the country. A proclamation was consequently issued giving sixty-five days for the departure of intending citizens. In stating in the preamble that its issue was caused by a claim made on behalf of such persons to the effect that under the law of nations they retained the right of renouncing their purpose of becoming citizens the government of the United States went further than it was asked; and in giving what was demanded not as a concession but as a right, abandoned all

case are affected by the fact that Koszta was in possession of a passport given to him by the American Consul at Smyrna; but a passport granted in contravention of the laws of the United States was obviously a mere piece of waste paper. In the fifth edition of his work Dr. Woolsey adds the admission that Koszta's 'mere declaration to become a citizen of the United States did not affect his nationality' (§ 80).

assertion of right to control persons as being citizens whose naturalisation is incomplete, and by implication abandoned also the assertion of a right to protect them [1].

The position of persons exercising rights reserved to subjects is different [2]. Whether or not they have been allowed to exercise them under a misapprehension as to their being subjects is immaterial. They have shown by their own acts that they wish to share in privileges understood to belong to subjects only, and they cannot afterwards turn round and repudiate their liability to correlative responsibilities. During the American civil war the English government very properly refused to interfere on behalf of British subjects who had placed themselves in this situation. It does not follow that such persons are in a better position than ordinary foreigners as between third states and the state within which they have arrogated to themselves the rights of subjects, and the burdens of which they must consequently bear. Third states, and the state of origin when it acknowledges naturalisation as changing nationality, can only look to the fact that the naturalisation laws of the state naturalising have or have not been fully complied with. Until these laws are satisfied the state into which a person has immigrated can have no right of protecting him.

The question arising out of sovereignty in relation to subjects with which international law deals.

When once the persons who are indisputably the subjects of a state, or whom it may regard as such, are ascertained, no question having special reference to sovereignty in its relation to the subjects of the state remains to be considered. International law has nothing to do with the authority exercised over a subject within the jurisdiction of a state, whether such jurisdiction be territorial or is that which is possessed in unappropriated places. Within the jurisdiction of a foreign state no authority exists, except in so far as those immunities from jurisdiction extend,

[1] Report of the Naturalisation Laws Commission, Appendix, pp. 42–5; De Martens, Causes Cél. v. 583.

[2] For acts unreasonably taken as showing intention of adopting the local national character, cf. antea, p. 216.

which are discussed elsewhere[1], as having more immediate connexion with sovereignty in its relation to territory; the state may issue any commands not incompatible with its duties to the foreign state, but it cannot of course enforce them except by the sanctions of municipal law, and consequently in places within its own jurisdiction. Finally, the right of protecting subjects abroad falls under the head of self-preservation[2].

Persons destitute of nationality, or of uncertain nationality.

In a certain number of cases it is possible for persons to be destitute of any national character. In Austria, for example, any one emigrating without permission of the state loses his nationality by the act of emigrating, and is consequently without nationality until or unless he is formally received into another state community; in the Argentine Confederation a foreign woman does not acquire the nationality of her husband on marrying an Argentine citizen, although she may have lost her nationality of origin by marrying a subject of another state; and the illegitimate son of an Englishwoman born in Russia, though British in the eye of Russian law, is of no nationality elsewhere, since by English law he is not British, and by Russian law he is not Russian. It is evident that the existence of numerous persons in like condition would be embarrassing; and it appears that much inconvenience was in fact caused until lately both in Germany and Switzerland by the presence of individuals who either had no nationality, or whose nationality it was impossible to determine. It was ultimately settled by convention as between the Swiss Cantons and as between the German states that any one found to be in either of these positions should be considered to be a subject of the state in which he was living, provided that he had resided there five years since attaining his majority, or had stayed there six weeks after his marriage, or finally had married there. It might be useful to adopt, as an international rule, a practice of ascribing a nationality of domicil to persons without nationality or of uncertain national character.

[1] See antea, pt. ii. chap. iv. 172 et seq.

[2] See postea, p. 278.

CHAPTER VI

JURISDICTION IN PLACES NOT WITHIN THE TERRITORY OF ANY STATE

General view of the jurisdiction exercised by states in places not within the territory of any state.

On the unappropriated sea, and on land not belonging to any community so far possessed of civilisation that its territorial jurisdiction can be recognised, it is evident that, as between equal and independent powers, unless complete lawlessness is to be permitted to exist, jurisdiction must be exercised either exclusively by each state over persons and property belonging to it, or concurrently with the other members of the body of states over all persons and property, to whatever country they may belong. The former of these alternatives is that which is most in consonance with principle. It has been seen that the state retains control over the members of the state community when beyond its territorial jurisdiction in so far as such control can be exercised without derogating from the territorial rights of foreign states, so that with respect to individuals there is always a state in a position to assert a claim to jurisdiction higher than any which can be put forward by other states; and although jurisdiction cannot be founded on non-territorial property so as to exclude or diminish territorial jurisdiction, the possession of an object as property at least forms a reasonable ground for the attribution of exclusive control to its owner when no equal or superior right of control can be shown by another. Concurrent jurisdiction could therefore only be justified by a greater universal convenience than several jurisdiction can secure, and in most cases, so far from universal convenience being promoted, it would be distinctly interfered with, by the admission of a common right of jurisdiction on the part of all nations. It is consequently

the settled usage that as a general rule persons belonging to a state community, when in places not within the territorial jurisdiction of any power, are in the same legal position as if on the soil of their own state, and that, also as a general rule, property belonging to a state or its subjects, while evidently in the possession of its owners, cannot be subjected to foreign jurisdiction.

For special reasons however exceptions are sometimes made to this usage. It has been already pointed out that in time of war a neutral state frees itself from responsibility for acts done outside its frontier by its subjects, when they are not employed as its own agents, by allowing a belligerent to exercise so much jurisdiction over them and their property as is necessary for the protection of his right to attack an enemy in the various ways sanctioned by the customs of war. In such cases the right of jurisdiction is wholly abandoned within defined limits. Concurrent jurisdiction, again, is conceded by a country to a specific foreign state when subjects of the former take passage or service on board the vessels of the latter, and to all foreign states when the crew of a ship belonging to it is guilty of certain acts which go by the name of piracy. Finally, when persons on board a ship lying in or passing through foreign waters commit acts forbidden by the territorial law the local authorities may pursue the offending vessel into the open sea in order to vindicate their jurisdiction.

Theory of the territoriality of vessels.

It is unquestioned that in a general way a state has the rights and the responsibilities of jurisdiction over ships belonging to it while they are upon the open sea, but a difference of opinion exists as to the theoretical ground upon which the jurisdiction of the state ought to be placed, and this is so wide-reaching and important in its effects as to make it worth while to examine carefully into the reasonableness of the doctrines on either side and into the amount of authority by which they are respectively supported.

According to some writers ships are floating portions of the

country upon which they depend, or, as the doctrine is sometimes expressed, they are a 'continuation or prolongation' of territory. According to others the jurisdiction possessed by a state over its ships upon the ocean arises simply from the fact that no local jurisdiction exists there; it is necessary for many purposes that jurisdiction over a vessel shall be vested in a specific state; it is natural to concede a right of jurisdiction to the owner of property until his claim as such is opposed by a superior title on the part of some one else; and all states being equally destitute of local rights upon the ocean, no right to jurisdiction over a vessel can, within the range of the purposes contemplated, be superior to that of the state owning it. According to this theory it does not follow that there are no rights other than those of the owner which are ever able to assert themselves. Claims springing from property may, for example, be confronted with claims based on the rights of self-preservation. And as claims which are ultimately founded on the latter right are actually made by belligerents, the theory has at least the advantage of fitting in better with existing practice than the competing doctrine. If the latter is authoritative, usages such as that of the capture of neutral vessels for contraband trade, instead of being sanctioned under the general principles of international law, would become exceptional and be thrown upon their defence. The legal position of merchant ships in territorial waters would also be affected, and it would be necessary upon that point to admit and to go beyond the views of the French school which have already been stated and rejected.

Its history.

It does not appear that the doctrine of the territoriality of vessels can be traced further back than to the 'Exposition des Motifs' put forth in 1752 by the Prussian government in justification of its behaviour in confiscating the funds payable to its English creditors in respect of the Silesian Loan[1]. In that repertory of bad law it is said that 'the Prussian vessels, although laden with property belonging to the enemies of England, were

[1] See postea, p. 370 n.

a neutral place, whence it follows that it is exactly the same thing to have taken such property out of the said vessels as to have taken it upon neutral territory[1].' The assertion, of which the object was to produce the impression that the English, in acting upon an ordinary usage, had been guilty of illegal conduct, was supported by no reasoning. In its origin therefore the doctrine had just so much authority as belongs to a legal proposition laid down by an advocate whose law is notoriously bad. A few years later the idea reappears in Vattel, but he uses it only incidentally to explain a particular custom, and evidently without adequate consideration of its scope and bearings. Children born at sea, he says, if born in a vessel belonging to the state of which their parents are subjects, 'may be considered to be born within the territory, for it is natural to regard the ships of the nation as parts of its territory, especially while they navigate unappropriated waters, since the state preserves its jurisdiction over them[2]. With Hübner the doctrine holds a more conspicuous position. A proof was required that enemy's goods ought not to be captured on board neutral vessels. Let the territoriality of merchant ships be granted and the proof was found. 'It is universally agreed that a belligerent cannot attack his enemy in a neutral place, nor capture his property there. Neutral vessels are unquestionably neutral places. Consequently when they are laden with enemy's goods a belligerent has no right to molest them because of their cargoes[3].' The question is simply begged. The territoriality of a vessel is a metaphorical conception; and before a metaphor can be employed as an operative principle of law, it must be proved to have been so adopted into law as to render its use necessary, or at least reasonable. It was impossible for Hübner to show this. It would have been idle for him to appeal to the exterritoriality of sovereigns, ambassadors, or ships of war, as one generally accepted, even if it had then been in fact

[1] De Martens, Causes Cél. ii. 117.
[2] Liv. i. ch. xix. § 216.
[3] De la Saisie des Bâtimens Neutres, tom. i. p^tie ii. ch. ii. § 6.

more fully accepted with respect to ships of war than it actually was. Enough has been said in stating the respective characteristics of ships of war and commerce, and the reasons for which privileges are conceded to the former within the territory of foreign countries, and even in giving the arguments by which the French view as to the position of merchant vessels in foreign ports is supported, to show that the analogy between the two classes of vessels is not close enough to require that a mode of treating the one shall be extended to the other at the cost of a reversal of usage. And usage, so far as merchant vessels was concerned, was wholly inconsistent with the doctrine of territoriality.

Notwithstanding that the theory was thus destitute of foundation, it has always had a certain number of adherents, it is probably adopted definitively by several states, it is professed by living or recent writers of current authority, and its influence is no doubt felt in much that is written against the established customs of maritime war.

Its inadmissibility.

The modern advocates of the doctrine are somewhat too apt to affirm that 'international law has long admitted the principle that a ship leaves the country to which it belongs as a floating portion of its territory,' without adducing any proof of its admission. If they endeavour to prove the correctness of their view, they say with Massé that, as sovereignty cannot be established over the seas, jurisdiction cannot be exercised there except over property by the state owning it, and that acts done on the high seas under the flag of a state are reputed to be done on the soil of that state[1].

[1] Bluntschli, § 317; Massé, liv. ii. tit. i. ch. ii. sect. ii. § 10, art. i. See also Heffter, § 78; Hautefeuille, Droits et Devoirs des Neutres, tit. vi. ch. i. sect. 1; Negrin, 95.

Ortolan (Dip. de la Mer, liv. ii. ch. x) appears to hold that merchant vessels are territorial upon the ocean, and lose their territorial character on entering territorial waters.

The territoriality of merchant vessels is not admitted by Lampredi (Com. dei Pop. Neut. pt. i. § xi), Wheaton (Elem. pt. ii. ch. ii. § 10), Manning (Law of Nations, p. 275, Abdy's ed.), Riquelme (i. 222), Twiss (i. § 159), Fiore (pt. ii. ch. v. ed. 1868), Harcourt (Letters of Historicus, No. x).

The doctrine of the non-territoriality of merchant vessels has always been

Both statements are inconsistent with the facts. They are only true of cases in which no other state than that to which a vessel belongs has an interest in also exercising jurisdiction; they are true of the effect of births, wills, &c., but they are not true, for example, when a vessel carries goods contraband of war, the seizure of which upon neutral territory would be a gross violation of sovereignty.

International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thorough-going assertors of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now

strongly, and often too strongly, held by English governments. Its position in their view at the beginning of the present century was expressed without exaggeration by Lord Stowell when he said that 'the great and fundamental principle of British maritime jurisprudence is, that ships upon the high seas compose no part of the territory of a state. The surrender of this principle would be a virtual surrender of the belligerent rights of this country.' (Sir W. Scott, Report in Impressment Papers, 1804, quoted in Append. to Report of Naturalisation Commission, p. 32.) The doctrine was not only maintained to the full, but in dealing with impressment it was pushed beyond its natural limits, and was converted into an assertion of concurrent jurisdiction, not by way of a customary exception, but as a matter of principle independently of general consent. Of course the conduct of England at the period in question had much to do with the vivacity which has been displayed by the fiction with which her doctrine was incompatible; and it tended to drive the United States into the opposite extreme. By the latter power in fact the territoriality of the merchant vessel has been distinctly asserted. Mr. Webster, writing to Lord Ashburton (Aug. 8, 1842) with reference to impressment, says, 'Every merchant vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry therefore into such vessel, being neutral, by a belligerent, is an act of force, and is *primâ facie* a wrong, a trespass, which can be justified only when done for some purpose allowed to form a sufficient justification by the law of nations.' Ib. p. 60.

it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it[1]. The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of exterritoriality, which of course cannot be brought into use as against a ship. This however the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied both by important states and by jurists of weight.

Limits of the jurisdiction of a state over its merchant vessels in non-territorial waters.

Putting aside the fiction of territoriality as untenable, it may be taken for granted that the jurisdiction exercised by a state over its merchant vessels upon the ocean is conceded to it in virtue of its ownership of them as property in a place where no local jurisdiction exists; this being a reasonable theory, and the only one which enters into competition with the doctrine of territoriality. It only remains therefore to see what are the limits of the jurisdiction thus possessed. As might be expected, it is sufficient to provide for the good order of the seas, and excludes foreign jurisdiction until grave reason can be shown for its exercise. Its extent may be defined as follows. A state has—

1. Administrative and criminal jurisdiction so as to bring all acts cognizable under these heads, whether done by subjects or foreigners, under the disciplinary authority established in virtue

[1] Manning, p. 276.

of state control on board the ship and under the authority of the state tribunals [1].

2. Full civil jurisdiction over subjects on board, and civil jurisdiction over foreigners to the extent and for the purposes that it is exercised over them on the soil of the state, unless partial exemption is given to them when on board ship by the municipal law of the state.

3. Protective jurisdiction to the extent of guarding the vessel against interference of any kind on the part of other powers, unless she commits acts of hostility against them, or does certain acts during war between two or more of them which belligerents are permitted to restrain [2], or finally, escapes into non-territorial waters after committing, or after some one on board has committed, an infraction of the law of a foreign country within the territory of the latter.

A state is responsible for all acts of hostility against another state done on the ocean by a merchant vessel belonging to it, and it is bound to offer the means of obtaining redress in its courts for wrongful acts committed against foreign individuals by her or by persons on board her. It is not responsible for those acts above mentioned which belligerents are permitted to restrain, or for acts, to be defined presently, which constitute piracy.

With respect to ships of war and other public ships little need

[1] It is worth while to note that an effect of this jurisdiction is to sometimes change the character of continuing acts, done partly in foreign territorial waters and partly on the high seas, so that acts innocent under foreign jurisdiction may become punishable when the vessel by issuing from it becomes subject to the criminal jurisdiction of its own country. Thus, in the case of Reg. *v.* Lesley (Bell's Crown Cases Reserved, 220), the defendant, who was master of a merchant vessel, entered into a contract with the Chilian government to bring over to England certain Chilian subjects, who had been sentenced to banishment. The banished persons were put on board, and were retained on board, against their will. On the arrival of the vessel in England the defendant was indicted and convicted for false imprisonment; it being held that the detention of his unwilling passengers, though perfectly justified within Chilian waters, became unlawful so soon as the vessel crossed their boundary.

[2] See postea, pt. iv. chaps. v, vi, vii.

be said. The fiction of territoriality is useless, but it is harmless; because it cannot cause larger privileges to be attributed to such vessels than they are acknowledged for other reasons to possess. They represent the sovereignty and independence of their state more fully than anything else can represent it on the ocean; they can only be met by their equals there; and equals cannot exercise jurisdiction over equals. The jurisdiction of their own state over them is therefore exclusive under all circumstances, and any act of interference with them on the part of a foreign state is an act of war.

Jurisdiction of a state over foreigners in its ships.

It follows from the amount of jurisdiction possessed by a country over its vessels upon the ocean that a state concedes to a foreign power concurrent jurisdiction over its subjects serving or taking passage in ships belonging to the latter. All acts done, or things occurring, on board have the same civil or criminal value relatively to the foreign state, and entail the same consequences, as if done within the territory of the latter. On the other hand it may be repeated that the state of which the subjects are on board a foreign ship can of course appreciate such acts or occurrences in whatever way it chooses, and may affix what consequences it likes to them, as within its own territory, provided that it does not supplant or exclude the primary jurisdiction of the country to which the vessel belongs[1].

[1] It may be worth while to mention a somewhat recent illustrative case. An English sailor on board an American vessel stabbed the mate. On the arrival of the vessel at Calcutta the sailor was handed over to the police for safe keeping. The commission of the crime having been thus brought to the notice of the authorities, they put the sailor on his trial under an Indian statute considered by the High Court of Calcutta to give the courts of the Empire jurisdiction over crimes committed by British subjects on the high seas, even though such crimes should be committed on board a foreign vessel. After the man was convicted the Consul General of the United States applied for his extradition, which was refused on the ground that the government of India was unable to order the surrender of a person on a charge in respect of which he had already been tried and convicted by a competent British court. Upon this the American Minister in London complained to the British government of the exercise of jurisdiction of the High Court, urging that 'as regards common crimes committed on board merchant vessels on the high seas, the competent tribunals of the vessel's nation have exclusive

PART II CHAP. VI

Pursuit of a vessel into non-territorial waters for infractions of law committed in territorial waters.

It has been mentioned that when a vessel, or some one on board her, while within foreign territory commits an infraction of its laws she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them [1]. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful [2].

jurisdiction of the question of trial and punishment of any person thus accused of the commission of a crime against its municipal law.' On examination it was found that the statute under which the trial took place did not confer the supposed powers; the British government therefore expressed its 'regret that the action of the authorities at Calcutta should have been governed by a view of the law which, in the opinion of Her Majesty's government, cannot be supported'; but it at the same time recorded its dissent from the general proposition laid down by the American Minister. It was 'not prepared to admit that a statute conferring jurisdiction on the court of the country of the offender, in the case of offences committed by its own subjects on the high seas, on board a foreign vessel or in places within foreign jurisdiction, would violate any principle of International Law or comity. On the contrary,' it was 'of opinion that there are many cases in which the conferring of such jurisdiction would subserve the purposes of justice, and be quite consistent with those principles. Such an assumption of jurisdiction does not involve a denial of jurisdiction on the part of the state in whose territory the offence was committed; it involves no more than the right of concurrent jurisdiction.' Probably, as indicated in the text, the claim to strictly concurrent jurisdiction is excessive. It might be best that extradition of an accused person, who has fallen into the hands of his territorial authorities, should be regarded as due whenever it is applied for before committal for trial, or equivalent conclusion of preliminary or instructional proceedings.

[1] Bluntschli, § 342; Woolsey, § 58.

[2] A doctrine has lately been suggested, to which it may be worth while to devote a few words. In the arguments laid before the Behring Sea Arbitral

Pirates, according to Bynkershoek[1], are persons who depredate by sea or land without authority from a sovereign. The definition, like most other definitions of pirates and piracy, is at once too wide and too narrow to correspond exactly with the acts which are now held to be piratical, but it may serve as a starting-point by directing attention to the external characteristic by which, next to their violent nature, they are chiefly marked. Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common: they are done under conditions which render it impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no state or organised political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject. So long as acts of violence are done under the authority of the state, or in such way as not to involve its supersession, the state is responsible, and it alone exercises jurisdiction. If a commissioned vessel of war indulges

Tribunal, on behalf of the United States, it was advanced as a proposition of law that a state has a right to make enactments under which it can assume jurisdiction upon the high seas, exercisable at an indefinite distance outside territorial waters, for the purpose of safeguarding property, and of protecting itself against acts 'threatening invasion of its interests.' The laws so passed were alleged to be 'binding upon other nations because they are defensible acts of force which a state has a right to exert.' In support of the supposed right, the practice of nations was adduced in the form of 'Hovering Acts,' of fishery regulations, &c. It was not difficult for Great Britain to show that the laws, by which it was argued that she and other states had acted in conformity with the American pretension, were either restricted in their operation to territorial waters, or were, probably everywhere, and certainly in the case of the more important countries, intended only to be enforced upon foreigners subject to the assent of their own government. The arguments from precedent therefore fell to the ground. As regards the principle involved, it will be seen later (pp. 269 et seq.) that a right of self-defensive action upon the high seas, and even within the territory of a foreign power, undoubtedly exists; but it will also be seen that its exercise is limited to cases of grave and sudden emergency, and that the very ground and essential nature of the right are incompatible with the steady and regular application of law. Subject to the isolated practice mentioned in the text, the laws of a state can only run outside its territorial waters against the vessels and subjects of another state with the express or tacit consent of the latter.

[1] Quæst. Jur. Pub. lib. i. cap. xvii.

in illegal acts, recourse can be had to its government for redress; if a sailor commits a murder on board a vessel the authority of the state to which it belongs is not displaced, and its laws are able to assert themselves; but if a body of men of uncertain origin seize upon a vessel and scour the ocean for plunder, no one nation has more right of control over them, or more responsibility for their doings, than another, and if the crew of a ship takes possession of it after confining or murdering the captain, legitimate authority has disappeared for the moment, and it is uncertain for how long it may be kept out. Hence every nation may seize and punish a pirate, and hence, in the strong language of judges and writers whose minds have dwelt mainly upon piracy of a particular sort, he is reputed to be the enemy of the whole human race.

When the distinctive mark of piracy is seen to be independence or rejection of state or other equivalent authority, it becomes clear that definitions are inadequate which, as frequently happens, embrace only depredations or acts of violence done *animo furandi*. If a vessel belonging to an extinguished state were to keep the seas after the national identity had been wholly lost, and were to sink the vessels and kill the subjects of the victorious state, the intention to plunder would be absent, but the act at bottom would be the same as one in which that intention was present. In both cases the acts done would be acts of violence committed by persons having no right to perform them without authority from a politically organised society, but having no such society behind them; and in both cases they would be acts for which no remedy could be obtained except upon the persons by whom they were done.

It may on the other hand be worth while to remark that a satisfactory definition of piracy must expressly exclude all acts by which the authority of the state or other political society is not openly or by implication repudiated. Probably it is never intended to convey anything else, but the language of some writers is sufficiently loose to render it uncertain whether cases

even of common robbery, cognizable only by the sovereign of the criminals, might not fall within the scope of the words used.

It is generally said that one of the conditions of the piratical character of an act is the absence of authority to do it derived from any sovereign state. Different language would no doubt have been employed if sufficient attention had been earlier given to societies actually independent, though not recognised as sovereign. Most acts which become piratical through being done without due authority are acts of war when done under the authority of a state; and as societies to which belligerent rights have been granted have equal rights with permanently established states for the purposes of war, it need scarcely be said that all such acts authorised by them are done under due authority. Whether the same can be said of acts done under the authority of politically organised societies which are not yet recognised as belligerent may appear more open to argument, though the conclusion can hardly be different. Such societies being unknown to international law, they have no power to give a legal character to acts of any kind; at first sight consequently acts of war done under their authority must seem to be at least technically piratical. But it is by the performance of such acts that independence is established and its existence proved; when done with a certain amount of success they justify the concession of belligerent privileges; when so done as to show that independence will be permanent they compel recognition as a state. It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question. It would be absurd to require a claimant to justify his claim by doing acts for which he may be hanged. Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with

public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state. The only reason therefore for punishing him as a pirate is that an unrecognised political society cannot offer a sufficient guarantee that the agents employed by it will not make the warlike operations in which they are engaged a cloak for indiscriminate plunder and violence. The reason seems hardly adequate. It is enough that the power must always exist to treat them as pirates so soon as they actually overstep the limits of political action. The true view then would seem to be that acts which are allowed in war, when authorised by a politically organised society, are not piratical. Whether a particular society is or is not politically organised is a question of fact which must be decided upon the circumstances of the case.

Usually piracy is spoken of as occurring only upon the high seas. If however a body of pirates land upon an island unappropriated by a civilised power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy. In so far as any definitions of piracy exclude such acts, and others done by pirates elsewhere than on the ocean but of the kind which would be called piratical if done there, the omission may be assumed to be accidental. Piracy no doubt cannot take place independently of the sea, under the conditions at least of modern civilisation; but a pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical[1].

[1] Molloy (bk. i. ch. iv. § 1) describes a pirate as 'a sea-thief, a hostis humani generis, who to enrich himself, either by surprise or open force, sets upon merchants or other traders by sea.' Casaregis (disc. lxiv. 4) says:

In what it consists.

If the foregoing remarks are well founded, piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of a state through descent from the sea, by a body of men acting independently of any politically organised society.

Classification of acts which are piratical, or are

The various acts which are recognised or alleged to be piratical may be classed as follows:—

1. Robbery or attempt at robbery of a vessel, by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use.

'Proprie pirata ille dicitur qui sine patentibus alicujus principis ex propria tantum et privata auctoritate per mare discurrit depredandi causa.' Kent (Comm. i. 183) calls piracy 'a robbery or a forcible depredation on the high seas, without lawful authority, and done animo furandi, and in the spirit and intention of universal hostility.' Wheaton (Elem. pt. ii. ch. ii. § 15) defines piracy as being 'the offence of depredating on the seas, without being authorised by any sovereign state, or with commissions from different sovereigns at war with each other.' Riquelme (i. 237) says that 'los piratas, segun la ley de las naciones, son aquellos que corren los mares por su propia autoridad, y no bajo el pabellon de un Estado civilizado, para cometer toda clase de desafueros á mano armada, ya en paz ya en guerra, contra los buques de todos los pueblos.' Ortolan (Dip. de la Mer, liv. ii. ch. xi) considers that 'à proprement parler, dans le sens le plus restreint et le plus généralement adopté, les pirates ou forbans sont ceux qui courent les mers de leur propre autorité, pour y commettre des actes de déprédation, pillant à main armée, soit en temps de paix, soit en temps de guerre, les navires de toutes les nations, sans faire aucune distinction que celle qui leur convient pour assurer l'impunité de leurs méfaits.' Phillimore (i. § ccccliii) calls piracy 'an assault upon vessels navigated on the high seas, committed animo furandi, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury.' Heffter (§ 104) says that it 'consiste dans l'arrestation et dans la prise violente de navires et des biens qui s'y trouvent, dans un but de lucre et sans justifier d'une commission délivrée à cet effet par un gouvernement responsable.' Bluntschli (§ 343) lays down that 'les navires sont considérés comme pirates, qui sans l'autorisation d'une puissance belligérante cherchent à s'emparer des personnes, à faire du butin (navires et marchandises), ou à anéantir dans un but criminel les biens d'autrui.' Calvo (§ 1134) understands by piracy 'tout vol ou pillage d'un navire ami, toute déprédation, tout acte de violence commis à main armée en pleine mer contre la personne ou les biens d'un étranger, soit en temps de paix, soit en temps de guerre.'

Bernard (The Neut. of Great Britain, 118) and Dana (Notes to Wheaton, Nos. 83–4) have valuable remarks on what does, and what does not, constitute piracy.

2. Depredation upon two belligerents at war with one another under commissions granted by each of them.

alleged to be piratical.

3. Depredations committed at sea upon the public or private vessels of a state, or descents upon its territory from the sea by persons not acting under the authority of any politically organised community, notwithstanding that the objects of the persons so acting may be professedly political. Strictly all acts which can be thus described must be regarded as in a sense piratical. In the most respectable instances they are acts of war which, being done in places where international law alone rules, or from such places as a base, and being therefore capable of justification only through international law, are nevertheless done by persons who do not even satisfy the conditions precedent of an attempt to become subjects of law, and who cannot consequently claim like unrecognised political societies to be endeavouring to establish their position as such. Often however the true character of the acts in question is far from corresponding with their legal aspect. Sometimes they are wholly political in their objects and are directed solely against a particular state, with careful avoidance of depredation or attack upon the persons or property of the subjects of other states. In such cases, though the acts done are piratical with reference to the state attacked, they are for practical purposes not piratical with reference to other states, because they neither interfere with nor menace the safety of those states nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction.

4. A disposition has occasionally been shown to regard as pirates persons taking letters of marque from one of two belligerents, their own state being at peace with the other belligerent. In 1839, France being at war with Mexico, Admiral Baudin, commanding the fleet of the former power, notified that every privateer sailing under the Mexican flag, of which the captain and two-thirds of the crew were not

Mexican subjects by birth, would be considered piratical and treated as such; and in 1846, during the war of the United States with Mexico, President Polk suggested in a message to Congress that it might be a question for the criminal courts to decide whether bearers of commissions, issued in blank by the Mexican government, and sold to foreigners by its agents abroad, ought not to be regarded as pirates[1]. That the views entertained by the French and American governments on these occasions were at variance with usage is confessed, but some writers hold that usage ought to be modified in conformity with them. It is argued that the change should be made because vessels acting in the manner contemplated would be disavowed by the state to which they properly belong, and because it would decline to be responsible for them; because, on the other hand, they do not belong to the state of which they carry the commission, since 'they fulfil none of the conditions required for the impress of a national character;' they are thus destitute of any nationality. The reasoning does not appear to be very conclusive. A vessel cannot be treated as piratical for the mere absence of a clear national character, because a clear national character is at least as much wanting to the vessels of a simply belligerent community as to foreign vessels employed by a sovereign state. In both cases, the acts purporting to be done being in themselves permissible, or at least not criminal, when authorised by a state or other political community, and criminal when not so authorised, the essential point must be that a responsible state or equivalent of a state shall really exist; and it is impossible to maintain that the grant of letters of marque or commissions to foreign vessels does not impose complete

[1] Ortolan, Dip. de la Mer, liv. ii. ch. xi, and Annexe H. The United States appear to have made it an object of their policy to secure by treaty from other states that the acceptance of letters of marque by the subjects of a state from one foreign country against another should be reckoned piracy; see e.g. treaties with France, 1778 (De Martens, Rec. ii. 597); England, 1794 (id. v. 678); Venezuela, 1836 (Nouv. Rec. Gén. xiii. 564); Guatemala, 1849 (id. xiv. 318).

responsibility upon the government issuing them. That a practice of granting such letters or commissions would be highly objectionable, and that it would give rise to the most serious abuses, is indisputable; but to say this, and to say that the persons receiving them ought to be treated as pirates, are two very distinct things. The true safeguard against the evils which would spring from the practice would be to conclude treaties binding the contracting powers not to issue such letters or commissions. Fortunately the smallness of the number of states which have not now become signataries of the Declaration of Paris renders the question of little importance. It would indeed be hardly worth discussing but for the opportunity which it gives of indicating that the true nature of piracy has been consistently observed in the formation of authoritative custom [1].

Presumption in favour of the innocence of a public vessel doing acts *primâ facie* piratical.

It follows from the intimacy of the connexion between a state and its public vessels that acts done by the latter must always be presumed in the absence of distinct proof to the contrary to be done under the authority of the state. Whatever therefore may be the nature of the acts done by a ship of war or other public vessel, it cannot be treated as a pirate unless it has evidently thrown off its allegiance to the state under circumstances which prevent it from being looked upon as the instrument of another politically organised community, or unless under like circumstances it has been declared to be piratical by the legitimate government. Unless one or other of these things has occurred, redress for excesses committed by it can only be sought, as the case may demand, either from the regular government of the state or from that of its seceded portion.

As a general rule the vessels of all nations have a right to

[1] Ortolan, Dip. de la Mer, liv. ii. ch. xi; Calvo, § 1145. Treaties binding the contracting powers not to issue letters of marque to subjects of neutral states were formerly frequent. Besides the treaties between the United States and other powers already cited, see those between England and France, 1786 (De Martens, Rec. iv. 157); Denmark and Genoa, 1789 (ib. 447); Russia and Sweden, 1801 (id. vii. 331); France and Venezuela, 1843 (Nouv. Rec. Gén. v. 170); France and Chile, 1852 (id. xvi. 9).

seize a pirate and to bring him in for trial and punishment by the courts of their own country irrespectively of his nationality or of the nationality, if any, of the vessel in which he may be found; and when weighty reasons exist for suspecting that a vessel is piratical all ships of war have a right to visit her for the purpose of ascertaining her true character. When however piratical acts have a political object, and are directed solely against a particular state, it is not the practice for states other than that attacked to seize, and still less to punish, the persons committing them. It would be otherwise, so far as seizure is concerned, with respect to vessels manned by persons acting with a political object, if the crew, in the course of carrying out their object, committed acts of violence against ships of other states than that against which their political operation was aimed, and the mode in which the crew were dealt with would probably depend upon the circumstances of the case.

Some of the points connected with piracy of a more or less political complexion may be illustrated from recent occurrences.

Cases of the insurgents of Carthagena,

In 1873 a communalist insurrection broke out in the south-east of Spain, and the Spanish squadron stationed at Carthagena fell into the hands of the insurgents. The crews of the vessels composing the squadron were proclaimed pirates by the government of Madrid, and it became necessary for states having vessels of war in the western Mediterranean to instruct the commanders as to the line of conduct to be adopted by them. Instructions were accordingly given by the governments of England, France and Germany; these, though communicated by each government to the others, were drawn up and issued without previous concert; they were however so similar as to be nearly identical. French and German naval commanders were ordered to allow freedom of action to the insurgent vessels so long as the lives or the property of subjects of their respective states were not threatened; the orders given to British officers differed only in directing interference in the case of danger to Italian as well as to English persons or property. If in the

course of any interference which might be needed, Spanish persons or ships were captured, British commanders were to hand over their prisoners and the property seized to the agents of the government of Madrid. Thus, the piracy of the Carthagenians being political, no criminal jurisdiction was assumed over them; and though the right of summary action was asserted, its exercise was limited to the requirements of self-protection [1].

The *Huascar*,

In 1877 a revolutionary movement took place in Peru, the first step in which consisted in the seizure at Callao of the ironclad *Huascar* by the crew and some of her officers. The ship got under weigh immediately for Iquique, where it was expected that the leader of the movement would be met, and in the course of the next few days, apparently while on her way thither, she took a supply of coals from a British ship without making any arrangement as to payment, and also stopped a British steamer, from which Colonels Varela and Espinosa, two government officials, were taken by force. In the meantime the Peruvian government had issued a decree stating that it would not be responsible for the acts of the persons on board the *Huascar*, of whatever nature they might be. Under these circumstances Admiral de Horsey, who was in command of the English squadron in the Pacific, regarding the acts of the *Huascar* as 'piratical against British subjects, ships, and property,' attacked her [with the *Shah*] and fought an action which remained undecided at nightfall, so that the *Huascar* was able to escape and surrender to a Peruvian squadron. In Peru the occurrence gave rise to great excitement, in which the government shared or affected to share, and a demand for satisfaction was made upon England. There the question was referred to the law officers of the crown, who reported in effect that the acts of the *Huascar* were piratical. The conduct of the Admiral was in consequence approved, and the matter was allowed to drop by Peru [2].

[1] Calvo, §§ 1146–8.

[2] Parl. Papers, Peru, No. 1, 1877.

The *Virginius*.

In 1873, during the insurrection of part of Cuba against Spain, an affair took place of a widely different nature. The *Virginius*, a vessel registered as the property of an American citizen, but in fact belonging to certain Cuban insurgent leaders, had sailed from New York in 1870 as an American ship, and after making sundry voyages for insurgent objects, found herself at Kingston in the first-mentioned year. There she took on board some men intended to be landed in Cuba, shipped a quantity of fresh hands, who were ignorant of the true destination of the vessel, and set sail ostensibly for Limon Bay in Costa Rica. While on her way to Cuba, but upon the open sea, she was chased by and surrendered to the Spanish vessel, the *Tornado*. She was taken into Santiago de Cuba, and the greater part of those on board, including several British subjects shipped in Jamaica, were shot by order of the general commanding the place. When the *Virginius* was captured she was undoubtedly engaged in an illegal expedition, but she had committed no act of piracy, she was sailing under the flag of the United States and with American papers, she offered no resistance, and was in fact unfitted both for offence and defence by the character of her equipment. Although therefore the Spanish authorities had ample reason for watching her, for seizing her if she entered the Cuban territorial waters, and possibly even for precautionary seizure upon the high seas, no excuse existed for regarding the vessel and crew as piratical at the moment of capture. Had they even been seized while in the act of landing the passengers the business in which they would have been engaged would not have amounted to piracy. The element of violence would have been wanting. Invasion is in itself an act of violence. But an invasion does not take place when a hundred men land in a country without means of seriously defending themselves, and when their only immediate object is to join their fellow rebels quietly and without observation. The British government demanded and obtained compensation for the families of the British subjects who were executed. In their correspondence

with the government of Spain they did not complain of the seizure of the vessel, or of the detention of the passengers and crew, but argued that after this had been effected 'no pretence of imminent necessity of self-defence could be alleged, and it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners;' maintaining further that had this been done it would have been found that 'there was no charge either known to the Law of Nations or to any municipal law under which persons in the situation of the British crew of the *Virginius* could have been justifiably condemned to death[1].'

By the municipal law of many countries acts are deemed piratical and are punished as such which are not reckoned piratical by international law. Thus the slave trade is piratical in England and the United States; and in France the crew of an armed vessel navigating in time of peace with irregular papers become pirates upon the mere fact of irregularity without the commission of any act of violence. It is scarcely necessary to point out that municipal laws extending piracy beyond the limits assigned to it by international custom affect only the subjects of the state enacting them and foreigners doing the forbidden acts within its jurisdiction.

[1] Parl. Papers, lxxvi. 1874.

CHAPTER VII

SELF-PRESERVATION

Right of self-preservation in general.

In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation. Where law affords inadequate protection to the individual he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary; and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation can be secured. But the right in this form is rather a governing condition, subject to which all rights and duties exist, than a source of specific rules, and properly perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles. If such suspension is necessary for existence, the general right is enough; if it is not strictly necessary, the occasion is hardly one of self-preservation. There are however circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved. This class of cases is not only susceptible of being brought under distinct rules, but evidently requires to be carefully defined, lest an undue range should be given to it.

Permissible action within foreign territory against individuals

The simplest form of the occasions on which the right of self-preservation, in its more limited sense, arises is offered when, on an overt attack being made upon a state by persons enjoying the protection afforded by the territory of another state, it is useless either from the suddenness of the attack or from other causes to

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making it a starting-point for attack.

call upon the state which serves as a cover for the act to preserve its neighbour from injury. The attacked state takes upon itself to exercise authority or violence within the territory of the other state, and thereby violates the sovereignty of the latter; it consequently does an act which is *primâ facie* hostile, and which can only be divested of the character of hostility by the urgency of the reason for it, and by an evident absence of hostile intention. The conditions of permissible action are therefore, first, that the danger shall be so great and immediate, or so entirely beyond the control of the government of the country which is used by the invaders, that a friendly state may reasonably be expected to consider it more important that the attacked state shall be protected than that its own rights of sovereignty shall be maintained untouched, and secondly, that the acts done by way of self-protection shall be limited to those which are barely necessary for the purpose [1].

Case of the *Caroline*.

An instance in which the right of self-preservation was exercised in this manner happened during the Canadian rebellion of 1838 [2]. A body of insurgents collected to the number of several hundreds in American territory, and after obtaining small arms and twelve guns by force from American arsenals, seized an island at Niagara within the American frontier, from which shots

[1] Phillimore, i. §§ ccxiii–v; Vattel, liv. iii. ch. vii. § 133; Klüber, § 44; Twiss, i. § 102.

Some writers, while admitting the right of self-protection by means of acts violating the sovereignty of another state, deny that it is a pacific right, and class acts done in pursuance of it with operations of 'imperfect war,' 'any invasion of state territory being' necessarily 'an act of hostility, which may be repelled by force.' (Halleck, i. 95; Calvo, §§ 203–4.) It is no doubt open to a state to treat any violation of its territory as an act of war; but a violation of the nature described is not hostile in intention, it may indeed be committed with the express object of preventing occurrences which would lead to war, and it is not directed against the state, or against persons or property belonging to it because they belong to it, but against specific ill-doers because of their personal acts; it therefore differs in very important respects from ordinary acts of war, and it is wholly unnecessary to consider it to be such until the state, of which the territory is violated, elects to regard the acts done in a hostile light.

[2] Cf. antea, p. 218 n.

were fired into Canada, and where preparations were made to cross into British territory by means of a steamer called the *Caroline*. To prevent the crossing from being effected, the *Caroline* was boarded by an English force while at her moorings within American waters, and was sent adrift down the falls of Niagara. The cabinet of Washington complained of the violation of territory, and called upon the British government 'to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show also that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.' There was no difficulty in satisfying the requirements of the United States, which though perhaps expressed in somewhat too emphatic language, were perfectly proper in essence. There was no choice of means, because there was no time for application to the American government; it had already shown itself to be powerless; and a regiment of militia was actually looking on at the moment without attempting to check the measures of the insurgents. Invasion was imminent; there was therefore no time for deliberation. Finally, the action which was taken was confined to the minimum of violence necessary to deprive the invaders of their means of access to British territory. After an exchange of notes the matter was dropped by the government of the United States, which must have felt that it would have been placed in a position of extreme gravity if the English authorities had allowed things to take their course, and had then held it responsible for consequences, to the production of which long-continued negligence on its part would have been largely contributory [1].

As the measures taken when a state protects itself by violating

[1] Mr. Webster to Mr. Fox, April 24, 1841; and Lord Ashburton to Mr. Webster, July 28, 1842. Parl. Papers, 1843, lxi. 46–51.

Limitations upon the right of action.

the sovereignty of another are confessedly exceptional acts, beyond the limits of ordinary law, and permitted only for the supreme motive of self-preservation, they must evidently be confined within the narrowest limits consistent with obtaining the required end. It is therefore more than questionable whether a state can use advantages gained by such measures to do anything beyond that which is necessary for immediate self-protection, which it would not otherwise be in a position to do. If, for example, subjects starting from foreign territory to invade the state are captured in the foreign territory in question, in the course of preventive operations, there can be no doubt on the one hand that they can be kept prisoners until the immediate danger is over, but it is evident on the other that they cannot be put upon their trial, or punished for treason, however complete the crime may be, in the same manner as if they had been captured within the state itself.

Permissible action against states which are not free agents.

The right of self-preservation in some cases justifies the commission of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it, and when, if he is not forestalled, it is almost certain that he will succeed, either through the helplessness of the country or by means of intrigues with a party within it. The case, though closely analogous to that already mentioned, so far differs from it that action, instead of being directed against persons whose behaviour it may be presumed is not sanctioned by the state, is necessarily directed against the state itself. The state must be rendered harmless by its territory being militarily occupied, or by the surrender of its armaments being extorted. Although therefore the measures employed may be consistent with amity of feeling, it is impossible to expect, as in the former case, that a country shall consider it more important that the threatened state shall be protected than that its own rights of sovereignty shall be maintained intact, and while the one state may do what is necessary for its own preservation, the