3. The effect of the expulsion of an invader by a power not in alliance with the occupied state.

4. Special usages with regard to property recaptured at sea.

Limitations upon the operation of postliminium in the case of occupied territory.

As a general rule the right of postliminium goes no further than to revive the exercise of rights from the moment at which it comes into operation. It does not, except in a very few cases, wipe out the effects of acts done by an invader, which for one reason or another it is within his competence to do. Thus judicial acts done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion; and as between the state and individuals the evil would be scarcely less,—it would be hard for example that payments of taxes made under duress should be ignored, and it would be contrary to the general interest that sentences passed upon criminals should be annulled by the disappearance of the intrusive government. Political acts on the other hand fall through as of course, whether they introduce any positive change into the organisation of the country, or whether they only suspend the working of that already in existence. The execution also of punitive sentences ceases as of course when they have had reference to acts not criminal by the municipal law of the state, such for example as acts directed against the security or control of the invader. Again, while acts done by an invader in pursuance of his rights of administrative control and of enjoyment of the resources of the state cannot be nullified in so far as they have produced their effects during his occupation, they become inoperative from the moment that the legitimate government is restored. Thus—to recur to a case which has already been glanced at in a slightly different aspect—in 1870–1 certain persons entered into contracts with

the German government for felling timber in state forests in France. They were paid in advance, and the stipulated fellings not having been finished at the time of the signature of the treaty of peace between the two countries, the contractors urged that as the German government was within its rights in causing the fellings to be made, the French government was bound to allow them to be completed. The French government held that the re-establishment of its own control had *ipso facto* nullified the contracts, and on the occasion of the signature of the supplementary convention of December 11, 1871, it made a declaration to that effect, which was accepted by the German government as correct in point of law. That French authority was re-established in the particular case by a treaty of peace is unimportant, the effects of re-establishment by treaty and in other ways being in such matters confessedly identical [1].

Effects of acts done by an invader in excess of his rights.

When an invader exceeds his legal powers, when for example he alienates the domains of the state or the landed property of the sovereign, his acts are null as against the legitimate government. Such acts are usually done by an invader who intends to effect a conquest, and supposes himself to have succeeded. Whether therefore they are valid or invalid in a given instance depends solely upon the strength of the evidence for and against his success.

Effect of expulsion of an invader by a power not in alliance with the occupied state.

Case of Genoa in 1815.

Some difference of opinion exists as to the effect of the expulsion of an invader by a power not in alliance with the occupied state. As the annexation of Genoa to Sardinia in 1815 forms the leading case upon the subject, and is that to which all arguments have reference, it may be as well to begin by stating it. In the spring of 1814 Lord William Bentinck landed on the coast of Tuscany with a small Anglo-Sicilian force, and learning that the city of Genoa was inadequately garrisoned, determined to attempt its capture. The results of a couple of days' fighting induced the commandant to capitulate. The place was surrendered; the garrison retired under the terms of

[1] Heffter, § 188; Bluntschli, § 731; Calvo, § 2990.

PART III CHAP. V

the capitulation to Nice; and the whole territory of the former republic fell into the hands of England, by conquest as between itself and France. The Genoese state had been destroyed in 1797, but the British government, in making the treaty of Amiens, had refused to acknowledge its destruction, and its formal union with France in 1805 had remained equally unrecognised. On the expulsion of the French a local republican government was set up with the sanction, and indeed at the suggestion, of Lord William Bentinck; but ultimately the city with its attendant territory was annexed to Sardinia, against the wishes of the inhabitants, in consequence of the general territorial redistribution which was made at the Congress of Vienna. Considerable feeling was excited in England by the latter occurrence, and resolutions condemnatory of it were moved in the House of Commons by Sir James Mackintosh. In the course of his speech in support of them he argued that 'in the year 1797, when Genoa was conquered by France, then at war with England, under pretence of being revolutionised, the Genoese republic was at peace with Great Britain; and consequently, in the language of the law of nations, they were friendly states. Neither the substantial conquest in 1797, nor the formal union of 1805, had ever been recognised by this kingdom. When the British commander therefore entered the Genoese territory in 1814, he entered the territory of a friend in the possession of an enemy. Can it be inferred that he conquered it from the Genoese people? We had rights of conquest against the French; but what right of conquest would accrue from their expulsion as against the Genoese? How could we be at war with the Genoese?—not as with the ancient republic of Genoa, which fell when in a state of amity with us,—not as subjects of France, because we had never legally and formally acknowledged their subjection to that power. There could be no right of conquest against them, because there was neither the state of war, nor the right of war. Perhaps the powers of the continent, which had either expressly or tacitly

recognised the annexation of Genoa in their treaties with France, might consistently treat the Genoese people as mere French subjects, and consequently the Genoese territory as a French province, conquered from the French government, which as regarded them had become the sovereign of Genoa. But England stood in no such position:—in her eye the republic of Genoa still of right subsisted. Genoa ought to have been regarded by England as a friendly state, oppressed for a time by the common enemy, and entitled to reassume the exercise of her sovereign rights as soon as that enemy was driven from her territory by a friendly force[1].'

The views of Sir James Mackintosh have very commonly been regarded as sound[2], but they are not admitted by all writers. Heffter supposes, in agreement with the line of conduct pursued by England, that a state freed by the exertions of a power which is not its ally does not recover its existence as of course; and M. Bluntschli argues that though the liberating power cannot dispose of the country wholly without reference to the wishes of the population, yet that a state which is neither able to defend itself in the first instance nor to re-establish itself afterwards cannot be held to possess a clear and solid right to existence, and at the same time the liberating power has a right to be rewarded for its sacrifices, which indeed cannot be supposed to have been made in a spirit of pure disinterestedness;—in settling the future of the liberated country the interests and wishes both of it and of its liberator ought, he thinks, to be taken into consideration[3].

[1] Hansard, xxx. 387 and 891, or Mackintosh's Miscell. Works, p. 703; Alison's Hist. of Europe, x. 209 and 295.

[2] Phillimore, iii. § cxxiii; Halleck, ii. 520–1; Calvo, § 2986. The same view had already been taken by Vattel, liv. iii. ch. xiv. § 213.

[3] Heffter, § 188 and § 184[a]; Bluntschli, § 729. Woolsey (§ 153) follows Heffter.

Perhaps the value of M. Bluntschli's opinion is somewhat affected by the fact that he instances 'les négociations entre la Prusse et le duc Frédéric d'Augustenbourg, au sujet des duchés de Schleswig et de Holstein, 1865–6, après que ces duchés eurent été affranchis par la Prusse de la domination danoise' as an example of the right course of conduct to adopt. But it is not quite clear how the case is an example at all of the class of cases under consideration.

PART III CHAP. V Conclusions.

It may probably be safely concluded that the opinions of Sir James Mackintosh and his followers on the one hand and of MM. Heffter and Bluntschli on the other both contain elements of truth. As a matter of common sense, there can be no question that conquest cannot be held to be consolidated while a war continues which by any reasonable chance may extend to the conquered territory, and that a country which has been independent must be supposed to retain its existence in law as between itself and a foreign state so long as the latter has not recognised that conquest has taken place. The foreign state cannot at the same moment deny proprietary rights to the intruder, and arrogate rights to itself which can only be derived from the enemy character of the country which has been temporarily or permanently subjugated. Nor does the fact that it has made sacrifices in ejecting the invader from the invaded territory alter its legal position, whether the sacrifices have been made disinterestedly or not. It was not obliged to make them. On the other hand it cannot be placed in a worse position by being at war with the intrusive state than it would otherwise have held. The legal effects of a war are not modified by the fact that one of the parties to it is waging another wholly distinct war at the same time. If therefore a conquest seems, either from the attitude taken up by the conquered population towards the victor, or from his apparent solidity of possession, to be so settled that a state would be justified if at peace with him in recognising it as definitive, there can be no reason for denying to an enemy the right of making up its own mind whether occupation continues or conquest has taken place;—he is merely prevented by the nature of the relation existing between him and the invader from showing what opinion he has formed until the course of his war leads him to attack the territory in question.

In all cases then in which conquest has unquestionably not been consolidated, and in which the territory of a state is therefore only occupied, the state recovers its existence and all the rights attendant on it as of course so soon as it is relieved

from the presence of the invader. Where, on the other hand, there is reasonable doubt as to whether a state is occupied or conquered, the third state must be allowed to determine the point for itself, and to act accordingly [1].

Recapture.

The circumstance that commercial vessels and their cargoes belong to private owners and that they are generally of more or less considerable value, coupled with the fact that recaptors are generally fellow-subjects of the original owners of recaptured property, has led to the adoption of certain usages with respect to maritime recapture by which the application of the right of postliminium is somewhat blurred. On the one hand, it has been thought well to reward recaptors by paying them salvage in all cases, so that property never returns unconditionally to the owner; on the other, property is as a rule returned to him upon payment of salvage, notwithstanding that the enemy may have evidenced his capture by taking the captured ship into a safe place, or even by formal condemnation in his courts.

In 1632 the Dutch government, in the interests of commerce, issued a placard directing restitution to the owners of vessels recaptured before being taken into an enemy's port, and by a decree of 1666 they regarded property in them as unchanged until after sale and a fresh voyage to a neutral port. In 1649 England ordered restitution of all British vessels to the owners on payment of salvage irrespectively of time or of the manner in which they had been dealt with by the enemy; and the practice has been continued by successive Prize Acts to the present time, an exception only being made in the case of ships which before recapture have been commissioned by the enemy as vessels of war [2]. Gradually a like mode of dealing with recaptured ships

[1] Of course where the ejecting state appears ostensibly in the character of a liberator it is bound by its own professions. In the case of Genoa, for example, it may be a question whether England by the general attitude which she assumed towards the Italian populations did not morally bind herself to restore such of them as might wish it to the position which they occupied before the French conquest.

[2] Bynkershoek, Quæst. Jur. Pub. l. i. c. iv; Nostra Signora del Rosario,

PART III CHAP. V

has been adopted by other nations, and the municipal laws of the United States, Portugal, Denmark, Sweden, Holland, France and Spain now direct their restitution. The cases in which restitution is made, and the conditions of restitution, are not however altogether similar in these various countries. The United States restores only when the recapture has been effected before condemnation in a prize court; France restores vessels retaken by a public ship of war after twenty-four hours' possession by an enemy, but leaves them as prizes in the hands of a privateer; Spain gives greater indulgence to neutrals than to her own subjects and returns recaptured vessels to the former, unless they are laden with enemy's property; Portugal, Denmark, Sweden, and Holland follow the English practice of making restitution in all cases. Payment of salvage is always required, but the amount varies in different countries. In France one tenth of the value is exacted, unless recapture has taken place before the expiration of twenty-four hours, when one thirtieth only is demanded; in England the amount given is one eighth, except in cases of special difficulty and danger; in Spain the rate is one eighth if the recapture has been effected by a public ship of war, and one sixth if a privateer is the recaptor; in Portugal the corresponding rates are one eighth and one fifth respectively; in Denmark one third and in Sweden one half is demanded; the normal rate in the United States is one eighth of the value, but other rates are levied in special cases[1]. In the majority of instances the above regulations have been made for municipal purposes, but it is usual to extend the same treatment to allies and friends as is applied by the recapturing state to its

iii Rob. 10; L'Actif, Edwardes, 185; The Ceylon, i Dodson, 118-9; 27 and 28 Vict. c. 25.

[1] 27 and 28 Vict. c. 25; Twiss, ii. §§ 174-5; Wheaton, Elem. pt. iv. ch. ii. § 12; Pistoye et Duverdy, ii. 105; Negrin, p. 288. As between England and France the treatment to be applied is still dictated by a treaty of 1786; if an enemy has taken a vessel which is recaptured after less than twenty-four hours' possession it is restored to its owner on payment of a third of its value; if it is recaptured after more than twenty-four hours' possession it belongs to the recaptors. Pistoye et Duverdy, ii. 109.

own subjects, provided the allied or friendly government acts upon the principle of reciprocity; if it give effect to a less liberal rule, its own practice is followed [1].

[1] The Santa Cruz, i Rob. 60. In the United States it is provided by Act of Congress that when a practice is known to exist in a foreign country with respect to vessels of the United States, such practice is to be observed with respect to vessels of that country, except that they are not to be returned if they have been condemned in a prize court; where no such practice is known the rules applicable to subjects of the United States are to be followed. Wheaton, Elem. pt. iv. ch. ii. § 12; The Schooner Adeline, ix Cranch, 288.

CHAPTER VI

ENEMY CHARACTER

Persons and property affected with an enemy character, other than subjects and property of an enemy state.

INDIVIDUALS being identified with the state to which they belong, and it being, besides, a special principle of the laws of war that the subjects of a state are the enemies of its enemy, it might *primâ facie* be expected that the whole of the subjects of a state would in all cases be the enemies of a state at war with it. On the other hand, it might also be expected that the subjects of a state at peace with both parties could in no case be looked upon as the enemies of either. The bare legal fact however that a person is or is not the subject of a state is of less practical importance in war than the consideration that he does or does not render assistance directly or indirectly to the enemy. It was seen in the chapter on the general principles of the law as between belligerents and neutrals that the former are allowed in certain cases to restrain neutral individuals from trade with the enemy, and to impose penalties for a breach of their rules. Where the association of the neutral person with the enemy is closer; where the assistance is given, not accidentally, but because the neutral person has chosen to identify himself with the enemy by taking service in the country or by establishing himself in it, it is natural that a belligerent should be permitted to go further, and to regard the neutral individual as himself hostile, at least to the extent that his acts are of advantage to the enemy, or that he presents himself as a member *de facto* of the enemy community. On the other hand, when the subject of a belligerent state has established himself in a neutral country, the closeness with which a person is identified with the place where he finds a home operates to free him, in so far as he is associated with it rather than with his own country, from the consequences of his belli-

gerent character; to seize his ships or his goods would be to put a stress, not upon the enemy, but upon the neutral state. With these reasons of a merely practical nature the effects of sovereignty, or in other words, of the authority which a state exercises over foreigners within its territory, combine to prevent the attribution of enemy character from corresponding exactly with the fact of national character. A foreigner living and established within the territory of a state is to a large extent under its control; he cannot be made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of a war may demand. His property being thus an element of strength to the state, it may reasonably be treated as hostile by an enemy. Conversely, when the foreigner lives in a neutral country, he is so far subject to its sovereignty that it can restrain him from taking advantage of its territory to do acts of hostility against the enemy of his state, and it is responsible for his acts, if he does them. For the purposes of the war therefore he is in reality a subject of the neutral state. Finally, if property be regarded separately, although on the one hand it cannot escape from the consequences of enemy ownership, it may on the other be necessarily hostile by its origin irrespectively of a neutral national character of its owner, and it is also capable of being so used in the service of a belligerent as to fall completely under his control, and to become his for every purpose of his hostilities.

Enemy character may thus attach either to persons of neutral national character and to their property as attendant on them, or to property owned by neutrals in virtue of its origin or of the use to which it is applied.

Effect of domicil.

The chief test of the existence of such an identification of a neutral subject with an enemy state as will suffice to clothe him with an enemy character is supplied by the fact of domicil.

What constitutes domicil

For belligerent purposes a person may be said to be domiciled in a country when he lives there under circumstances which give

PART III CHAP. VI for belligerent purposes.

rise to a reasonable presumption that he intends to make it his sole or principal place of residence during an unlimited time. The circumstances upon which such a presumption can be founded are the two, which may be united in infinitely varying proportions, of the past duration and the object of residence. If a person goes to a country with the intention of setting up in business he acquires a domicil as soon as he establishes himself, because the conduct of a fixed business necessarily implies an intention to stay permanently; if on the other hand he goes for a purpose of a transitory nature, he does not necessarily acquire a domicil, even though he lingers in the country after his immediate object is satisfied; he only does so if at last by the length of his residence he displaces the presumption of merely temporary sojourn which is supplied by his original purpose[1]. Of these two elements of time and object, time is nevertheless the more important ultimately. Lord Stowell said with regard to it that 'of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects, in most cases it is unavoidably conclusive. . . . I cannot but think that against a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case that other purposes forced themselves upon the person living in a foreign state 'and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war, it is cer-

[1] The first of these examples may be illustrated by the case of Mr. Whitehill, who 'arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned.' (Referred to in The Diana, v Rob. 60.) The two latter are covered by the language of Lord Stowell in the case of The Harmony, quoted in the text.

Foreign writers generally devote little attention to questions of enemy character. English and American writers merely reflect the doctrines laid down in the decisions rendered by the courts in the two states; it is not therefore usually necessary to refer to them.

tainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself, but if he continues to reside during a good part of the war, contributing by payment of taxes or other means to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *à priori*, but such a time there must be. In proof of the efficacy of mere time it is not impertinent to remark that the same quantity of business which would not fix a domicil in a certain space of time would nevertheless have that effect, if distributed over a larger space of time. Suppose an American came to Europe with six contemporary cargoes of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo, and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time; be the occupation what it may, it cannot happen but with few exceptions that mere length of time shall not constitute a domicil [1].'

Change of domicil during war.

As domicil is acquired for private purposes of business or pleasure, and the consequences to a man of its possession by him flow, not from an attitude of hostility on his part, but from the accidental circumstance that his conduct is of advantage to a belligerent, he is not tied down to the domicil in which he is found at the beginning of war. So soon as he actually removes elsewhere, or takes steps to effect a removal in good faith and without intention to return, he severs his connexion with the belligerent country. He thus recovers his friendly character, and with it

[1] The Harmony, ii Rob. 322.

recovers also the rights of a friend. In 1783, for example, a Mr. Johnson, an American subject, came to England to trade, and by staying there till 1797 acquired an English domicil. Some time before the latter year he had formed an intention of leaving, and during its course he actually left. Before his departure however a vessel belonging to him, which he had sent out in order that she should be freighted for America, but which an agent, supposing that Mr. Johnson would have reached the United States before the completion of the voyage, had sent to ports enemy of England and then back to the latter country, was detained there. It was held that as 'the national character of Mr. Johnson as a British merchant was founded on residence only, as it was acquired by residence, and rested on that circumstance alone, he was in the act of resuming his original character, and is to be considered as an American, from the moment he turns his back on the country where he has resided on his way to his own country; the character that is gained by residence ceases by residence; it is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*[1].'

House of trade.

A person though not resident in a country may be so associated with it through having, or being a partner in, a house of trade there, as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory; if he is a merchant in two countries, of which one is neutral and the other belligerent, he is regarded as neutral or belligerent according to the country in which a particular transaction of his commerce has originated. Things are different when a merchant living in a neutral country, and carrying on an ordinary neutral

[1] The Indian Chief, iii Rob. 12. For an application of the principle during the Crimean War under the somewhat delicate circumstances of the sale of a vessel, in view of the outbreak of war, by a Russian father to a son domiciled in England, who afterwards removed to Denmark in order to carry on a neutral trade, see the Baltica, Spinks, 264. For an American decision, see the Venus, viii Cranch, 280. For a case in which the change of domicil was held to be not effected in good faith, see the Ernst Merck, Spinks, 89.

trade has merely a resident agent in the belligerent state, the agent being looked upon as only an instrument for facilitating the conduct of a trade which in other respects is not distinguishable from that of other neutral merchants. If however the trade is in itself such as to create any special association, through the concession of exceptional privileges or otherwise, between the merchant and the belligerent state, the former becomes impressed with a hostile character relatively to enemies of the state, notwithstanding the fact of his absence. Thus an American, possessing a tobacco monopoly in the Caraccas, but not residing in Spanish territory, and conducting his trade through an agent, was held to have contracted a Spanish mercantile character [1].

The application of the foregoing rules is not modified in the practice of England and the United States by the fact that a merchant falling under their operation is a consul either for a neutral or a belligerent power. He has the mercantile character of the country in which he is commercially domiciled, and he receives no protection or harm in his private affairs from his official position. If his property is liable to condemnation upon his mercantile character it is condemned; and on the other hand, if he is domiciled in neutral territory, he does not forfeit his neutral character by acting as consul of a belligerent state. The French practice is so far different that the property of a neutral subject, consul for a neutral state in a belligerent country, and carrying on trade in the latter, is held to be itself neutral [2].

Effect of permanent civil or military employment.

When a person belonging to a neutral state takes permanent civil or military service with a foreign state he identifies himself so fully with it that he becomes the enemy of its enemies for every purpose. When he merely contracts to do specific services,

[1] The Jonge Classina, v Rob. 302; The Freundschaft, iv Wheaton, 105; The Anna Catherina, iv Rob. 119; The Portland, iii Rob. 44; Calvo, § 1719.

[2] The Indian Chief, iii Rob. 27; Admiralty Manual of Prize Law (Holland), 1888, p. 11; Le Hardi contre la Voltigeante, Pistoye et Duverdy, i. 321; La Paix, ib.

he becomes an enemy to the extent, and for the purposes, of those services.

The occasions during the progress of a war upon which a neutral openly holds forth himself or his property as identified with the enemy, or being so identified in fact takes up by resistance a hostile attitude, need no discussion; those in which during the progress of the war it falls to the courts of a belligerent, when the neutral has submitted to capture, to draw inferences from his conduct, will be best treated in another connexion [1]. It is only necessary here to consider a preliminary question raised, not by the character of the acts, but by the moment at which they are done. Can a neutral so identify himself or his property with a possible or intending belligerent before the outbreak of war that hostilities can be opened by an attack upon him or by the capture of his property? In some extreme cases the answer is at once evident. No one would deny that a body of troops raised and officered among a neutral population is as much a part of the army of the state which employs them as are troops native to the country. And there are more temporary services, of which the nature is as little uncertain, that a foreigner can render to a state. If a Belgian vessel, laden with French troops, other vessels laden in like manner being in the neighbourhood, were found near the English coast, and heading for it, the neutral would be unable to pretend that he imagined his service to be pacific; the circumstances indeed might well be such that the captain of a British man of war would be fully justified in opening fire immediately without regard to the Belgian flag. But there are many cases in which the intention of the neutral would be doubtful; there are many in which there would be a presumption in his favour, or a certainty of his innocence. If, for example, he were engaged solitarily in conveying a French force to Martinique it would be possible, it might even be extremely probable, that he should suppose himself to be employed in carrying out an ordinary

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

service of reliefs for the garrison. In such circumstances is he liable to capture? The answer in reality is no less clear. However innocent the intention of the neutral may be, he serves a state which is operating with a view to hostilities, or against which hostilities are about to be undertaken; in either case his action may be gravely prejudicial to the vital interests of the country which is about to be an enemy. It would be futile, it would be unjust, and it would almost be ridiculous, to exact that with vital interests at stake the enemy should look impassively on until an opportunity had occurred of showing the existence of war by collision with the armed forces of his adversary; and the enemy alone can decide whether the interests at stake are serious or not. In effect he must so far have a free hand as to be able to arrest the action which threatens to injure him. He must therefore be permitted to establish the facts by visit and capture if he finds that something is being done important enough to induce him to commence hostilities. From the summons to bring to, and the subsequent visit, the neutral gains full knowledge of the actual state of things; he is no more taken by surprise than he would be if a fleet action, of which he was unaware, had taken place on the previous day. It becomes his duty to allow himself to be brought in; it becomes the duty of the prize court in turn to release the vessel if there be any room whatever for the supposition of innocence. It is scarcely necessary to add that as visit upon the high seas is only permitted during war, and as, consequently, a summons to bring to delivered by a vessel, giving evidence that she is a public vessel of her state, amounts to notice that war exists, the neutral who endeavours to escape or resists throws in his lot actively with the belligerent whom he serves, and exposes himself to be forcibly dealt with[1]. It is equally superfluous to point out that the state which through its agents

[1] [For the application of this principle to the case of the Kowshing, a British vessel sunk by a Japanese cruiser, July 25, 1894, while conveying Chinese troops prior to declaration of war, see Professor Holland, Studies in International Law, p. 126.]

seizes, or even visits, the neutral vessel does an act from which it cannot recede; it is irretrievably committed to war[1].

How property becomes affected with an enemy character.

Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interests of the state to which it belongs, and its proprietor, so far from being able to impress his own character, if it happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which cannot be moved into identification in respect of it with its national character. The produce of such property therefore is liable to capture under all circumstances in which enemy's property can be seized[2].

Property, not impressed with a belligerent character by its origin, and belonging to a neutral, becomes identified with a belligerent by being subjected wholly to his control, or being incorporated into his commerce. Thus, a vessel owned by a neutral, but manned by a belligerent crew, commanded by a belligerent captain, and employed in the trade of a belligerent state, is deemed to be a vessel of the country from which she navigates; and the acceptance of a pass or a licence from a belligerent state, or the fact of sailing under its flag, entails the same consequence[3].

Further questions.

Besides the foregoing points connected with the possibility of the acquisition of an enemy character by neutral persons and things, questions present themselves with regard to—

1. Things originally belonging to an enemy, but sold to a neutral during war, or shortly before its commencement

[1] For the due conduct of a state on commencing hostilities towards neutral states and towards neutrals not engaged in carrying out a military or naval operation for his enemy, see postea, p. 574.

[2] The Phœnix, v Rob. 20; Thirty Hogsheads of Sugar *v.* Boyle, ix Cranch, 191.

[3] The Vigilantia, i Rob. 13; Admiralty Manual of Prize Law (Holland), 1888, p. 6. The navigation laws of some states are so lax that international conflicts might readily arise out of the above rules. To take an extreme case, in Colombia a vessel owned solely by foreigners, and with a foreign crew, may be registered as Colombian, so that a ship not even owned by a Colombian neutral might endeavour to cover herself with Colombian neutrality while carrying on a purely belligerent trade.

under circumstances admitting of the suspicion of sale in anticipation of war.

2. Goods consigned by neutrals from neutral ports to an enemy consignee, or *vice versâ*.

3. Places belonging to a belligerent which are in the military occupation of his enemy.

4. Places under double or ambiguous sovereignty.

Questions with regard to things sold by an enemy during war.

As a general rule a neutral has a right to carry on such trade as he may choose with a belligerent. But the usages of war imply the assumption that the exercise of this right is subjected to the condition that the trade of the neutral shall not be such as to help the belligerent in prosecuting his own operations, or in escaping from the effects of those of his enemy. When neutral commerce produces this result the belligerent who suffers from the trade is allowed to put it under such restraint as may be necessary to secure his freedom of action. Hence, as private property is liable to capture at sea, and as an unlimited right of transfer from belligerent to neutral owners, irrespectively of time or place, might evidently be used as a means of preserving belligerent property from confiscation, a belligerent may refuse to recognise any transfers of property which seem to him to be made with fraudulent intent; and as a matter of fact sales of such property as is liable to capture at sea are not indiscriminately permitted.

The right which a neutral has to carry on innocuous trade with a belligerent of course involves the general right to export from a belligerent state merchandise which has become his by *bonâ fide* purchase. Vessels, according to the practice of France, and apparently of some other states, are however excepted on the ground of the difficulty of preventing fraud. Their sale is forbidden, and they are declared good prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of a war [1]. In England and

[1] Pistoye et Duverdy, ii. 3. The sale of a vessel, to be good, must be proved by authentic instruments anterior to the commencement of hos-

the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinised, and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war [1].

With respect to vessels and merchandise, belonging to an enemy, in transit upon the ocean, the French doctrine gave no scope for special usage until the freedom of neutral goods on board belligerent vessels was accepted by the Declaration of Paris. A valid sale of a vessel being always impossible during war, enemy goods on board an enemy vessel necessarily remained liable to capture; and enemy goods in course of transport by a neutral being protected by the flag, the effect of sale did not need to be considered. By English and American custom all sales during war of property *in transitu* are bad, unless the transferee has actually taken possession, the probability that they are fraudulently intended being thought to be so high as to amount to a practical certainty; in the words of Lord Stowell,

tilities, and must be registered by a public officer. The practice dates back to 1694, when it was defined by the Règlement of Feb. 17 of that year. Valin, Ord. de la Marine, ii. 246.

[1] The Bernon, i Rob. 102; Halleck, ii. 139; Admiralty Manual of Naval Prize Law (Holland), 1888, p. 9. The principle that the circumstances of the sale must be clear has been sometimes applied with extreme stringency. Before the Crimean War a vessel was sold by its Russian owner to a Belgian firm; the vessel was afterwards brought in for adjudication on suspicion of the sale being fraudulent. The sale was genuine, but it had not been made to the persons who professed to be owners. Restitution was decreed, but without costs or damages. The general rule was laid down that 'if any doubt exists as to the character of a ship claimed to be the property of a neutral being still enemy's property, the claimant shall be put to strict proof of ownership, and any circumstances of fraud or contrivance or attempt at imposition on the court, in making out his title, is fatal to the claimant. Condemnation of the ship as enemy's property necessarily follows.' Bullen *v.* The Queen, xi Moore, 271.

'if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect[1].' PART III CHAP. VI

Transfer of property by an enemy immediately before war.

Transfer *in transitu* being legitimate in time of peace, transfers effected up to the actual outbreak of war are *primâ facie* valid; where however it appears from the circumstances of the case that the vendor has sold, to the knowledge of the purchaser, in contemplation of war the contract is invalidated, notwithstanding that the purchaser may have been in no way influenced in buying by a wish to assist the vendor. The transaction is held to be in principle the same as a transfer *in transitu* effected during the progress of war. 'The nature of both contracts,' says Lord Stowell, 'is identically the same, being equally to protect the property from capture in war, not indeed in either case from capture at the present moment, but from the danger of capture when it is likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are in my opinion justly subject to the same rule[2].'

Goods consigned by neutrals from neutral ports to an enemy consignee, or *vice versâ*.

It is the general rule that a consignor, on delivering goods ordered to the master of a ship, delivers them to him as the agent of the consignee, so that the property in them is vested in the latter from the moment of such delivery. In time of peace this rule may be departed from by special agreement, or may be changed by the custom of a particular trade, so that the property in the goods may remain in the consignor until their arrival in the port of the consignee and actual delivery to him. In time of war, however, the English and American courts, keenly alive to the opening which would be given to fraud by allowing special

[1] The Vrow Margaretha, i Rob. 338; The Odin, ib. 250; The Ann Green, Gallison, 291; Halleck, ii. 137; Admiralty Manual of Prize Law (Holland), 1888, p. 26.

[2] The Jan Frederick, v Rob. 133.

agreements to be made, refuse to recognise them, as between a neutral consignor and an enemy consignee, whether they have been concluded during the progress of hostilities or in contemplation of them; and the breadth with which it is stated by Mr. Justice Story that in time of war 'property consigned to become the property of an enemy upon its arrival shall not be permitted to be protected by the neutrality of the shipper,' may give rise to a doubt whether proof of a custom of trade varying from the common rule would be admitted to prevent property shipped by a neutral to an enemy on the conditions of the custom from being confiscated. When the consignor is an enemy, as an attempt to disguise the true character of property would take the form, not of setting up a fictitious contract, but of hiding the existence of a real one, evidence is required that the consignee is as a matter of fact the owner. It must appear that he is bound absolutely to accept the goods, and that, except in the case of his insolvency, the consignor has no power to reclaim them[1]. French practice seems to be different[2].

Places belonging to a belligerent, which are in the military occupation of his enemy.

Although the national character of a place and its inhabitants is not altered by military occupation on the part of an enemy, yet for many belligerent purposes they are necessarily treated as hostile by their legitimate sovereign. They are in fact under the control of the enemy, and to treat them as friendly would be to relieve him from the pressure and losses of war. Trade with them, consequently, is subjected to the same restrictions as trade with the enemy and his territory, and property the produce of the country or belonging to persons domiciled there is confiscable under the same conditions as enemy's property. When, for example, the island of Santa Cruz was captured from Denmark by the British, some sugar shipped from there on board an English ship was captured by an American privateer, and was condemned as British property, Chief Justice Marshall saying

[1] The Packet de Bilboa, ii Rob. 133; The Ann Green, i Gallison, 291; The Francis, ib. 450; Kent, Comm. i. 86.

[2] Calvo, § 1998.

that 'some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation, although acquisitions made during war are not considered as permanent, until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them [1].'

It is to be regretted that this necessary doctrine has been used by the English and American courts to cover acts which it does not justify. It is reasonable that property which has become hostile through the conquest by an enemy of the port at which its owners are domiciled shall be condemned; but if this be done, no good cause can be shown for deciding that hostile property shall not become friendly to a belligerent state from the moment at which the latter obtains possession of the port to which the property belongs. Lord Stowell ruled otherwise. A vessel, owned by merchants residing at the Cape of Good Hope, was captured on a voyage from Batavia to Holland. The voyage was begun before the conquest of the Cape by the English, but the capture was effected afterwards. Lord Stowell condemned the vessel upon the ground, which would not have been taken up in the inverse case, and which, the change of character being involuntary, was not really in point, that the ship, 'having sailed as a Dutch ship, her character during the voyage could not be changed.' In like manner an English vessel was condemned during the American Civil War by a majority of judges in the Supreme Court, on the ground that 'the occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighbourhood, and the occupation limited, recent, and subject to the vicissitudes of war [2].' In both these cases

[1] Thirty Hogsheads of Sugar, ix Cranch, 195.
[2] The Danckebaar Africaan, i Rob. 107. The Circassian, ii Wallace, 135. In the latter case compensation for wrongful capture was subsequently

the essential fact was lost sight of that the property of individuals engaged in mercantile acts is confiscated, not because they are personally hostile to the belligerent, but because they are members of the enemy state or closely associated with it, and so contribute to its strength, or else because they are doing acts inconvenient to the belligerent. So soon as they cease, in whatever manner, or from whatever cause, to be members of an enemy state, or to be associated with it, or so soon as their acts cease to be inconvenient, all reason for the confiscation of their property falls to the ground.

Places under double or ambiguous sovereignty.

It is possible for a place to possess at the same moment a belligerent and a neutral character. So long, for example, as the sovereignty of Turkey is not extinguished in Bosnia and the Herzegovina or in Cyprus, these provinces are probably capable of being belligerent territory in virtue of Austrian or English authority, and neutral territory in respect of Turkey, or *vice versâ*[1]; and while the German Confederation existed, that part of its territory which belonged to Austria or Prussia was always in this equivocal position whenever either of those states was at war.

Case of Triest in 1848.

On one occasion the awkwardness arising from a double character was brought strongly into notice. During the Austro-Sardinian war of 1848 an Austrian squadron took refuge from the Sardinian fleet in the port of Triest, which belonged both to Austria and the Confederation. A blockade was declared by the Italians on the grounds that Triest had become a *place de guerre*

awarded by the Mixed Commission on British and American Claims. Parl. Papers, North Am., No. 2, 1874, p. 124.

[1] [To these territories must now be added the Island of Crete. Since 1898 it has been under the government of a High Commissioner, appointed by Great Britain, Italy, France, and Russia, who is charged with the establishment of an autonomous administration, while recognising the Sovereign rights of the Sultan (Annual Register, 1898, p. 284; 1901, p. 305).] Their precise legal position it is very difficult, and perhaps impossible, to determine. Holtzendorff (1887; Handbuch, ii. § 51) examines it carefully, quotes the varying opinions of several recent writers, and comes to the conclusion that 'eine juristische Prüfung dieser Verhältnisse kann jedoch nur zu negativen Resultaten führen: es handelt sich um ein politisches Interimisticum, bei dem Recht und Thatsache in Widerspruch stehen.'

by being fortified with a castle and several batteries which were garrisoned by a numerous body of enemy troops, that the Austrian squadron had found refuge there, that the place had also been used for aggressive purposes, and that fire had been opened from it upon the Sardinian vessels. Upon the consuls of the various German states protesting against the blockade, the Italian admiral declared that he would recognise that the town belonged to the Confederation when the German colours were hoisted instead of the Austrian flag. Subsequently, after communication with his government, he announced that he would allow all merchant vessels, whether Austrian or foreign, to go in and out, provided that they had on board no soldiers, arms, or munitions of war, or articles of contraband for a naval force; all vessels were to be visited and were only to be permitted to enter or come out by day. While therefore the blockade was made as little onerous as possible, it was maintained in principle. The minister for foreign affairs of the Confederation protested against the measures taken by Sardinia; denying that as a matter of fact Triest had been used as a base of offensive operations, he argued that a state in amity with Germany could have no right to throw obstacles in the way of free communication between one of its ports and foreign countries, that in time of peace no right of visit existed, and that articles contraband of war were necessarily innocent from the neutrality of their port of consignment[1]. Supposing the fact to be, as stated by the minister, that Triest had not really been used for offensive purposes, the protest put forward on behalf of the Confederation amounts to a claim that where any shadow of over-sovereignty exists, and the one sovereign is neutral, territory shall be taken to be neutral notwithstanding that it is used as a place of retreat for defeated or overmatched forces and as a means of obtaining munitions of war and other supplies. The difference between such use and employment as a base of offensive operations is too slight to make it important to separate them in principle. If then any claim of

[1] De Martens, Nouv. Rec. Gén. xii. 497–506.

the sort were admitted, it could hardly stop short of covering fully with the neutrality of an over-sovereign all belligerent use of territory in which over-sovereignty exists. Conversely the belligerency of an over-sovereign would taint such territory even though the whole effective authority within it were in the hands of a neutral.

The contention of the German Confederation was obviously inadmissible. It would indeed have been barely worth while to state it if it did not serve to bring into relief the necessity of frankly adopting the alternative view that the belligerency or neutrality of territory subject to a double sovereignty must be determined for external purposes, upon the analogy of territory under military occupation, by the belligerent or neutral character of the state *de facto* exercising permanent military control within it. As we have just seen, when a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil. In like manner, but with stronger reason, where sovereignty is double or ambiguous a belligerent must be permitted to fix his attention upon the crude fact of the exercise of power. He must be allowed to deal his enemy blows wherever he finds him in actual military possession, unless that possession has been given him for a specific purpose, such as that of securing internal tranquillity, which does not carry with it a right to use the territory for his military objects. On the other hand, where a scintilla of sovereignty is possessed by a belligerent state over territory where it has no real control, an enemy of the state, still fixing his attention on facts, must respect the neutrality with which the territory is practically invested.

Effect of a personal union between states.

It has been pointed out in a former chapter that states joined by a personal union are wholly separate states, which happen to employ the same agents for the management of their affairs, and that they are not responsible for each other's acts. It is the clear rule therefore that either may remain neutral during a war

in which the other is engaged. It is only necessary so far to qualify this statement as to say that any suspicion of indirect aid given by the neutral state, or of any fraudulent use of the produce of its taxes or other resources, gives the enemy of the belligerent power a right to disregard the character which the associated state claims to possess. The connexion between the two states is such, wherever at least the common sovereign may happen not to be trammelled by a constitution, that a right of ceasing to respect a neutrality thought to be unreal may fairly be held to arise upon less evidence of non-neutral conduct than would be required in the case of two wholly separate countries.

Case of the Convention of Suhlingen.

The irresponsibility of one of two states joined by a personal union for the acts of the other has usually, but not quite invariably, been respected by belligerents. In 1803 a case, in which one of two states united by a personal tie was improperly attacked on account of its connexion with the other, arose out of the personal union between England and Hanover. George III studiously kept distinct his position as Elector from that which he held as King; in 1795 the French government by allowing him to accede to the treaty of Basle in his former capacity had shown that they understood and acknowledged the reality of the severance which he made; and the principle of his neutrality as Elector had been confirmed both on the occasion of the treaty of Luneville, and by arrangements subsequently made with respect to the indemnities of German states. On the outbreak of war however between France and England in 1803 a French corps entered Hanover and compelled the electoral troops to capitulate at Suhlingen. A copy of the capitulation was sent over by the French government to Lord Hawkesbury, Secretary of State for Foreign Affairs, accompanied with the announcement that Hanover had been occupied as a pledge for the evacuation of Malta, with a demand that the capitulation should be ratified, and the statement that if it were not ratified Hanover should be treated with all the rigours of war, as a country which being abandoned by its sovereign had been

PART III CHAP. VI

conquered without capitulation. Lord Hawkesbury, in refusing on behalf of George III to do any act which would imply an admission of identity between England and Hanover, pointed out that the neutrality of the latter country was not assumed with reference to the then existing circumstances, that it had been maintained during the former war, and that it had been recognised in the ways mentioned above. The French government nevertheless declared the Convention of Suhlingen to be null, and imposed a fresh and less favourable capitulation upon the Hanoverian army [1].

1 De Martens, Rec. viii. 86; Alison's Hist. of Europe (ed. 1843), v. 140; De Garden, Hist. des Traités de Paix, viii. 192.

CHAPTER VII

MEANS OF EXERCISING THE RIGHTS OF OFFENCE AND DEFENCE

Division of the subject.

The rights of offence and defence possessed by a belligerent community are exercised through the instrumentality of armed forces, and by means of military and naval operations. The legal questions which present themselves with reference to the constitution of armed forces being necessarily distinct from those having reference to the manner in which such forces may act, the general subject of the law dealing with the rights of offence and defence is primarily divided into two heads, the first of which may be again conveniently divided, since, though the principles which govern continental and maritime warfare are identical, the differences which exist in the external conditions under which the two are carried on lead to differences in the particular rules affecting the constitution of the forces employed.

Hostilities on land.

Hostilities on land are for the most part carried on by the regular army of a state. The characteristics of this force from a legal point of view may be said to be that it is a permanently organised body, so provided with external marks that it can be readily identified, and so under the efficient control of the state that an enemy possesses full guarantees for the observance by its members of the established usages of war. It is the instrument expressly provided for the conduct of hostilities, and expressly adapted to carry them on in a legal manner.

Question as to who are legitimate combatants.

But belligerent acts are also performed by bodies of men less formally organised, and the legal position of some of these is not yet so defined as to be in all cases clear.

It has been seen that although all the subjects of a belligerent state were originally in fact, and still are theoretically, the enemies of the enemy state, a distinction has long been made,

under the influence of humanity and convenience, between combatant and non-combatant individuals. The latter are not proper objects of violence; the former may be killed and made prisoners, but when captured they must be treated in a specified way. It is evident that the treatment which is accorded to the two classes respectively, and the distinctive privileges which they enjoy, being caused by the difference in their character, must have been conceded on the tacit understanding that the separation between them shall be maintained in good faith. Non-combatants are exempted from violence because they are harmless; combatants are given privileges in mitigation of the full right of violence for the express reason that they hold themselves out as open enemies. If either class were able to claim the immunities belonging to the other without permanently losing those proper to itself, an enemy would have made concessions without securing any corresponding advantage. Non-combatants would not be harmless and combatants would not be known. Those persons only therefore can properly do belligerent acts and claim belligerent privileges on being captured who openly manifest their intention to be combatant; and a belligerent, before granting such privileges, has obviously the right to exact evidence of intention. In the case of an invading army the distinction is easily made. With the exception of surgeons and other persons, whose employments, though ancillary to war, are conventionally regarded as peaceful, all persons must be taken to be combatant. But in the case of defensive forces the legitimate demands of an invader tend to conflict with the unrestricted right of self-defence, which is possessed by the individual as a component part of the assailed community. It is impossible to push the doctrine that combatants and non-combatants must remain separate to its logical results when the duty and sentiment of patriotism, and the injury which even in modern warfare is always suffered by private persons, combine to provoke outbursts of popular resistance. Persons must sometimes be admitted to the privileges of soldiers who are not included in the regular army. At the same time the

interests of invading belligerents lead them to reduce the range of privilege as much as possible. Naturally practice shows the marks of these opposing influences. It is confused and not a little uncertain.

The evidences of intention to form part of the combatant class, which belligerents have been in the habit of exacting, fall under the heads of—

1. The possession of an authorisation given by the sovereign.
2. The possession of a certain number of the external characteristics of regular soldiers.

Whether an authorisation from the sovereign is necessary.

The rule that permission from the sovereign is the condition of legitimate warfare, as a matter of historical fact, sprang rather from the requirements of sovereignty than from those of the belligerent rights possessed by an enemy. When the notions involved in the idea of the modern state began to be formed, sovereigns in investing themselves with the exclusive right to make war, by implication kept to themselves the right of regulating the war when begun, and so refused to their subjects the power of attacking the common enemy when and how they pleased. Subjects acted simply as the agents of the sovereign. At first they were all agents. The want of fleets and sufficient armies compelled sovereigns to rely upon the population at large; leave therefore was usually given in a general manner at the beginning of war, and the declaration that 'we permit and give leave to all our subjects to take up arms against the above-named by sea and land,' or the order to 'courir sus' upon all the subjects of the enemy rendered warfare permissible to every one who chose to undertake it[1]. But as war became more systematic, offensive operations were necessarily conducted by the regular forces of the state; and in defence it was found, either that irregular levies plundered their fellow-countrymen without doing service against the enemy, or that the rising of an unarmed peasantry in despair was merely the signal for a massacre. The old forms of

[1] 'Le Cry de la Guerre ouverte entre le Roi de France et l'Empereur' in the Papiers d'Etat du Cardinal de Granvelle, ii. 630; Dumont, vii. i. 323.

permission continued, but they ceased to have a natural meaning[1]; and in the eighteenth century hostilities on land were in practice exercised only by persons furnished with a commission from their sovereign. Belligerents acting on the offensive were not slow to give to facts an interpretation in consonance with their interests; and although the right of taking up arms in its own defence with the permission of the sovereign might still be conceded in books to an invaded population[2], it became the habit to refuse the privileges of soldiers not only to all who acted without express orders from their government, but even to those who took up arms in obedience to express orders when these were not addressed to individuals as part of the regular forces of the state[3]. The doctrine

[1] For instance, Vattel says that in the eighteenth century the order to 'courir sus' was understood as meaning that persons and things belonging to the enemy were to be detained if they fell into the hands of those to whom the order was addressed, but that it gave no right of offensive action; liv. ii. § 227.

[2] Vattel, liv. iii. § 223.

[3] De Martens, Précis, § 271. See the Proclamations of the Austrians on entering Provence in 1747 and Genoa in 1748 (Moser, Versuch, ix. i. 232-6), of the French on landing in Newfoundland in 1762 (ib. 240), and of the French on entering Hanover in 1761 (Ann. Register for 1761, p. 278).

Jomini (Guerres de la Révolution, viii. 137) in speaking of the execution, by Napoleon's orders in 1796, of the magistrates of Pavia and the slaughter of the peasants who had endeavoured to defend the town, says that 'le droit public moderne avait jusqu'alors tiré une ligne de démarcation positive entre le citoyen paisible et les troupes de la ligne, et les habitants qui prenaient part aux hostilités sans faire partie de l'armée régulière étaient traités comme des révoltés.'

A proclamation issued by the commanders of the Russo-Austrian army in the Lower Valais in 1799 is of little interest with reference to the present point, because the invaders may have looked upon the population of the Lower Valais as being in insurrection against the suzerainty of the Upper Valais; but it is sufficiently atrocious and curious to be worth quoting on its own account. The generals order 'le peuple du bas Valais par la présente de poser les armes sans aucun délai,' and declare that 'si au mépris de notre proclamation . . . quelques-uns d'entre vous sont trouvés les armes à la main, nous vous annonçons qu'ils seront sans grâce passés au fil de l'épée, leurs avoirs confisqués, et leurs femmes et enfants même ne seront pas épargnés pour servir d'exemple à tous les mutins. C'est pourquoi, chrétiens frères, rentrez en vous-mêmes, tournez enfin vos armes contre vos véritables ennemis, qui vous trompent en se disant vos amis; songez que votre dernière heure a sonné et qu'il dépend encore dans cet instant de vous choisir votre parti.' Koch, Mém. de Masséna, Pièces justificatives, iii. 475.

which was thus on the point of being fixed was however to a great extent broken down by the events of the French revolutionary and imperial wars. France, Prussia and Russia all called upon their people at different times to embody themselves in levies which until then had not been recognised as legitimate, and other states encouraged or permitted still more irregular risings. No doubt nations were little willing to accord to others the rights of defence which they used for themselves; but the change in the character of wars from mere contests of princes, as they generally were in the eighteenth, to struggles between peoples, as they generally were in the beginning of the following century, left its trace upon opinion. Of the writers who more immediately succeeded the Napoleonic period De Martens appears to incline to the old doctrine; but Wheaton gives combatant privileges not only to the regular forces of a nation, but to 'all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose;' and Klüber recognises levies *en masse*, and thinks besides that inhabitants of a fortress assisting in its defence act under an implied authorisation [1]. Statements of this kind, made after the question of the permissibility of the employment of subjects otherwise than as regular soldiers had been brought forcibly to the attention of the world, have greater weight than those of earlier writers. For a long time it was not necessary for any state to declare itself on the subject. In 1863 however it fell to the lot of the United States to do so. In that year the 'Instructions for the Government of Armies in the Field' were issued, and the 51st article says that 'if the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorised levy, *en masse* to resist the invader, they are now treated as public enemies, and if captured, are prisoners of war.' In 1870 the Germans acted in a harsher spirit. Notwithstanding

[1] De Martens, Précis, § 271; Wheaton, Elem. pt. iv. ch. ii. § 9; Klüber, § 267.

that a law was passed by the French Assembly in August of that year under which 'citizens rising spontaneously in defence of the territory' were 'considered to form part of the national guard,' provided that they were distinguished by one at least of the distinctive signs of that corps, the Prussian government required that 'every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier by showing that he has been called out and borne on the lists of a military organised corps, by an order emanating from the legal authority and addressed to him personally[1].' This requirement, though far less stringent than the demands made in the eighteenth century, has failed to commend itself to the minds of jurists[2]; and the ninth article of the Declaration of Brussels laid down only that corps of volunteers shall 'have at their head a person responsible for his subordinates.' The tenth article declared that 'the population of a territory, not occupied, which spontaneously takes up arms at the approach of an enemy in order to combat the invading force, without having had time to organise itself conformably' to certain other requirements of the preceding article, shall be considered as 'belligerent if it respects the laws and customs of war.' Under these proposals, which were approved of by the larger military powers, and to which objection was made by the delegates of the smaller states on the ground only that enough scope was not left by them for spontaneous effort, the doctrine of state authorisation was doomed for all practical purposes to disappear.

[1] Art. ii of the French law mentioned provided that 'sont considérés comme faisant partie de la garde nationale les citoyens qui se portent spontanément à la défense du territoire avec l'arme dont ils peuvent disposer, et en prenant un des signes distinctifs de cette garde qui les couvre de la garantie reconnue aux corps militaires constitués.' Calvo, § 1800. Proclamation of the General commanding-in-chief transcribed from the German Recueil Officiel, published at Versailles, in Delerot, Versailles pendant l'Occupation, 104. Part of a similar proclamation is quoted by Bluntschli, § 570, bis.

[2] The majority of the members of the Institute of International Law present at the Hague in 1875, by expressing their approval of the Russian project of a declaration upon the laws and customs of war as modified by the Brussels Conference, condemned the conduct of the Germans.

In some cases a rising would be permitted without authorisation, whether express or implied; in all it would be implied if a responsible person, not necessarily a soldier, were found at the head of a body of men possessing certain of the external marks characteristic of regular forces. The requirement of a state authorisation is generally superfluous. It offers no guarantee for the observance of the usages of war that is not better given by other rules, which are in most cases necessary, and to the enforcement of which there is no objection. In the few cases where the requirement of authorisation would work independently it may be questioned whether its effect would not be distinctly bad. History does not suggest that sudden uprisings of a population in face of an advancing enemy will often occur; but when they do take place, the depth of the patriotic sentiment which must have inspired them, and their helplessness against an organised force, call rather for treatment of unusual leniency than for exceptional severity.

Whether the possession of some of the external characteristics of regular soldiers is required.

The characteristics of regular soldiers which armed forces have been required by belligerents to possess as the condition of being recognised as legitimate combatants, may be said to be, either together or separately, according to the circumstances of the case,—

1. The fact of acting in more or less organised bodies of considerable size.
2. The existence of a responsible chief.
3. The possession of a uniform, or of permanent distinguishing marks on the dress.

With these conditions, as with authorisation, the tendency of usage has of late been towards relaxation. According to De Martens[1], it was scarcely allowed in the eighteenth century that a militia force could claim the privileges of regular troops, although in its nature it is a permanently organised body and consequently rather more than satisfied the first two of the three requirements. There are certainly some cases which go as far as

[1] Précis, § 271.

this. In 1742 the Austrians excluded the Bavarian militia from belligerent rights; and the capitulation of Quebec in 1759, by providing that the inhabitants who had borne arms should not be molested, on the ground that 'it is customary for the inhabitants of the colonies of both crowns to serve as militia,' suggests that, apart from the special custom, they would have been left to the mercy of the English general[1]. The root of this indisposition to admit militia to be legitimate combatants was rather in military pride than in any doubt as to the sufficiency of the guarantees which they presented. Through prejudice inherited from feudal times and the era of mercenaries, soldiers thought a militia unworthy to share in privileges which were looked upon as the sign of the honourable character of the military calling, because its members were neither soldiers by profession, nor able to share in the larger operations of war which were the peculiar business of the latter. The same causes which shook the doctrine of the necessity of express authority during the revolutionary and Napoleonic wars could not but be fatal to a distinction founded on no more solid a basis than this; and accordingly from that time no doubt has been entertained as to the legitimacy in principle of militia and other imperfectly organised levies. Such questions as exist refer solely to the quantity and relative value of the marks by which the legal position of a force, not belonging to the army proper, can be ascertained.

Imperfectly organised levies permissible in principle.

Controversy during the Franco-German war of 1870.

In the course of the war of 1870–1 bodies of irregulars called Francs Tireurs were formed in France, who acted independently, without a military officer at their head, and who were distinguished in respect of dress only by a blue blouse, a badge, and sometimes a cap. The Germans refused to consider them legitimate belligerents on the double ground that they were not

[1] Moser, Versuch, ix. i. 268; Ann. Regist. for 1759, p. 247. By the capitulation of the French troops in Canada in the ensuing year it is agreed that the militia 'shall not be molested on account of their having carried arms.' Ann. Regist. for 1760, p. 222.

embodied as part of the regular forces of the state, viz. as part of the army or of the Garde Mobile, and that the distinguishing marks on the dress were insufficient or removable. The blouse, it was said, was the common dress of the population, and the badge and cap could be taken off and hidden at will. It was demanded that the marks should be irremovable and distinguishable at rifle distance. Where bodies of men are small, are acting independently, and especially if they are not under the immediate orders either of a military officer or of a local notability, such as a mayor in certain countries, an administrative official of sufficient rank, or a landed proprietor of position, they depend solely upon their dress marks for their right to belligerent privileges, since it is solely through them that the enemy can ascertain their quality. It is clear therefore that such marks must be irremovable; but to ask for marks distinguishable at a long distance is to ask not only for a complete uniform, but for a conspicuous one. The essential points are that a man shall not be able to sink into the class of non-combatants at his convenience, and that when taken prisoner there shall be no doubt on the patent facts how he ought to be dealt with. For both these purposes irremovable marks, clearly distinguishable at a short distance, are amply sufficient.

Brussels Conference.

The question whether irregular levies must be under the general military command, whether in fact, as a matter not of authorisation but of the sufficiency of the guarantees which it can offer for proper behaviour, a population has the right of spontaneous action in a moment of opportunity or emergency, was discussed at the Conference of Brussels. In the original draft Project of Convention it was made a condition of the possession of combatant rights that the persons claiming to have them should be under such command, and the representative of Germany showed a strong desire to maintain the requirement. After a good deal of discussion however the paragraph containing the condition was modified, and it became difficult for the great military states to ignore the admissions made on their behalf, and to refuse to

Requirements which may reasonably be exacted from

PART III CHAP. VII

acknowledge bodies of men headed by any responsible person as being combatant, irrespectively of connexion with the general military command, provided that, as a body, they conform to the rules of war, and that if in small numbers they are distinguishable by sufficient marks. If in large numbers the case is different. Large bodies, which do not possess the full marks of a militia, must belong to one of two categories. They must either form part of the permanent forces of a state, which from poverty or some other reason is unable to place them in the field properly uniformed, or perhaps officered, as in the instance of the Norwegian Landsturm, to which attention was directed at Brussels by the Swedish representative[1]; or else they must consist in a part of the unorganised population rising in arms spontaneously or otherwise in face of the invader. In neither case are dress marks required. In the first the dependence on military command is immediate, and affords sufficient guarantees. In the second, dress marks are from the nature of the case impossible as well as unnecessary. The fact that a large body is operating together sufficiently separates it as a mass from the non-combatant classes, and there can be no difficulty in supplying the individual members with certificates which would prove their combatant quality when captured singly or in small detachments. The possession of belligerent privilege in such cases hinges upon subordination to a responsible person, who by

1. men acting in small bodies,

2. men acting in large bodies.

[1] The case of the Ordenanza in Portugal was similar. It was an organised but un-uniformed militia, which during the advance of Massena in 1810 was used by Lord Wellington to harass the communications of the French army. Massena issued an order that all who might be captured should be shot, on which the English general addressed a letter to the former stating that 'ce que vous appelez "des paysans sans uniforme," "des assassins et des voleurs de grand chemin," sont l'Ordenanza du pays, qui comme j'ai déjà eu l'honneur de vous assurer sont des corps militaires commandés par des officiers, payés, et agissant sous les lois militaires. Il paraît que vous exigez que ceux qui jouiront des droits de la guerre soient revêtus d'un uniforme; mais vous devez vous souvenir que vous-même avez augmenté la gloire de l'armée française en commandant des soldats qui n'avaient pas d'uniforme.' Wellington Despatches, vi. 464. 'La leçon que Masséna reçut à cette occasion du général anglais ne saurait être trop connue,' remarks Lanfrey, Hist. de Nap. i. v. 386.

his local prominence, coupled with the fact that he is obeyed by a large force, shows that he can cause the laws of war to be observed, and that he can punish isolated infractions of them if necessary [1].

Hague Convention.

[The principles which were maintained at Brussels and supported at greater detail in the previous editions of this book have now been largely adopted by the Hague Convention, and may be regarded as law. By the first article of that instrument it was declared that the laws, rights, and duties of war apply not only to armies but also to militia and volunteer corps fulfilling the following conditions, namely that they should:

1. Be commanded by one person responsible for his subordinates;
2. Have a fixed distinctive emblem recognisable at a distance;
3. Carry arms openly; and
4. Conduct their operations in accordance with the laws and customs of war.

The second article provides, that if the population of a territory which has not been occupied shall spontaneously take up arms on the enemy's approach to resist the invading troops without having time to organise themselves in accordance with the former article, they shall be regarded as belligerents if they respect the laws and customs of war. It will be noticed that the doctrine of state authorisation is thus abandoned, and that in case of a national rising against an invader the necessity for a commander responsible for the action of his subordinates is apparently waived, as well as the possession by the combatants of any distinctive marks. To dispense with such requirements

[1] D'Angeberg, Nos. 375, 854; Parl. Papers, Miscell., No. i. 1875, 80, 122, 140; arts. 9 and 45 of the Project of Convention, and arts. 9 and 10 of the Project of Declaration of Brussels. See also American Instruct., §§ 49, 51–2; the French Manuel de Droit Int. à l'Usage, &c., 30; and the Manual of the Inst. de Droit Int., art. 2.

M. Rolin Jaequemyns (La Guerre Actuelle and Second Essai sur la Guerre Franco-Allemande) and Mr. Droop (Papers read before the Juridical Soc., vol. iii. pt. xxi) have examined the questions treated of in the above section.

is open to the grave objections pointed out on a previous page, and we may hazard the conjecture that non-compliance with the latter of them at any rate would be regarded as a breach of the laws and customs of war.]

Maritime hostilities.

Hostilities at sea are in the main carried on by the regular navy of the state, which corresponds with the regular military forces employed on land.

Privateers.

Until lately all maritime states have also been in the habit of using privateers, which are vessels belonging to private owners, and sailing under a commission of war empowering the person to whom it is granted to carry on all forms of hostility which are permissible at sea by the usages of war. Before giving a privateering commission, it is usual for the government issuing it to require the lodgment of caution money or the execution of a bond by way of security against illegal conduct on the part of the holder, and against a breach of the instructions which are issued for his guidance. The commission is revocable on proof of its misuse being produced, and by the English law at least the owners of the vessel were liable in damages; it was also usual for the Lords of the Admiralty to institute proceedings in the Admiralty Court upon complaint of ill-conduct. As a further safeguard, a privateer is liable to visit by public vessels of war; and as she is not invested with a public character, neutral ships of war are permitted to verify the lawfulness of the commission under which she sails by requiring its production.

Universally as privateers were formerly employed, the right to use them has now almost disappeared from the world. It formed part of the Declaration adopted at the Congress of Paris in 1856 with reference to Maritime Law that 'privateering is and remains abolished;' and all civilised states have since become signataries of the Declaration, except the United States, Spain, and Mexico. For the future privateers can only be employed by signataries of the Declaration of Paris during war with one of the last-mentioned states[1]. [Strangely enough the most im-

[1] [Hertslet, Map of Europe by Treaty, No. 271.]

portant maritime war since the Declaration of Paris has been waged between two of these non-signatary powers. In 1898 the United States government announced its intention 'not to resort to privateering, but to adhere to the rules of the Declaration of Paris.' Spain, while maintaining her right to issue letters of marque, limited herself by proclamation 'for the immediate present' to 'a service of auxiliary cruisers of the navy composed of ships of the Spanish mercantile marine and subject to the statutes and jurisdiction of the navy.' The Spanish government also declared its intention of treating as pirates the officers of non-American vessels manned as to one-third of the crew by other than American citizens and committing acts of war against Spain[1].]

Volunteer navy.

A measure taken by Prussia during the Franco-German war of 1870 opens a rather delicate question as to the scope of the engagement not to employ privateers by which the signataries of the Declaration of Paris are bound. In August of that year the creation of a volunteer navy was ordered by decree. The owners of vessels were invited to fit them out for attack on French ships of war, and large premiums for the destruction of any of the latter were offered. The crews of vessels belonging to the volunteer navy were to be under naval discipline, but they were to be furnished by the owners of the ships; the officers were to be merchant seamen, wearing the same uniform as naval officers, and provided with temporary commissions, but not forming part of, or attached to, the navy in any way, though capable of receiving a commission in it as a reward for exceptional services; the vessels were to sail under the flag of the North German navy. The French government protested against the employment of private vessels in this manner as an evasion of the Declaration of Paris, and addressed a despatch on the subject to the government of England. The matter was laid before the law officers of the Crown, and they reported that there were substantial differences between a volunteer navy as proposed by

[1] [Hertslet, Commercial Treaties, xxi. pp. 836, 1074.]

the Prussian government and the privateers which it was the object of the Declaration to suppress. Lord Granville in consequence declared himself unable to make any objection to the intended measure on the ground of its being a violation of the engagement into which Prussia had entered. Nevertheless it hardly seems to be clear that the differences, even though substantial, between privateers and a volunteer navy organised in the above manner would necessarily be always of a kind to prevent the two from being identical in all important respects. In both the armament is fitted out by persons whose motive is wish for gain, in both the crews and officers are employed by them and work therefore primarily rather in their interests than in those of the nation. The difference that in the particular case of the Prussian volunteer navy attacks upon men of war were alone contemplated was accidental and would have been temporary. At the beginning of the war Prussia announced her intention not to capture private property at sea in the hope of forcing France to spare the commerce which she was herself unable to protect. If the war had been continued for any length of time after January 1871, when this announcement was withdrawn, and if a volunteer navy had in fact been formed, it would of course have been authorised to capture private property; and there is no reason to suppose that any state acting upon the custom of seizing private property would make a distinction between public and private vessels in the powers given to its volunteer navy. The sole real difference between privateers and a volunteer navy is then that the latter is under naval discipline, and it is not evident why privateers should not also be subjected to it[1]. It cannot be supposed that the Declaration of Paris was merely intended to put down the use of privateers governed by

[1] Bluntschli (§ 670) makes the fact that the Prussian volunteer navy was to be under general naval command a point of distinction from privateers. But, as he properly says in an earlier part of the same section, 'le corsaire reconnaissait l'autorité de l'amiral commandant la flotte.' Was the dependence intended to be closer in the one case than it has been in the other?

the precise regulations customary up to that time. Privateering was abandoned because it was thought that no armaments maintained at private cost, with the object of private gain, and often necessarily for a long time together beyond the reach of the regular naval forces of the state, could be kept under proper control. Whether this belief was well founded or not is another matter. If the organisation intended to be given to the Prussian volunteer navy did not possess sufficient safeguards, some analogous organisation no doubt can be procured which would provide them. If so there could be no objection on moral grounds to its use; but unless a volunteer navy were brought into closer connexion with the state than seems to have been the case in the Prussian project it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the Declaration of Paris [1].

The incorporation of a part of the merchant marine of a country in its regular navy is of course to be distinguished from such a measure as that above discussed. A marked instance of incorporation is supplied by the Russian volunteer fleet. The vessels are built at private cost, and in time of peace they carry the mercantile flag of their country; but their captain and at least one other officer hold commissions from their sovereign, they are under naval discipline, and they appear to be employed solely in public services, such as the conveyance of convicts to the Russian possessions on the Pacific. Taking the circumstances as a whole, it is difficult to regard the use of the mercantile flag as serious; they are not merely vessels which in the event of war can be instantaneously converted into public vessels of the state, they are properly to be considered as already belonging to the imperial navy. The position of vessels belonging to the great French mail lines is different. They are commanded by a commissioned officer of the navy, but so long as peace lasts their employment

[1] D'Angeberg, Nos. 352 and 362; Bluntschli, § 670; Calvo, § 2086. M. Geffcken (note to Heffter, ed. 1883, p. 279) is right in saying that the action of Prussia 'ne prouve qu'une chose, c'est que l'abolition de la course n'a pas résolu toute la question.'

is genuinely private and commercial; means is simply provided by which they can be placed under naval discipline and turned into vessels of war so soon as an emergency arises. They are not now incorporated in the French navy, but incorporation would take place on the outbreak of hostilities. [The Liners which of recent years have been subsidised by the British Government in return for a lien on their services as cruisers in time of war stand on a similar footing, except that in peace time they are not under the command of an officer in the Royal Navy.]

Right of non-commissioned vessels to resist capture.

Non-commissioned vessels have a right to resist when summoned to surrender to public ships or privateers of the enemy. The crews therefore which make such resistance have belligerent privileges; and it is a natural consequence of the legitimateness of their acts that if they succeed in capturing their assailant the capture is a good one for the purpose of changing the ownership of the property taken and of making the enemy prisoners of war [1].

Attack by non-commissioned ships illegitimate.

By some writers it is asserted that a non-commissioned ship has also a right to attack [2]. If there was ever anything to be said for this view, and the weight of practice and of legal authority was always against it [3], there can be no question that it is too much opposed to the whole bent of modern ideas to be now open to argument. There is no such reason at sea as there is on land for permitting ill-regulated or unregulated action. On the common ground of the ocean a man is not goaded to leave the non-combatant class, if he naturally belongs to it, by the peril of his country or his home. Every one's right to be there being moreover equal, the initiative in acts of hostility must always be aggressive; and on land irregular levies only rise

[1] Kent, i. 94; Halleck, ii. 12; Mr. Justice Story in Brown *v.* The United States, viii Cranch, 135.

[2] Wheaton, pt. iv. ch. ii. § 9. Kent (i. 96) thinks that persons depredating without the leave of their state expressed in a commission commit a municipal wrong, but that 'as respects the enemy they violate no rights by capture.'

[3] Vattel, liv. iii. ch. xv. § 226; De Martens, Précis, § 289; Queen's Naval Regulations, 1861.

for defence, and are only permissible for that purpose. It is scarcely necessary to add that non-commissioned ships offer no security that hostilities will be carried on by them in a legitimate manner. Efficient control at sea must always be more difficult than on land; and if it was found that the exercise of due restraint upon privateers was impossible, *à fortiori* it would be impossible to prevent excesses from being indulged in by non-commissioned captors.

General limitation upon the rights of violence.

In a general sense a belligerent has a right to use all kinds of violence against the person and property of his enemy which may be necessary to bring the latter to terms. *Primâ facie* therefore all forms of violence are permissible. But the qualification that the violence used shall be necessary violence has received a specific meaning; so that acts not only cease to be permitted so soon as it is shown that they are wanton, but when they are grossly disproportioned to the object to be attained; and the sense that certain classes of acts are of this character has led to the establishment of certain prohibitory usages.

These prohibitory usages limit the right of violence in respect of

1. The means of destruction which may be employed.
2. The conditions under which a country may be devastated.
3. The use of deceit.

Some questions not falling under either of these heads have to be determined by reference to the general limitation forbidding wanton or disproportionate violence.

Specific usages with respect to, 1. The means of destruction which may be employed;

The first of the above prohibitory usages may be described as the rough result of a compromise between a dislike to cause needless suffering and a wish to use the most efficient engines of war. On the whole it may be said generally that weapons are illegitimate which render death inevitable or inflict distinctly more suffering than others, without proportionately crippling the enemy. Thus poisoned arms have long been forbidden, and guns must not be loaded with nails or bits of iron of irregular

shape. To these customary prohibitions the European powers, except Spain, have added as between themselves the abandonment of the right to use explosive projectiles weighing less than fourteen ounces; and in the Declaration of St. Petersburg, by which the renunciation of the right was effected in 1868, they took occasion to lay down that the object of the use of weapons in war is 'to disable the greatest possible number of men, that this object would be exceeded by the employment of arms which needlessly aggravate the sufferings of disabled men, or render their death inevitable, and that the employment of such arms would therefore be contrary to the laws of humanity[1].' [In one of the supplementary Hague Declarations of July 29, 1899, the representatives of all the powers assembled, with the exception of Great Britain, the United States and Portugal, bound themselves to abstain from the use of bullets which expand or flatten in the human body[2].] On the other hand, the amount of destruction or of suffering which may be caused is immaterial if the result obtained is conceived to be proportionate. Thus no objection has ever been made to mines; it is not thought improper to ram a vessel so as to sink her with all on board; and torpedoes have been received without protest among the modern engines of war. [The powers assembled at the Hague,

[1] De Martens, Nouv. Rec. Gén. xviii. 474, or Hertslet, No. 414; Vattel, liv. iii. § 156; Ortolan, liv. iii. ch. i; Bluntschli, §§ 557–8. Klüber (§ 244) pretends that the use of chain-shot is forbidden. Heffter (§ 124) and Bluntschli (§ 560) transform into a prohibition of red-hot shot the remarks of Klüber and De Martens (§ 273 note) that its use has been renounced by agreement in several naval wars, and that doubts have been expressed as to whether it can be legitimately employed. [The Hague Convention, art. 23, apart from the stipulation of the Geneva or other Conventions, prohibits the employment of poison, poisoned weapons, and of any weapons, projectiles or materials calculated to cause unnecessary suffering.]

[2] ['Balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain, telles que les balles à enveloppe dure dont l'enveloppe ne couvrirait pas entièrement le noyau ou serait pourvue d'incisions.' The objection felt by a power like Great Britain, whose normal warfare is conducted against savage tribes, has received fresh justification during the recent military operations in Somaliland; to the warriors of the Indian frontier or the Soudan the Lee-Metford bullet is little more than a pinprick unless it breaks a limb or touches a vital organ.]

with the exception of Great Britain and the United States, bound themselves to prohibit the employment of projectiles solely intended to spread asphyxiating or noxious gases. Lyddite, which was presumably aimed at, was freely employed in the South African War with somewhat disappointing results; its object moreover is primarily destructive, only secondarily asphyxiating. In another of the Hague Declarations the powers, with the exception of Great Britain, bound themselves for a probationary period of five years from July 1899 to abstain from utilising balloons or analogous inventions for dropping projectiles and explosives.]

2. Devastation;

Devastation is capable of being regarded independently as one of the permitted kinds of violence used in order to bring an enemy to terms, or as incidental to certain military operations, and permissible only for the purpose of carrying them out. Formerly it presented itself in the first of these aspects. Grotius held that 'devastation is to be tolerated which reduces an enemy in a short time to beg for peace,' and in the practice of his time it was constantly used independently of any immediate military advantage accruing from it[1]. But during the seventeenth century opinion seems to have struggled, not altogether in vain, to prevent its being so used in more than a certain degree; and though the devastation of Belgium in 1683 and of Piedmont in 1693 do not appear to have excited general reprobation[2], Louis XIV was driven to justify the more savage destruction of the Palatinate by alleging its necessity as a defensive measure for the protection of his frontiers. In the eighteenth century the alliance of devastation with strategical objects became more close. It was either employed to deny the use of a tract of country to the enemy by rendering subsistence difficult, as when

[1] De Jure Belli et Pacis, lib. iii. c. xii. § 1.

[2] But the better minds of the time already disapproved of devastation. Evelyn (Memoirs, iii. 335) says, under the date 1694, 'Lord Berkeley burnt Dieppe and Havre in revenge for the defeat at Brest. This manner of destructive war was begun by the French, and is exceedingly ruinous, especially falling on the poorer people, and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge.'

the Duke of Marlborough wasted the neighbourhood of Munich in 1704, and the Prussians devastated part of Bohemia in 1757; or it was an essential part of a military operation, as when the Duc de Vendôme cut the dykes and laid the country under water from the neighbourhood of Ostend to Ghent, while endeavouring to sever the communications with the former place of the English engaged in the siege of Lille[1]. At the same time devastation was still theoretically regarded as an independent means of attack. Wolff declares it to be lawful both as a punishment and as lessening the strength of an enemy; Vattel not only allows a country to be 'rendered uninhabitable, that it may serve as a barrier against forces which cannot otherwise be arrested,' but treats devastation as a proper mode of chastising a barbarous people; and Moser in like manner permits it both in order to 'deprive an enemy of subsistence which a territory affords to him,' and 'to constrain him to make peace[2].' But every few years an advance in opinion is apparent. De Martens restricts further the occasions upon which recourse can be had to devastation. Property he says may be destroyed which cannot be spared without prejudicing military operations, and a country may be ravaged in extraordinary cases either to deprive an enemy of subsistence or to compel him to issue from his positions in order to protect his territory[3]. Even at the beginning of this century instances of devastation of a not necessary kind occasionally present themselves. In 1801 the enlargement of Lake Mareotis by the English during the siege of Alexandria was no doubt justified by the bare law as it was then understood; but the measure, though of great advantage to the besiegers, was not the sole condition of success[4]. The destruction of the towns of Newark and York by the American troops during their retreat from Canada in 1813 and of the

[1] Marlborough's Despatches, i. 378 and iv. 269; Moser, Versuch, ix. i. 122.

[2] Wolff, Jus Gentium, § 823; Vattel, liv. iii. c. ix. § 167; Moser, Versuch, ix. i. 121.

[3] Précis, § 280.

[4] Wilson's Hist. of the British Expedition to Egypt, ii. 65.

public buildings of Washington by the English in 1814 may be classed together as wholly unnecessary and discreditable [1]. The latter case was warmly animadverted upon by Sir J. Mackintosh in the House of Commons; and since that time not only have no instances occurred, save by indulgence in an exceptional practice to be mentioned presently, but opinion has decisively laid down that, except to the extent of that practice, the measure of permissible devastation is to be found in the strict necessities of war [2].

When devastation is permissible.

The right being thus narrowed, it is easy to distinguish between three groups of cases, in one of which devastation is always permitted, while in a second it is always forbidden, and in a third it is permitted in certain circumstances. To the first group belong those cases in which destruction is a necessary concomitant of ordinary military action, as when houses are razed or trees cut down to strengthen a defensive position, when the suburbs of a fortified town are demolished to facilitate the attack or defence of the place, or when a village is fired to cover the retreat of an army. Destruction, on the other hand, is always illegitimate when no military end is served, as is the case when churches or public buildings, not militarily used and so situated or marked that they can be distinguished, are subjected to bombardment in common with the houses of a besieged town. Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender; it would even be impossible to deny to an invader the right to cut the dykes of Holland to save himself from such a fate; but when, as in the case supposed, the devastation is extensive in scale and lasting in effect, modern opinion would demand that the necessity should be extreme and patent [3].

[1] The case of Washington so far differs from the former that it may perhaps be not unreasonably defended as an act of reprisals.

[2] Ann. Regist. for 1814, pp. 145 and 177; Hansard, xxx. 527; Manning, bk. v; Heffter, § 125; Twiss, War, § 65; Bluntschli, § 663; Calvo, § 1919.

[3] It is scarcely necessary to point out that the above restrictions upon devastation apply only to devastation of an enemy's country.

So stands the law; and no change has taken place in the conditions under which war is waged that can justify or excuse a change in practice. Nevertheless it was seen in a former section [1] that some naval officers of authority are disposed to ravage the shores of a hostile country and to burn or otherwise destroy its undefended coast towns; on the plea, it would appear, that every means is legitimate which drives an enemy to submission. It is a plea which would cover every barbarity that disgraced the wars of the seventeenth century. That in the face of a continued softening of the customs of war it should be proposed to introduce for the first time into modern maritime hostilities [2] a practice which has been abandoned as brutal in hostilities on land, is nothing short of astounding. Happily, before things of such kind are done, states are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth [3].

Bombardment of towns.

The exceptional practice of which mention has been made consists in the bombardment, during the siege of a fortified town, of the houses of the town itself in order to put an indirect pressure on the commandant inducing him to surrender on account of the misery suffered by the inhabitants. The measure is one of peculiar cruelty, and is not only unnecessary, but more often than not is unsuccessful. It cannot be excused; and can only be accounted for as a survival from the practices which were formerly regarded as permissible and which to a certain extent

[1] Antea, p. 433.

[2] One instance, that of the bombardment of Valparaiso by Admiral Nuñez, has no doubt occurred, in which a commercial town has been attacked as a simple act of devastation, but the act gave rise to universal indignation at the time, and has never been defended.

[3] Of course nothing which is above said has reference to the destruction of property capable of being used by an enemy in his war. No objection can be taken to the bombardment of shipbuilding yards in which vessels of war or cruisers can be built. Of course, also, a belligerent is not responsible for devastation caused by, say, the accidental spreading of a fire to a town from vessels in harbour burnt because of their possible use as transports, or from burning naval or military stores.

lasted, as has been seen, till the beginning of the present century. For the present however it is sanctioned by usage; and it was largely resorted to during the Franco-German war of 1870.

[At the Hague Conference an endeavour was made to keep the effects of bombardment within as narrow limits as are consistent with accepted modern usage. In the first place, the bombardment of undefended towns, villages and dwellings is absolutely forbidden. In the case of bombardment which does not form part of a general assault or storm, the officer commanding the besiegers is bound to notify his intention, to the best of his power, to the authorities of the town. In bombardments and sieges generally every possible care is to be taken to spare churches and buildings set apart for objects of art, science, or benevolence, as well as hospitals and places where the sick and wounded are sheltered, provided that they are not used for military purposes and that they are designated by special marks visible to the besiegers and communicated to them beforehand. This connexion, it must be remembered, refers only to land warfare, and leaves untouched the question of bombardment from the sea [1].]

As a general rule deceit is permitted against an enemy; and it is employed either to prepare the means of doing violent acts under favourable conditions, by misleading him before an attack, or to render attack unnecessary, by inducing him to surrender, or to come to terms, or to evacuate a place held by him. But under the customs of war it has been agreed that particular acts and signs shall have a specific meaning, in order that belligerents may carry on certain necessary intercourse; and it has been seen that persons and things associated with an army are sometimes exempted from liability to attack for special reasons. In these cases an understanding evidently exists that particular acts shall be done, or signs used, or characters assumed, for the appropriate purposes only; and it is consequently forbidden to employ them in deceiving an enemy. Thus information must not be surreptitiously obtained under the shelter of a flag of truce, and the

3. Deceit.

[1] [Hague Convention on the laws and customs of war, articles 35, 36, 37.]

bearer of a misused flag may be treated by the enemy as a spy; buildings not used as hospitals must not be marked with a hospital flag; and persons not covered by the provisions of the Geneva Convention must not be protected by its cross[1].

A curious arbitrary rule affects one class of stratagems by forbidding certain permitted means of deception from the moment at which they cease to deceive. It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognised before attacking, and

[1] Vattel, liv. iii. §§ 177-8; Halleck, ii. 25; Bluntschli, § 565; American Instruct., arts. 101, 114, 187; Project of Declaration of Brussels, art. 13; Manuel de l'Inst. de Droit Int., art. 8.

Occasionally stratagems are criticised upon grounds which imply some confusion of mind. In the year 1800 an English squadron is said to have seized a Swedish galliot on the high seas near Barcelona, and put a force of soldiers and marines on board, which under cover of the apparent innocence of the vessel was able to surprise and mainly contribute to the capture of two Spanish frigates lying in the roads. As is very frequently the case with occurrences which are made the subject of animadversion against England in foreign works on international law, owing to a too common neglect to compare the English with the foreign sources of information, the true facts were wholly different from those alleged. No ruse was employed, and the Swedish vessel had nothing to do with the attack (James's Naval Hist. iii. 50). Assuming the facts however to be correctly stated by M. Ortolan (Dip. de la Mer, liv. iii. ch. i), it would be interesting to know how he and M. Calvo (§ 2063) could separate the case from that of a vessel flying, as she is confessedly at liberty to do, false colours until the moment before firing her first gun. It is not pretended that the Swedish galliot was laid alongside the frigates and that the boarding was effected from her, nor that a single shot was fired from her; yet the English are accused of 'treason towards the enemy.' It seems pretty clear that the writers quoted must have allowed themselves to be influenced by the fact that the vessel was really Swedish, although the impression produced upon the minds of the Spanish commanders was entirely independent of this circumstance. However distinctly Swedish the galliot may have been in build and rig, she might have become British property by condemnation for carriage of contraband or breach of blockade. She would then have been an English ship using the legitimate ruse of flying the Swedish flag, and the Spaniards had no means of knowing that this was not actually the case. MM. Ortolan and Calvo point out rightly, on the assumed facts, that a gross breach of neutrality was committed; but as between the two enemies, the breach of neutrality would have had no bearing on the character of the acts done, and the deception effected would have been of a perfectly legitimate kind.

that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell. The rule, disobedience to which is considered to entail grave dishonour, has been based on the statement that 'in actual battle, enemies are bound to combat loyally and are not free to ensure victory by putting on a mask of friendship.' In war upon land victory might be so ensured, and the rule is consequently sensible; but at sea, and the prohibition is spoken of generally with reference to maritime war, the mask of friendship no longer misleads when once fighting begins, and it is not easy to see why it is more disloyal to wear a disguise when it is obviously useless, than when it serves its purpose [1].

Spies.

A spy is a person who penetrates secretly, or in disguise or under false pretences, within the lines of an enemy for the purpose of obtaining military information for the use of the army employing him. Some one of the above indications of intention being necessary to show the character of a spy, no one can be treated as such who is clothed in uniform, who whether in uniform or not has accidentally strayed within the enemy's lines while carrying despatches or messages, or who merely endeavours to traverse those lines for the purpose of communicating with a force beyond or of entering a fortress.

It is legitimate to employ spies; but to be a spy is regarded as dishonourable, the methods of obtaining information which are used being often such that an honourable man cannot employ them. A spy, if caught by the enemy, is punishable after trial by court-martial with the ignominious death of hanging; though, as M. Bluntschli properly remarks, it is only in the more dangerous cases that the right of inflicting death should be acted upon, the penalty being in general out of all proportion with the crime [2].

[1] Ortolan, liv. iii. ch. i; Pistoye et Duverdy, i. 231–4; Bluntschli, § 565. Lord Stowell (The Peacock, iv Rob. 187) in stating the rule gives a different reason for it from that mentioned above, but it is one that is not applicable to all cases.

[2] Bluntschli, §§ 628-32, 639; American Instruct., &c., arts. 88, 99, 100; Projet

Together with spies, as noxious persons whom it is permitted to execute, but differing from them in not being tainted with dishonour, and so in not being exposed to an ignominious death, are bearers of despatches or of verbal messages, when found within the enemy's lines, if they travel secretly or, when soldiers, without uniform, and persons employed in negotiating with commanders or political leaders intending to abandon or betray the country or party to which they belong.

Persons in balloons.

A strong inclination was shown by the Germans during the war of 1870 to treat as spies persons passing over the German lines in balloons. 'All persons,' says Colonel Walker in writing to Lord Granville, 'who attempt to pass the Prussian outposts without permission, whether by land, water or air,' were 'deported to Prussia under suspicion of being French spies;' and it was declared by Count Bismarck, in writing of an English subject captured in a balloon, that apart from the fact that he was suspected to be the bearer of illicit correspondence, his arrest and trial by court-martial 'would have been justified, because he had spied out and crossed our outposts and positions in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained, to our prejudice.' As a matter of fact, though persons captured from balloons were in no case executed as spies, they were treated with great severity. A M. Verrecke, for example, dropped with some companions in Bavaria, and was of course captured; the whole party were sent to a military prison, and only liberated two months after the signature of peace. A M. Nobécourt had his balloon fired upon, and when subsequently captured, he was condemned to death; the sentence was commuted to fortress imprisonment at Glatz. Neither secrecy, nor disguise, nor pretence being possible to persons travelling in balloons, the view taken by the Germans is inexplicable; and it is satisfactory

d'une Déclaration, &c., arts. 19 and 22; Manuel de Droit Int. à l'Usage, &c., p. 32; Manuel de l'Inst. de Droit Int., arts. 23-6. [Hague Convention, arts. 29-31.]

to notice that the treatment of balloon travellers as spies [is forbidden in the Hague Convention], and that their right to be treated as prisoners of war is affirmed in the French official manual for the use of military officers [1].

A person punishable as a spy, or subject to penalties for the other reasons mentioned above, cannot be tried and punished or subjected to such penalties if after doing the punishable act he has rejoined the army by which he is employed before his arrest is effected [2].

[1] Parl. Papers, 1871, lxxii; Journal de Droit Int. Privé, xviii. 442; Projet d'une Déclaration, &c., art. 22; Manuel à l'Usage, &c., p. 40. See also the Manuel de l'Inst. de Droit Int., art. 21. [Hague Convention, art. 29.]

[2] [Hague Convention, art. 31.]

CHAPTER VIII

NON-HOSTILE RELATIONS OF BELLIGERENTS

PART III
CHAP. VIII

General character of non-hostile relations.

UNDER the modern customs of war belligerents are brought from time to time into non-hostile or quasi-amicable relations with each other, which impose obligations, and for the due establishment of which certain formalities are required. These relations sometimes consist in a temporary cessation of hostility towards particular individuals, who are protected by flags of truce, passports, safe-conducts, or licences; or towards the whole or part of the armed forces of the enemy under suspensions of arms, truces, or armistices; and sometimes in the partial abandonment of the rights of hostility under cartels and agreements for capitulation. As hostility ceases in so far as these relations are set up, the arrangements which are made under them proceed upon the understanding that they will be carried out with the same good faith which one nation has a right to demand from another in time of peace, and therefore both that no attempt will be made to use them as a cover for acts not contemplated by them, and that on the other hand the enemy will be given the full benefit of their expressed or implied intention.

Flags of truce.

A flag of truce is used when a belligerent wishes to enter into negotiations with his enemy. The person charged with the negotiation presents himself to the latter accompanied by a drummer or a bugler and a person bearing a white flag. As belligerents have the right to decline to enter into negotiations they are not obliged to receive a flag of truce; but the persons bearing it are inviolable; they must not therefore be turned back by being fired upon, and any one who kills or wounds them intentionally is guilty of a serious infraction of the laws of war. If however they present themselves during the progress of an

engagement, a belligerent is not obliged immediately to put a stop to his fire, the continuance of which may be of critical importance to him, and he cannot be held responsible if they are then accidentally killed. If the enemy receives persons under the protection of a flag of truce he engages by implication to suspend his war with respect to them for so long as the negotiation lasts; he cannot therefore make them prisoners, and must afford them the means of returning safely within their own lines; but a temporary detention is permissible if they are likely to be able to carry back information of importance to their army [and *à fortiori* if they are convicted of actually doing so]. Effectual precautions may always be taken to hinder the acquisition of such knowledge; bearers of flags of truce may for example be blindfolded, or be prevented from holding communication with other persons than those designated for the purpose of having intercourse with them.

It is a necessary consequence of the obligation to conduct the non-hostile intercourse of war with good faith, that a belligerent may not make use of a flag of truce in order to obtain military information; and though its bearer is not expected to refrain from reporting whatever he may learn without effort on his own part, any attempt to acquire knowledge surreptitiously exposes him to be treated as a spy. Deserters, whether bearing or in attendance upon a flag of truce, are not protected by it; they may be seized and executed, notice being given to the enemy of the reason of their execution [1].

Passports. Passports are written permissions given by a belligerent to subjects of the enemy whom he allows to travel without special restrictions in the territory belonging to him or under his control.

[1] American Instruct., arts. 101–12; Manuel de l'Inst. de Droit Int., arts. 27–31; Calvo, § 2128; Bluntschli, §§ 681–4; Halleck, ii. 361; Washington's Corresp. v. 341–2. [Hague Convention, arts. 32–34. It should be noted that the Convention is silent as to the right of treating as a spy the bearer of a flag who abuses his position by obtaining military information, and merely authorises a temporary detention. The envoy who has been proved beyond all doubt to have taken advantage of his privileged position to commit an act of treachery 'loses his rights of inviolability.']

Safe-conducts are like permissions under which persons to whom they are granted may come to a particular place for a defined object. Passports, being general, must be given by the government or its duly appointed agents; safe-conducts may be conceded either by the government or by any officer in military or naval command in respect of places within his district, but in the latter case they may be rescinded by a higher authority; and both passports and safe-conducts may be annulled by the person who has given them, or by his superior, whenever owing to any change of circumstances their continued use has in his judgment become dangerous or inconvenient. When this is done, good faith obviously requires that the grantee who has placed himself in the grasp of his enemy under a promise of immunity shall be allowed to withdraw in safety; it is not necessary however that he shall be permitted to retire in a direction chosen by himself if he has a passport, or in that contemplated by his safe-conduct; his destination and his route may be fixed for him. Neither passports nor safe-conducts are transferable. When they are given for a certain time only, but from illness or other unavoidable cause the grantee is unable to withdraw from the hostile jurisdiction before the end of the specified term, protection must be extended to him for so long as is necessary; if, on the other hand, he voluntarily exceeds prescribed limits of time and place he forfeits the privileges which have been accorded to him, and he may be punished severely if it can be shown that he has taken advantage of the indulgence which he has received for improper objects[1].

Suspensions of arms and armistices.

Agreements for the temporary cessation of hostilities are called suspensions of arms when they are made for a passing and merely military end and take effect for a short time or within a limited space; and they are called truces or armistices when

[1] Halleck, ii. 351; Calvo, §§ 2111–4; Bluntschli, §§ 675–8. An Act of Congress passed in 1790 exposes any civilian violating a passport or safe-conduct to imprisonment for three years and a fine of indeterminate amount, and sends soldiers before a court-martial.

they are concluded for a longer term, especially if they extend to the whole or a considerable portion of the forces of the belligerents, or have an entirely or partially political object[1].

As neither belligerent can be supposed in making such agreements to be willing to prejudice his own military position, it is implied in them that all things shall remain within the space and between the forces affected as nearly as possible in the condition in which they were at the moment when the compact was made, except in so far as causes may operate which are independent of the state of things brought about by the previous operations; the effect of truces and like agreements is therefore not only to put a stop to all directly offensive acts, but to interdict all acts tending to strengthen a belligerent which his enemy apart from the agreement would have been in a position to hinder. Thus in a truce between the commander of a fortress and an investing army the besieger cannot continue his approaches or make fresh batteries, while the besieged cannot repair damages sustained in the attack, nor erect fresh works in places not beyond the reach of the enemy at the beginning of the truce, nor throw in succours by roads which the enemy at that time commanded; and in a truce between armies in the field neither party can seize upon more advanced positions, nor put himself out of striking distance of his enemy by retreat, nor redistribute his corps to better strategical advantage. But in the former case the besieged may construct works in places hidden from or unattainable by his enemy, and the besieger may receive reinforcements and material of war; and in the latter case magazines may be replenished and fresh troops may be brought up and may occupy any position access to which could not have been disputed during the progress of hostilities. During the continuance of a truce covering the whole forces of the respective

[1] It is hardly possible to draw a clear line of distinction between suspensions of arms, truces, and armistices, though in their more marked forms they are readily to be distinguished. See Vattel (liv. iii. ch. xvi. § 233), Halleck (ii. 342-7), Bluntschli (§§ 688-9), and Calvo (§ 2130).

states a belligerent may still do all acts, within such portion of his territory as is not the theatre of war, which he has a right to do independently of the truce; he may therefore levy troops, fit out vessels, and do everything necessary to increase his power of offence and defence [1].

Revictualling of a besieged place.

Whether the revictualling of a besieged place should be permitted as of course during the continuance of a truce is a question which stands somewhat apart. The introduction of provisions is usually mentioned by writers as being forbidden in the absence of special stipulations whenever the enemy might but for the truce have prevented their entrance; there can be no doubt that the same view would be taken by generals in command of a besieging army [2]; and as it is not in most cases possible to introduce trains of provisions in the face of an enemy, the act of doing so under the protection of a truce might at first sight seem to fall naturally among the class of acts prohibited for the reason that apart from the truce they could not be effected. It is however in reality separated from them by a very important difference. Provisions are an exhaustible weapon of defence, the consumption of which, unlike that of munitions of war, continues during a truce or armistice; the ultimate chances of successful resistance are lessened by every ration which is eaten,

[1] The principle of the law regulating acts permitted during a truce was very early recognised; see Albericus Gentilis, De Jure Belli, lib. ii. c. 13. The modern doctrine on the subject is given by Halleck (ii. 345), Bluntschli (§§ 691-2), Calvo (§ 2136). The American Instructions for Armies in the Field (§ 143) regard it as an open question whether the garrison of a besieged town has a right to repair breaches and throw up new works, irrespectively of whether the enemy could have prevented them if hostilities had continued. Heffter however (§ 142) seems to be the only modern writer who is inclined to give this advantage to a garrison, and it is difficult to see what reasons could be alleged in its favour. Nevertheless to avoid possible disputes it may be worth while, in accordance with the direction given in the American Instructions, to make a special stipulation on the subject.

[2] Halleck, ii. 345; Wheaton, Elem. pt. iv. ch. ii. § 22; Calvo, § 2137. The consideration that a belligerent may intend to reduce the besieged places by famine seems to weigh with the latter; but the essence of a truce is that all forms of hostile action are suspended, and the continuance of steps taken towards an ultimate reduction by famine is necessarily a continuance of hostile action.

and to prohibit their renewal to the extent to which they are consumed is precisely equivalent to destroying a certain number of arms for each day that the armistice lasts. To forbid revictualment is therefore not to support but to infringe the principle that at the end of a truce the state of things shall be unchanged in those matters which an enemy can influence. Generally no doubt armistices contain special stipulations for the supply of food by the besieger, or securing the access of provisions obtained by the garrison or non-combatant population under the supervision of the enemy, who specifies the quantity which may from time to time be brought in[1]. The view consequently that revictualling is not a necessary accompaniment of a truce is rarely of practical importance; but as a belligerent cannot be expected to grant more favourable terms to his enemy than can be demanded in strict law, if he sees advantage in severity he will be tempted to refuse to allow provisions to be brought into an invested place, if he is strong enough to impose his will, whenever the starvation of the garrison and the inhabitants is likely to influence the determination of his adversary. A case in point is supplied by the refusal of Count Bismarck in November, 1870, to allow Paris to receive sufficient food for the subsistence of the population during an armistice of twenty-five days' duration which it was then proposed to conclude in order that an Assembly might be elected competent to decide upon the question of making peace[2]. There can be no question that

[1] By the Armistice of Treviso in 1801 Mantua was to be revictualled from ten days to ten days with a fixed amount of provisions for the garrison; the inhabitants were to be at liberty to bring in supplies for themselves, but the French army was to be free to take measures to prevent the quantity exceeding the daily consumption (De Martens, Rec. vii. 294); by that of Pleiswitz in 1813 the fortresses held by the French were to be revictualled every five days by the commanders of the investing troops. A commissary named by the commandant of each of the besieged places was to watch over the exactness of the supply (id. Nouv. Rec. i. 584).

[2] M. de Chaudordy in a circular addressed to the French diplomatic agents abroad thus expresses his view of the principle of law affecting the matter. While I do not think that the law is in conformity with his views, there can be no question that it ought to be so. 'Dans la langue du droit des gens, les

a rule permitting revictualment from day to day, or at short intervals, under the supervision of the besieger, unless express stipulations to the contrary were made, would be better than that at present recognised. Besides being more equitable in itself, it would strengthen the hands of the besieged, or in other words the weaker party, in negotiation.

Truces which affect a large area.

When a truce affects a considerable area it is not always possible at once to acquaint the whole forces on both sides with the fact that it has been concluded; it is therefore usual to fix different dates for its commencement at different places, the period allowed to elapse before it comes into force at each place being proportioned to the length of time required for sending information. It sometimes happens in spite of this precaution when it is taken, and even when, a limited area being affected, the armistice begins everywhere at the same moment, that acts of hostility are done in ignorance of its having commenced. In such cases no responsibility is incurred by the belligerent who has unintentionally violated the truce on account of destruction of life or property, unless he has been remiss in conveying information to his subordinates; but prisoners and property which have been captured are restored, and partial truces or capitulations made by detached forces which are at variance with the terms of the wider agreement are annulled. Ignorance is considered to exist until the receipt of official notification; if therefore one of the belligerents at a given spot receives notification sooner than the other, and communicates his knowledge to his enemy, the latter is not bound to act upon the information

termes ont une valeur qu'on ne peut pas dénaturer, et le principe d'un armistice accepté par M. de Bismarck implique nécessairement, quand il est question d'une place assiégée, le ravitaillement de cette place. Ce n'est pas là un objet de libre interprétation, mais bien une conséquence naturelle de l'expression même dont on s'est servi et que nous ne pouvions entendre dans un autre sens que celui qui est universellement adopté. Pour tous les peuples en effet, la condition du ravitaillement est implicitement contenue dans le principe de l'armistice, puisque chaque belligérant doit se trouver, à la fin de la suspension d'hostilités, dans l'état où il se trouvait au commencement.' D'Angeberg, Rec. No. 758.

which is presented to him, or before acting may require rigorous proof of its correctness [1].

In the absence of special stipulations the general prohibition of commercial and personal intercourse which exists during war remains in force during an armistice.

Persons competent to conclude truces.

All commanding officers may conclude suspensions of arms with a view to burying the dead, to have time for obtaining permission to surrender, or for a parley or conference; for longer periods and larger purposes officers in superior command have provisional competence within their own districts, but armistices concluded by them cease to have effect if not ratified by the supreme authority, so soon as notice of non-ratification is given to the enemy; agreements for an armistice binding the whole forces of a state are obviously state acts, the ordinary powers of a general or admiral in chief do not therefore extend to them, and they can only be made by the specially authorised agents of the government [2].

Termination of a truce.

Truces and like agreements are sometimes made for an indefinite, but more commonly for a definite, period. In the former case the agreement comes to an end on notice from one of the belligerents, which he is sometimes required to give at a stated time before the resumption of hostilities; in the latter case provision is sometimes made for notice to be given a certain number of days before the date fixed, and sometimes the truce expires without notice [3]. Disregard of the express or tacit conditions of a truce releases an enemy from the obligation to

[1] Vattel, liv. iii. ch. xvi. § 239; Halleck, ii. 344; American Instruct., art. 139; Bluntschli, § 690; Calvo, § 2143.

[2] Halleck, ii. 342; American Instruct., art. 140; Calvo, § 2134. See also Bluntschli, § 688.

[3] For examples see De Martens, Rec. vii. 76, 291, and Nouv. Rec. i. 583. An omission to state the hour at which hostilities are to recommence upon the terminal day, or an ambiguity in the indication of the day itself, might lead to serious consequences; it is therefore usual in modern armistices and truces to mark with precision the moment at which they are intended to expire. For opinions as to the manner in which lax phraseology should be construed, see Vattel, liv. iii. ch. xvi. § 244; Calvo, § 2145.

observe it, and justifies him in recommencing hostilities, without notice if the violation has clearly taken place by the order or with the consent of the state, or in case of doubt after a notice giving opportunity for the disavowal and punishment of the delinquent. Violation of the terms of a truce by private persons, acting on their own account, merely gives the right to demand their punishment, together with compensation for any losses which may have been suffered [1].

Cartels.

Cartels are a form of convention made in view of war or during its existence in order to regulate the mode in which such direct intercourse as may be permitted between the belligerent nations shall take place, or the degree and manner in which derogations from the extreme rights of hostility shall be carried out. They provide for postal and telegraphic communication, when such communication is allowed to continue, for the mode of reception of bearers of flags of truce, for the treatment of the wounded and prisoners of war, for exchange and the formalities attendant on it, and for other like matters. Whether postal or telegraphic communication is forbidden or allowed is a subject upon which the belligerents decide purely in accordance with their own convenience, and the principles and usages which govern the treatment of bearers of flags of truce and of wounded combatants and the exchange of prisoners have been already stated. Hence the only points which now require notice are any special practices with regard to details which may not have been mentioned, and such practices exist only in the case of vessels, called cartel ships, which are employed in the carriage by sea of exchanged prisoners. These are subjected to a few rules calculated to secure that they shall be used in good faith.

Cartel ships.

[1] Vattel (liv. iii. ch. xvi. § 242) and Bluntschli (§§ 695–6) give the right of recommencing hostilities without notice whenever a private person is not the delinquent. The proposed Declaration of Brussels would only have given the right to denounce the armistice even when an infraction by the state had clearly taken place. [Articles 36–41 of the Hague Convention deal with Armistices, but they throw little light on the questions discussed in the text or on the established practice.]

A cartel ship sails under a safe-conduct given by an officer called a commissary of prisoners, who lives in the country of the enemy, and she is protected from capture or molestation, both when she has prisoners on board, and when she is upon a voyage to fetch prisoners of her own country or is returning from handing over those belonging to the enemy. This protection does not extend to a voyage undertaken from one port to another within the territory of the cartel ship for the purpose of taking prisoners on board at the latter place for conveyance to the hostile territory; and it is lost if she departs from the strict line of the special purpose for which she is used, or gives reason to suspect that she intends to do so. Thus she may not carry merchandise or passengers for hire, a fraudulent use must not be made of her to acquire information or to convey persons noxious to the enemy, and she must not be in a condition to exercise hostilities [1].

Capitulations.

A capitulation is an agreement under which a body of troops or a naval force surrenders upon conditions. The arrangement is a bargain made in the common interest of the contracting parties, of which one avoids the useless loss which is incurred in a hopeless struggle, while the other, besides also avoiding loss, is spared all further sacrifice of time and trouble and is enabled to use his troops for other purposes. Hence capitulations vary greatly in their conditions, according to the amount of the generosity shown by the victors, and more frequently according to the extent to which the power of the surrendering force to prolong resistance enables it to secure favourable terms. The force surrendering may become prisoners of war, certain indulgences only being promised to it or to the inhabitants of a place falling by its surrender into the hands of the victors; as when the right of being released upon parole is reserved to such officers as choose to receive their personal freedom, or when provision is made for

[1] Calvo, §§ 2117–9; The Daifje, iii Rob. 141–3; The Venus, ib. iv. 357–8; Admiralty Manual of Prize Law (Holland), 1888, pp. 11–12. The privileges of cartel ships have been accorded to vessels sailing under an understanding with a commanding officer, even though unprovided with formal documents, when the *bona fides* of the employment has been clear. La Gloire, v Rob. 192.

the security of privileges of the inhabitants during the continuance of hostilities. Under more honourable forms of capitulation the garrison of a besieged fortress marches out with the honours of war, leaving the place and the warlike material contained in it in the hands of the enemy, but itself proceeding to the nearest posts of its own army; or a portion of territory and the magazines within it are yielded on condition of the force holding it being sent home with or without arms, and subject to or free from an engagement not to serve for the remainder of the war[1].

Persons competent to conclude them.

In so far as capitulations are agreements of a strictly military kind, officers in superior or detached command are as a general rule competent to enter into them. But stipulations affecting the political constitution or administration of a country or place, or making engagements with respect to its future independence, cannot be consented to even by an officer commanding in chief without the possession of special powers; and a subordinate commander cannot grant terms without reference to superior authority, under which the enemy gains any advantage more solid than permission to surrender with forms of honour. In the one case it is evident that the functions belonging to officers commanding in chief in virtue of their employment are exceeded; in the other, as forces excluded from the control of the subordinate officer may be so placed when the agreement is arrived at, or may be intended so to move, as to render it unnecessary to give any better conditions than those least favourable to the enemy, the officer conceding advantageous terms necessarily oversteps the limits of his military competence. Capitulations therefore which include articles of such nature are void unless they are ratified by the state or commander-in-chief on the side of the

[1] Wheaton, Elem. pt. iv. chap. ii. § 24; Halleck, ii. 348; Bluntschli, §§ 697–9. The capitulation of Sedan, which was the type to which most capitulations conformed during the war of 1870, that of Belfort, and the Convention of Cintra, may serve as examples of the different varieties mentioned in the text. See D'Angeberg, Nos. 392 and 1096; Wellington Despatches, iv. 127. For other specimens see Moser's Versuch, ix. ii. 160, 162, 176, 193, 206, 224; Washington's Correspondence, viii. 533.

officer accepting the surrender, and unless the party surrendering is willing on the arrival of the ratification to carry out his agreement.

Capitulation of El Arisch.

The capitulation of El Arisch in 1800 is an instance which illustrates the working of this rule. In December, 1799, General Kleber, who had been placed by Buonaparte at the head of the French army in Egypt, finding that he had no prospect of maintaining himself permanently in the country, made proposals for a capitulation to the Grand Vizier, who was advancing through Syria, and to Sir Sidney Smith, who acted upon the coast as commodore under the orders of Lord Keith, the admiral in command of the Mediterranean fleet. Sir Sidney Smith, believing that his government would be fully satisfied by any agreement under which the retirement of the French from Egypt was secured, consented that they should go to France, and be transported thither with their arms, baggage, and other property; and on the 24th January, 1800, he signed a convention to that effect. On the previous 17th December, however, orders had been sent to Lord Keith instructing him not to agree to any capitulation unless the French forces surrendered themselves prisoners of war, and the orders were repeated to Sir Sidney Smith on the 8th January. At the time therefore when he granted terms which were beyond his competence as a subordinate commander, because they protected the enemy against a force which was not under his control, orders had actually been received by his superior officer prohibiting him from concluding any arrangement of the kind. The British government not being in any way bound by the acts of Sir Sidney Smith, when the instructions sent by it were communicated to General Kleber in March, the latter with entire propriety assumed the agreement to be non-existent, and notwithstanding that Sir Sidney Smith stated his intention of endeavouring to procure its ratification, he immediately recommenced hostilities. The English Cabinet on their part, on hearing of the convention in the same month, while expressing their disapproval of it, directed, as the French

general had supposed Sir Sidney Smith to be sufficiently authorised, that effect should be given to it; but General Menou, who had succeeded to the command before the arrival of their consent, thinking himself strong enough to hold the country, refused to renew the agreement, and it accordingly fell to the ground [1].

Safe-guards.

A safeguard is a protection to persons or property accorded as a grace by a belligerent. It may either consist in an order in writing, or in a guard of soldiers charged to prevent the performance of acts of war. The objects of such protections are commonly libraries, museums, and buildings of like nature, or neutral or friendly property; sometimes they are granted to an enemy as a special mark of respect. When a safeguard is given in the form of soldiers, the latter cannot be captured or attacked by the enemy [2].

Licences to trade.

A licence to trade is sometimes granted by a belligerent state to the subjects of its enemy, either in the form of a general permission to all enemy subjects to trade with a particular place or in particular articles, or of a special permission addressed to individuals to do an act of commerce or to carry on a commerce which is specified in the licence. In both cases all the disabilities under which an enemy labours are removed by the permission to the extent of its scope, so that he can contract with the subjects of the state and enforce his contracts in its courts [3].

The propriety of granting a licence is a question of policy,

[1] De Garden, Hist. des Traités de Paix, vi. 210–14, 288; De Martens, Rec. vii. 1; Alison, Hist. of Europe, chap. xxxiv; Parliamentary History, xxxv. 587–97. The insinuation made by Wheaton (Elem. pt. iv. ch. ii. § 24) that the English government acted in bad faith is inexcusable. His reference to the parliamentary discussions shows that he had, at least at some time, been acquainted with the facts.

[2] Moser, Versuch, ix. ii. 452–6; De Martens, Précis, § 292; Halleck, ii. 353; Calvo, §§ 2115–6.

[3] Halleck, ii. 364 and 374; Usparicha *v.* Noble, 13 East, 341. According however to Lord Ellenborough in Kensington *v.* Ingles (8 East, 290) an enemy trader in England cannot sue in his own name, though he can sue through the medium of a British agent or trustee.

and the grant of a privilege exempting from the ordinary effects of war is a high exercise of sovereign power; as a rule consequently licences can only be given by the supreme authority of the state; a general or admiral-in-chief may however concede them to the extent of the needs of the force or district under his command. Thus during the war between the United States and Mexico, supplies being scarce in California and American vessels being wanting on that coast, licences for the import of supplies were issued by the commander of the Pacific squadron and by the military governor of the occupied province. If an officer in command grants licences in excess of his powers, his protection is good as against members of the force under his immediate command, but is ineffectual as against other forces of the state [1].

It is an implied condition of the validity of all licences that an application for them, if made, shall not have been accompanied by misrepresentation or suppression of material facts. A licence, says Lord Stowell, 'is a thing *stricti juris*, to be obtained by a fair and candid representation and to be fairly pursued.' It is not even necessary, in order to invalidate it, that the misrepresentation or suppression shall have been made with intention to deceive; the grant of a licence being a question of policy, it cannot be certain that it would be made under any other circumstances than those disclosed in the application. Thus a licence was held void, although there was no proof of fraudulent intent, in the case of a person who had a house of business in Manchester, and who received leave under the description of a Manchester merchant to import goods into England, upon its being discovered that he had also a house of business in Holland and that he was the exporter from there as well as the importer into England. And in another case, a licence given to a person described as 'Hampe, of London, merchant,' was invalidated on the ground that he was not at the time settled in London, but

[1] Halleck, ii. 366; The Hope, i Dodson, 229.

was only about to go there, and was in fact resident in Heligoland[1].

How they are to be construed.

The objects of a licence and the circumstances in view of which it is given are such that it is not necessary to the interests of the grantor that it shall be construed with literal accuracy, and on the other hand it is necessary that it shall be construed with reference to his intentions entertained, and capable of being supposed by a grantee acting in good faith to be entertained, at the time of gift. The principle therefore, which is applicable to the construction of a licence, is that a reasonable effect must be given to it in view, first, of the general conditions under which licences are granted, and secondly, of the particular circumstances of the case. Applying this principle to the several heads of the persons who may use a licence, the merchandise and means of conveyance which it will cover, the permissible amount of deviation in a voyage, and the time within which it is good, the following may be said.

1. If a licence is granted to a particular person by name, he or his agent may use it for the purposes of his trade; if it be granted to a particular person and others, he may act either as principal or agent, and he need not necessarily have any interest in the property in which trade is carried on under it; if, finally, it be granted to a particular person by name, he is incompetent to act as the agent of other persons, and so in effect to make his personal privilege a subject of transfer and sale[2].

2. When goods in favour of which a licence is given are

[1] The Vriendschap, iv Rob. 98; Klingender *v.* Bond, 14 East, 484; the Jonge Klassina, v Rob. 297. That in the two latter cases the persons to whom the licences were issued were not enemies does not affect the principle of the decisions.

The fraudulent alteration of a licence destroys its validity, even where the person claiming protection under it is innocent of the fraud. The Louise Charlotte de Guilderoni, i Dodson, 308.

[2] Halleck, ii. 370; Feize *v.* Thompson, i Taunton, 121; Warin *v.* Scott, iv Taunton, 605; Robinson *v.* Morris, v Taunton, 740. When a licence is not granted to specific individuals, but is perfectly general in its terms, the privilege of trade which it grants can be sold. The Acteon, i Dodson, 53.

limited in quantity or specified in character, it is not necessary that there shall be more than a fair general correspondence between the cargo conveyed and the amount and kind permitted; a small excess, that is to say, or small quantities of goods varying somewhat from the description in the licence, or even wholly foreign to it if they are inoffensive in their nature, will not entail condemnation. In the same way immaterial variations in the mode of conveyance are regarded as innocent. Thus when leave was given to import a cargo of brandy from the Charente, and owing to all vessels lying there having been put under an embargo importation from there was impossible, brandy of due quantity, but imported from Bordeaux, and in two small vessels instead of in a single large one, was released [1].

3. As a rule, deviation from a prescribed course entails confiscation. Deviation caused by stress of weather is of course excepted; and it appears that to touch for orders at a port which, though lying out of the prescribed course, is not absolutely interdicted, is permissible [2].

4. The effect of a limitation in time is different when it has reference to the beginning or to the end of a voyage. If a date is fixed as that before which a voyage must begin, the licence is voided if the vessel possessed of the licence has not set sail before the proper time; when, on the other hand, a date is fixed before which the vessel must arrive, stress of weather, delays interposed by the enemy, and other like causes are taken into consideration, and condemnation takes place on account only of delays which cannot be so accounted for [3].

[1] The Vrow Cornelia, Edwards, 350; Halleck, ii. 371–3.
[2] The Manly, i Dodson, 257; The Emma, Edwards, 366.
[3] The Sarah Maria, Edwards, 361; The Æolus, i Dodson, 300; Effurth v. Smith, v Taunton, 329; Williams *v.* Marshall, vi Taunton, 390.

CHAPTER IX

TERMINATION OF WAR

Modes in which war may be terminated.

War is terminated by the conclusion of a treaty of peace, by simple cessation of hostilities, or by the conquest of one, or of part of one, of the belligerent states by the other.

Effects of a Treaty of Peace in setting up rights and obligations.

The general effect of a treaty of peace is to replace the belligerent countries in their normal relation to each other. The state of peace is set up, and they enter at once into all the rights and are bound by all the duties which are implied in that relation. It necessarily follows that, so soon as peace is concluded, all acts must cease which are permitted only in time of war. Thus if an army is in occupation of hostile territory when peace is made, not only can it levy no more contributions or requisitions during such time as may elapse before it evacuates the country, but it cannot demand arrears of those of which the payment has been already ordered. It is obviously not an exception to this rule that an enemy may be authorised by the treaty of peace itself to do certain acts which, apart from agreement, would be acts of war; such as to remain in occupation of territory until specific stipulations have been fulfilled, or to levy contributions and requisitions if the subsistence of the troops in occupation is not provided for by the government of the occupied district; a state may of course always contract itself out of its common law rights. It can also hardly be said to be an exception that although prisoners of war acquire a right to their freedom by the simple fact of the conclusion of peace, it is not necessary that their actual liberation shall instantaneously take place; their return to their own country may be subordinated to such rules, and they may be so far kept under military surveillance, as may be dictated by reasonable precaution against

misconduct or even by reasonable regard for the convenience of the state by which they have been captured [1].

By the principle commonly called that of *uti possidetis* it is understood that the simple conclusion of peace, if no express stipulation accompanies it, or in so far as express stipulations do not extend, vests in the two belligerents as absolute property whatever they respectively have under their actual control in the case of territory and things attached to it, and in the case of moveables whatever they have in their legal possession at the moment; occupied territory, for example, is transferred to the occupying power, and moveables on the other hand, which have been in the territory of an enemy during the war without being confiscated, remain the property of the original owner. The doctrine is not altogether satisfactory theoretically, but it supplies a practical rule for the settlement of such matters relating to property and sovereignty as may have been omitted in a treaty, or for covering concessions which one or other party has been unwilling to make in words. This advantage could evidently not be claimed by the necessarily alternative doctrine that, except in so far as expressly provided, all things should return to their state before the war [2].

When a stipulation to the latter effect is made it is to be understood, if couched in general terms, to mean only that any territory belonging to one party, which may be occupied by the other party, with the buildings &c. on it, is to be handed back with no further changes than have been brought about by the operations of war, or by acts legitimately done during the course of hostilities. The clause covers neither property which has been appropriated, nor property which has been destroyed or damaged, in accordance with the laws of war [3].

Notwithstanding that treaties only become definitely binding

[1] Vattel, liv. iv. ch. ii. § 19; Halleck, i. 265; Bluntschli, §§ 708, 716, 717; Calvo, §§ 2949, 2953, 2956.

[2] Vattel, liv. iv. ch. ii. § 21; Heffter, § 181; Phillimore, iii. § dlxxxvi; Bluntschli, § 715; Nuestra Señora de los Dolores, Edwards, 60.

[3] Vattel, liv. iv. ch. ii. § 22, and ch. iii. § 31; Phillimore, iii. § dlxxxiv.

PART III CHAP. IX

Date from which hostilities cease on conclusion of a treaty.

on the states between which they are made on being ratified, a treaty of peace, whether it be in the form of a definitive treaty or of preliminaries of peace[1], is so far temporarily binding from the date of signature, unless some other date for the commencement of its operation is fixed by the treaty itself, that hostilities must immediately cease. It acts as an armistice, if no separate armistice is concluded[2]. The rule is obviously founded on the fact that the chance in any given case that ratification will be refused is not sufficient to justify fresh attempts on the part of either belligerent to secure a better position for himself at the cost of effusion of blood, and of infliction of misery on the population inhabiting the seat of war.

The exceptional case that a future date is fixed by a treaty for the commencement of peace occurs when hostilities extend to regions with which immediate communication is impossible. Under such circumstances it is usual to make the termination of hostilities depend upon the length of time necessary for sending information that a treaty has been concluded, and to fix accordingly different dates after which acts of war become illegal in different places. When in such cases duly authenticated information reaches a given place before the time fixed for the cessation of hostilities, the question arises whether further hostilities are legitimate, or whether, as a margin of time is only given in order that knowledge may be obtained, they ought at once to be

[1] Preliminaries of peace are an agreement intended to put an end to hostilities at an earlier moment than that at which the terms of a definitive treaty can be settled. They contain the stipulations which are essential to the re-establishment of peace, together sometimes with arrangements having a temporary object; minor points which lie open to discussion or bargain, and details for the settlement of which time is required, being held over for more leisurely treatment. Preliminaries thus constitute a treaty which is binding in every respect so far as it goes, but which is intended to be superseded by a fuller arrangement, and is so superseded when the definitive treaty is signed. For an example of preliminaries and of a definitive treaty of peace see the Preliminaries of Versailles and the definitive Treaty of Frankfurt in D'Angeberg, Nos. 1119 and 1179.

[2] It is the practice to conclude an armistice before signing a treaty of peace; the above rule could therefore seldom, if ever, come into operation, unless as the result of accidental circumstances.

stopped. The latter and reasonable doctrine seems now to be thoroughly accepted in principle; but its value is somewhat diminished by the reservation, which is perhaps necessarily made, that a naval or military commander is not obliged to accept any information as duly authenticated, the correctness of which is not in some way attested by his own government. In the case of the English ship Swineherd, for example, a vessel provided with letters of marque sailed from Calcutta for England before the end of the period of five months fixed by the Treaty of Amiens for the termination of hostilities in the Indian seas, but after the news of peace had reached Calcutta, and after a proclamation of George III, requiring his subjects to abstain from hostilities from the time fixed, and therein mentioned, had been published in a Calcutta paper. The Swineherd had a copy of this proclamation on board. She was captured by the Bellone, a French privateer, without resistance, there being only enough powder on board for signalling purposes. The Bellone had been informed by a Portuguese vessel bearing a flag of truce which had put into the Mauritius, by an Arab vessel, and by an English vessel which she had captured, that peace was concluded; her commander was shown the proclamation in the Gazette extraordinary of Calcutta, and he could see for himself that a privateer, which by the date of the Gazette must have sailed lately from Calcutta, was without powder; so that there was no room to doubt the accuracy of the information given or the good faith of the statement that the intentions of the Swineherd herself were peaceful. The vessel was nevertheless condemned in France as good prize. In a case like this, in which the fact that peace had been concluded was established beyond all possibility of question, the rule that an officer in command of armed forces of his state may disregard all information which is not authenticated by his own government, operates with extreme harshness; and though the right of seizure could scarcely be abandoned, there seems to be no reason for not subsequently restoring ships captured after receipt of information which should turn out in the end to be correct. For most

Case of the Swineherd.

purposes of war however the rule must be a hard and fast one. The consequences of suspending hostilities upon erroneous information might easily be serious, and if it were once conceded that commanders were ever bound to act upon information not proceeding from their own government, it would be difficult to prevent them from being sometimes misled by information intentionally deceptive[1].

Effects of a treaty of peace with reference to

A treaty of peace has the following effects with reference to acts done before the commencement of the war which it has terminated.

1. Acts done before the commencement of the war.

1. It puts an end to all pretensions, and draws a veil over all quarrels, out of which the war has arisen. It has set up a new order of things, which forms a fresh starting-point, and behind which neither state may look. War consequently cannot be renewed upon the same grounds.

2. It revives the execution of international engagements of a certain kind, when such execution has been suspended by one or both of the parties to a war[2].

3. In a general way it revives all private rights, and restores the remedies which have been suspended during the war—contracts, for example, are revived between private persons if they are not of such a kind as to be necessarily put an end to by war[3], and if their fulfilment has not been rendered impossible by such acts of a belligerent government as the confiscation of debts due by subjects to those of its enemy; the courts also are re-opened for the enforcement of claims of every kind[4].

2. Acts done during the war.

As between the contracting states, a treaty of peace is a final settlement of all matters connected with the war to which it puts an end. If therefore any acts have been done during the course of hostilities in excess or irrespectively of the rights of war under the authority of one of the belligerent states, the enemy state

[1] Kent, Comm. i. 171; Wheaton, Elem. pt. iv. ch. iv. § 5; Heffter, § 183; La Bellone contre le Porcher, Pistoye et Duverdy, i. 149.

[2] See antea, p. 385.

[3] See antea, p. 390.

[4] Wheaton, Elem. pt. iv. ch. iv. § 3; Heffter, § 180.

cannot urge complaints or claims from the moment that a treaty is signed, either on its own behalf or on behalf of its subjects.

It is possible however that ordinary acts of war may have been done without sufficient authority, that wrongful acts may have been done wholly without authority, and that subjects of one of the two belligerent states, without having committed treason, may yet have compromised themselves with their own government by dealings with the enemy. In order to bury the occurrences of the war in oblivion, and to prevent ill-feeling from being kept alive, in order also to protect men who may only have been guilty of a technical wrong, or who may at any rate have been carried away by the excitement of hostilities, and finally in the common interests of belligerents who may be in occupation of an enemy's country, it is understood that persons acting in any of the ways above mentioned are protected by the conclusion of peace from all civil or criminal processes to which they might be otherwise exposed in consequence of their conduct in the war, except civil actions arising out of private contracts, and criminal prosecutions for acts recognised as crimes by the law of the country to which the doer belongs, and done under circumstances which remove them from the category of acts having relation to the war. Actions, for example, can be brought on ransom bills; if a prisoner of war borrows money or runs into debt he may be sued; or if a prisoner of war or a soldier on service commits a common murder he may be tried and punished. The immunity thus conceded is called an amnesty.

Usually, but far from invariably, the rule of law is fortified by express stipulation, and a clause securing an amnesty is inserted in treaties of peace. Though unnecessary for other purposes, it is required as a safeguard for subjects of a state who, having had distinctly treasonable relations with an enemy, are not protected by an amnesty which is only implied[1].

[1] Halleck, i. 258; Bluntschli, §§ 710–12; Calvo, § 2955; Lord Stowell in the Molly, i Dodson, 396; Crawford and Maclean *v.* The William Penn, iii Washington, 491–3, and the cases there cited: and for examples of

PART III
CHAP. IX
3. Acts of war done subsequently to the conclusion of peace.

Acts of war done subsequently to the conclusion of peace, or to the time fixed for the termination of hostilities, although done in ignorance of the existence of peace, are necessarily null. They being so, the effects which they have actually produced must be so far as possible undone, and compensation must be given for the harm suffered through such effects as cannot be undone. Thus, territory which has been occupied must be given up; ships which have been captured must be restored; damage from bombardment or from loss of time or market, &c., ought to be compensated for; and it has been held in the English courts, with the general approbation of subsequent writers, that compensation may be recovered by an injured party from the officer through whose operations injury has been suffered, and that it is for the government of the latter to hold him harmless. It is obvious, on the other hand, that acts of hostility done in ignorance of peace entail no criminal responsibility[1].

Termination of war by simple cessation of hostilities.

The termination of war by simple cessation of hostilities is extremely rare. Possibly the commonly cited case of the war between Sweden and Poland, which ceased in this manner in 1716, is the only unequivocal instance; though it is likely that if anything

amnesty clauses see the Treaties of Tilsit (De Martens, Rec. viii. 640 and 666), and that of Paris in 1856 (Hertslet, 1254). Some writers, e.g. Vattel (liv. iv. ch. ii. §§ 20, 22), Wheaton (Elem. pt. iv. ch. iv. § 3), and Heffter (§ 180), treat an amnesty as applying to conduct of one belligerent state towards the other, and the language of some of the older treaties stipulates for oblivion of all acts done on the two sides respectively; see, e.g., the Treaty of Teschen (De Martens, Rec. ii. 663).

[1] Halleck, ii. 262–4; Phillimore, iii. § dxviii; Bluntschli, § 709; Calvo, § 2964. In the case of the Mentor, which was an American ship captured off the Delaware by English cruisers, all parties being ignorant that a cessation of hostilities had taken place, Lord Stowell said, 'If an act of mischief was done by the king's officers, through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. If by articles a place or district was put under the king's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a court of prize, to show that he had been injured by this breach of the peace, and was entitled to compensation; and if the officer acted through ignorance his own government must protect him;' . . . he is to be 'borne harmless at the expense of that government.' The Mentor, i Rob. 183.

had occurred to compel the setting up of distinct relations of some kind between Spain and her revolted colonies in America during the long period which elapsed between the establishment of their independence and their recognition of the mother country, it would have been found that the existence of peace was tacitly assumed. No active hostilities appear to have been carried on later than the year 1825, and no effort was made to hold neutral states or individuals to the obligations imposed by a state of war; but it was not till 1840 that intercourse with any of the Central or South American republics, except Mexico, was authorised by the Spanish government. In that year commercial vessels of the republic of Ecuador were admitted by royal decree into the ports of the kingdom, and at various subsequent times like decrees were issued in favour of the remaining states. It was only however in 1844, three years after commercial relations had been established, that Chile, which was the earliest of the republics except Mexico to receive recognition, was formally acknowledged to be independent; and Venezuela, which was the last, was not recognised till 1850[1].

The inconvenience of such a state of things is evident. When war dies insensibly out the date of its termination is necessarily uncertain. During a considerable time the belligerent states and their subjects must be doubtful as to the light in which they are regarded by the other party to the war, and neutral states and individuals must be equally doubtful as to the extent of their rights and obligations. Nevertheless a time must come sooner or later at which it is clear that a state of peace has supervened upon that of war. When this has arrived, the effects of the informal establishment of peace are identical with those general effects flowing from the conclusion of a treaty which are necessarily consequent upon the existence of a state of peace. Beyond this it is difficult to say whether any effects would be produced. It is at any rate certain that the pretensions which may have given rise to the war cannot be regarded as abandoned, and that

[1] Lawrence, Commentaire, ii. 327.

PART III CHAP. IX

the quarrel cannot be assumed to have been definitively settled. It would always be open to either side to begin a fresh war upon the same grounds as those which supplied the motive for hostilities in the first instance.

Conquest.

Conquest consists in the appropriation of the property in, and of the sovereignty over, a part of the whole of the territory of a state, and when definitively accomplished vests the whole rights of property and sovereignty over such territory in the conquering state.

When it can be held to be effected.

As in the case of other modes of acquisition by unilateral acts, it is necessary to the accomplishment of conquest that intention to appropriate and ability to keep shall be combined. Intention to appropriate is invariably, and perhaps necessarily, shown by a formal declaration or proclamation of annexation. Ability to keep must be proved either by the conclusion of peace or by the establishment of an equivalent state of things; the conqueror must be able to show that he has solid possession, and that he has a reasonable probability of being able to maintain possession, in the same way and to much the same degree as a political society which claims to be a state must show that it has independence and a reasonable probability of maintaining it. A treaty of peace by which the principle of *uti possidetis* is allowed to operate affords the best evidence of conquest, just as recognition of the independence of a revolted province on the part of the mother country is the best evidence of the establishment of a new state; but possession which is *de facto* undisputed, and the lapse of a certain time, the length of which must depend on the circumstances of the case, are also admitted to be proof when combined; and recognition by foreign states, though in strictness only conclusive, like all other unilateral acts, against the recognising states themselves, affords confirmation which is valuable in proportion to the number and distinctness of the sources from which it springs.

Notwithstanding the necessary uncertainty in the abstract of evidence supplied by possession and recognition, the fact of conquest is generally well marked enough to be unquestioned.

Case of Hesse Cassel.

One instructive modern case however exists in which the conclusiveness of an alleged conquest was disputed. In the beginning of the nineteenth century the Elector of Hesse Cassel held as private property domains within his own territory, and sums lent on mortgage to subjects of other German states. Shortly after the battle of Jena he was expelled from his dominions by French troops, and he did not return until French domination in Germany was put an end to by the battle of Leipzig. For about a year after its occupation Hesse Cassel remained under the immediate government of Napoleon; it was then handed over by him to the newly-formed kingdom of Westphalia, the existence of which was expressly recognised by Prussia and Russia in the Treaty of Tilsit and, through the maintenance of friendly relations, by such other European states as were at peace with France and its satellites. Napoleon intended to effect a conquest, he dealt with the territory which he had entered as being conquered, and was acknowledged by a considerable number of states to have made a definitive conquest. One of his acts of conquest, effected before the transfer of the territory to the kingdom of Westphalia, was to confiscate the private property of the Elector, which, as the latter after his expulsion had taken service in the Prussian army, was seized apparently as that of a person remaining in arms against the legitimate sovereign of the state. However revolting it may be morally that Napoleon should have taken advantage of the position which he had acquired through his own wrong-doing to inflict further injury upon a man whom he had already plundered without provocation, there can be no doubt that if his conquest was complete he was within his strict legal rights. Was then his conquest a complete one? The question was first raised, in a suit brought by the Elector after his return, before the Mecklenburg courts, as creditor of the estate of a certain Count Hahn Hahn. The Count had borrowed money on mortgage from the Elector before his expulsion, and had obtained a release in full from Napoleon on payment of a portion of the debt.

The Elector contested the validity of the discharge. The Mecklenburg court appears not to have given judgment, but to have remitted the matter to the University of Breslau, whence it was successively carried by way of appeal to two other German Universities. The ultimate judgment affirmed the legality of the act of confiscation on the grounds—

1. That the restored government of the Elector could not be regarded as a continuation of his former government, because he had not been constantly in arms against Napoleon during his absence from Hesse Cassel, and because he had been treated by the peaces of Tilsit and Schönbrunn as politically extinct, the kingdom of Westphalia having been recognised as occupying the place of the electorate.

2. That Napoleon had in fact effected a conquest, and consequently had a right as sovereign to confiscate the property of an active enemy of the state.

3. That even if the property of the Elector could have been held to revert with the conclusion of peace, a restored owner, 'according to the letter of the Roman law,' must take his property as he finds it, without compensation for the damage which it may have suffered in the interval [1].

The above judgment appears to have met with very general approval; and though the Congress of Vienna refused to interfere to prevent the resumption by the Elector of alienated domains within the electorate, there is nothing to show that any of the powers represented there considered his action to be right under the circumstances of the particular case; Prussia pronounced herself adversely to it [2]. There can indeed be no doubt that the

[1] Phillimore, pt. xii. ch. vi.

[2] Sir R. Phillimore points to the fact that 'Austria, Prussia, Russia, the Bourbon sovereigns in France and Italy, Sardinia, and the Pope' left undisturbed titles acquired through the intrusive rulers of territory which they had lost during the revolutionary and Napoleonic wars, as confirmatory of the view that the conduct of the Elector was wrong. The conduct of the Elector was no doubt wrong, but the case against him is not made stronger by suggesting inexact analogies. Possession of the territory wrested from Austria, Prussia, and Russia was in all cases confirmed by treaty; the aliena-

title which Napoleon assumed himself to have acquired by conquest became consolidated by lapse of time, and that alienations made in virtue of it were consequently good. It does not follow from this that the confiscation was in the first instance valid. It took place immediately after the conclusion of the treaties of Tilsit. Although it was impossible to suppose that Hesse Cassel would ever be able to shake off the yoke of France for herself, there was nothing in the aspect of Europe to induce the belief that the settlement of Germany then made was a final one; war still continued with England; it was certain that war would sooner or later be renewed on the continent, and it was necessarily uncertain how soon it might arrive; finally, most of the recognitions given to the kingdom of Westphalia were of little value, because they were given by states which were hardly free agents in the matter. In such a state of things time was absolutely necessary to consolidate the conquest. At first Napoleon and those who derived their title from him were merely occupiers with the pretensions of conquerors. But with the lapse of time the character of occupier insensibly changed into that of a true conqueror; and when the fact of conquest was definitively established, it validated retroactively acts which the conqueror had prematurely done in that capacity. It would be idle to argue, in all the circumstances of the case, that possession had not hardened into conquest during the interval between 1806 and 1813[1].

tions made in France were the result, not of foreign conquest, but of internal revolution; and though the case of the Italian States is very much nearer to that of Hesse, it is prevented from being identical by the much greater duration of the foreign intrusion to which they were subjected. The government of Hanover, which was in exactly the same position as Hesse, acted in the same manner as the Elector.

[1] It is sometimes not only very difficult to be sure whether a conquest has in fact been effected, but also to determine what view of the facts, which may be supposed to have constituted a conquest, has in the long run been taken by states interested in forming an opinion, and by the occupied or conquered country itself, after it has been freed from the control of its enemy.

The kingdom of the Netherlands offers a singularly confused instance of

PART III
CHAP. IX
Effects of conquest.

The effects of a conquest are:—

1. To validate acts done in excess of the rights of a military

this kind. In 1795 the republic of the United Netherlands was overrun by French troops, and a republic of the French type, practically dependent on France, was substituted for the government previously existing; in 1806 the republic was converted into a kingdom under Louis Bonaparte; and in 1810 the country was forcibly annexed to France, to which it remained attached until 1814. Whether in the then condition of Europe these four years of union sufficed to effect a conquest in the absence of treaties confirming it may be doubtful; but in 1815 the Netherlands regarded the political existence of Holland as having ended at the date of the annexation; and though the identity of a state is not usually affected by a change of government, it would have been reasonable in the special circumstances of the case to argue that Holland had so lost her separate life at the accession of King Louis as to make it fair to assume that date instead of 1810 as the commencement of French possession. In 1814, however, this view was not taken by the four Great Powers. Article vi of the General Treaty of Peace placed Holland under the Sovereignty of the House of Orange, and provided that it should receive an 'increase of territory;' and the Congress Treaty of the 9th June, 1815, provided that the 'ancient United Provinces of the Netherlands' and the late Belgic Provinces shall form the Kingdom of the Netherlands. Holland was regarded as a state already in existence, which was merely to receive enlargement and a new form of government, and which was to resort to its former name so far as it could do so consistently with its new position as a kingdom. But at the very moment that Holland was reconstituting itself in this manner under the sanction of Europe, it denied the continuity of its existence by regarding a treaty made before the French revolution as annulled by subsequent events. So early as February, 1815, the Dutch Minister at Washington was instructed to open negotiations for a new treaty of commerce upon the basis of the Treaty of 1782, and it is clear from two notes written by Mr. Monroe to him, that he stated the treaty in question to be, in the opinion of the Dutch government, no longer in force. Subsequently the American government, in order to claim compensation for the seizure and confiscation of vessels and cargoes belonging to subjects of the United States under the reign of Louis Bonaparte, urged that the identity of the state had not been changed; and it appears from a despatch of Mr. Adams of the year 1815, that both States at that time were acting on the supposition that the Treaty of 1782 was binding upon them. The government of the Netherlands, in order to meet the American demands, reverted to the view that the treaty had been annulled; and argued that the identity of the state had been destroyed by its incorporation into France. The United States yielded, and abandoned their claims, but without admitting the validity of the argument from incorporation. They simply took the fact that the kingdom of the Netherlands repudiated the continued identity of the state, together with the further facts that the form of government was different, and the territory enlarged, as sufficient ground for supposing that a new state had been created. Hertslet, Map of Europe by Treaty; Wharton, Digest, § 137.

occupant between the time that the intention to conquer has been signified and that at which conquest is proved to be completed [1]. PART III CHAP. IX

2. To confer upon the conquering state property in the conquered territory, and to invest it with the rights and affect it with the obligations which have been mentioned as accompanying a territory upon its absorption into a foreign state [2].

3. To invest the conquering state with sovereignty over all subjects of a wholly conquered state and over such subjects of a partially conquered state as are identified with the conquered territory at the time when the conquest is definitively effected, so that they become subjects of the state and are naturalised for external purposes, without necessarily acquiring the full status of subject or citizen for internal purposes [3]. The persons who are so identified with conquered territory that their nationality is changed by the fact of conquest, are of course mainly those who are native of and established upon it at the moment of conquest; to these must be added persons native of another part of the dismembered state, who are established on the conquered territory, and continue their residence there. Correlatively persons native of the conquered territory, but established in another part of the state to which it formerly belonged, ought to be considered to be subjects of the latter.

Difference between the effect of cession and conquest.

In strictness, the effects of a cession, of a treaty concluded on the basis of *uti possidetis*, and of conquest, upon the inhabitants of territory which changes hands at the conclusion of a war are

[1] Halleck, ii. 484; Calvo, § 2162.

[2] See antea, pp. 98, 99, and compare also pp. 91 et seq.

[3] Dana, note to Wheaton's Elem. No. 169; Lord Mansfield in Hall *v.* Campbell, i Cowper, 208. For the position of the inhabitants of a country conquered by the United States, see antea, p. 243, note. For French law and practice, see Fœlix, § 35, and Cogordan, La Nationalité, 2de éd. For the action of the allied powers in 1814, see Lawrence, Commentaire, iii. 192. 'A rule of public law,' it is laid down in a recent American case, 'is that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them.' United States *v.* De Repentigny, v Wallace, 260.

identical, though for somewhat different reasons in the three cases. In each case the population is subjected to the sovereignty of the state by which the territory is acquired; but while in the cases of bare conquest, and of conquest confirmed by a treaty grounded on the principle of *uti possidetis*, the sovereignty is simply appropriated by the conquering state, in that of express cession a transfer of it is effected through an act of the state making the cession, by which the members of that state are bound.

It has however been usual in modern treaties to insert a clause securing liberty to inhabitants of a ceded country to keep their nationality of origin [1]. In the case of persons native of, and established in, the ceded territory, and even in the case of persons who are established in, without being natives of, the ceded territory, this liberty is commonly saddled with the condition that they shall retire within the territory remaining to their state of origin, a certain time being allowed to them to arrange their affairs and dispose of landed and other property which they may be unable to take with them [2]. In the most recent treaty

[1] Like provisions sometimes appear in older treaties, e. g. those of Ryswick and Utrecht.

[2] The Treaties of Vienna in 1809 (De Martens, Nouv. Rec. i. 214), of Paris in 1814 (id. ii. 9), and of Vienna in 1864 (Nouv. Rec. Gén. xvii. ii. 482) gave six years, that of Frederikshamm in 1809 gave three years (Nouv. Rec. i. 25), and those of Zurich in 1859 (Nouv. Rec. Gén. xvi. ii. 520), of Turin in 1860 (ib. 540), and of Vienna in 1866 (id. xviii. 409) afforded one year. The Treaty of Frankfurt in 1871 conceded liberty of emigration until October 1, 1872 (Nouv. Rec. Gén. xix. 689).

Halleck (ii. 486–7) and Calvo (§ 2164) think that inhabitants of a ceded country have a right of keeping their old allegiance if they choose to emigrate. It is unquestionable that to prevent them from doing so would be harsh and oppressive in the extreme, but as the possession of such a right is inconsistent with the general principles of law, it could only have been established by a practice of which there is certainly as yet no reasonable evidence. In the United States *v.* De Repentigny, already cited, it was expressly laid down that persons choosing to adhere without permission to their former state 'deprive themselves of protection to their property situated within the conquered portion; and the alienation of the property of the Elector of Hesse Cassel (see antea, p. 567), which, on the assumption that a conquest was effected, has universally been held to be good, would have been illegal if persons have a right to withdraw themselves from an

of cession a more liberal treatment was accorded; natives of Alsace and the ceded districts of Lorraine, who chose to retain their French nationality, though compelled to emigrate, were allowed by the Treaty of Frankfurt to keep their landed property within the ceded territory[1].

Residence in foreign countries being a frequent incident of modern life, withdrawal from a ceded district is not conclusive of the intention of the person withdrawing to reject the nationality of the conquering state. It is therefore usual to exact an express declaration of intention, as a condition of preservation of the nationality of birth, from persons against whom there is a presumption of changed nationality—that is to say, from persons born within the territory and living there, and from persons born within the territory but absent at the date of annexation. There being no such presumption against persons born in another part of the state making the cession, the simple fact of withdrawal is in their case sufficient.

allegiance imposed by conquest, and therefore *à fortiori* by cession. It is of course not to the point that, as between persons adhering to their former state, and removing into it, and that state, the national character of origin is always preserved; the state of origin has no reason for rejecting them or for refusing them the rights of subjects.

It is to be remarked that as the individual has no right of keeping his old allegiance, irrespectively of treaty, he may find that the sovereign, for whom he would wish to elect, declines to accept him as a subject, if the treaty merely gives a right to emigrate and contains no specific stipulation providing for choice of nationality. After 1814 and 1815 the restored monarchy of France considered that 'les habitants des pays annexés à l'Empire Napoléonien n'avaient pas été plus légitimement Français, que l'Empereur n'avait été légitimement souverain de la France.' It was unwilling to add to the Napoleonic element in the population. Accordingly persons emigrating from the restored provinces into France were required to obtain naturalisation as ordinary foreigners. Cogordan, La Nationalité, 2de éd., 333.

[1] It may be pointed out that the treaties usually fail to deal with all the classes of persons which are affected by them, and that their language is often insufficiently precise. Thus the Treaty of Turin left open the position of minors and of natives of Savoy and Nice residing outside their own country; and many delicate questions have arisen upon the construction of the Treaty of Frankfurt. See Cogordan, chap. vii. §§ 5 and 8.

PART IV

CHAPTER I

THE COMMENCEMENT OF WAR IN ITS RELATION TO NEUTRALITY

PART IV
CHAP. I

Notification of the outbreak of war to be made when possible.

It was shown in an earlier chapter that as between belligerents no necessity exists for a notification that war has begun or is about to begin. As between belligerents and neutrals however the case stands differently. As a matter of courtesy it is due to the latter as friends that a belligerent shall not if possible allow them to find out incidentally and perhaps with uncertainty that war has commenced, but that they shall be individually informed of its existence. As a matter of law they can only be saddled with duties and exposed to liabilities from the time at which they have been affected with knowledge of the existence of war; when there is no privity between two persons, one cannot impose duties or liabilities upon the other by doing an act without the knowledge of the person intended to be affected.

Hence it is in part that it has long been a common practice to address a manifesto to neutral states, the date of which serves to fix the moment at which war begins; and it is evident that when practicable the issue of such a manifesto is the most convenient way of bringing the fact of war to their knowledge. Where war breaks out at a moment which is not determined by the respective governments engaged, or by that which has just done acts of war; as for example when it results from conditional orders given to an armed force, or from an act of self-preservation or pacific intervention being regarded as hostile, a manifesto cannot of course be issued before its commencement. But in

such cases a belligerent cannot expect states to take up the attitude of neutrality contemporaneously with the outbreak of hostilities; even when he has reason to think that the existence of war is known it is his clear duty to give every indulgence to neutrals; and where war breaks out through the performance of an act which one of the two parties elects to consider hostile, the date of its commencement, though carried back as between the belligerents to the occurrence of the hostile act, must be taken as against neutrals to be that of the election through which third powers become acquainted with the fact of war. Hence war can never so exist as to throw upon neutrals their ordinary duties and liabilities without opportunity for the issue of a manifesto having arisen; and though to give express notice, whether in that or in any other form, is merely an act of courtesy, because it is the fact of knowledge however acquired which constitutes the ground of neutral duty, it is evident that the omission of notice may be productive of so much inconvenience and even of loss to neutrals, through the doubt in which they may for some time be left, that the issue of a manifesto is as obligatory as an act of courtesy can well be[1].

[1] Cf. however antea, p. 502. What is said above as to the moment from which states, and therefore their subjects, become affected by the consequences of non-neutral actions does not apply to cases in which neutral persons are engaged knowingly or even ignorantly in carrying out a naval or military operation for an intending belligerent.

CHAPTER II

GROWTH OF THE LAW AFFECTING BELLIGERENT AND NEUTRAL STATES TO THE END OF THE EIGHTEENTH CENTURY

Absence of the conception of neutral duty in the Middle Ages.

UNTIL the latter part of the eighteenth century the mutual relations of neutral and belligerent states were, on the whole, the subject of the least determinate part of international usage. At a time when the daily necessities of intercourse had forced nations to work out an at least rudimentary code for neutral trade in time of war, the relations of states themselves remained in a chaos, from which order was very slowly developed.

Throughout the Middle Ages it was neither contrary to habit nor repugnant to moral opinion that a prince should commit, or allow his subjects to commit, acts of flagrant hostility against countries with which he was formally at peace. It may even be said broadly that at the end of the sixteenth century a neutral state might allow the enemy of its ally to levy troops within its dominions, it might lend him money or ships of war, and it might supply him with munitions of war. What the state might do its subjects might also do. The common law of nations permitted a license which was checked only by the fear of immediate war.

Its growth.

But as it was the interest of every one in turn to diminish the wide liberty of action which was exercised by neutral powers, most nations became gradually so bound by treaties on every hand as to make a rough friendliness their standard of conduct. For centuries innumerable treaties, not only of simple peace and friendship, but even of defensive alliance, contained stipulations that the contracting parties would not assist the enemies of the other, either publicly with auxiliary forces or subsidies, or

privately by indirect means. They were also to prevent their subjects from doing like acts[1]. The habits thus formed reacted

[1] The treaties are sometimes couched in general, and sometimes in very specific language. The following may be taken as fairly typical specimens:— In 1502, Henry VII and Maximilian, King of the Romans, agreed 'quod nullus dictorum principum movebit aut faciet etc. guerram etc., nec dabit auxilium, consilium, vel favorem, publice vel occulte, ut hujusmodi guerra moveatur vel excitetur quovismodo.' In 1505, Henry VII and the Elector of Saxony covenanted that neither of the contracting parties 'patrias, dominia, etc. alterius a suis subditis invadi aut expugnari permittet, sed expresse et cum effectu prohibebit et impediet,' and neither of them 'alicui alteri patrias, dominia etc., alterius invadenti etc. consilium, auxilium, favorem, subsidium, naves, pecunias, gentes armorum, victualia aut aliam assistentiam quamcunque publice vel occulte dabit, aut præstari consentiet, sed palam et expresse prohibebit et impediet.'

The following treaties may be cited as giving sufficiently varied examples of the stipulations which were commonly made. It will be observed to how late a period it was necessary to insist upon them:—

I. TREATIES OF DEFENSIVE ALLIANCE.

1465.	Edward IV and Christian I of Denmark	Dumont, Corps Diplomatique	iii. i. 586.
1467.	Edward IV and Henry IV of Castile	,,	iii. i. 588.
1475.	Charles Duke of Burgundy and Galeazzo Sforza	,,	iii. i. 496.
1475.	Frederic III and Louis XI	,,	iii. i. 521.
1506.	Henry VII and Joanna Queen of Castile	,,	iv. i. 76.
1508.	Henry VII and Joanna Queen of Castile	,,	iv. i. 103.
1510.	Ferdinand King of Aragon and Joanna Queen of Castile	,,	iv. i. 521.
1623.	James I and Michael Federowitz Grand Duke of Russia	,,	v. ii. 437.
1655.	Frederic William of Brandenburg and the United Provinces	,,	vi. ii. 111.

II. TREATIES OF SIMPLE PEACE AND FRIENDSHIP.

1559.	Elizabeth and Mary of Scotland	Dumont, Corps Diplomatique	v. i. 29.
1559.	Peace of Château Cambrésis	,,	v. i. 32.
1564.	Elizabeth and Charles IX	,,	v. i. 211.
1610.	Louis XIII and James I	,,	v. ii. 149.
1631.	Louis XIII and the Elector Maximilian of Bavaria	,,	vi. i. 14.

The Treaty of Münster, in 1648, provided that 'alter alterius hostes præsentes aut futuros nullo unquam titulo, vel prætextu, vel ullius controversiæ bellive ratione contra alterum armis, pecunia, milite, commeatu

PART IV CHAP. II

View of the duty of neutral states taken in the seventeenth century;

upon thought, and men grew willing to admit the doctrine, that what they had become accustomed to do flowed from an obligation dictated by natural law. By the latter half of the seventeenth century it was no longer necessary to stipulate for neutrality in precise language. The neutrality article dwindled into a promise of mutual friendship[1]. But it would be a mistake to infer from this that international practice conformed to the more stringent provisions of former treaties. These had certainly not been observed when a sovereign felt tempted to infringe them; and though thinkers had begun to apply ethics to the conduct of nations, no one had so marked out the principles of neutrality that particular usages could be compared with them and improved with their help. Grotius gave the subject no serious consideration, and went no farther in his meagre chapter 'De his qui in bello medii sunt' than to say that 'it is the duty of those who stand apart from a war to do nothing which may strengthen the side whose cause is unjust, or which may hinder the movements of him who is carrying on a just war; and in a doubtful case, to act alike to both sides, in permitting transit, in supplying provisions to the respective armies, and in not assisting persons besieged[2].' Elsewhere he incidentally remarks that 'it is not

by Grotius.

aliterve juvet, aut illis copiis quas contra aliquem hujus pacificationis consortem a quocumque duci contigerit, receptum, stativa, transitum indulgeat.' Dumont, vi. i. 451.

[1] The Peace of the Pyrenees (1659) has merely the general words 'Les Roys, &c., éviteront de bonne foy tant qu'il leur sera possible le dommage l'un de l'autre.' Dumont, vi. ii. 265. Like language is found in the Treaty of Breda, between England and France, in 1667 (Dumont, vii. i. 41); in the Peace of Lisbon, between Spain and Portugal, in 1668 (Dumont, vii. i. 73); in the Treaty of Nymeguen, in 1678 (Dumont, vii. i. 357); and the Peace of Ryswick, in 1697 (Dumont, vii. ii. 389). The treaty between England and Denmark in 1669, and that between the same powers in 1686 (Dumont, vii. i. 127), are exceptions. The contracting parties promise 'se alterutrius hostibus, qui aggressores fuerint, nihil subsidii bellici, veluti milites, arma, machinas, bombardas, naves et alia bello gerendo apta et necessaria subministraturos, aut suis subditis subministrare passuros; si vero alterutrius regis subditi hisce contravenire audeant, tum ille rex, cujus subditi id fecerint, obstrictus erit in eos acerbissimis poenis, tanquam seditiosos et foedifragos animadvertere.'

[2] 'Eorum qui a bello abstinent officium est nihil facere, quo validior fiat is

inconsistent with an alliance that those who are attacked by one of the parties to it shall be defended by the other—peace being maintained in other respects [1].' Various quotations from ancient authors, from which he draws no conclusions, suggest that he looked upon an impartial permission to raise levies as consistent with neutrality, but that the grant of a subsidy or the supply of munitions of war was an hostile act.

Practice of the seventeenth century.

So long as these somewhat incoherent doctrines alone represented the views of theorists it is not strange that usage was in general rude, or that countries concluded treaties with the express object of restricting its operation on themselves. Henry IV allowed entire regiments of French soldiers to pass into the service of the United Provinces; the expedition, numbering 6,000 men, which the Marquis of Hamilton, with the consent of his sovereign, led to the assistance of Gustavus Adolphus in 1631, was exceptional only in its size [2]; and Burnet draws a lively picture of the character of English neutrality at a much later time. In 1677 complaints were made in Parliament 'of the regiments that the King kept in the French army, and of the great service done by them. It is true the King suffered the Dutch to make levies. But there was another sort of encouragement given to the levies of France, particularly in Scotland; where it looked liker a press than a levy. They had not only the public gaols given them to keep their men in, but when these were full, they had the castle of Edinburgh assigned to them, till ships were ready for their transport [3].'

It was important to small and ambitious states, which occupied a larger space in the field of politics than was justified by their

qui improbam fovet causam, aut quo justum bellum gerentis motus impediantur; in re vero dubia aequos se praebere utrisque in permittendo transitu, in commeatu praebendo legionibus, in obsessis non sublevandis.' De Jure Belli et Pacis, lib. iii. cap. xvii.

[1] 'Non pugnat autem cum foedere, ut quos alii offenderent, hi defenderentur ab aliis, manente de caetero pace.' Lib. ii. cap. xvi.

[2] Martin, Hist. de France, x. 497; Burnet, Memoirs of James and William, Dukes of Hamilton, pp. 7 and 9.

[3] Hist. of his own Time, ii. 114 (ed. 1823).

inherent power, to keep their hold on foreign recruiting-grounds. A treaty therefore between Brandenburg and the United Provinces in 1655 declares that 'the levy of land or sea forces, and the purchase, lading, and equipment of vessels of war shall always be permitted, and be lawful, in the lands and harbours of the two parties;' and in 1656 a treaty between England and Sweden provided, more in the interest of the latter than the former power, that it should be 'lawful for either of the contracting parties to raise soldiers and seamen by beat of drum within the kingdoms, countries, and cities of the other, and to hire men of war and ships of burden [1].'

A treaty of neutrality may secure something more, and will certainly provide for nothing less, than the bare performance of strict neutral duties. By that which was concluded between Louis XIV and the Duke of Brunswick in 1675, the Duke promises to observe a 'sincere and perfect neutrality towards the King. . . . In conformity with this neutrality, his Highness will not anywhere assist the enemies of the King directly or indirectly, and will not permit any levies to be made in his states, nor the passage of troops through them, nor the formation of any kind of magazines [2].'

In other words he promises :—

1. That no active assistance shall be given by Brunswick to any enemy of France as by one sovereign state to another.

2. That it will not afford passive aid by permitting enlistments or by allowing its territory to be made a base of operations.

He does not promise to restrain the individual action of his subjects in any way.

It would therefore seem that towards the end of the seventeenth century the utmost that could be demanded by a belligerent

[1] Dumont, vi. ii. 111, and vi. ii. 125. The provision was 'propounded by the ambassador' of Sweden, and six thousand men were levied for Sweden in England. Whitelock's Memorials, 633–6.

[2] Dumont, vii. i. 312.

from a neutral state was that the latter should refrain from giving active help to the enemy of the belligerent, and should prevent his territory from being continuously used for a hostile purpose. Indeed, his customary right to so much as this may have been far from unquestionable; and neither then nor long afterwards had he any good grounds for complaint if privileges given to his enemy could be shared by himself.

It must not however be forgotten that though the practice of neutrality in the seventeenth century was highly imperfect, and though its theory was not thought out, the ethical view of the general relations of states to each other which was commonly taken by writers prepared the way for a more rapid settlement of its fundamental conceptions, when once attention was directed to them, than might otherwise have taken place.

Rights of a neutral state as understood in the seventeenth century.

The right of a sovereign to forbid and to resent the performance of acts of war within his lands or waters was theoretically held as fully then as now to be inherent in the fact of sovereignty [1]. In 1604, James I issued a Proclamation directing that 'all officers and subjects by sea and land shall rescue and succour all such merchants and others as shall fall within the danger of such as await the coasts.' And in 1675, Sir Leoline Jenkins, in writing to the King in Council with respect to a vessel which had been seized by a French privateer, says that 'all foreign ships, when they are within the King's Chambers, being understood to be within the places intended in these directions' of James I, 'must be in safety and indemnity, or else when they are surprised must be restored to it, otherwise they have not the protection worthy of your Majesty [2].' Philip II, so early as 1563, had published an edict forbidding, under pain of death, that any violence should be done to his subjects or allies, whether for reason of war or for any other

[1] 'Alienum territorium securitatem praestat,' says Albericus Gentilis (De Jure Belli, lib. ii. c. 22); it is true that he also says, 'etiam nec puto grave delictum in loco non licito hostes offendisse.'

[2] Wynne, Life of Sir Leoline Jenkins, ii. 780.

cause, within sight of shore. The Dutch, after acquiring their independence, made a like decree [1]; and several treaties exist in which it was stipulated that the rights of sovereignty should be enforced by neutral nations for the benefit of an injured belligerent [2].

How far they were observed.

But the history of the century bristles with occurrences which show how little the doctrine had advanced beyond the stage of theory. In 1627, the English captured a French ship in Dutch waters; in 1631, the Spaniards attacked the Dutch in a Danish port; in 1639, the Dutch were in turn the aggressors, and attacked the Spanish fleet in English waters; again in 1666, they captured English vessels in the Elbe, and in spite of the remonstrances of Hamburg and of several other German states did not restore them; in 1665, an English fleet endeavoured to seize the Dutch East India squadron in the harbour of Bergen, but were beaten off with the help of the forts; finally, in 1693, the French attempted to cut some Dutch ships out of Lisbon, and on being prevented by the guns of the place from carrying them off, burnt them in the river [3].

In the eighteenth century the principle of sovereignty was on the whole better respected. In 1759, when Admiral Boscawen pursued a French squadron into Portuguese waters and captured

[1] Bynkershoek, Quæst. Jur. Pub., lib. i. c. viii.

[2] Art. xxi of the Treaty of Breda (1667) declares: 'Item, si qua navis aut naves, quae subditorum aut incolarum alterutrius partis aut neutralis alicujus fuerint, in alterutrius portubus a quovis tertio capiantur, qui ex subditis et incolis alterutrius partis non sit; illi, quorum in portu aut ex portu aut quacunque ditione praedictae naves captae fuerint, pariter cum altera parte dare operam tenebuntur in praedictis nave vel navibus insequendis et reducendis, suisque dominis reddendis; verum hoc totum fiet dominorum impensis, aut eorum quorum id interest.' Dumont, vii. i. 47. Like provisions were contained in the treaties made between the United Provinces and England in 1654 and 1661, and France in 1662.

[3] Bynkershoek, op. cit.; Pepys's Diary, Aug. 19, 1665. It is significant of the view which was commonly taken of such acts that Pepys, with evident surprise, speaks of 'the town and castle, *without any provocation*, playing on our ships.' This surprise can have no reference to the agreement which is supposed to have been made by the English with the King of Denmark, for his silence shows that he was ignorant of its existence.

two vessels, the government of Portugal, though perfectly indifferent in fact, was obliged to demand reparation in order to avoid embroilment with France; and as full reparation by surrender of the vessels was not exacted, France subsequently alleged that the neutrality of Portugal was fraudulent, and grounded her declaration of war in 1762 in part upon the occurrence. Progress nevertheless was slow, as is sufficiently testified by the following passage in a memorial respecting a proposed augmentation of the land forces of the United Provinces, which was presented to the States-General by the Princess Regent in 1758. 'This augmentation,' she says, 'is the more necessary, as it behoves the state to be able to hinder either army from retiring into the territory of the state if it should be defeated; for in that case the conqueror being authorised to pursue his enemy wherever he can find him would bring the war into the heart of our own country[1].'

Growth of opinion in the eighteenth century.

In the course of the eighteenth century, opinion ripened greatly as to the due relations of belligerents and neutral states. It was not strong enough to form an adequate or consistent usage; but it adopted a few general principles with sufficient decision to afford the basis of a wholesome rule of conduct. This progress was in part owing to text writers, who formulated the best side of international practice into doctrines, which from their definite shape, and their alliance with natural law, seemed to be clothed with more authority than was perhaps their due, and which soon came to be acknowledged as standards of right.

Bynkershoek.

Bynkershoek was the earliest writer of real importance, and few of his successors have equalled him in sense or insight. In his 'Quæstiones Juris Publici,' written in 1737, he says, 'I call those non-enemies who are of neither party in a war, and who owe nothing by treaty to one side or to the other. If they are

[1] Lord Stanhope's Hist. of England from the Peace of Utrecht, iv. 148, and Append. xxxiv; Ann. Register for 1758, p. 150. Bynkershoek (Quæst. Jur. Pub., lib. i. c. viii) says, 'Ad summum largiendum est, proelio recens commisso, hostem fugientem persequi licere in alterius imperio.'

under any such obligation they are not mere friends but allies . . . Their duty is to use all care not to meddle in the war . . . If I am neutral, I cannot advantage one party, lest I injure the other . . . The enemies of our friends may be looked at in two lights, either as our friends, or as the enemies of our friends. If they are regarded as our friends, we are right in helping them with our counsel, our resources, our arms, and everything which is of avail in war. But in so far as they are the enemies of our friends, we are barred from such conduct, because by it we should give a preference to one party over the other, inconsistent with that equality in friendship which is above all things to be studied. It is more essential to remain in amity with both than to favour the hostilities of one at the cost of a tacit renunciation of the friendship of the other [1].'

Wolff.

Wolff, who wrote in 1749, calls those neutrals 'who adhere to the side of neither belligerent, and consequently do not mix themselves up in the war [2].' They are in a state of amity with both parties, and owe to each whatever is due in time of general peace. Belligerents have therefore the right of unimpeded access to neutral territory, and of buying there at a fair price such things as they may want. This right, it is true, is qualified by the requirement that it shall be exercised for a *causa justa*, but war is a *causa justa*, and therefore the passage of troops is to be permitted.

Vattel.

Vattel, who published his work in 1758, says that neutrality

[1] 'Non hostes appello qui neutrarum partium sunt, nec ex foedere his illisve quicquam debent; si quid debeant, foederati sunt, non simpliciter amici. . . . Horum officium est omni modo cavere ne se bello interponant. . . . Si medius sim, alteri non possum prodesse, ut alteri noceam. . . . Credo amicorum nostrorum hostes bifariam considerandos esse, vel ut amicos nostros, vel ut amicorum nostrorum hostes. Si ut amicos consideres, recte nobis iis adesse liceret ope, consilio, eosque juvare, milite auxiliari, armis et quibuscunque aliis, quibus in bello habent. Quatenus autem amicorum nostrorum hostes sunt, id nobis facere non licet, quia sic alterum alteri in bello praeferremus, quod vetat aequalitas amicitiae, cui in primis studendum est. Praestat cum utroque amicitiam conservare, quam alteri in bello favere, et sic alterius amicitiae tacite renunciare.' Quæst. Jur. Pub., lib. i. c. ix.

[2] Jus Gentium, § 672.

consists in 'an impartial attitude so far as the war is concerned, and so far only; and it requires—1st, that the neutral people shall abstain from furnishing help when they are under no prior obligation to grant it, and from making free gifts of troops, arms, munitions, or anything else of direct use in war. I say that they must abstain from giving help, and not that they must give it equally, for it would be absurd that a state should succour two enemies at the same moment. Besides, it would be impossible to do so equally; the very same things—the same number of troops, the same quantity of arms, of munitions, &c., furnished under different circumstances, are not equivalent succour. 2nd, that in all matters not bearing upon the war a neutral and impartial nation shall not refuse to one of the parties, because of the existing quarrel, that which it accords to the other[1].' Vattel afterwards so far qualifies this sound general statement as to lay down that a country without derogating from its neutrality, may make a loan of money at interest to one of two belligerents, refusing a like loan to the other, provided the transaction between the states is of a purely business character[2]. The qualification is only of importance as tending to show in how narrow a sense Vattel would have been inclined to construe his own words.

It is to be observed that these authors, in dealing with conduct failing to satisfy the obligations of neutrals, speak only of acts done by the state itself with the express object of assisting

[1] 'Un peuple neutre doit garder une impartialité . . . qui se rapporte uniquement à la guerre, et comprend deux choses: 1. Ne point donner de secours quand on n'y est pas obligé; ne fournir librement ni troupes, ni armes, ni munitions, ni rien de ce qui sert directement à la guerre. Je dis ne point donner de secours et non pas en donner également; car il serait absurde qu'un état secourût en même temps deux ennemis. Et puis il serait impossible de le faire avec égalité; les mêmes choses, le même nombre de troupes, la même quantité d'armes, de munitions, etc., fournies en des circonstances différentes ne forment plus de secours équivalents. 2. Dans tout ce qui ne regarde pas à la guerre, une nation neutre et impartiale ne refusera point à l'une des parties, à raison de sa querelle présente, ce qu'elle accorde à l'autre.' Droit des Gens, liv. iii. c. vii. § 104. See also Barbeyrac, note to Pufendorf, bk. viii. c. vi, and Burlamaqui, vol. ii. pt. iv. c. viii.

[2] Liv. iii. c. vii. § 110.

a belligerent. They say nothing indicating how far in their view a nation was bound to watch over the acts of its subjects; and in practice this doctrine as to state conduct was controlled by the action of treaties.

Practice of the eighteenth century as to troops furnished under treaty by a neutral state to a belligerent.

It was clearly open to a state, without abandoning its position of neutrality, to supply a body of troops to a belligerent under a treaty between the two powers, either for mutual help, or for succour to be given by one only to the other in the event of a war which might be in contemplation by an intending belligerent at the very moment of concluding the treaty. Agreements of this kind were often made, and were sometimes guarded against by express stipulation. In 1727, when England was already in a state of informal war with Spain, the Landgrave of Hesse Cassel agreed to provide her with 12,000 troops 'whenever they should be wanted[1].' One of the most marked instances of the practice is furnished by the conduct of the United Provinces during the war of the Austrian Succession. Under their guarantee of the Pragmati Sanction they sent in 1743 an auxiliary corps of 20,000 men to the assistance of Maria Theresa, and they gradually so engaged with their whole force in the active operations of the war that the brilliant campaign of Marshal Saxe in 1746 left them destitute of an army. Nevertheless, when in the next year the French forces entered Holland, a Royal Declaration announced that the invasion was solely intended to put a stop to the effects of the protection given to the English and Austrian armies by the Republic, 'sans rompre avec elle[2].' Piedmont engaged in like manner in the same war; and England in it, as in the Seven Years' War and that of American Independence, drew large bodies of troops from neutral German states under treaty with their sovereign[3]. Bynkershoek says, 'What if I have promised help to an ally, and he goes to war with my

[1] Dumont, viii. ii. 141.

[2] Martin, Hist. de France, lib. xcv. § ii.

[3] Lord Stanhope, Hist. of England, vol. iii. 144, vol. iv. 49, and vol. vi. 86; De Martens, Rec. ii. 417 and 422.

friend? I think that I ought to stand by my promise, and that I can do so properly.' The neutral may however abstain when the war has been undertaken unjustly on the part of his ally; and when it is once begun no new engagement must in any case be entered into [1].

It was not until 1788 that the right of a neutral state to give succour under treaty to a belligerent gave rise to serious, if to any, protest. Denmark, while fulfilling in favour of Russia an obligation of limited assistance contracted under treaty, declared itself to be in a state of amity with Sweden. The latter power acquiesced as a matter of convenience in the continuance of peace, but it placed on record a denial that the conduct of Denmark was permissible under the Law of Nations [2]. Probably Sweden stood almost alone in her view as to the requirements of neutral duty. In 1785, the United States agreed with Prussia that 'neither one nor the other of the two states would let for hire, or lend, or give any part of its naval or military forces to the enemy of the other to help it or to enable it to act offensively or defensively against the belligerent party' to the treaty; and in 1780 a similar treaty had been concluded between England and Denmark [3]. It is needless to repeat that positive covenants are not inserted in treaties merely to embody obligations which without them would be of equal stringency; and the continuance of the old practice is proved by the conclusion of a treaty in 1788 under which the Duke of Brunswick contracted to supply Holland with 3,000 men, and of another in the same year with a like object between Holland and Mecklenburg-Schwerin [4].

As to levies in a neutral state made

It is more doubtful whether the levy of troops by belligerents on their own account within neutral territory was still recognised by custom, when allowed apart from treaty to both parties

[1] Quæst. Jur. Pub. lib. i. c. ix.

[2] The declaration and counter declaration are quoted in full by Phillimore, iii. § cxl.

[3] Elliot, American Diplomatic Code, i. 347; Chalmers, Collection of Treaties, i. 97.

[4] De Martens, Rec. iv. 349 and 362.

PART IV CHAP. II

apart from treaty.

indifferently. Bynkershoek says, 'I think that the purchase of soldiers among a friendly people is as lawful as the purchase of munitions of war[1];' they would merely be subject to capture like other contraband articles on their way to the belligerent state. Vattel in somewhat inconsistent language probably intends to give the same liberty[2]. But there are a few treaties to the contrary effect between some of the most important powers. England and Holland were both reciprocally bound with France by the Treaties of Utrecht to prevent their subjects from accepting commissions in time of war from the enemies of whichever might be engaged in hostilities; a treaty of the year 1670 of the same nature was still in force between England and Denmark; and in 1725 Spain entered into a like engagement with the Empire[3]. When troops were wanted they seem to have been generally, if not always, obtained under treaty; England and Holland for municipal reasons enacted laws expressly to restrain their subjects from entering the service of foreign states; and the neutrality edicts of the Two Sicilies in 1778, and of Venice and the Papal States in 1779, forbid enlistment with a belligerent under pain of exile or imprisonment[4]. The old practice may

[1] 'Quod juris est in instrumentis bellicis, idem esse puto in militibus apud amicum populum comparandis.' Quæst. Jur. Pub. lib. i. cap. xxii.

In the usually sensible Derecho Internacional of Pando (written in 1838) is a curious instance of the tendency of a doctrine, once sanctioned by a writer of authority, to perpetuate itself, like an organ which has become useless, and only remains in a rudimentary state to attest an epoch of lower development. He almost repeats the words of Bynkershoek: 'Los hombres deben considerarse como artículo de guerra, en que es libre á todas naciones comerciar de la misma manera que en los otros, y con iguales restricciones' (§ clxxxix). In the particular case the doctrine is too much out of harmony with modern opinion to do mischief; but it is only an unusually glaring example of a common, and—as text writers are quoted in international controversy—a dangerous practice.

[2] Droit des Gens, liv. iii. c. vii. § 110. His qualification that troops may be levied in a neutral state—'à moins qu'elles ne soient données pour envahir les états' of the opposite belligerent, and provided that they are not too numerous—takes away with one hand what he gives with the other.

[3] Dumont, viii. i. 348 and 378; vii. i. 136; and viii. ii. 115.

[4] 9 Geo. II. c. 30 and 29 Geo. II. c. 17. For comments on the intention of these acts, see Debates on the Foreign Enlistment Act, Hansard, xl (1819);

therefore be taken to have fallen into desuetude, and perhaps to have become illegal.

As to cruisers fitted out by neutrals.

The equipment by private adventure of cruisers to be employed under letters of marque in the service of a belligerent is an act analogous to the levy of a body of men in aid of his land force, but from the conditions of marine warfare it is more mischievous to his enemy. A better defined rule might therefore be expected to exist with regard to it. Perhaps, on the whole, this was the case; but the dispute between England and France in 1777 shows that it would be easy to overvalue the significance of facts tending to show such adventures to be illegal under the common law of nations. During the correspondence between the two governments with reference to the covert help afforded to the American insurgents in France, M. de Vergennes admitted that France was bound to prevent ships of war from being armed and manned with French subjects within its territory to cruise against England. But in this instance, and in all the controversy of that time between the two nations, the demands of one party and the admissions of the other were alike based upon obligations under the Treaties of Utrecht and of Paris. It is not probable that England in her frequent Notes and her elaborate 'Mémoire Justificatif' would have refrained from supporting the special obligations of treaties by the authority of general law had she thought that its voice would be distinct enough for her purpose[1].

1777. Dispute between England and France.

De Martens, Rec. iii. 47, 53, 74. Bynkershoek (Quæst. Jur. Pub. lib. i. c. xxii) says that in his day most states permitted their subjects to enter foreign service.

[1] De Martens, Causes Célèbres, iii. 152. The fifteenth article of the Treaty of Commerce of Utrecht declares that 'il ne sera pas permis aux armateurs étrangers, qui ne seront pas sujets de l'une ou de l'autre couronne, et qui auront commission de quelqu'autre Prince ou État ennemis de l'un et de l'autre, d'armer leurs vaisseaux dans les ports de l'un et de l'autre des deux royaumes, d'y vendre ce qu'ils auront pris, . . . ni d'acheter même d'autres vivres que ceux qui leur seront nécessaires pour parvenir au port le plus prochain du Prince dont ils auront obtenu des commissions.' Dumont, viii. i. 348. The stipulations of the Treaty of Utrecht were revived by the Treaty of Paris. The absence of reference to the authority of general law rather than to treaty stipulations is the more significant that the above article evidently fails to cover the acts complained of.

Yet she had occasion to complain of acts which in the present day would seem to be of extraordinary flagrancy. The Reprisal, an American privateer, sailed from Nantes to cruise against the English. She returned to L'Orient, sold her prizes, and took in reinforcements of men. She then again cruised in company with a privateer which had been armed at Nantes, and was manned solely by Frenchmen; and fifteen ships captured by the two vessels were brought into French ports and sold.

Neutrality edicts.

The evidence tending to show that general opinion already looked upon the outfit and manning of cruisers by private persons as compromising the neutrality of a state, mainly consists in the neutrality edicts which were issued shortly after this time on the outbreak of actual war between England and France. Venice, Genoa, Tuscany, the Papal States, and the Two Sicilies, subjected any person arming vessels of war or privateers in their ports to a fine; and in 1779 the States-General of the United Provinces issued a placard reciting that it was suspected that subjects of the state had equipped and placed on the sea armed vessels under a belligerent flag, and declaring such 'conduct to be contrary to the law of nations, and to the duties binding on subjects of a neutral power[1].'

Neutral duty at the end of the eighteenth century according to De Martens.

Ten years later De Martens summed up the duties of neutrality as follows. 'It is necessary,' he says, 'for the observance of complete neutrality to abstain from all participation in warlike expeditions. . . . But can a power, without overstepping the bounds of neutrality, allow its subjects to accept letters of marque from a belligerent? In strictness, it would seem that it cannot. Treaties of commerce often contain an express promise

[1] De Martens, Rec. iii. 25, and 47, 53, 62, 74. It appears however from a recital in the Treaty of 1787 between Russia and the Two Sicilies that subjects of the latter power were forbidden both in time of war and peace to build ships for, or to sell them to, foreigners; and that they were also forbidden to buy them without express permission. Id. iv. 240. On the other hand, the Venetian government expressly refers to its wish to observe 'la più esatta ed imparziale neutralità'; but the provisions of the edict go in several respects further than can be required by law as it now is.

not to accord any such permission.' He adds that a state which sends succour in troops or in money to one of the two belligerents 'can no longer in strictness demand to be looked upon as a neutral,' although in the case of pre-existent treaties it is 'the custom to regard it as such [1].' It has been remarked by Kent that De Martens attached exaggerated importance to treaties, and in this case it would seem to be mainly on their authority that he declares neutrality to be inconsistent with the acceptance by neutrals of letters of marque. And, after all, his doctrine is expressed with some hesitation. Both applications of his general principles are carefully limited by the words 'à la rigueur.' Custom in these matters was growing; it was not yet established.

1793. Neutrality policy of the United States.

The United States had the merit of fixing it permanently. On the outbreak of war in Europe in 1793, a newly-appointed French Minister, M. Genêt, on landing at Charlestown, granted commissions to American citizens who fitted out privateers and manned them with Americans to cruise against English commerce. Immediate complaint was made by the English Minister, who expressed his 'persuasion that the government of the United States would regard the act of fitting out these privateers in its ports as an insult offered to its sovereignty [2].' The view taken by the American government was in fact broader, and Mr. Jefferson expressed it clearly and tersely in writing to M. Genêt, 'that it is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring powers; that the granting military commissions [3] within the United States by any other authority than their own is an infringement of their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe to their

[1] Précis du Droit des Gens, §§ 264, 265, and note to latter section, ed. 1788. The later editions are modified.

[2] Mr. Hammond to Mr. Jefferson, June 7, 1793.

[3] M. Genêt maintained that to grant commissions and letters of marque was one of the usual functions of French consuls in foreign ports.

country[1].' Somewhat later he writes to Mr. Morris, American Minister in Paris, 'that a neutral nation must in all things relating to the war observe an exact impartiality towards the two parties . . . that no succour should be given to either, unless stipulated by treaty, in men, arms, or anything else directly serving for the war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments[2].' Taking this language straightforwardly, without forcing into it all the meaning which a few phrases may bear, but keeping in mind the facts which were before the eyes of Mr. Jefferson when he penned it, there can be no doubt that the duties which it acknowledges are the natural if not inevitable deductions from the general principles stated by Bynkershoek, Vattel, and De Martens; and there can be as little doubt that they had not before been frankly fulfilled. To give effect to the views then stated, instructions were issued to the collectors of customs scheduling 'rules concerning sundry particulars which have been adopted by the President as deductions from the laws of neutrality established and received among nations.' Under these, 'equipments of vessels in the ports of the United States which are of a nature solely adapted for war,' and the enlistment of 'inhabitants' of the United States, were forbidden. On the other hand, it was permitted to furnish merchant vessels and ships of war with equipments of doubtful nature, as applicable either to war or commerce[3]. The trial of Gideon Henfield for cruising in one of the privateers commissioned by M. Genêt soon proved that the existing law was not

[1] June 5, 1793. American State Papers, i. 67.
[2] Aug. 16, 1793. American State Papers, i. 116.
[3] Appendix iii to Report of Neutrality Law Commissioners, 1868.

strong enough to enable the government to carry out neutrality in the sense in which they defined it [1]. An Act was accordingly passed by Congress to prevent citizens or inhabitants of the United States from accepting commissions or enlisting in the service of a foreign state, and to prohibit the fitting out and arming of cruisers intended to be employed in the service of a foreign belligerent, or the reception of any increased force by such vessels when armed [2].

The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main however it is identical with the standard of conduct which is now adopted by the community of nations.

[1] Wharton's State Trials, p. 49.
[2] Statutes at Large of the United States, ed. by Peters, i. 381.

CHAPTER III

THE EXISTING LAW AFFECTING BELLIGERENT AND NEUTRAL STATES

General principles of the law of neutrality as ascertained at the end of the eighteenth century.

From the somewhat incoherent practice followed by belligerents and neutrals with respect to each other during the eighteenth century, three principles disengage themselves with clearness. The neutral state was bound not to commit any act favouring one of two belligerents in matters affecting their war, and it was in turn incumbent on belligerents to respect the sovereignty of the neutral. It was also recognised, though less fully, that it is the duty of a state to restrain foreign governments and private persons from using the territory and resources of a country for belligerent purposes. In these principles are involved every obligation under which a neutral state can lie, and almost every right the possession of which is important to it. But the foregoing sketch has shown that they were not always observed, and still more that they were not made to yield all the results which logically flow from them. Those results which were in fact reached were not entirely consistent with each other.

Their relation to modern doctrine.

During the present century expansion of trade and quickness of communication have given birth in certain directions to new difficulties in the relations of neutrals and belligerents, while at the same time the vitality of some of the older customs has never been tested in action. Hence a certain number of doctrines appear to survive which can hardly in any true sense be said to live; and on the other hand, new applications of the old principles have continually to be made to complex facts, in dealing with which there is no strict precedent, and sometimes a very doubtful analogy. The most convenient mode therefore of treating the

present relations of neutral and belligerent states will be, after clearing away a few cases of effete doctrine, to take the applications of the principles which have been laid down in the order of their complexity. In the principles themselves there is never any difficulty; the only question to be answered is, whether or not they ought to be applied to a certain state of facts.

Whether troops can be furnished under treaty.

Although, since late in the eighteenth century, no nation has given military assistance to an ally while professing to maintain neutrality, and although no government would probably now venture to conclude a treaty with that object, there are text writers, recent or of existing authority, in whose works the opinion lingers, that a treaty made before the outbreak of war justifies the gift of such assistance and shelters the neutral from the consequences of his act.

According to Manning, the custom is 'directly at variance with the true basis of neutrality, but it has now been established by the habitual and concurrent practice of states, and is at the present day an undisputed principle of the European law of nations.' Kent and Wheaton are equally positive as to the law and more blind as to the moral aspect of the case; and the doctrine is reasserted in the more modern work of M. Bluntschli[1].

It is impossible to ignore the authority of these writers, but they cite no later precedent than that of the Danish loan of troops to Russia in 1788; it is even doubtful whether the facts of that case are not more against than in favour of the conclusion which they are brought to establish; and no nation is now bound by any like obligation. The usage is not therefore upheld by continuing practice, and it is not in conformity with legal principle, by which, or by practice, it could alone be rendered authoritative. It is granted that the acts contemplated would, apart from prior agreement, be a violation of neutrality as now understood, and it is unnecessary to argue that a prior agreement

[1] Manning, p. 225; Kent, Comm. lect. vi; Wheaton, Elem. pt. iv. chap. iii. § 5; Bluntschli, § 759.

PART IV CHAP. III

in no way affects the character of acts with reference to a non-consenting third party [1].

Whether loans by neutral individuals are permissible.

It is usually said that a loan of money to one of the belligerent parties is a violation of neutrality [2]. That it is so, if made or guaranteed by the neutral state, is abundantly evident. But it is difficult to understand why modern writers repudiate analogy and custom by condemning the negotiation of a loan by neutral subjects under ordinary mercantile conditions. M. Bluntschli says that the neutral state must abstain from making loans for purposes of war, and adds that the rule is equally applicable to loans negotiated by private persons. Sir R. Phillimore uses language not easily to be reconciled with his emphatic assertions of the right of a neutral subject to trade. Calvo, while agreeing that loans during war are illicit, will not admit that the neutral government is able so to control the acts of individuals in such matters as to be held responsible for their consequences [3]. But outside the boards of works on International Law a healthier rule is unquestioned. A modern belligerent no more dreams of complaining because the markets of a neutral nation are open to his enemy for the purchase of money, than because they are open for the purchase of cotton. The reason is obvious. Money is in theory and in fact an article of commerce

[1] The above view is taken by Phillimore, vol. iii. § cxxxviii ; Calvo, § 2322 ; and Heffter, § 117.

[2] Formerly neutrals seem occasionally to have acted under the impression that it is so, and the language of modern books may be founded upon the unnecessary responsibilities which some states may have assumed. In 1795 'le comité du salut public, croyant que la paix conclue avec l'Espagne lui donnerait plus de crédit à l'étranger, imagina de contracter un emprunt pour mettre l'armée d'Italie en état de reprendre l'offensive, et le ministre Villars fut autorisé à ouvrir des négociations dans Gênes à ce sujet. Un mois s'écoula dans l'attente des premiers versements ; enfin le Sénat, se retranchant derrière sa neutralité, refusa formellement son autorisation.' Koch, Mém. de Masséna, i. 220.

[3] Bluntschli (§ 768), Phillimore (iii. § clvii), Calvo (§ 2331). Wheaton, Manning, De Martens, Klüber, Heffter, and Twiss make no mention of loans, whether by the sovereign or by subjects. Kent merely says that 'a loan of money to one of the belligerent parties is considered to be a violation of neutrality ;' but it does not appear whether this language is intended to include private as well as public loans.

in the fullest sense of the word. To throw upon neutral governments the obligation of controlling dealings in it taking place within their territories would be to set up a solitary exception to the fundamental rule that states are not responsible for the commercial acts of their subjects. And not only would the existence of such an exception be unwarranted by anything peculiar in the nature of money, which is certainly not more noxious than munitions of war, but it would burden states with a responsibility which they would be wholly unable to meet. Money is a merchandise the transmission of which would elude all supervision. Loans need not be handed over in specie; it is possible that payment might be made in bills not one of which might enter the neutral country in which the contract is made; and if it were attempted to stop the practice by penalties, nothing would be more easy than for the real lenders to conceal themselves behind names borrowed in the country of the belligerent debtor. The true law on the subject was laid down by Mr. Webster in 1842 with a decision, and in language, which indicate how clear and invariable the practice of nations is. 'As to advances and loans,' he says, 'made by individuals to the government of Texas or its citizens, the Mexican government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States, and that these are things which no government undertakes to restrain [1].'

Whether the sale of articles of warlike use by a neutral

The general principle that a mercantile act is not a violation of a state neutrality, is pressed too far when it is made to cover the sale of munitions or vessels of war by a state. Trade is not one of the common functions of a government; and an extraordinary

[1] Mr. Webster to Mr. Thompson, Executive Documents, 27th Congress, 1841-2. The dictum of Lord Wynford in De Wütz *v.* Hendricks, on which Sir R. Phillimore relies as expounding the view of the English courts, merely expresses his opinion that it is 'contrary to the law of nations for persons residing in this country to enter into engagements by way of loan *for the purpose of supporting* subjects of a foreign state in arms against a government in alliance with our own.' ix Moore, 586. During the Franco-German War both the French Morgan Loan and part of the North German Confederation Loan were issued in England.

state is permissible.

motive must be supposed to stimulate an extraordinary act. The nation is exceptionally unfortunate which is forced to get rid of surplus stores precisely at the moment when their purchase is useful to a belligerent. In the year 1825, the Swedish government, wishing to reduce its navy, offered six frigates for sale to the government of Spain. The latter refused to buy, and three of them were then sold to an English mercantile firm, who, as it afterwards appeared, were probably acting on behalf of Mexico, then in revolt against the mother country. In any case it became known before the vessels were handed over that a further sale had been or was about to be effected to the recognised Mexican agent in England; and the Swedish government, listening to the warmly expressed complaints of Spain, rescinded the contract at some monetary loss to itself, notwithstanding that the ships had been sold in ignorance of their ultimate destination [1]. During the war between France and Prussia, the government of the United States seems to have taken an opposite view of its duty [2]; but there can be no question that Sweden, in yielding, chose the better part. The vendor of munitions of war in large quantities during the existence of hostilities knows perfectly well that the purchaser must intend them for the use of one of the belligerents, and a neutral government is too strictly bound to hold aloof from the quarrel to be allowed to seek safety in the quibble that the precise destination of the articles bought has not been disclosed.

Limits of the duty to prohibit the levy of men within neutral territory.

The principle that it is incumbent on the neutral sovereign to prohibit the levy of bodies of men within his dominions for the service of a belligerent, which was gradually becoming authoritative during the eighteenth century, is now fully recognised as the foundation of a duty. And its application extends to isolated

[1] De Martens, Causes Célèbres, v. 229.

[2] A series of public sales of surplus guns, rifles, and other arms took place at New York. Large quantities were bought by French agents, were taken on board French ships direct from the arsenal at Governor's Island, and were paid for through the French consul. Mr. Thornton to Lord Granville, State Papers, 1871, lxxi. 202. On the general question comp. Ortolan, ii. 182.

instances when the circumstances are such as to lead to serious harm being done to a friendly nation. The acceptance of letters of marque by neutral subjects from a belligerent is now prohibited by international common law, and is always forbidden by the neutral sovereign [1], although from several points of view the act is unobjectionable. An individual may abandon his country and take service with a foreign state; the foreign state is free to accept his services. But in accepting a letter of marque he does not cut himself off from his own state. It is able to lay hands on him; and that ability is enough to fix it with responsibility.

On the other hand, a state is not expected to take precautions against the commission of microscopic injuries [2]. The true limits of neutral care as regards individuals were indicated in the Proclamations of Neutrality issued by England in 1861, 1870 [and 1898]. At the outbreak of the American Civil War it was thought possible that large numbers of English subjects might engage in it, and an express prohibition of such service was therefore inserted in the Proclamation. In that issued at the beginning of the war between France and Germany the prohibition was omitted, it not being likely that any sufficient number to justify government action would be found in the ranks of either army [3] [but it appears again in the Proclamation issued at the outbreak of war between Spain and the United States]. As a matter of fact a few English served as officers in both the German and French armies, without the neutrality of Great Britain being in any way supposed to be compromised.

It is scarcely an exception from the general prohibition to

[1] E. g. see Proclamations of Neutrality issued by Austria, France, Italy, Spain, and the Netherlands, Append. iv to Report of Neutrality Law Commissioners, 1868; and the Spanish Proclamation of 1870, D'Angeberg, No. 254. [See also the British Proclamation of Neutrality, during the war of 1898, between the United States and Spain. Hertslet's Commercial Treaties, vol. xxi. p. 826.] Formerly treaties with respect to letters of marque were very common, for the last half century it has only been thought necessary to make them with South American States; see antea p. 264 n.

[2] Calvo, § 2321; Heffter, § 145.

[3] Hansard, 3rd Series, vol. cciii. 1098.

make levies in a neutral state that a belligerent ship entering a neutral port with a crew reduced from whatever cause to a number less than that necessary to her safe navigation may take on board a sufficient number of men to enable her to reach a port of her own country. In doing this, and no more, she does not become capable of being used as an engine of war, and consequently does nothing which the neutral state is bound to prevent as inconsistent with its neutrality. The matter of course stands otherwise if the limits of bare necessity are passed.

Whether a neutral state may permit a belligerent force to pass through its territory.

During the eighteenth century it was an undisputed doctrine that a neutral state might grant a passage through its territory to a belligerent army, and that the concession formed no ground of complaint on the part of the other belligerent. The earlier writers of the last century, and Sir R. Phillimore more lately, preserve this view, only so far modifying it as to insist with greater strength that the privilege, if accorded, shall be offered impartially to both belligerents[1]. But the most recent authors assert a contrary opinion[2]; no direct attempt has been made since 1815 to take advantage of the asserted right; and the permission granted to the allies in that year to cross Switzerland in order to invade France was extorted from the Federal Council under circumstances which would in any case rob the precedent of authority[3]. The same country in 1870 denied a passage to bodies of Alsatians, enlisted for the French army, but travelling without arms or uniforms[4]; and there can be no question that existing opinion would imperatively forbid any renewed laxity of conduct in this respect on the part of neutral countries. Passage for the sole and obvious purpose of attack is clearly forbidden. The grant of permission is an act done by the state with the express object of furthering a warlike end, and is in its nature

[1] De Martens, Précis, § 310; Kent, lect. vi; Klüber, § 284; Manning, p. 245; Wheaton, Elem. pt. iv. c. iii. § 8; Phillimore, iii. § cliii. Pando (§ cxci) follows Vattel in saying that in cases of extreme necessity the belligerent may effect his passage even against the will of the neutral.

[2] Heffter, § 147; Bluntschli, § 770; Calvo, § 2345; Negrin, p. 173.

[3] Wheaton, Elem. pt. iv. chap. iii. § 4.

[4] Bluntschli, § 770.