

**ELEMENTS**  
OF  
**INTERNATIONAL LAW:**  
WITH  
**A SKETCH**  
OF THE  
**HISTORY OF THE SCIENCE.**

BY  
**HENRY WHEATON, LL.D.**

**RESIDENT MINISTER FROM THE UNITED STATES IN AMERICA TO THE  
COURT OF BERLIN;**

*Member of the American Philosophical Society of Philadelphia; of the Royal Asiatic Society  
of London; and of the Scandinavian Literary Society of Copenhagen.*

**IN TWO VOLUMES.**

**VOL. II.**

**LONDON:**  
**B. FELLOWES, LUDGATE STREET.**

**1836.**

LONDON :  
PRINTED BY R. CLAY, BREAD-STREET-HILL.

## CONTENTS OF VOL. II.

### PART FOURTH.

#### INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE RELATIONS.

#### CHAPTER I.

##### COMMENCEMENT OF WAR, AND ITS IMMEDIATE EFFECTS.

	PAGE
§ 1. Redress by forcible means between nations . . . . .	3
2. Reprisals . . . . .	5
3. Effect of reprisals . . . . .	7
4. Embargo previous to declaration of hostilities . . . . .	8
5. Right of making war, in whom vested . . . . .	9
6. Public or solemn war . . . . .	10
7. Perfect or imperfect war . . . . .	<i>ib.</i>
8. Declaration of war, how far necessary . . . . .	11
9. Enemy's property found in the territory on the com- mencement of war, how far liable to confiscation . . . . .	12
10. Rule of reciprocity . . . . .	19
11. Droits of admiralty . . . . .	20

	PAGE
§12. Debts due to the enemy . . . . .	21
13. Trading with the enemy, unlawful on the part of subjects of the belligerent state . . . . .	25
14. Trade with the common enemy, unlawful on the part of allied subjects . . . . .	37
15. Contracts with the enemy prohibited . . . . .	39
16. Persons domiciled in the enemy's country liable to reprisals . . . . .	<i>ib.</i>
17. Species of residence constituting domicil . . . . .	42
18. Merchants residing in the east . . . . .	68
19. House of trade in the enemy's country . . . . .	70
20. Converse of the rule . . . . .	71
21. National character of ships . . . . .	72
22. Sailing under the enemy's license . . . . .	73

---

## CHAPTER II.

### RIGHTS OF WAR AS BETWEEN ENEMIES.

§ 1. Rights of war against an enemy . . . . .	75
2. Limits to the rights of war against the persons of an enemy . . . . .	76
3. Exchange of prisoners of war . . . . .	77
4. Persons exempt from acts of hostility . . . . .	79
5. Enemy's property, how far subject to capture and confiscation . . . . .	80
6. Ravaging the enemy's territory, when lawful . . . . .	82
7. Distinction between private property taken at sea, or on land . . . . .	84
8. What persons are authorized to engage in hostilities against the enemy . . . . .	85
9. Non-commissioned captors . . . . .	86

CONTENTS OF VOL. II.

v

	PAGE
§10. Privateers . . . . .	87
11. Title to property captured in war . . . . .	88
12. Validity of maritime captures determined in the courts of the captor's country . . . . .	89
13. Jurisdiction of the courts of the captor, how far ex- clusive . . . . .	91
14. Condemnation by consular tribunal sitting in the neutral country . . . . .	94
15. Responsibility of the captor's government for the acts of its commissioned cruizers and courts . . . . .	95
16. Title to real property, how transferred in war, <i>jus</i> <i>postliminii</i> . . . . .	112
17. Good faith towards enemies . . . . .	113
18. Truce or armistice . . . . .	114
19. Power to conclude an armistice . . . . .	115
20. Period of its operation . . . . .	116
21. Rules for interpreting conventions of truce . . . . .	117
22. Recommencement of hostilities on the expiration of truce . . . . .	118
23. Capitulations for the surrender of troops and fortresses	119
24. Passports, safe-conducts, and licenses . . . . .	122
25. Licenses to trade with the enemy . . . . .	123
26. Authority to grant licenses . . . . .	125
27. Ransom of captured property . . . . .	128

---

CHAPTER III.

RIGHTS OF WAR AS TO NEUTRALS.

§ 1. Rights and duties of neutrality . . . . .	132
2. Neutrality modified by a limited alliance with one of the belligerent parties . . . . .	133

	PAGE
§ 3. Qualified neutrality, arising out of antecedent treaty stipulations, admitting the armed vessels and prizes of one belligerent into the neutral ports, whilst those of the other are excluded . . . . .	134
4. Hostilities within the territory of the neutral state . . . . .	137
5. Passage through the neutral territory . . . . .	<i>ib.</i>
6. Captures within the maritime territorial jurisdiction, or by vessels stationed within it or hovering on the coasts . . . . .	138
7. Vessels chased into the neutral territory and there captured . . . . .	139
8. Claim on the ground of violation of neutral territory, must be sanctioned by the neutral state . . . . .	140
9. Restitution by the neutral state of property captured within its jurisdiction, or otherwise in violation of its neutrality . . . . .	141
10. Limitations of the neutral jurisdiction to restore in cases of illegal capture . . . . .	147
11. Right of asylum in neutral ports dependent on the consent of the neutral state . . . . .	148
12. Neutral impartiality, in what it consists . . . . .	149
13. Arming and equipping vessels, and enlisting men within the neutral territory, by either belligerent, unlawful . . . . .	150
14. Prohibition enforced by municipal statutes . . . . .	151
15. Immunity of the neutral territory, how far it extends to neutral vessels on the high seas . . . . .	157
16. Usage of nations subjecting enemy's goods in neutral vessels to capture . . . . .	160
17. Neutral vessels laden with enemy goods subject to confiscation by the ordinances of some states . . . . .	161
18. Goods of a friend on board the ships of an enemy . . . . .	162

	PAGE
§19. The two maxims, of <i>free ships free goods</i> , and <i>enemy ships enemy goods</i> , not necessarily connected . . . . .	165
20. Conventional law as to <i>free ships free goods</i> . . . . .	167
21. Contraband of war . . . . .	185
22. Transportation of military persons and despatches in the enemy's service . . . . .	210
23. Penalty for the carrying of contraband . . . . .	217
24. Rule of the war of 1756 . . . . .	225
25. Breach of blockade . . . . .	228
26. Right of visitation and search . . . . .	248
27. Forcible resistance by an enemy master . . . . .	256
28. Right of a neutral to carry his goods in an <i>armed</i> enemy vessel . . . . .	257
29. Neutral vessels under enemy's convoy, liable to capture . . . . .	260

#### CHAPTER IV.

##### TREATY OF PEACE.

§ 1. Power of making peace dependent on the municipal constitution . . . . .	279
2. Power of making treaties of peace limited in its extent . . . . .	280
3. Effects of a treaty of peace . . . . .	285
4. <i>Utī possidetis</i> the basis of every treaty of peace unless the contrary be expressed . . . . .	288
5. From what time the treaty of peace commences its operation . . . . .	290
6. In what condition things taken are to be restored . . . . .	293
7. Breach of the treaty . . . . .	294
8. Disputes respecting its breach, how adjusted . . . . .	295



**PART FOURTH.**

**INTERNATIONAL RIGHTS OF STATES IN  
THEIR HOSTILE RELATIONS.**



**PART FOURTH.**

**INTERNATIONAL RIGHTS OF STATES IN  
THEIR HOSTILE RELATIONS.**

**VOL. II.**

**B**



others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each state is also entitled to judge for itself what are the nature and extent of the injuries which will justify such a means of redress.

Among the various modes of terminating the differences between nations, by forcible means short of actual war, are the following:—

1. By laying an embargo or sequestration on the ships and goods, or other property of the offending nation found within the territory of the injured state.

2. By taking forcible possession of the thing in controversy, by securing to yourself by force, and refusing to the other nation, the enjoyment of the right drawn in question.

3. By exercising the right of vindictive retaliation, (*retorsio facti*,) or of amicable retaliation, (*retorsion de droit*;) by which last the one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances.

4. By making reprisals upon the persons and things belonging to the offending nation,

## PART FOURTH.

### INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE RELATIONS.

---

#### CHAP. I.

##### COMMENCEMENT OF WAR, AND ITS IMMEDIATE EFFECTS.

THE independent societies of men called states acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every state has therefore a right to resort to force as the only means of redress for injuries inflicted upon it by

§ 1.  
Redress by  
forcible  
means  
between  
nations.

others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each state is also entitled to judge for itself what are the nature and extent of the injuries which will justify such a means of redress.

Among the various modes of terminating the differences between nations, by forcible means short of actual war, are the following:—

1. By laying an embargo or sequestration on the ships and goods, or other property of the offending nation found within the territory of the injured state.

2. By taking forcible possession of the thing in controversy, by securing to yourself by force, and refusing to the other nation, the enjoyment of the right drawn in question.

3. By exercising the right of vindictive retaliation, (*retorsio facti*;) or of amicable retaliation, (*retorsion de droit*;) by which last the one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances.

4. By making reprisals upon the persons and things belonging to the offending nation,

until a satisfactory reparation is made for the alleged injury.<sup>1</sup>

This last seems to extend to every species of forcible means for procuring redress, short of actual war, and, of course, to include all the others above enumerated. Reprisals are *negative*, when a state refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims; they are *positive*, when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.<sup>2</sup>

§ 2.  
Reprisals.

Reprisals are also either *general* or *special*. They are *general*, when a state which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war, and may be considered as

<sup>1</sup> Vattel, liv. ii. ch. 18. Kluber, Droit des Gens Moderne de l'Europe, § 234.

<sup>2</sup> Kluber, § 234, Note (c).

amounting to a declaration of hostilities, unless satisfaction is made by the offending state. *Special* reprisals are, where letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation.<sup>3</sup>

Reprisals are to be granted only in case of a clear and open denial of justice. The right of granting them is vested in the sovereign or supreme power of the state, and in former times was regulated by treaties and by the municipal ordinances of different nations. Thus, in England, the statute 4 Hen. V. cap. 7, declares, "That if any subjects of the realm "are oppressed in time of peace by any "foreigners, the king will grant marque in "due form to all that feel themselves "grieved;" which form is specially pointed out, and directed to be observed in the statute. So also, in France, the celebrated marine ordinance of Louis XIV. of 1681, prescribed the forms to be observed for obtaining special letters of marque by French subjects against those of other nations. But these special

<sup>3</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. Duponceau's Transl. p. 182, Note.

reprisals in time of peace have almost entirely fallen into disuse.<sup>4</sup>

Any of these acts of reprisal, or resort to forcible means of redress between nations, may assume the character of war in case adequate satisfaction is refused by the offending state. “Reprisals,” says *Vattel*, “are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage till it obtains payment of what is due, together with interest and damages; or keep it as a pledge till the offended nation has refused ample satisfaction. The effects thus seized are preserved while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and then reprisals are accomplished. If the

§ 3.  
Effect of  
Reprisals.

<sup>4</sup> *Vattel*, *Droit des Gens*, liv. ii. ch. 18, §§ 342—346. *Bynkershoek*, *Quæst. Jur. Pub.* lib. i. cap. 24. *Martens*, *Précis du Droit des Gens Moderne de l'Europe*, liv. viii. ch. 2, § 260.

“ two nations, upon this ground of quarrel,  
 “ come to an open rupture, satisfaction is  
 “ considered as refused from the moment that  
 “ war is declared, or hostilities commenced ;  
 “ and then, also, the effects seized may be  
 “ confiscated.”<sup>5</sup>

§ 4.  
 Embargo  
 previous to  
 declaration  
 of hosti-  
 lities.

Thus, where an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens in 1803, under such circumstances as were considered by the British government as constituting a hostile aggression on the part of Holland, Sir *W. Scott*, (Lord Stowell,) in delivering his judgment in this case, said, that “ the seizure was at first  
 “ equivocal ; and if the matter in dispute had  
 “ terminated in reconciliation, the seizure  
 “ would have been converted into a mere  
 “ civil embargo, so terminated. Such would  
 “ have been the retroactive effect of that  
 “ course of circumstances. On the contrary,  
 “ if the transaction end in hostility, the retro-  
 “ active effect is exactly the other way. It  
 “ impresses the direct hostile character upon  
 “ the original seizure ; it is declared to be no  
 “ embargo ; it is no longer an equivocal act,

<sup>5</sup> Vattel, Droit des Gens, liv. ii. ch. 18, § 342.

“ subject to two interpretations ; there is a  
 “ declaration of the *animus* by which it is  
 “ done ; that it was done *hostili animo*, and  
 “ is to be considered as a hostile measure *ab*  
 “ *initio* against persons guilty of injuries which  
 “ they refuse to redeem by any amicable  
 “ alteration of their measures. This is the  
 “ necessary course, if no particular compact  
 “ intervenes for the restitution of such pro-  
 “ perty taken before a formal declaration of  
 “ hostilities.”<sup>6</sup>

The right of making war, as well as of § 5.  
 authorizing reprisals, or other acts of vindic- Right of  
 tive retaliation, belongs in every civilized making  
 nation to the supreme power of the state. war, in  
 whom  
 vested.  
 The exercise of this right is regulated by the  
 fundamental laws or municipal constitution in  
 each country, and may be delegated to its  
 inferior authorities in remote possessions, or  
 even to a commercial corporation—such, for  
 example, as the British East India Company  
 —exercising, under the authority of the state,  
 sovereign rights in respect to foreign nations.<sup>7</sup>

<sup>6</sup> Robinson's Adm. Rep. vol. v. p. 246. The Boedes  
 Lust.

<sup>7</sup> Vattel, liv. iii. ch. 1, § 4. Martens, Précis, &c. liv. viii.  
 ch. 2, §§ 260, 264.

§ 6.  
Public or  
solemn  
war.

A contest by force between independent sovereign states is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations makes no distinction in this respect between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted, by the laws of war, to one of the belligerent parties, is equally permitted to the other.<sup>8</sup>

§ 7.  
Perfect or  
imperfect  
war.

A *perfect* war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case and under every circumstance permitted by the general laws of war. An *imperfect* war is limited as to places, persons, and things.<sup>9</sup>

A civil war between the different members of the same society is what *Grotius* calls a

<sup>8</sup> Vattel, *Droit des Gens*, liv. iii. ch. 12. Rutherford's *Inst.* b. ii. ch. 9, § 15.

<sup>9</sup> Such were the limited hostilities authorized by the United States against France in 1798. Dallas' *Rep.* vol. ii. p. 21; vol. iv. p. 37.

*mixed* war ; it is, according to him, *public* on the side of the established government, and *private* on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations.<sup>10</sup>

A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. It was uniformly practised by the ancient Romans, and by the states of modern Europe until about the middle of the seventeenth century. The latest example of this kind was the declaration of war by France against Spain, at Brussels, in 1635, by heralds at arms, according to the forms observed during the middle age. The present usage is to publish a manifesto, within the territory of the state declaring war, announcing the existence of hostilities and the motives for commencing them. This publication may be necessary for the instruction and direction of the subjects of the belligerent state in respect to their intercourse with the enemy, and

§ 8.  
Declara-  
tion of war,  
how far  
necessary.

<sup>10</sup> Vide ante, pt. i. ch. 2, § 19.

regarding certain effects which the voluntary law of nations attributes to war in form. Without such a declaration, it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war, from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.<sup>11</sup>

§ 9.  
Enemy's  
property,  
found in  
the terri-  
tory on the  
commence-  
ment of  
war, how  
far liable to  
confisca-  
tion.

As no declaration, or other notice to the enemy, of the existence of war, is necessary, in order to legalize hostilities, and as the property of the enemy is, in general, liable to seizure and confiscation as prize of war, it would seem to follow as a consequence that the property belonging to him and found within the territory of the belligerent state at the commencement of hostilities is liable to the same fate with his other property wheresoever situated. But there is a great diversity of opinions upon this subject among institutional writers, and the tendency of modern usage

<sup>11</sup> Grotius, de Jur. Bel. ac Pac. lib. i. cap. 3, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2. Rutherford's Inst. b. ii. ch. 9, § 10. Vattel, Droit des Gens, liv. iv. ch. 4, § 56. Kluber, Droit des Gens Moderne de l'Europe, §§ 238, 239.

between nations seems to be to exempt such property from the operations of war.

One of the exceptions to the general rule, laid down by the text writers, which subjects all the property of the enemy to capture, respects property locally situated within the jurisdiction of a neutral state ; but this exemption is referred to the right of the neutral state, not to any privilege which the situation gives to the hostile owner. Does reason, or the approved practice of nations, suggest any other exception ?

With the Romans, who considered it lawful to enslave, or even to kill an enemy found within the territory of the state on the breaking out of war, it would very naturally follow that his property found in the same situation would become the spoil of the first taker. *Grotius*, whose great work on the laws of war and peace appeared in 1625, adopts as the basis of his opinion upon this question the rules of the Roman law, but qualifies them by the more humane sentiments which began to prevail in the intercourse of mankind at the time he wrote. In respect to debts, due to private persons, he considers the right to demand them as suspended only during the war, and reviving with the peace. *Bynkershoek*, who wrote about

the year 1737, adopts the same rules, and follows them to all their consequences. He holds that, as no declaration of war to the enemy is necessary, no notice is necessary to legalize the capture of his property, unless he has by express compact reserved the right to withdraw it on the breaking out of hostilities. This rule he extends to things in action, as debts and credits, as well as to things in possession. He adduces, in confirmation of this doctrine, a variety of examples from the conduct of different states, embracing a period of something more than a century, beginning in the year 1556 and ending in 1657. But he acknowledges that the right had been questioned, and especially by the States-General of Holland; and he adduces no precedent of its exercise later than the year 1667, seventy years before his publication. Against the ancient examples cited by him, there is the negative usage of the subsequent period of nearly a century and a half previously to the wars of the French revolution. During all this period, the only exception to be found is the case of the Silesia loan in 1753. In the argument of the English civilians against the reprisals made by the king of Prussia in that case on account of the capture of Prussian vessels by the

cruizers of Great Britain, it is stated that  
 “ it would not be easy to find an instance  
 “ where a prince had thought fit to make  
 “ reprisals upon a debt due from himself to  
 “ private men. There is a confidence that  
 “ this will not be done. A private man lends  
 “ money to a prince upon an engagement  
 “ of honour ; because a prince cannot be  
 “ compelled, like other men, by a court of  
 “ justice. So scrupulously did England and  
 “ France adhere to this public faith, that even  
 “ during the war,” (alluding to the war ter-  
 minated by the peace of Aix-la-Chapelle,)  
 “ they suffered no inquiry to be made whether  
 “ any part of the public debt was due to the  
 “ subjects of the enemy, though it is certain  
 “ many English had money in the French  
 “ funds, and many French had money in  
 “ ours.”<sup>12</sup>

*Vattel*, who wrote about twenty years after  
 Bynkershoek, after laying down the general

<sup>12</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 16.  
 Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2, 7. Letters of  
 Camillus, by A. Hamilton, No. 20.

*Vattel* calls the Report of the English civilians “ un ex-  
 cellent morceau de droit des gens,” (liv. ii. ch. 7, § 34,  
 Note a;) and Montesquieu terms it “ une reponse sans  
 replique.”—*Œuvres*, tom. vi. p. 445.

principle that the property of the enemy is liable to seizure and confiscation, qualifies it by the exception of real property (*les immeubles*) held by the enemy's subjects within the belligerent state, which having been acquired by the consent of the sovereign, is to be considered as on the same footing with the property of his own subjects, and not liable to confiscation *jure belli*. But he adds that the rents and profits may be sequestrated, in order to prevent their being remitted to the enemy. As to debts, and other things in action, he holds that war gives the same right to them as to the other property belonging to the enemy. He then quotes the example referred to by Grotius, of the hundred talents due by the Thebans to the Thessalians, of which Alexander had become master by right of conquest, but which he remitted to the Thessalians as an act of favour : and proceeds to state that " the sovereign has naturally the same right over what his subjects may be indebted to the enemy ; therefore he may confiscate debts of this nature, if the term of payment happen in time of war, or at least he may prohibit his subjects from paying while the war lasts. But at present, the advantage and safety of commerce have induced all the sovereigns

“ of Europe to relax from this rigour. And  
“ as this custom has been generally received,  
“ he who should act contrary to it would injure  
“ the public faith ; since foreigners have con-  
“ fided in his subjects only in the firm per-  
“ suasion that the general usage would be  
“ observed. The state does not even touch  
“ the sums which it owes to the enemy ; every  
“ where, in case of war, the funds confided  
“ to the public, are exempt from seizure and  
“ confiscation.” In another passage, Vattel  
gives the reason of this exemption. “ In  
“ reprisals, the property of subjects is seized,  
“ as well as that belonging to the sovereign or  
“ state. Every thing which belongs to the  
“ nation is liable to reprisals as soon as it can  
“ be seized, provided it be not a deposit con-  
“ fided to the public faith. This deposit being  
“ found in our hands only on account of that  
“ confidence which the proprietor has reposed  
“ in our good faith, ought to be respected  
“ even in case of open war. Such is the usage in  
“ France, in England, and elsewhere, in respect  
“ to money placed by foreigners in the public  
“ funds.” Again he says : “ The sovereign  
“ declaring war can neither detain those sub-  
“ jects of the enemy who were within his do-  
“ minions at the time of the declaration, nor

principle that the property of the enemy is liable to seizure and confiscation, qualifies it by the exception of real property (*les immeubles*) held by the enemy's subjects within the belligerent state, which having been acquired by the consent of the sovereign, is to be considered as on the same footing with the property of his own subjects, and not liable to confiscation *jure belli*. But he adds that the rents and profits may be sequestrated, in order to prevent their being remitted to the enemy. As to debts, and other things in action, he holds that war gives the same right to them as to the other property belonging to the enemy. He then quotes the example referred to by Grotius, of the hundred talents due by the Thebans to the Thessalians, of which Alexander had become master by right of conquest, but which he remitted to the Thessalians as an act of favour : and proceeds to state that " the  
" sovereign has naturally the same right over  
" what his subjects may be indebted to the  
" enemy ; therefore he may confiscate debts  
" of this nature, if the term of payment happen  
" in time of war, or at least he may prohibit  
" his subjects from paying while the war lasts.  
" But at present, the advantage and safety of  
" commerce have induced all the sovereigns

“ of Europe to relax from this rigour. And  
“ as this custom has been generally received,  
“ he who should act contrary to it would injure  
“ the public faith ; since foreigners have con-  
“ fided in his subjects only in the firm per-  
“ suasion that the general usage would be  
“ observed. The state does not even touch  
“ the sums which it owes to the enemy ; every  
“ where, in case of war, the funds confided  
“ to the public, are exempt from seizure and  
“ confiscation.” In another passage, Vattel  
gives the reason of this exemption. “ In  
“ reprisals, the property of subjects is seized,  
“ as well as that belonging to the sovereign or  
“ state. Every thing which belongs to the  
“ nation is liable to reprisals as soon as it can  
“ be seized, provided it be not a deposit con-  
“ fided to the public faith. This deposit being  
“ found in our hands only on account of that  
“ confidence which the proprietor has reposed  
“ in our good faith, ought to be respected  
“ even in case of open war. Such is the usage in  
“ France, in England, and elsewhere, in respect  
“ to money placed by foreigners in the public  
“ funds.” Again he says : “ The sovereign  
“ declaring war can neither detain those sub-  
“ jects of the enemy who were within his do-  
“ minions at the time of the declaration, nor

before referred to, in order to enforce their argument that the king of Prussia could not justly extend his reprisals to the Silesia loan, that “ French ships and effects, wrongfully “ taken, after the Spanish war, and before the “ French war, have, during the heat of the “ war with France, and since, been restored “ by sentence of your Majesty’s courts to the “ French owners. No such ships or effects “ ever were attempted to be confiscated as “ enemy’s property, here, during the war; “ because, had it not been for the wrong first “ done, these effects would not have been in “ your Majesty’s dominions.”

§ 11.  
Droits of  
Admiralty.

The ancient law of England seems thus to have surpassed in liberality its modern practice. In the recent maritime wars commenced by that country, it has been the constant usage to seize and condemn as droits of admiralty the property of the enemy found in its ports at the breaking out of hostilities, and this practice does not appear to have been influenced by the corresponding conduct of the enemy in that respect. As has been observed by an English writer, commenting on the judgment of Sir W. Scott in the case of the Dutch ships, “ there seems something of subtlety in

“ the distinction between the virtual and the  
 “ actual declaration of hostilities, and in the  
 “ device of giving to the actual declaration a  
 “ retrospective efficacy, in order to cover the  
 “ defect of the virtual declaration previously  
 “ implied.”<sup>16</sup>

In respect to debts due to an enemy pre-  
 viously to the commencement of hostilities,  
 the law of Great Britain pursues a policy of a  
 more liberal, or at least of a wiser character.  
 A maritime power which has an overwhelming  
 naval superiority may have an interest, or may  
 suppose it has an interest, in asserting the right  
 of confiscating enemy's property seized before  
 an actual declaration of war; but a nation,  
 which by the extent of its capital must generally  
 be the creditor of every other commercial  
 country, can certainly have no interest in  
 confiscating debts due to an enemy, since  
 that enemy might, in almost every instance,  
 retaliate with much more injurious effect.  
 Hence, though the prerogative of confiscating  
 such debts, and compelling their payment to  
 the crown, still theoretically exists, it is seldom  
 or never practically exerted. The right of the

§ 12.  
 Debts due  
 to the  
 enemy.

<sup>16</sup> Chitty's Law of Nations, ch. 3, p. 80.

original creditor to sue for the recovery of the debt is not extinguished : it is only suspended during the war, and revives in full force on the restoration of peace.<sup>17</sup>

Such, too, is the law and practice of the United States. The debts due by American citizens to British subjects before the war of the revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery, on the restoration of peace between the two countries. The impediments which had existed to the collection of British debts under the local laws of the different states of the confederation were stipulated to be removed by the treaty of peace in 1783 ; but this stipulation proving ineffectual for the complete indemnification of the creditors, the controversy between the two countries on this subject was finally adjusted by the payment of a sum *en bloc* by the government of the United States for the use of the British creditors. The commercial treaty of 1794 also contained an express declaration that it was unjust and impolitic that private

<sup>17</sup> Bosanquet and Puller's Rep. vol. iii. p. 191. *Furtado v. Rogers*. Vesey, Jun. Rep. vol. xiii. p. 71, *ex parte* Boussmaker. Edward's Adm. Rep. p. 60. *The Nuestra Señora de los Dolores*.

contracts should be impaired by national differences, with a mutual stipulation that “neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies which they may have in the public funds, or in the public or private banks, shall ever, in any event of war, or national differences, be sequestered or confiscated.”<sup>18</sup>

On the commencement of hostilities between France and Great Britain in 1793, the former power sequestered the debts and other property belonging to the subjects of her enemy, which decree was retaliated by a countervailing measure on the part of the British government. By the additional articles to the treaty of peace between the two powers, concluded at Paris in April, 1814, the sequestrations were removed on both sides, and commissaries were appointed to liquidate the claims of British subjects for the value of their property unduly confiscated by the French authorities, and also for the total or partial loss of the debts due to them, or other property unduly retained under sequestration subsequently to 1792. The engagement thus extorted from France may be

<sup>18</sup> Dallas' Rep. vol. iii. pp. 4, 5, 199—235.

considered as a severe application of the rights of conquest to a fallen enemy, rather than a measure of even-handed justice; since it does not appear that French property, seized in the ports of Great Britain and at sea, in anticipation of hostilities, and subsequently condemned as droits of admiralty, was restored to the original owners under this treaty on the return of peace between the two countries.<sup>19</sup>

So also, on the rupture between Great Britain and Denmark in 1807, the Danish ships and other property, which had been seized in the British ports and on the high seas before the actual declaration of hostilities, were condemned as droits of admiralty by the retrospective operation of the declaration. The Danish government issued an ordinance, retaliating this seizure by sequestrating all debts due from Danish to British subjects, and causing them to be paid into the Danish royal treasury. The English court of King's Bench determined that this ordinance was not a legal defence to a suit in England for such a debt, not being conformable to the usage of nations; the text writers having condemned the practice, and no instance having

<sup>19</sup> Martens, *Nouveau Recueil*, tom. ii. p. 16.

occurred of the exercise of the right, except the ordinance in question, for upwards of a century. The soundness of this judgment may well be questioned. It has been justly observed, that between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason draws no distinction; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations by which the judgment of the sovereign may be guided.<sup>20</sup>

One of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the states at war, without the license of their respective governments. In Sir W. Scott's judgment, in the case of the *Hoop*, this is stated to be a principle of

§ 13.  
Trading  
with the  
enemy,  
unlawful  
on the part  
of subjects  
of the  
belligerent  
state.

<sup>20</sup> Maule & Selwyn's Rep. vol. vi. p. 92. *Wolff v. Oxholm*. Cranch's Rep. vol. viii. p. 110. *Brown v. the United States*.

universal law, and not peculiar to the maritime jurisprudence of England. It is laid down by *Bynkershoek* as a universal principle of law. "There can be no doubt," says that writer, "that from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such intercourse, as is often the case, commerce is forbidden by the mere operation of the law of war. Declarations of war themselves sufficiently manifest it, for they enjoin on every subject to attack the subjects of the other prince, seize on their goods, and do them all the harm in their power. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war, as to commerce. Hence it is alternately permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandizes only, while others are prohibited; and sometimes it is pro-

“hibited altogether. But in whatever manner  
 “it may be permitted, whether generally or  
 “specially, it is always, in my opinion, so far  
 “a suspension of the laws of war; and in this  
 “manner, there is partly war and partly peace  
 “between the subjects of both countries.”<sup>21</sup>

“It appears from these passages to have  
 “been the law of Holland. *Valin* states it to  
 “have been the law of France, whether the  
 “trade was attempted to be carried on in  
 “national or in neutral vessels; and it appears  
 “from a case cited (in the *Hoop*) to have  
 “been the law of Spain; and it may without  
 “rashness be affirmed to be a general prin-  
 “ciple of law in most of the countries of  
 “Europe.”<sup>22</sup>

Sir *W. Scott* proceeds to state two grounds upon which this sort of communication is forbidden. The first is, that “by the law and constitution of Great Britain the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by

<sup>21</sup> Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 3.*

<sup>22</sup> *Valin, Comm. sur l'Ordonn. de la Marine, liv. iii. tit. 6, art. 3.*

“ permitting, where he sees proper, that com-  
“ mercial intercourse which is a partial sus-  
“ pension of the war. There may be occasions  
“ on which such an intercourse may be highly  
“ expedient ; but it is not for individuals to  
“ determine on the expediency of such occa-  
“ sions, on their own notions of commerce  
“ merely, and possibly on grounds of private  
“ advantage not very reconcilable with the  
“ general interests of the state. It is for the  
“ state alone, on more enlarged views of  
“ policy, and of all circumstances that may  
“ be connected with such an intercourse, to  
“ determine when it shall be permitted, and  
“ under what regulations. No principle ought  
“ to be held more sacred than that this inter-  
“ course cannot subsist on any other footing  
“ than that of the direct permission of the  
“ state. Who can be insensible to the con-  
“ sequences that might follow, if every person  
“ in time of war had a right to carry on a  
“ commercial intercourse with the enemy, and,  
“ under colour of that, had the means of  
“ carrying on any other species of intercourse  
“ he might think fit ? The inconvenience to  
“ the public might be extreme ; and where is  
“ the inconvenience on the other side, that  
“ the merchant should be compelled, in such

“ a situation of the two countries, to carry  
“ on his trade between them (if necessary)  
“ under the eye and control of the govern-  
“ ment charged with the care of the public  
“ safety?

“ Another principle of law, of a less politic  
“ nature, but equally general in its reception  
“ and direct in its application, forbids this sort  
“ of communication as fundamentally incon-  
“ sistent with the relation existing between  
“ the two belligerent countries; and that is,  
“ the total inability to sustain any contract  
“ by an appeal to the tribunals of the one  
“ country, on the part of the subjects of the  
“ other. In the law of almost every country,  
“ the character of alien enemy carries with it  
“ a disability to sue, or to sustain, in the  
“ language of the civilians, a *persona standi in*  
“ *judicio*. A state in which contracts cannot  
“ be enforced cannot be a state of legal com-  
“ merce. If the parties who are to contract  
“ have no right to compel the performance  
“ of the contract, nor even to appear in a  
“ court of justice for that purpose, can there  
“ be a stronger proof that the law imposes a  
“ legal inability to contract? To such trans-  
“ actions it gives no sanction—they have no  
“ legal existence; and the whole of such

“ commerce is attempted without its protection, and against its authority. *Bynker-shoek* expresses himself with force upon this argument, in his first book, chapter vii., where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable. He says, that cases of commerce are undistinguishable from cases of any other species in this respect: ‘ But if the enemy be once permitted to bring actions, it is difficult to distinguish from what causes they may arise ; nor have I been able to observe that this distinction has ever been carried into practice.’ ”

Sir *W. Scott* then notices the constant current of decisions in the British courts of prize where the rule had been rigidly enforced in cases where acts of parliament had, on different occasions, been made to relax the navigation law and other revenue acts ; where the government had authorized, under the sanction of an act of parliament, a homeward trade from the enemy’s possessions, but had not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence ; where strong claims, not merely of convenience, but

of necessity, excused it on the part of the individual ; where cargoes had been laden before the war, but the parties had not used all possible diligence to countermand the voyage after the first notice of hostilities ; and where it had been enforced, not only against British subjects, but also against those of its allies in the war, upon the supposition that the rule was founded upon a universal principle, which states allied in war had a right to notice and apply mutually to each other's subjects.

Such, according to this eminent civilian, are the general principles of the rule under which the public law of Europe, and the municipal law of its different states, have interdicted all commerce with an enemy. It is thus sanctioned by the double authority of public and of private jurisprudence ; and is founded both upon the sound and salutary principle forbidding all intercourse with an enemy, unless by permission of the sovereign or state, and upon the doctrine that he who is *hostis*—who has no *persona standi in judicio*, no means of enforcing contracts, cannot make contracts unless by such permission.<sup>23</sup>

<sup>23</sup> Robinson's Adm. Rep. vol. i. p. 196. The Hoop.

Decisions  
of the  
American  
courts.

The same principles were applied by the American courts of justice to the intercourse of their citizens with the enemy on the breaking out of the late war between the United States and Great Britain. A case occurred in which a citizen had purchased a quantity of goods within the British territory, a long time previous to the declaration of hostilities, and had deposited them on an island near the frontier ; upon the breaking out of hostilities, his agents had hired a vessel to proceed to the place of deposit, and bring away the goods ; on her return she was captured, and, with the cargo, condemned as prize of war. It was contended for the claimant that this was not a trading within the meaning of the cases cited to support the condemnation ; that, on the breaking out of war, every citizen had a right, and it was the interest of the community to permit its members, to withdraw property purchased before the war, and lying in the enemy's country. But the supreme court determined that whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations had acknowledged the demoralizing effects which would result from the admission of

individual intercourse between the states at war. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it. Condemnation to the captor is equally the fate of the enemy's property, and of that found engaged in an anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks. This liability of the property of a citizen to condemnation as prize of war may likewise be accounted for on other considerations. Every thing that issues from a hostile country is, *primâ facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen, or an ally, at the same time that he makes out his interest, he confesses the commission of an offence, which, under a well-known rule

of the municipal law, deprives him of his right to prosecute his claim. Nor did this doctrine rest upon abstract reasoning only: it was supported by the practice of the most enlightened, perhaps it might be said, of all commercial nations: and it afforded the court full confidence in their judgment in this case, that they found, upon recurring to the records of the court of appeals in prize causes established during the war of the revolution, that in various cases it was reasoned upon as the established law of that court. Certain it was, that it was the law of England before the American revolution, and therefore formed a part of the admiralty and maritime jurisdiction conferred upon the United States courts by their federal constitution. Whether the trading, in that case, was such as in the eye of the prize law subjects the property to capture and confiscation, depended on the legal force of the term. If by *trading*, in the law of prize, were meant that signification of the term, which consists in negotiation or contract, the case would certainly not come under the penalty of the rule. But the object, policy, and spirit of the rule are intended to cut off all communication, or actual locomotive intercourse between individuals of the states at war. Negotiation or

contract had therefore no necessary connexion with the offence. Intercourse, inconsistent with actual hostility, is the offence against which the rule is directed; and by substituting this term for that of *trading with the enemy*, an answer was given to the argument, that this was not a trading within the meaning of the cases cited. Whether, on the breaking out of war, a citizen has a right to remove to his own country with his property, or not, the claimant certainly had not a right to leave his own country for the purpose of bringing home his property from an enemy country. As to the claim for the vessel, it was held to be founded upon no pretext whatever; for the undertaking was altogether voluntary and inexcusable.<sup>24</sup>

So also, where goods were purchased, some time before the war, by the agent of an American citizen in Great Britain, but not shipped until nearly a year after the declaration of hostilities, they were pronounced liable to confiscation. Supposing a citizen had a right, on the breaking out of hostilities, to withdraw his property, purchased before the war, from the enemy's country, (on which the

<sup>24</sup> Cranch's Rep. vol. viii. p. 155. The Rapid.

court gave no opinion,) such right must be exercised with due diligence, and within a reasonable time after a knowledge of hostilities. To admit a citizen to withdraw property from a hostile country a long time after the commencement of war, upon the pretext of its having been purchased before the war, would lead to the most injurious consequences, and hold out temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent the right could not exist.<sup>25</sup>

We have seen what is the rule of public and municipal law on this subject, and what are the sanctions by which it is guarded. Various attempts have been made to evade its operation, and to escape its penalties; but its inflexible rigour has defeated all these attempts. The apparent exceptions to the rule, far from weakening its force, confirm and strengthen it. They all resolve themselves into cases where the trading was with a neutral, or the circumstances were considered as implying a license, or the trading was not consummated until the enemy had ceased to be such. In all other cases, an

<sup>25</sup> Cranch's Rep. vol. viii. p. 434. The St. Lawrence. Vol. ix. p. 120, S. C.

express license from the government is held to be necessary to legalize commercial intercourse with the enemy.<sup>26</sup>

Not only is such intercourse with the enemy, on the part of the subjects of the belligerent state, prohibited and punished with confiscation in the prize courts of their own country, but, during a conjoint war, no subject of an ally can trade with the common enemy, without being liable to the forfeiture in the prize courts of the ally of his property engaged in such trade. This rule is a corollary of the other, and is founded upon the principle that such trade is forbidden to the subjects of the co-belligerent by the municipal law of his own country, by the universal law of nations, and by the express or implied terms of the treaty of alliance subsisting between the allied powers. And as the former rule can be relaxed only by the permission of the sovereign power of the state, so this can be relaxed only by the permission of the

§ 14.  
Trade  
with the  
common  
enemy,  
unlawful  
on the part  
of allied  
subjects.

<sup>26</sup> Robinson's Adm. Rep. vol. vi. p. 127. The Franklin. Vol. iv. p. 195. The Madonna del le Gracie. Vol. v. p. 141. The Juffrow Catharina. P. 251. The Alby. Wheaton's Rep. vol. ii. Appendix, Note I. p. 34.

allied nations according to their mutual agreement. A declaration of hostilities naturally carries with it an interdiction of all commercial intercourse. Where one state only is at war, this interdiction may be relaxed as to its own subjects without injuring any other states; but when allied nations are pursuing a common cause against a common enemy, there is an implied, if not an express contract, that neither of the co-belligerent states shall do any thing to defeat the common object. If one state allows its subjects to carry on an uninterrupted trade with the enemy, the consequence will be that it will supply aid and comfort to the enemy which may be injurious to the common cause. It should seem that it is not enough, therefore, to satisfy the prize court of one of the allied states, to say that the other has allowed this practice to its own subjects; it should also be shown, either that the practice is of such a nature as cannot interfere with the common operations, or that it has the allowance of the other confederate state.<sup>27</sup>

<sup>27</sup> Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 10.* Robinson's *Adm. Rep.* vol. iv. p. 251; vol. vi. p. 403. *The Neptunus.*

It follows as a corollary from the principle, <sup>§ 15.</sup> interdicting all commercial and other pacific Contracts with the enemy prohibited. intercourse with the public enemy, that every species of private contract made with his subjects during the war is unlawful. The rule thus deduced is applicable to insurance on enemy's property and trade; to the drawing and negotiating of bills of exchange between subjects of the powers at war; to the remission of funds, in money or bills, to the enemy's country; to commercial partnerships entered into between the subjects of the two countries after the declaration of war, or existing previous to the declaration, which last are dissolved by the mere force and act of the war itself, although as to other contracts it only suspends the remedy.<sup>28</sup>

*Grotius*, in the second chapter of his third <sup>§ 16.</sup> book, where he is treating of the liability of Persons domiciled in the enemy's country liable to reprisals. the property of subjects for the injuries committed by the state to other communities, lays down that "by the law of nations, all the subjects of the offending state, who

<sup>28</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 21. Duponceau's Transl. p. 165, Note. Kent's Commentaries on American Law, vol. i. p. 64.

“ are such from a permanent cause, whether  
“ natives or emigrants from another coun-  
“ try, are liable to reprisals, but not so those  
“ who are only travelling or sojourning for  
“ a little time ;—for reprisals,” says he, “ have  
“ been introduced as a species of charge im-  
“ posed in order to pay the debts of the  
“ public ; from which are exempt those who  
“ are only temporarily subject to the laws.  
“ Ambassadors and their goods are, however,  
“ excepted from this liability of subjects, but  
“ not those sent to an enemy.” In the fourth  
chapter of the same book, where he is treating  
of the right of killing and doing other bodily  
harm to enemies, in what he calls *solemn war*,  
he holds that this right extends, “ not only to  
“ those who bear arms, or are subjects of the  
“ author of the war, but to all those who are  
“ found within the enemy’s territory. In fact,  
“ as we have reason to fear the hostile inten-  
“ tions even of strangers who are within the  
“ enemy’s territory at the time, that is suffi-  
“ cient to render the right of which we are  
“ speaking applicable even to them in a  
“ general war. In which respect there is a  
“ distinction between war and reprisals, which  
“ last, as we have seen, are a kind of con-

“ tribution paid by the subjects for the debts  
“ of the state.”<sup>29</sup>

*Barbeyrac*, in a note collating these passages, observes, that “ the late M. Cocceius, “ in a dissertation which I have already cited, “ *De Jure Belli in Amicos*, rejects this distinction, and insists that even those foreigners who have not been allowed time “ to retire ought to be considered as adhering “ to the enemy, and for that reason justly “ exposed to acts of hostility. In order to “ supply this pretended defect, he afterwards “ distinguishes foreigners who remain in the “ country, from those who only transiently “ pass through it, and are constrained by “ sickness or the necessity of their affairs. “ But this is alone sufficient to show that, “ in this place, as in many others, he criticised our author without understanding “ him. In the following paragraph, Grotius “ manifestly distinguishes from the foreigners “ of whom he has just spoken those who are “ permanent subjects of the enemy, by whom “ he doubtless understands, as the learned “ Gronovius has already explained, those who “ are *domiciled* in the country. Our author

<sup>29</sup> De Jur. Bel. ac Pac. lib. iii. cap. 2, § 7; cap. 4, § 6.

“ explains his own meaning in the second  
 “ chapter of this book, in speaking of reprisals,  
 “ which he allows against this species of  
 “ foreigners, whilst he does not grant them  
 “ against those who only pass through the  
 “ country, or are temporarily resident in  
 “ it.”<sup>20</sup>

Whatever may be the extent of the claims of a man's native country upon his political allegiance, there can be no doubt that the natural-born subject of one country may become the citizen of another, in time of peace, for the purposes of trade, and may become entitled to all the commercial privileges attached to his acquired domicile. On the other hand, if war breaks out between his adopted country and his native country, or any other, his property becomes liable to reprisals in the same manner as the effects of those who owe a permanent allegiance to the enemy state.

§ 17.  
 Species of  
 residence  
 consti-  
 tuting  
 domicile.

As to what species of residence constitutes such a domicile as will render the party liable to reprisals, the text writers are deficient in definitions and details. Their defects are

<sup>20</sup> Grotius, par Barbeyrac, *in loc.*

supplied by the precedents furnished by the British prize courts, which, if they have not applied the principle with undue severity in the case of neutrals, have certainly not mitigated it in its application to that of British subjects resident in the enemy's country on the commencement of hostilities.

In the judgment of the lords of appeal in prize causes, upon the cases arising out of the capture of St. Eustatius by Admiral Rodney, delivered in 1785 by *Lord Camden*, he stated that "if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence, not attended with these circumstances, ought to be considered as a permanent residence." In applying the evidence and the law to the resident foreigners in St. Eustatius, he said, that "in every point of view, they ought to be considered resident subjects. Their persons, their lives, their industry, were employed for the benefit of the state under whose protection they lived; and if war broke out, they continuing to reside there, paid their proportion of taxes, imposts, and the like, equally with

“ natural-born subjects, and no doubt come  
 “ within that description.”<sup>31</sup>

“ Time,” says Sir *W. Scott*, “ is the grand  
 “ ingredient in constituting domicil. In most  
 “ cases, it is unavoidably conclusive. It is  
 “ not unfrequently said, that if a person comes  
 “ only for a special purpose, *that* shall not  
 “ fix a domicil. This is not to be taken in  
 “ an unqualified latitude, and without some  
 “ respect to the time which such a purpose  
 “ may or shall occupy ; for if the purpose be  
 “ of such a nature as *may probably*, or *does*  
 “ *actually*, detain the person for a great length  
 “ of time, a general residence might grow upon  
 “ the special purpose. A special purpose may  
 “ lead a man to a country, where it shall  
 “ detain him the whole of his life. Against  
 “ such a long residence, the plea of an ori-  
 “ ginal special purpose could not be averred ;  
 “ it must be inferred, in such a case, that  
 “ other purposes forced themselves upon him,  
 “ and mixed themselves with the original  
 “ design, and impressed upon him the cha-  
 “ racter of the country where he resided.

<sup>31</sup> MS. Proceedings of the Commissioners under the Treaty of 1794, between Great Britain and the United States. Opinion of Mr. W. Pinkney in the case of the *Betsey*.

“ Supposing a man comes into a bellige-  
“ rent country at or before the beginning  
“ of a war, it is certainly reasonable not  
“ to bind him too soon to an acquired cha-  
“ racter, and to allow him a fair time to  
“ disentangle himself; but if he continues to  
“ reside during a good part of the war, con-  
“ tributing by the payment of taxes and other  
“ means to the strength of that country, 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 frauds and abuses of  
“ masked, pretended, original and sole pur-  
“ poses 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  
“ rule 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 quantity  
“ of time, would nevertheless have that effect  
“ if distributed over a larger space of time.  
“ This matter is to be taken in the 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, with but few exceptions,

“ that mere length of time shall not constitute  
“ a domicil.”<sup>22</sup>

In the case of the *Indian Chief*, determined in 1800, Mr. Johnson, a citizen of the United States domiciled in England, had engaged in a mercantile enterprize to the British East Indies, a trade prohibited to British subjects, but allowed to American citizens under the commercial treaty of 1794, between the United States and Great Britain. The vessel came into a British port on its return voyage, and was seized as engaged in illicit trade. Mr. Johnson, having then left England, was determined not to be a British subject at the time of capture, and restitution was decreed. In delivering his judgment in this case, Sir *W. Scott* said, “ Taking it to be clear  
“ that the national character of Mr. Johnson,  
“ as a British merchant, was founded in resi-  
“ dence only, that it was acquired by resi-  
“ dence, and rested on that circumstance  
“ alone, it must be held that from the  
“ moment he turned his back on the country  
“ where he had resided, on his way to his own  
“ country, he was in the act of resuming his  
“ original character, and must be considered

<sup>22</sup> Robinson's Adm. Rep. vol. ii. p. 324. The Harmony.

“ as an American. The character that is  
 “ gained by residence, ceases by non-residence.  
 “ It is an adventitious character, and no  
 “ longer adheres to him from the moment  
 “ that he puts himself in motion, *bond fide*,  
 “ to quit the country, *sine animo revertendi*.”<sup>33</sup>

The native character easily reverts, and it requires fewer circumstances to constitute domicil, in the case of a native subject, than to impress the national character on one who is originally of another country. Thus the property of a Frenchman, who had been residing and was probably naturalized in the United States, but who had returned to St. Domingo, and shipped from thence the produce of that island to France, was condemned in the High Court of Admiralty.<sup>34</sup>

The native  
 character  
 easily  
 reverts.

In the *Indian Chief*, the case of Mr. Dutilth is referred to by the claimant's counsel, as having obtained restitution, though *at the time of sailing* he was resident in the enemy's

<sup>33</sup> Robinson's Adm. Rep. vol. iii. p. 12. The *Indian Chief*.

<sup>34</sup> Robinson's Adm. Rep. vol. v. p. 99. La *Virginie*. The same rule is also adopted in the prize law of France, (*Code des Prises*, tom. i. pp. 92, 139, 303,) and by the American prize courts, (*Wheaton's Rep.* vol. ii. p. 76.) The *Dos Hermanos*.

country ; but a decision of the lords of appeal, in 1800, is mentioned by Sir C. Robinson, in which Mr. Dutilth's property was condemned according to the circumstances of his residence at the time of capture. That decision is more particularly stated by Sir J. Nicholl, at the hearing of the case of the *Harmony* before the lords, July 7, 1803. " The case of Mr. " Dutilth also illustrates the present. He " came to Europe about the end of July, " 1793, at a time when there was a great " deal of alarm on account of the state of " commerce. He went to Holland, then not " only in a state of amity, but of alliance with " this country ; he continued there until the " French entered. During the whole time he " was there, he was without any establish- " ment ; he had no counting-house ; he had " no contracts nor dealings with contractors " there ; he employed merchants there to " sell his property, paying them a commis- " sion. Upon the French entering into Hol- " land, he applied for advice to know what " was left for him to do under the circum- " stances, having remained there on account " of the doubtful state of mercantile credit, " which not only affected Dutch and Ame- " rican, but English houses, who were all

“ looking after the state of credit in that  
 “ country. In 1794, when the French came  
 “ there, Mr. D. applied to Mr. Adams, the  
 “ American minister, who advised him to stay  
 “ until he could get a passport. He continued  
 “ there until the latter end of that year, and  
 “ having wound up his concerns, came away.  
 “ Some part of his property was captured  
 “ before he came there. That part which  
 “ was taken before he came there was re-  
 “ stored to him, (the *Fair American*, Adm. 1796,)  
 “ but that part which was taken while he  
 “ was there was condemned, and *that* because  
 “ he was in Holland at the time of the  
 “ capture.”— (The *Hannibal* and *Pomona*,  
 Lords, 1800.)<sup>35</sup>

The case of the *Diana*, determined by Sir W. Scott in 1803, is also full of instruction on this subject. During the war which commenced in 1795 between Great Britain and Holland, the colony of Demerara surrendered to the British arms, and by the treaty of Amiens it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the

<sup>35</sup> Wheaton's Rep. vol. ii. p. 56, Note.

notification of the treaty, for the purpose of disposing of their effects acquired before or during the war, in which term they might have the free enjoyment of their property. Previous to the declaration of war against Holland in 1803, the *Diana* and several other vessels, laden with colonial produce, were captured on a voyage from Demerara to Holland. Immediately after the declaration, and before the expiration of the three years from the notification of the treaty of Amiens, Demerara again surrendered to Great Britain. Claims to the captured property were filed by original British subjects, inhabitants of Demerara, some of whom had settled in the colony while it was in possession of Great Britain; others before that event. The cause came on for hearing after it had again become a British colony.

Sir *W. Scott* decreed restitution to those British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held that those of the first class by settling in Demerara while belonging to Great Britain, afforded a presumption of their intending to return if the island should be transferred to a foreign power,

which presumption, recognised by the treaty, relieved those claimants from the necessity of proving such intention. He thought it reasonable that they should be admitted to their *jus postliminii*, and he held them entitled to the protection of British subjects. But he was clearly of opinion that “mere recency of establishment would not avail, if the intention of making a permanent residence there was fixed upon the party. The case of Mr. Whitehill fully established this point. He had 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. Here recency, therefore, would not be sufficient.”

But the property of those claimants who had settled in Demerara before that colony came into the possession of Great Britain, was condemned. “Having settled without any faith in British possession, it cannot be supposed,” he said, “that they would have relinquished their residence because that possession had ceased. They had passed from one sovereignty with indifference; and if they may be supposed to have looked

“ again to a connexion with this country,  
 “ they must have viewed it as a circumstance  
 “ that was in no degree likely to affect their  
 “ intention of remaining there. On the situa-  
 “ tion of persons settled there previous to the  
 “ time of British possession, I feel myself  
 “ obliged to pronounce that they must be  
 “ considered in the same light as persons  
 “ resident in Amsterdam. It must be under-  
 “ stood, however, that if there were among  
 “ these any who were actually removing, and  
 “ that fact is properly ascertained, their goods  
 “ may be capable of restitution. All that I  
 “ mean to express is, that there must be  
 “ evidence of an intention to remove on the  
 “ part of those who settled prior to British  
 “ possession, the presumption not being in  
 “ their favour.”<sup>36</sup>

Case of  
 persons  
 removing  
 from the  
 enemy's  
 country  
 on the  
 breaking  
 out of war.

The case of the *Ocean*, determined in 1804, was a claim relating to British subjects settled in foreign states in time of amity, and taking early measures to withdraw themselves on the breaking out of war. It appeared that the claimant had been settled as a partner in a house of trade in Holland, but that he had made arrangements for the dissolution of the

<sup>36</sup> Robinson's Adm. Rep. vol. v. p. 60. The Diana.

partnership, and was prevented from removing personally only by the violent detention of all British subjects who happened to be within the territories of the enemy at the breaking out of the war. In this case, Sir *W. Scott* said, "It would, I think, be " going further than the law requires, to con- " clude this person by his former occupation, " and by his present constrained residence " in France, so as not to admit him to " have taken himself out of the effect of " supervening hostilities, by the means which " he had used for his removal. On sufficient " proof being made of the property, I shall " be disposed to hold him entitled to resti- " tution."<sup>37</sup>

In a note to this case, Sir *C. Robinson* states that the situation of British subjects wishing to remove from the enemy's country on the event of a war, but prevented by the sudden occurrence of hostilities from taking measures sufficiently early to obtain restitution, formed not unfrequently a case of considerable hardship in the prize court. He advises persons so situated, on their actual removal, to make application to government for a special

<sup>37</sup> *Robinson's Adm. Rep.* vol. v. p. 91.

pass, rather than to trust valuable property to the effect of a mere intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution. And Sir *W. Scott*, in the case of the *Dree Gebroeders*, observes, "that pretences of withdrawing funds are, at all times, to be watched with considerable jealousy; but when the transaction appears to have been conducted *boná fide* with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this kind are entitled to be treated with some indulgence." But in a subsequent case, where an indulgence was allowed by the court for the withdrawal of British property under peculiar circumstances, he intimated that the decree of restitution in that particular case was not to be understood as in any degree relaxing the necessity of obtaining a license wherever property is to be withdrawn from the enemy's country.<sup>38</sup>

The same principles as to the effect of

<sup>38</sup> Robinson's Adm. Rep. vol. iv. p. 234; vol. v. p. 141. The *Juffrow Catharina*.

domicil or commercial inhabitancy in the enemy's country were adopted by the prize tribunals of the United States during the late war with Great Britain. The rule was applied to the case of native British subjects, who had emigrated to the United States long before the war, and became naturalized citizens under the laws of the Union, as well as to native citizens residing in Great Britain at the time of the declaration. The naturalized citizens in question had, long prior to the declaration of war, returned to their native country, where they were domiciled and engaged in trade at the time the shipments in question were made. The goods were shipped before they had a knowledge of the war. At the time of the capture, one of the claimants was yet in the enemy's country, but had, since he heard of the capture, expressed his anxiety to return to the United States, but had been prevented by various causes set forth in his affidavit. Another had actually returned some time after the capture, and a third was still in the enemy's country.

Decisions  
of the  
American  
courts.

In pronouncing its judgment in this case, the Supreme Court stated that, there being no dispute as to the facts upon which the domicil of the claimants was asserted, the questions of

law to be considered were two: *First*, by what means and to what extent a national character may be impressed upon a person, different from that which permanent allegiance gives him? and, *secondly*, what are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or that in which he had been naturalized?

Upon the first of these questions, the opinions of the text writers and the decisions of the British courts of prize, already cited, were referred to; but it was added, that in deciding whether a person has obtained the right of an acquired domicil, it was not to be expected that much, if any assistance, should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law, and it becomes the duty of courts of justice to establish rules for the proper application of those principles. The question whether the person to be affected by the right of domicil has sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he has made no express declaration on the

subject, and his secret intention is to be discovered, his *acts* must be attended to as affording the most satisfactory evidence of his intention. On this ground the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of an intention permanently to reside there, as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appears that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by residence even of a few days. This was one of the rules of the British prize courts, and it appeared to be perfectly reasonable. Another was that a neutral or subject, found residing in a foreign country, is presumed to be there *animo manendi*; and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. As to some other rules of the prize courts of

England, particularly those which fix the national character of a person on the ground of constructive residence or the peculiar nature of his trade, the court was not called upon to give an opinion at that time; because in the present case it was admitted that the claimants had acquired a right of domicile in Great Britain at the time of the breaking out of the war between that country and the United States.

The next question was, what are the consequences to which this acquired domicile may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes permanent allegiance. A neutral, in this situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance; but although he cannot be considered an enemy in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the enemy's trade as is connected

with his residence. It is found adhering to the enemy; he is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or perhaps refuses, when required by his country, to return. The same rule as to property engaged in the commerce of the enemy, applies to neutrals, and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with the rest of the world.

But this national character which a man acquires by residence may be thrown off at pleasure by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. The reasonableness of this rule can hardly be disputed. Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an inten-

tion of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bonâ fide* intention should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies these declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal as to put in his power whichever may best suit his purpose when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confis-

cation, by alleging that he had intended to remove from the enemy's country to his own, then neutral, and therefore that as a neutral, the trade was to him lawful? If war exists between the country of his residence and his native country, and his property be seized by the former or by the latter, shall he be heard to say, in the former case, that he was a domiciled subject of the country of the captor, and in the latter that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character, and thus to parry the belligerent rights of both? It was to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above-mentioned had been adopted. Upon what sound principle could a distinction be framed between the case of a neutral and the subject of one belligerent domiciled in the country of the other at the breaking out of the war? The property of each found engaged in the commerce of their adopted country belonged to them before the war in their character of subjects of that country, so long as they continued to retain their domicil; and when war takes place between that country and any other, by which

## COMMENCEMENT OF WAR,

the two nations and all their subjects become enemies to each other, it follows that this property, which was once the property of a friend, belongs now to him who, in reference to that property, is an enemy.

This doctrine of the common law courts and prize tribunals of England is founded, like that mentioned under the first head, upon international law, and was believed to be strongly supported by reason and justice. And why, it might be confidently asked, should not the property of enemies' subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicile, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound by such residence to the society of which they were members, subject to the laws of the state, and owing a qualified allegiance thereto. They are obliged to defend it, (with an exception of such subject with relation to his native country,) in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their locality, is to be considered as the goods

of the nation *in regard to other states*. It belongs in some sort to the state, from the right which the state has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. (*Vattel*, liv. i. ch. 14, § 182.) “In reprisals,” continues the same author, “we seize on “the property of the subject, just as on that “of the sovereign ; every thing that belongs “to the nation is subject to reprisals, wher- “ever it can be seized, with the exception “of a deposit entrusted to the public faith.” (Liv. ii. ch. 18, § 344.) Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals as a part of the property of the nation, it would seem difficult to maintain that the same consequences would not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

If then nothing but an actual removal, or a *bond fide* beginning to remove, could change a national character acquired by domicile ; and if, at the time of the inception of the voyage, as

well as at the time of capture, the property belonged to such domiciled person, in his character of a subject; what was there that did or ought to exempt it from capture by the cruizers of his native country, if at the time of capture he continues to reside in the country of the adverse belligerent?

It was contended that a native or naturalized subject of one country who is surprised, in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance; and that until such election be made, his property ought to be protected from capture by the cruizers of the latter. This doctrine was believed to be as unfounded in reason and justice, as it clearly was in law. In the first place, it was founded upon a presumption that the person will certainly remove before it can possibly be known whether he may elect to do so or not. It was said, that the presumption ought to be made, because upon receiving information of the war it would be his duty to return home. This position was denied. It was his duty to commit no acts of hostility against his native country, and to return to her assistance when required to

do so ; nor would any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse permission to him to withdraw whenever he wished to do so, unless under peculiar circumstances, which by such removal at a critical period might endanger the public safety. The conventional law of nations was in conformity with these principles. It is not uncommon to stipulate in treaties that the subjects of each party shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects to remove or remain. They are left free to choose for themselves ; and when they have made their election, may claim the right of enjoying it under the treaty. But until the election is made, their former character continues unchanged. Until this election is made, if the claimant's property found upon the high seas engaged in the commerce of his adopted country, should be permitted by the cruisers of the other belligerent to pass free under a notion that he may elect to remove upon notice of the war, and should arrive safe ; what is to be done, in case the owner of it should elect to remain where he is ? For if captured and brought immediately



to adjudication, it must, upon this doctrine, be acquitted until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all and can lose nothing. If he, after the capture, should find it for his interest to remain where he is domiciled, his property embarked before his election was made is safe; and if he finds it best to return, it is safe of course. It is safe, whether he goes or stays. The doctrine producing such contradictory consequences was not only unsupported by any authority, but would violate principles long and well established in the prize courts of England, and which ought not, without strong reasons which may render them inapplicable to America, to be disregarded by the court. The rule there was, that the character of property during war cannot be changed *in transitu* by any act of the party, subsequent to the capture. The rule indeed went further; as to the correctness of which, in its greatest extension, no judgment needed then to be given: but it might safely be affirmed, that the change could not and ought not to be effected by an election of the owner and shipper, made subsequent to the capture, and more especially after a know-

ledge of the capture is obtained by the owner. Observe the consequences. The capture is made and known. The owner is allowed to deliberate whether it is his intention to remain a subject of his adopted, or of his native country. If the capture be made by the former, then he elects to become a subject of that country; if by the latter, then a subject of that. Could such a privileged situation be tolerated by either belligerent? Could any system of law be correct which places an individual, who adheres to one belligerent, and down to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, was altogether a novel theory, and seemed from the course of the argument to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on the subject was correct, no such hardship could exist; for if before the election is made, his property on the ocean

is liable to capture by the cruizers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted.”<sup>20</sup>

§ 18.  
Merchants  
residing in  
the east.

The national character of merchants residing in Europe and America is derived from that of the country in which they reside. In the eastern parts of the world, European persons, trading under the shelter and protection of the factories founded there, take their national character from that association under which they live and carry on their trade : this distinction arises from the nature and habits of the countries. In the western parts of the world, alien merchants mix in the society of the natives ; access and intermixture are permitted, and they become incorporated to nearly the full extent. But in the east, from almost the oldest times, an immiscible character has been kept up ; foreigners are not

<sup>20</sup> Cranch's Rep. vol. viii. p. 253. See other cases of Domicil in the American Prize Courts, Wheaton's Rep. vol. ii. Appendix, Note I. p. 27.

admitted into the general body and mass of the nation ; they continue strangers and sojourners, as all their fathers were. Thus, with respect to establishments in Turkey, the British courts of prize, during war with Holland, determined that a merchant, carrying on trade at Smyrna, under the protection of the Dutch consul, was to be considered a Dutchman, and condemned his property as belonging to an enemy. And thus in China, and generally throughout the east, persons admitted into a factory are not known in their own peculiar national character ; and not being permitted to assume the character of the country, are considered only in the character of that association or factory.

But these principles are considered not applicable to the vast territories occupied by the British in Hindostan ; because, as Sir *W. Scott* observes, “ though the sovereignty  
“ of the Mogul is occasionally brought forward  
“ for purposes of policy, it hardly exists other-  
“ wise than as a phantom : it is not applied  
“ in any way for the regulation of their esta-  
“ blishments. Great Britain exercises the  
“ power of declaring war and peace, which  
“ is among the strongest marks of actual  
“ sovereignty ; and if the high and empyrean

“ sovereignty of the Mogul is sometimes brought  
 “ down from the clouds, as it were, for the  
 “ purposes of policy, it by no means interferes  
 “ with the actual authority which that country,  
 “ and the East India Company, a creature  
 “ of that country, exercises there with full  
 “ effect. Merchants residing there are hence  
 “ considered as British subjects.”<sup>40</sup>

§ 19.  
 House of  
 trade in  
 the  
 enemy's  
 country.

In general, the national character of a person, as neutral or enemy, is determined by that of his domicile; but the property of a person may acquire a hostile character, independently of his national character, derived from personal residence. Thus the property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize. This rule does not apply to cases arising at the commencement of a war, in reference to persons who, during peace, had habitually carried on trade in the enemy's country, though not resident there; and are therefore entitled to time to withdraw from that commerce. But if a person enters into a house of trade in the enemy's country;

<sup>40</sup> Robinson's Adm. Rep. vol. iii. p. 12. The Indian Chief.

or continues that connexion during the war, he cannot protect himself by mere residence in a neutral country.<sup>41</sup>

The converse of this rule of the British prize courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see, in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions.<sup>42</sup>

<sup>41</sup> Robinson's Adm. Rep. vol. i. p. 1. The *Vigilantia*. Vol. ii. p. 255. The *Susa*. Vol. iii. p. 41. The *Portland*. Vol. v. pp. 2, 97. The *Jonge Classina*. Wheaton's Rep. vol. i. p. 159. The *Antonia Johanna*. Vol. iv. p. 105. The *Friendschaft*.

<sup>42</sup> Mr. Chief Justice Marshall, Cranch's Rep. vol. viii. p. 253. The *Venus*.

§ 21.  
National  
character  
of ships.

So also, in general, and unless under special circumstances, the character of ships depends on the national character of the owner as ascertained by his domicil; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails: she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country; for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries may actually have in them. But where the cargo is laden on board in time of peace, and documented as foreign property, in the same manner with the ship, with the view of avoiding alien duties, the sailing under the foreign flag and pass is not held conclusive as to the cargo. A distinction is made between the ship, which is held bound by the character imposed upon it by the authority of the government from which all the documents issue, and the goods, whose character has no such dependence upon the authority of the state. In time of

war, a more strict principle may be necessary ; but where the transaction takes place in peace, and without any expectation of war, the cargo ought not to be involved in the condemnation of the vessel, which, under these circumstances, is considered as incorporated into the navigation of that country whose flag and pass she bears.<sup>43</sup>

We have already seen that no commercial intercourse can be lawfully carried on between the subjects of states at war with each other, except by the special permission of their respective governments. As such intercourse can only be legalized in the subjects of one belligerent state by a license from their own government, it is evident that the use of such a license from the enemy must be illegal unless authorized by their own government ; for it is the sovereign power of the state alone which is competent to act on the considerations of policy by which such an exception from the ordinary consequences of war must be controlled. And this principle is applicable not only to a license protecting a direct

§ 22.  
Sailing  
under the  
enemy's  
license.

<sup>43</sup> Robinson's Adm. Rep. vol. i. p. 1. The *Vigilantia*. Vol. v. p. 161. The *Vrouw Anna Catharina*. Dodson's Adm. Rep. vol. i. p. 131. The *Success*.

commercial intercourse with the enemy, but to a voyage to a country in alliance with the enemy, or even to a neutral port; for the very act of purchasing or procuring the license from the enemy is an intercourse with him prohibited by the laws of war: and even supposing it to be gratuitously issued, it must be for the special purpose of furthering the enemy's interests, by securing supplies necessary to prosecute the war, to which the subjects of the belligerent state have no right to lend their aid by sailing under these documents of protection."

" Cranch's Rep. vol. viii. p. 181. The Julia. P. 203. The Aurora. Wheaton's Rep. vol. ii. p. 143. The Ariadne. Vol. iv. p. 100. The Caledonia.

## CHAP. II.

## RIGHTS OF WAR AS BETWEEN ENEMIES.

IN general, it may be stated, that the rights of war, in respect to the enemy, are to be measured by the object of the war. Until that object is attained, the belligerent has, strictly speaking, a right to use every means necessary to accomplish the end for which he has taken up arms. We have already seen that the practice of the ancient world, and even the opinion of some modern writers on public law, made no distinction as to the means to be employed for this purpose. Even such institutional writers as *Bynkershoek* and *Wolf*, who lived in the most learned and not least civilized countries of Europe at the commencement of the eighteenth century, assert the broad principle that every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, and even poison, may be

§ 1.  
Rights of  
war  
against an  
enemy.

employed against him ; and that an unlimited right is acquired by the victor to his person and property. Such, however, was not the sentiment and practice of enlightened Europe at the period when they wrote ; since *Grotius* had long before inculcated milder and more humane principles, which *Vattel* subsequently enforced and illustrated, and which are adopted by the unanimous concurrence of all the publicists of the present age.<sup>1</sup>

§ 2.  
Limits to  
the rights  
of war  
against the  
persons of  
an enemy.

The law of nature has not precisely determined how far an individual is allowed to make use of force, either to defend himself against an attempted injury, or to obtain reparation when refused by the aggressor, or to bring an offender to punishment. We can only collect, from this law, the general rule, that such use of force as is necessary for obtaining these ends is not forbidden. The same principle applies to the conduct of sovereign states existing in a state of natural independence with respect to each other. No use of force is lawful, except so far as it is necessary. A belligerent has,

<sup>1</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. Wolfius, Jus Gent. § 878. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 4, §§ 5—7. Vattel, Droit des Gens, liv. iii. ch. 8.

therefore, no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. Those ends may be accomplished by making prisoners of those who are taken in arms, or compelling them to give security that they will not bear arms against the victor for a limited period, or during the continuance of the war. The killing of prisoners can only be justifiable in those extreme cases where resistance on their part, or on the part of others who come to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing that nothing but the strongest necessity will justify such an act.<sup>2</sup>

According to the law of war, as still practised by savage nations, prisoners taken in war are put to death. Among the more polished

§ 3.  
Exchange  
of prison-  
ers of war.

<sup>2</sup> Rutherford's Inst. b. ii. ch. 9, § 15.

nations of antiquity, this practice gradually gave way to that of making slaves of them. For this, again, was substituted that of ransoming, which continued through the feudal wars of the middle age. The present usage of exchanging prisoners was not firmly established in Europe until some time in the course of the seventeenth century. Even now this usage is not obligatory among nations who choose to insist upon a ransom for the prisoners taken by them, or to leave their own countrymen in the enemy's hands until the termination of the war. Cartels for the mutual exchange of prisoners of war are regulated by special convention between the belligerent states, according to their respective interests and views of policy. Sometimes prisoners of war are permitted, by capitulation, to return to their own country upon condition not to serve again during the war, or until duly exchanged; and officers are frequently released upon their parole, subject to the same condition. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war without defeating its legitimate purposes. By the modern usage of nations, commissaries are permitted to reside in the

respective belligerent countries, to negotiate and carry into effect the arrangements necessary for this object. Breach of good faith in these transactions can be punished only by withholding from the party guilty of such violation the advantages stipulated by the cartel; or, in cases which may be supposed to warrant such a resort, by reprisals or vindictive retaliation.<sup>3</sup>

All the members of the enemy state may lawfully be treated as enemies in a public war; but it does not therefore follow, that all these enemies may be lawfully treated alike; though we may lawfully destroy some of them, it does not therefore follow that we may lawfully destroy all. For the general rule derived from the natural law is still the same, that no use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of

§ 4.  
Persons  
exempt  
from acts  
of hos-  
tility.

<sup>3</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 7, §§ 8, 9; cap. 11, §§ 9—13. Vattel, Droit des Gens, liv. iii. ch. 8, § 153. Robinson's Adm. Rep. vol. iii. Note, Appendix A. Correspondence between M. Otto, French Commissary of Prisoners in England, and the British Transport Board, 1801. Annual Register, vol. xlv. p. 265. (State Papers.)

civilized nations, founded upon this principle, has therefore exempted the persons of the sovereign and his family, the members of the civil government, women and children, cultivators of the earth, artisans, labourers, merchants, men of science and letters, and generally all other public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war by which they forfeit their immunity.<sup>4</sup>

§ 5.  
Enemy's  
property,  
how far  
subject to  
capture  
and con-  
fiscation.

The application of the same principle has also limited and restrained the operations of war against the territory and other property of the enemy. From the moment one state is at war with another, it has, on general principles, a right to seize on all the enemy's property, of whatsoever kind and wheresoever found, and to appropriate the property thus taken to its own use or to that of the captors. By the ancient law of nations, even what were

<sup>4</sup> Rutherford's Inst. b. ii. ch. 9, § 15. Vattel, *Droit des Gens*, liv. iii. ch. 8, §§ 145—147, 159. Kluber, *Droit des Gens Moderne de l'Europe*, pt. ii. tit. 2, sect. 2, ch. 1, §§ 245—247.

called *res sacræ* were not exempt from capture and confiscation. Cicero has conveyed this idea in his expressive metaphorical language, in the fourth Oration against Verres, where he says that "Victory made all the *sacred* things of the Syracusans *profane*." But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war. Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country. In ancient times, both the movable and immovable property of the vanquished passed to the conqueror. Such was the Roman law of war, often asserted with unrelenting severity, and such was the fate of the Roman provinces subdued by the northern barbarians on the decline and fall of the western empire. A

large portion, from one-third to two-thirds of the lands belonging to the vanquished provincials, was confiscated and partitioned among their conquerors. The last example in Europe of such a conquest was that of England, by William of Normandy. Since that period, among the civilized nations of Christendom, conquest, even when confirmed by a treaty of peace, has been followed by no general or partial transmutation of landed property. The property belonging to the government of the vanquished nation passes to the victorious state, which also takes the place of the former sovereign in respect to the eminent domain. In other respects, private rights are unaffected by conquest.<sup>5</sup>

§ 6.  
Ravaging  
the ene-  
my's terri-  
tory, when  
lawful.

The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of the same original principle of natural law which authorizes us to use against an enemy such a degree

<sup>5</sup> Vattel, *Droit des Gens*, liv. iii. ch. 9, 13. Kluber, *Droit des Gens Moderne de l'Europe*, pt. ii. tit. 2, sect. 2, ch. 1, §§ 250—253. Martens, *Précis*, &c. liv. viii. ch. 4, §§ 279—282.

of violence, and such only, as may be necessary to secure the object of hostilities. The same general rule which determines how far it is lawful to destroy the persons of enemies will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary in order to accomplish the just ends of war, it may be lawfully done, but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our own frontier secured, or if the approaches to a town intended to be attacked cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war. If modern usage has sanctioned any other exceptions, they will be found in the right of reprisals or vindictive retaliation. The whole international code is founded upon reciprocity. The rules it prescribes are observed by one nation in confidence that they will be so by others. Where, then, the established usages of war are violated by an enemy, and there are no other means of restraining his excesses, retaliation may be justly resorted to by the suffering nation, in order to compel the enemy to return to

the observance of the law which he has violated.<sup>6</sup>

§ 7.  
Distinction  
between  
private  
property,  
taken at  
sea, or on  
land.

The progress of civilization has slowly but constantly tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army in lieu of a general confiscation of the property belonging to the inhabitants; and that the objects of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the

<sup>6</sup> Vattel, liv. iii. ch. 8, § 142; ch. 9, §§ 166—173. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. viii. ch. 4, §§ 272—280. Kluber, pt. ii. tit. 2, sect. 2, ch. 1, §§ 262—265.

victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property.

The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent power in a state of mutual hostility. The usage of nations has modified this maxim by legalising such acts of hostility only as are committed by those who are authorized by the express or implied command of the state. Such are the regularly commissioned naval and military forces of the nation, and all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose. *Cicero* tells us, in his *Offices*, that by the Roman feacial law, no person could lawfully engage in battle with the public enemy, without being regularly enrolled and taking the military oath. This was a regulation sanctioned both by policy and religion.

§ 8.  
What persons are authorized to engage in hostilities against the enemy.

The horrors of war would indeed be greatly aggravated, if every individual of the belligerent states was allowed to plunder and slay indiscriminately the enemy's subjects without being in any manner accountable for his conduct. Hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations.<sup>7</sup>

§ 9.  
Non-com-  
missioned  
captors.

It must probably be considered as a remnant of the barbarous practices of those ages when maritime war and piracy were synonymous, that captures made by private armed vessels without a commission, not merely in self-defence, but even by attacking the enemy, are considered lawful, not indeed for the purpose of vesting the enemy's property thus seized in the captors, but to prevent their conduct from being regarded as piratical, either by their own government or by the other belligerent state. Property thus seized is condemned to the government as prize of war, or, as these captures are technically

<sup>7</sup> Vattel, *Droit des Gens*, liv. iii. ch. 15, §§ 223—228.  
Kluber, *Droit des Gens Moderne de l'Europe*, § 267.

called, *Droits of Admiralty*. The same principle is applied to the captures made by armed vessels commissioned against one power, where war breaks out with another: the captures made from that other are condemned, not to the captors, but to the government.<sup>8</sup>

The practice of cruising with private armed vessels commissioned by the state has been hitherto sanctioned by the laws of every maritime nation, as a legitimate means of destroying the commerce of an enemy. This practice has been justly arraigned as liable to gross abuses, as tending to encourage a spirit of lawless depredation, and as being in glaring contradiction to the more mitigated modes of warfare practised by land. Powerful efforts have been made by humane and enlightened individuals to suppress it, as inconsistent with the liberal spirit of the age. The treaty negotiated by Franklin between the United States and Prussia, in 1785, by which it was stipulated that, in case of war, neither power

§ 10.  
Privateers.

<sup>8</sup> Brown's Civ. and Adm. Law, vol. ii. p. 526, Appendix. Robinson's Adm. Rep. vol. iv. p. 72. The Abigail. Dodson's Adm. Rep. p. 397. The Georgiana. Sparks's Diplomatic Correspondence, vol. i. p. 443. Wheaton's Rep. vol. ii. Appendix, Note I. p. 7.

should commission privateers to depredate upon the commerce of the other, furnishes an example worthy of applause and imitation. But this stipulation was not revived on the renewal of the treaty in 1799; and it is much to be feared that so long as maritime captures of private property are tolerated, this particular mode of injuring the enemy's commerce will continue to be practised, especially where it affords the means of countervailing the superiority of the public marine of an enemy.\*

§ 11.  
Title to  
property  
captured  
in war

The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor. This general principle is modified by the positive law of nations, in its application both to personal and real property. As to personal property or movables, the title is, in general, considered as lost to the former proprietor as soon as the enemy has acquired a firm possession; which, as a general rule, is considered as taking place

\* Vattel, liv. iii. ch. 15, § 229. Franklin's Works, vol. ii. pp. 447, 530. Edinburgh Review, vol. viii. pp. 13—15. North American Review, vol. ii. (N. S.) pp. 166—196.

after the lapse of twenty-four hours. The established usage of maritime nations has excepted from the operation of this rule the case of ships and goods captured at sea, the original title to which is not generally considered as completely divested until carried *infra præsidia*, and regularly condemned in a competent court of prize. To such nations who do not acknowledge this rule, the principle of reciprocity or amicable retaliation is applied, by restoring the recaptured property of an ally in cases where the law of his own country would restore, upon the same terms of salvage, and condemning where it condemns. A neutral purchaser is, in all cases, required to produce a regular sentence of condemnation as evidence of his title against the claim of the original proprietor.<sup>10</sup>

§ 12.  
Validity of  
maritime  
captures,  
deter-

The validity of maritime captures must be determined in a court of the captor's government, sitting either in his own country or in

<sup>10</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 3; cap. 9, § 14. Kluber, Droit des Gens Moderne de l'Europe, § 254. Robinson's Adm. Rep. vol. i. p. 50. The Santa Cruz. P. 139. The Flad Oyen. Wheaton's Rep. vol. ii. Appendix, Note I. pp. 40—49; vol. iii. p. 73. The Star. P. 93, Note (a).

mined in  
the courts  
of the  
captor's  
country.

that of its ally. This rule of jurisdiction applies, whether the captured property be carried into a port of the captor's country, into that of an ally, or into a neutral port.

Condem-  
nation of  
property  
lying in  
the ports  
of an ally.

Respecting the *first* case, there can be no doubt. In the *second* case, where the property is carried into the port of an ally, there is nothing to prevent the government of the country, although it cannot itself condemn, from permitting the exercise of that final act of hostility, the condemnation of the property of one belligerent to the other: there is a common interest between the two governments, and both may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. Such an adjudication is therefore sufficient in regard to property taken in the course of the operations of a common war. But where the property is carried into a *neutral* port, it may appear, on principle, more doubtful whether the validity of a capture can be determined even by a court of prize established in the captor's country; and the reasoning of Sir *W. Scott*, in the case of the *Henrick and Maria*, is certainly very cogent, as tending to show the irregularity of the practice; but he considered

Property  
carried  
into a neu-  
tral port.

that the English court of admiralty had gone too far in its own practice of condemning captured vessels lying in neutral ports to recall it to the proper purity of the original principle. In delivering the judgment of the court of appeals in the same case, Sir *William Grant* also held, that Great Britain was concluded by her own inveterate practice, and that neutral merchants were sufficiently warranted in purchasing under such a sentence of condemnation by the constant adjudications of the British tribunals. The same rule has been adopted by the supreme court of the United States, as being justifiable on principles of convenience to belligerents as well as neutrals; and though the prize was in fact within a neutral jurisdiction, it was still to be considered as under the control of the captor, whose possession is considered as that of his sovereign.<sup>11</sup>

This jurisdiction of the national courts § 13. of the captor, to determine the validity of Jurisdiction of the captures made in war under the authority of courts of the captor,

<sup>11</sup> Robinson's Adm. Rep. vol. iv. p. 43; vol. vi. p. 138, Note (a). Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5. Duponceau's Transl. Note, p. 38. Kent's Commentaries on American Law, vol. i. p. 103.

how far  
exclusive.

his government, is exclusive of the judicial authority of every other country, with two exceptions only:—1. Where the capture is made within the territorial limits of a neutral state. 2. Where it is made by armed vessels fitted out within the neutral territory.<sup>13</sup>

In either of these cases, the judicial tribunals of the neutral state have jurisdiction to determine the validity of the captures thus made, and to vindicate its neutrality by restoring the property of its own subjects, or of other states in amity with it, to the original owners. These exceptions to the exclusive jurisdiction of the national courts of the captor have been extended by the municipal regulations of some countries to the restitution of the property of their own subjects, in all cases where the same has been unlawfully captured, and afterwards brought into their ports; thus assuming to the neutral tribunal the jurisdiction of the question of prize or no prize, wherever the captured property is brought within the neutral territory. Such a regulation is contained in the marine ordinance of Louis XIV. of 1681,

<sup>13</sup> Wheaton's Rep. vol. iv. p. 298. The Estrella. Vol. vii. p. 283. The Santissima Trinidad.

and its justice is vindicated by *Valin*, upon the ground that this is done by way of compensation for the privilege of asylum granted to the captor and his prizes in the neutral port. There can be no doubt that such a condition may be expressly annexed by the neutral state to the privilege of bringing belligerent prizes into its ports, which it may grant or refuse at its pleasure, provided it be done impartially to all the belligerent powers; but such a condition is not implied in a mere general permission to enter the neutral ports. The captor who avails himself of such a permission does not thereby lose the military possession of the captured property, which gives to the prize courts of his own country exclusive jurisdiction to determine the lawfulness of the capture. This jurisdiction may be exercised either whilst the captured property is lying in the neutral port, or the prize may be carried thence *infra præsidia* of the captor's country where the tribunal is sitting. In either case, the claim of any neutral proprietor, even a subject of the state into whose ports the captured vessel or goods may have been carried, must, in general, be asserted in the prize court of the belligerent country, which alone has

the word  
as aforesaid

jurisdiction of the question of prize or no prize.<sup>13</sup>

§ 14.  
Condemnation by consular tribunal sitting in the neutral country.

This jurisdiction cannot be exercised by a delegated authority in the neutral country, such as a consular tribunal sitting in the neutral port and acting in pursuance of instructions from the captor's state. Such a judicial authority in the matter of prize of war cannot be conceded by the neutral state to the agents of a belligerent power within its own territory, where even the neutral government itself has no right to exercise such a jurisdiction except in cases where its own neutral jurisdiction and sovereignty have been violated by the capture. A sentence of condemnation pronounced by a belligerent consul in a neutral port is therefore considered as insufficient to transfer the property in vessels or goods captured as prize of war and carried into such port for adjudication.<sup>14</sup>

The jurisdiction of the court of the cap-

<sup>13</sup> Valin, *Comment. sur l'Ordon. de la Marine*, liv. iii. tit. 9. *Des Prises*, art. 15, tom. ii. p. 274. Lampredi, *Trattato del Commercio de' Popoli Neutrali in Tempo de Guerra*, p. 228.

<sup>14</sup> Robinson's *Adm. Rep.* vol. i. p. 135. *The Flad Oyen*.

turing nation is conclusive upon the question of property in the captured thing. Its sentence forecloses all controversy respecting the validity of the capture as between claimant and captors, and those claiming under them, and terminates all ordinary judicial inquiry upon the subject matter. Where the responsibility of the captors ceases, that of the state begins. It is responsible to other states for the acts of the captors under its commission, the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war.

§ 15.  
Responsibility of the captor's government for the acts of its commissioned cruisers and courts.

*Grotius* states that a judicial sentence, plainly against right, (*in re munime dubia*) to the prejudice of a foreigner, entitles his nation to obtain reparation by reprisals: "for the authority of the judge" (says he) "is not of the same force against strangers as against subjects. Here is the difference: subjects are bound up and concluded by the sentence of the judge, though it be unjust, so that they cannot lawfully oppose its execution, nor by force recover their own right, on account of the controlling efficacy of that authority under which they live. But strangers have coercive power," (*i. e.* of reprisals,

Unjust sentence of a foreign court, ground of reprisals.

of which the author is treating,) "though it  
 " be not lawful to use it so long as they can  
 " obtain their right in the ordinary course of  
 " justice."<sup>15</sup>

So also *Bynkershoek*, in treating the same subject, puts an unjust judgment upon the same footing with naked violence in authorizing reprisals on the part of the state whose subjects have been thus injured by the tribunals of another state. And *Vattel*, in enumerating the different modes in which justice may be refused, so as to authorize reprisals, mentions "a judgment manifestly unjust and partial:" and though he states, what is undeniable, that the judgments of the ordinary tribunals ought not to be called in question upon frivolous or doubtful grounds, yet he is manifestly far from attributing to them that sanctity which would absolutely preclude foreigners from seeking redress against them.<sup>16</sup>

These principles are sanctioned by the authority of numerous treaties between the different powers of Europe regulating the subject of reprisals, and declaring that they shall not

<sup>15</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 2, § 5.

<sup>16</sup> Bynkershoek, Quæst. Jur. Pub. Vattel, Droit des Gens.

be granted unless in case of *the denial of justice*. An unjust sentence must certainly be considered a denial of justice, unless the mere privilege of being heard before condemnation is all that is included in the idea of justice.

Even supposing that unjust judgments of municipal tribunals do not form a ground of reprisals, there is evidently a wide distinction in this respect between the ordinary tribunals of the state proceeding under the municipal law as their rule of decision, and prize tribunals appointed by its authority, and professing to administer the law of nations to foreigners as well as subjects. The ordinary municipal tribunals acquire jurisdiction over the person or property of a foreigner by his consent; either *expressed* by his voluntarily bringing the suit, or *implied* by the fact of his bringing his person or property within the territory. But when courts of prize exercise their jurisdiction over vessels captured at sea, the property of foreigners is brought by force within the territory of the state by which those tribunals are constituted. By natural law, the tribunals of the captor's country are no more the rightful exclusive judges of captures in war made on the high seas from under the

Distinction  
between  
municipal  
tribunals  
and courts  
of prize.

neutral flag, than are the tribunals of the neutral country. The equality of nations would, on principle, seem to forbid the exercise of a jurisdiction thus acquired by force and violence, and administered by tribunals which cannot be impartial between the litigating parties, because created by the sovereign of the one to judge the other. Such, however, is the actual constitution of the tribunals in which by the positive international law is vested the exclusive jurisdiction of prizes taken in war. But the imperfection of the voluntary law of nations, in its present state, cannot oppose an effectual bar to the claim of a neutral government seeking indemnity for its subjects who have been unjustly deprived of their property under the erroneous administration of that law. The institution of these tribunals, so far from exempting, or being intended to exempt, the sovereign of the belligerent nation from responsibility for the acts of his commissioned cruisers, is designed to ascertain and fix that responsibility. Those cruisers are responsible only to the sovereign whose commissions they bear. So long as seizures are regularly made upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors are

confirmed by the sovereign in the sentences of the tribunals appointed by him to adjudicate in matters of prize, the neutral has no ground of complaint, and what he suffers is the inevitable result of the belligerent right of capture. But the moment the decision of the tribunal of the last resort has been pronounced, (supposing it not to be warranted by the facts of the case, and by the law of nations applied to those facts,) and justice has been thus finally denied, the capture and the condemnation become the acts of the state, for which the sovereign is responsible to the government of the claimant.

There is nothing more irregular in maintaining that the sovereign is responsible towards foreign states for the acts of his tribunals, than in maintaining that he is responsible for his own acts, which, in the intercourse of nations, are constantly made the ground of complaint, of reprisals, and even of war. No greater sanctity can be imputed to the proceedings of prize tribunals, even by the most extravagant theory of the conclusiveness of their sentences, than is justly attributed to the acts of the sovereign himself. But those acts, however binding upon his own subjects, if they are not conformable to the public law of the world, cannot be considered as binding upon the subjects of other

states. A wrong done to them forms an equally just subject of complaint on the part of their government, whether it proceeds from the direct agency of the sovereign himself, or is inflicted by the instrumentality of his tribunals. The tribunals of a state are but a part, and only a subordinate part, of the government of that state. But the right of redress against injurious acts of the whole government, of the supreme authority, incontestably exists in foreign states, whose subjects have suffered by those acts. Much more clearly then must it exist when those acts proceed from persons, authorities, or tribunals, responsible to their own sovereign, but irresponsible to a foreign government otherwise than by its action on their sovereign.

These principles, so reasonable in themselves, are also supported by the authority of the writers on public law, and by historical examples.

“ The exclusive right of the state to which  
“ the captors belong to adjudicate upon the  
“ captures made by them,” says Rutherford,  
“ is founded upon another,” *i. e.* “ its right to  
“ inspect into the conduct of the captors, both  
“ because they are members of it, and because  
“ it is responsible to all other states for what

“ they do in war ; since what they do in  
“ war is done either under its general or its  
“ special commission. The captors are there-  
“ fore obliged, on account of the jurisdiction  
“ which the state has over their persons, to  
“ bring such ships or goods as they seize in  
“ the main ocean into their own ports, and  
“ they cannot acquire property in them until  
“ the state has determined whether they were  
“ lawfully taken or not. This right which their  
“ own state has to determine this matter is so  
“ far an exclusive one, that no other state can  
“ claim to judge of their conduct until it has  
“ been thoroughly examined into by their own ;  
“ both because no other state has jurisdiction  
“ over their persons, and likewise because no  
“ other state is answerable for what they do.  
“ But the state to which the captors belong,  
“ whilst it is thus examining into the conduct  
“ of its own members, and deciding whether the  
“ ships or goods which they have seized are  
“ lawfully taken or not, is determining a  
“ question between its own members and the  
“ foreigners who claim the property : and this  
“ controversy did not arise within its own ter-  
“ ritory, but in the main ocean. The right,  
“ therefore, which it exercises, is not civil  
“ jurisdiction ; and the civil law. which is

“ peculiar to its own territory, is not the law by  
“ which it ought to proceed. Neither the place  
“ where the controversy arose, nor the parties  
“ who are concerned in it, are subject to this  
“ law. The only law by which this contro-  
“ versy can be determined, is the law of nature,  
“ applied to the collective bodies of civil so-  
“ cieties, that is the law of nations: unless  
“ indeed there have been any particular treaties  
“ made between the two states, to which the  
“ captors and the other claimants belong,  
“ mutually binding them to depart from  
“ such rights as the law of nations would  
“ otherwise have supported. Where such  
“ treaties have been made, they are a law to  
“ the two states, as far as they extend, and to  
“ all the members of them in their intercourse  
“ with one another. The state, therefore, to  
“ which the captors belong, in determining  
“ what might or what might not be lawfully  
“ taken, is to judge by these particular treaties,  
“ and by the law of nations taken together.—  
“ This right of the state, to which the captors  
“ belong, to judge exclusively, is not a com-  
“ plete jurisdiction. The captors, who are its  
“ own members, are bound to submit to its  
“ sentence, though this sentence should hap-  
“ pen to be erroneous, because it has a com-

“ plete jurisdiction over their persons. But the  
“ other parties to the controversy, as they are  
“ members of another state, are only bound to  
“ submit to its sentence so far as this sentence  
“ is agreeable to the law of nations or to par-  
“ ticular treaties : because it has no jurisdiction  
“ over them, either in respect of their persons,  
“ or of the things that are the subject of the  
“ controversy. If justice therefore is not done  
“ them, they may apply to their own state for  
“ a remedy ; which may, consistently with the  
“ law of nations, give them a remedy either by  
“ solemn war or reprisals. In order to deter-  
“ mine when their right to apply to their own  
“ state begins, we must inquire when the ex-  
“ clusive right of the other state to judge in  
“ this controversy ends. As this exclusive  
“ right is nothing else but the right of the  
“ state, to which the captors belong, to ex-  
“ amine into the conduct of its own members  
“ before it becomes answerable for what they  
“ have done, such exclusive right cannot end  
“ until their conduct has been thoroughly ex-  
“ amined. Natural equity will not allow that  
“ the state should be answerable for their acts  
“ until those acts are examined by all the ways  
“ which the state has appointed for this pur-  
“ pose. Since, therefore, it is usual in maritime

“ countries to establish not only inferior courts  
“ of marine to judge what is, and what is not  
“ lawful prize, but likewise superior courts of  
“ review to which the parties may appeal, if  
“ they think themselves aggrieved by the in-  
“ ferior courts; the subjects of a neutral state  
“ can have no right to apply to their own state  
“ for a remedy against an erroneous sentence  
“ of an inferior court, till they have appealed  
“ to the superior court, or to the several supe-  
“ rior courts, if there are more courts of this sort  
“ than one, and till the sentence has been con-  
“ firmed in all of them. For these courts are  
“ so many means appointed by the state, to  
“ which the captors belong, to examine into  
“ their conduct; and till their conduct has been  
“ examined by all these means, the state’s  
“ exclusive right of judging continues. After  
“ the sentence of the inferior court has been  
“ thus confirmed, the foreign claimants may  
“ apply to their own state for a remedy, if  
“ they think themselves aggrieved: but the  
“ law of nations will not entitle them to  
“ a remedy unless they have been actually  
“ aggrieved. When the matter is carried thus  
“ far, the two states become the parties in the  
“ controversy. And since the law of nature,  
“ whether it is applied to individuals or civil

“ societies, abhors the use of force till force  
“ becomes necessary, the supreme rulers of the  
“ neutral state, before they proceed to solemn  
“ war or to reprisals, ought to apply to the  
“ supreme rulers of the other state, both to  
“ satisfy themselves that they have been rightly  
“ informed, and likewise to try whether the  
“ controversy cannot be adjusted by more  
“ gentle methods.”<sup>17</sup>

In the celebrated report made to the British government in 1753, upon the case of the reprisals granted by the king of Prussia on account of captures made by the cruizers of Great Britain of the property of his subjects, the exclusive jurisdiction of the captor's country over captures made in war by its commissioned cruizers, is asserted, and it is laid down that “ the law of nations, founded upon justice, “ equity, convenience, and the reason of the “ thing, does not allow of reprisals, except in “ case of violent injuries, directed or supported “ by the state, and justice absolutely denied “ *in re minime dubiâ*, by all the tribunals, and “ afterwards by the prince ;”—plainly showing that, in the opinion of the eminent persons by whom that paper was drawn up, if justice be

<sup>17</sup> Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19.

denied, in a clear case, by all the tribunals, and afterwards by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruizers and tribunals the injury is committed. And that *Vattel* was of the same opinion, is evident from the manner in which he quotes this paper to support his own doctrine, that the sentences of the tribunals ought not to be made the ground of complaint by the state against whose subjects they are pronounced, “*excepting* the case of “a refusal of justice, palpable, and evident “injustice, a manifest violation of rules and “forms, &c.”<sup>18</sup>

In the case above referred to, the king of Prussia (then neutral) had undertaken to set up within his own dominions a commission to reexamine the sentences pronounced against his subjects in the British prize courts, a conduct which is treated by the authors of the report to the British government as an innovation “which was never attempted in any country of “the world before. Prize or no prize must be “determined by courts of admiralty belonging “to the power whose subjects made the capture.” But the report proceeds to state that

<sup>18</sup> *Vattel*, *Droit des Gens*, liv. ii. ch. 7, § 85.

“ every foreign prince in amity has a right to  
“ demand that justice shall be done to his  
“ subjects in these courts according to the law  
“ of nations, or particular treaties, where they  
“ are subsisting. If *in re minime dubiâ*—these  
“ courts proceed upon foundations directly  
“ opposite to the law of nations, or subsisting  
“ treaties, the neutral state has a right to com-  
“ plain of such determination.”

The king of Prussia did complain of the determinations of the British tribunals, and made reprisals by stopping the interest upon a loan due to British subjects and secured by hypothecation upon the revenues of Silesia, until he actually obtained from the British government an indemnity for the Prussian vessels unjustly captured and condemned. The proceedings of the British tribunals, though they were asserted by the British government to be the only legitimate mode of determining the validity of captures made in war, were not considered as excluding the demand of Prussia for redress upon the government itself. So also under the treaty of 1794 between the United States and Great Britain, a mixed commission was appointed to determine the claim of American citizens, arising from the capture of their property by British cruizers during the existing

war with France, according to justice, equity, and the law of nations. In the course of the proceedings of this board objections were made on the part of the British government against the commissioners proceeding to hear and determine any case where the sentence of condemnation had been affirmed by the lords of appeal in prize causes, upon the ground that full and entire credit was to be given to their final sentence, inasmuch as according to the general law of nations it was to be presumed that justice had been administered by this the competent and supreme tribunal in matters of prize. But this objection was overruled by the board upon the grounds and principles already stated, and a full and satisfactory indemnity was awarded in many cases where there had been a final sentence of condemnation.

Many other instances might be mentioned of arrangements between states, by which mixed commissions have been appointed to hear and determine the claims of the subjects of neutral powers arising out of captures in war, not for the purpose of revising the sentences of the competent courts of prize as between the captors and captured, but for the purpose of providing an adequate indemnity

between state and state, in cases where satisfactory compensation had not been received in the ordinary course of justice. Although the theory of public law treats prize tribunals established by and sitting in the belligerent country exactly as if they were established by and sitting in the neutral country, (*i. e.* conformably to the international law common to both,) yet it is well known that in practice such tribunals do take for their guide the prize ordinances and instructions issued by the belligerent sovereign, without stopping to inquire whether they are consistent with the paramount rule. If, therefore, the final sentences of these tribunals were to be considered as absolutely conclusive, so as to preclude all inquiry into their merits, the obvious consequence would be to invest the belligerent state with legislative power over the rights of neutrals, and to prevent them from showing that the ordinances and instructions under which the sentences have been pronounced are repugnant to that law by which foreigners alone are bound.

These principles have received a recent confirmation in the negotiation between the American and Danish governments respecting the captures of American vessels and cargoes

made by the cruizers of Denmark during the last war between that power and Great Britain. In the course of this negotiation, it was objected by the Danish ministers that the validity of these captures had been finally determined in the competent prize court of the belligerent country, and could not be again drawn in question. On the part of the American government, it was admitted that the jurisdiction of the tribunals of the capturing nation was exclusive and complete upon the question of prize or no prize, so as to transfer the property in the things condemned from the original owner to the captors, or those claiming under them; that the final sentence of those tribunals is conclusive as to the change of property operated by it, and cannot be again incidentally drawn in question in any other judicial forum; and that it has the effect of closing for ever all private controversy between the captors and the captured. The demand which the United States made upon the Danish government was not for a judicial revision and reversal of the sentences pronounced by its tribunals, but for the indemnity to which the American citizens were entitled in consequence of the denial of justice by the tribunals in the last resort, and

of the responsibility thus incurred by the Danish government for the acts of its cruisers and tribunals. The Danish government was, of course, free to adopt any measures it might think proper to satisfy itself of the injustice of those sentences, one of the most natural of which would be a reexamination and discussion of the cases complained of, conducted by an impartial tribunal under the sanction of the two governments, not for the purpose of disturbing the question of title to the specific property which had been irrevocably condemned, or of reviving the controversy between the individual captors and claimants which had been for ever terminated, but for the purpose of determining between government and government whether injustice had been done by the tribunals of one power against the citizens of the other, and of determining what indemnity ought to be granted to the latter.

The accuracy of this distinction was acquiesced in by the Danish ministers, and a treaty concluded, by which a satisfactory indemnity was provided for the American claimants.<sup>19</sup>

<sup>19</sup> Martens, *Nouveau Recueil*, tom. viii. p. 350.

§ 16.  
Title to  
real pro-  
perty, how  
transferred  
in war,  
*Jus post-  
liminii.*

We have seen that a firm possession, or the sentence of a competent court, is sufficient to confirm the captor's title to personal property or movables taken in war. A different rule is applied to real property, or immovables. The original owner of this species of property is entitled to what is called the benefit of postliminy, and the title acquired in war must be confirmed by a treaty of peace before it can be considered as completely valid. This rule cannot be frequently applied to the case of mere private property, which by the general usage of modern nations is exempt from confiscation. It only becomes practically important in questions arising out of alienations of real property, belonging to the government, made by the opposite belligerent, while in the military occupation of the country. Such a title must be expressly confirmed by the treaty of peace, or by the general operation of the cession of territory made by the enemy in such treaty. Until such confirmation, it continues liable to be divested by the *jus postliminii*. The purchaser of any portion of the national domain takes it at the peril of being evicted by the original sovereign owner when

he is restored to the possession of his dominions.<sup>20</sup>

*Grotius* has devoted a whole chapter of his great work to prove, by the consenting testimony of all ages and nations, that good faith ought to be observed towards an enemy. And even *Bynkershoek*, who holds that every other sort of fraud may be practised towards him, prohibits perfidy, upon the ground that his character of enemy ceases by the compact with him, so far as the terms of that compact extend. "I allow of any kind of deceit," says he, "perfidy alone excepted, not because any thing is unlawful against an enemy, but because when our faith has been pledged to him, so far as the promise extends, he ceases to be an enemy." Indeed, without this mitigation, the horrors of war would be indefinite in

§ 17.  
Good faith  
towards  
enemies.

<sup>20</sup> *Grotius*, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 4; cap. 9, § 13. *Vattel*, Droit des Gens, liv. iii. ch. 13, §§ 197—200, 210, 212. *Kluber*, Droit des Gens Moderne de l'Europe, §§ 256—258. *Martens*, Précis, &c. liv. viii. ch. 4, § 282, a. Where the case of conquest is complicated with that of civil revolution, and a change of internal government recognised by the nation itself and by foreign states, a modification of the rule may be required in its practical application. Vide ante, pt. i. ch. 2.

extent, and interminable in duration. The usage of civilized nations has therefore introduced certain *commercias belli*, by which the violence of war may be allayed, so far as is consistent with its object and purposes, and something of a pacific intercourse may be kept up, which may lead, in time, to an adjustment of differences, and ultimately to peace.<sup>21</sup>

§ 18.  
Truce or  
armistice.

There are various modes in which the extreme rigour of the rights of war may be relaxed at the pleasure of the respective belligerent parties. Among these is that of a suspension of hostilities, by means of a truce or armistice. This may be either general or special. If it be general in its application to all hostilities in every place, and is to endure for a very long or indefinite period, it amounts in effect to a temporary peace, except that it leaves undecided the controversy in which the war originated. Such were the truces formerly concluded between the christian powers and the Turks. Such, too, was the armistice concluded in 1609 between

<sup>21</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. Robinson's Adm. Rep. vol. iii. p. 139. The Daifje.

Spain and her revolted provinces in the Netherlands. A partial truce is limited to certain places, such as the suspension of hostilities which may take place between two contending armies, or between a besieged fortress and the army by which it is invested.<sup>22</sup>

The power to conclude a universal armistice or suspension of hostilities is not necessarily implied in the ordinary official authority of the general or admiral commanding in chief the military or naval forces of the state. The conclusion of such a general truce requires either the previous special authority of the supreme power of the state, or a subsequent ratification by such power.<sup>23</sup>

§ 19.  
Power to  
conclude  
an armistice.

A partial truce or limited suspension of hostilities may be concluded between the military and naval officers of the respective belligerent states, without any special authority for that purpose, where, from the nature and extent of their commands, such an authority is necessarily implied as

<sup>22</sup> Vattel, *Droit des Gens*, liv. iii. ch. 16, §§ 235, 236.

<sup>23</sup> Grotius, *de Jur. Bel. ac Pac.* lib. iii. cap. 22, § 8. Barbeyrac's Note. Vattel, *Droit des Gens*, liv. iii. ch. 16, §§ 233—238.

essential to the fulfilment of their official duties.<sup>24</sup>

§ 20.  
Period of  
its opera-  
tion.

A suspension of hostilities binds the contracting parties, and all acting immediately under their direction, from the time it is concluded; but it must be duly promulgated in order to have the force of legal obligation with regard to the other subjects of the belligerent states; so that if, before such notification, they have committed any act of hostility, they are not penally responsible, unless their ignorance be imputable to their own fault or negligence. But as the supreme power of the state is bound to fulfil its own engagements, or those made by its authority, express or implied, the government of the captor is bound, in the case of a suspension of hostilities by sea, to restore all prizes made in contravention of the armistice. To prevent the disputes and difficulties arising from such questions, it is usual to stipulate in the convention of armistice, as in treaties of peace, a prospective period within which hostilities are to cease, with a due regard to the situation and distance of places.<sup>25</sup>

<sup>24</sup> Vide ante, pt. iii. ch. 2—Of Negotiations and Treaties.

<sup>25</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 5. Vattel, Droit des Gens, liv. iii. ch. 16, § 239.

Besides the general maxims applicable to the interpretation of all international compacts, there are some rules peculiarly applicable to conventions for the suspension of hostilities. The *first* of these peculiar rules, as laid down by Vattel, is that each party may do within his own territory, or within the limits prescribed by the armistice, whatever he could do in time of peace. Thus either of the belligerent parties may levy and march troops, collect provisions and other munitions of war, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged.

§ 21.  
Rules for  
interpret-  
ing con-  
ventions  
of truce.

The *second* rule is, that neither party can take advantage of the truce to execute, without peril to himself, what the continuance of hostilities might have disabled him from doing. Such an act would be a fraudulent violation of the armistice. For example:—in the case of a truce between the commander of a fortified town and the army besieging it, neither party is at liberty to continue works, constructed either for attack or defence, or to erect new fortifications for such purposes. Nor can the garrison avail itself of the truce to introduce provisions or succours into the town, through passages or in any other manner

which the besieging army would have been competent to obstruct and prevent had hostilities not been interrupted by the armistice.

The *third* rule stated by Vattel is rather a corollary from the preceding rules than a distinct principle capable of any separate application. As the truce merely suspends hostilities without terminating the war, all things are to remain in their antecedent state in the places, the possession of which was specially contested at the time of the conclusion of the armistice.

It is obvious that the contracting parties may, by express compact, derogate in any and every respect from these general conditions.

§ 22.  
Recommence-  
ment of  
hostilities  
on the ex-  
piration of  
truce.

At the expiration of the period stipulated in the truce, hostilities recommence as a matter of course, without any new declaration of war. But if the truce has been concluded for an indefinite, or for a very long period, good faith and humanity concur in requiring previous notice to be given to the enemy of an intention to terminate what he may justly regard as equivalent to a treaty of peace. Such was the duty inculcated by the Fecial college upon the Romans at the expiration of a long truce which

they had made with the people of Veii. That people had recommenced hostilities before the expiration of the time limited in the truce. Still it was held necessary for the Romans to send heralds and demand satisfaction before renewing the war.<sup>26</sup>

Capitulations for the surrender of troops, fortresses, and particular districts of country, fall naturally within the scope of the general powers entrusted to military and naval commanders. Stipulations between the governor of a besieged place, and the general or admiral commanding the forces by which it is invested, if necessarily connected with the surrender, do not require the subsequent sanction of their respective sovereigns. Such are the usual stipulations for the security of the religion and privileges of the inhabitants, that the garrison shall not bear arms against the conquerors for a limited period, and other like clauses properly incident to the particular nature of the transaction. But if the commander of the fortified town undertake to stipulate for the perpetual cession of the place, or enter into other engagements not fairly

§ 23.  
Capitulations for the surrender of troops and fortresses.

<sup>26</sup> Liv. Hist. lib. iv. cap. 30.

within the scope of his implied authority, his promise amounts to a mere *sponsion*.<sup>27</sup>

The celebrated convention made by the Roman consuls with the Samnites at the Caudine Forks was of this nature. The conduct of the Roman senate in disavowing this ignominious compact is approved by Grotius and Vattel, who hold that the Samnites were not entitled to be placed in *statu quo*, because they must have known that the Roman consuls were wholly unauthorized to make such a convention. This consideration seems sufficient to justify the Romans in acting on this occasion according to their uniform uncompromising policy by delivering up to the Samnites the authors of the treaty, and persevering in the war until this formidable enemy was finally subjugated.<sup>28</sup>

The convention concluded at Closter-Seven, during the seven years' war, between the Duke of Cumberland, commander of the British forces in Hanover, and Marshal Richelieu, commanding the French army, for a suspension of arms in the north of Germany, is one of the most remarkable treaties of this kind recorded

<sup>27</sup> Vide ante, pt. iii. ch. 2, § 3.

<sup>28</sup> See the account given by Livy of this remarkable transaction.

in modern history. It does not appear, from the discussions which took place between the two governments on this occasion, that there was any disagreement between them as to the true principles of international law applicable to such transactions. The conduct, if not the language of both parties, implies a mutual admission that the convention was of a nature to require ratification as exceeding the ordinary powers of military commanders in respect to mere military capitulations. The same remark may be applied to the convention signed at El Arish in 1800 for the evacuation of Egypt by the French army; although the position of the two governments, as to the convention of Closter Seven, was reversed in that of El Arish, the British government refusing in the first instance to permit the execution of the latter treaty upon the ground of the defect in Sir Sidney Smith's powers, and after the battle of Heliopolis insisting upon its being performed by the French when circumstances had varied and rendered its execution no longer consistent with their policy and interest. Good faith may have characterized the conduct of the British government in this instance, as was strenuously insisted by ministers in the parliamentary discussions to which

the treaty gave rise, but there is at least no evidence of perfidy on the part of General Kleber. His conduct may rather be compared with that of the Duke of Cumberland at Closter-Seven, (and it certainly will not suffer by the comparison,) in concluding a convention suited to existing circumstances, which it was plainly his interest to carry into effect when it was signed, and afterwards refusing to abide by it when those circumstances were materially changed. In these compacts, time is material: indeed it may be said to be of the very essence of the contract. If any thing occurs to render its immediate execution impracticable, it becomes of no effect, or at least is subject to be varied by fresh negotiation.<sup>29</sup>

§ 24.  
Passports,  
safe con-  
ducts, and  
licenses.

Passports, safe-conducts, and licenses, are documents granted in war to protect persons and property from the general operation of hostilities. The competency of the authority to issue them depends on the general principles already noticed. This sovereign authority may be vested in military and naval

<sup>29</sup> Flassan, *Histoire de la Diplomatie Française*, tom. vi. pp. 97—107. *Annual Register*, vol. i. pp. 209—213, 228—234; vol. xlii. p. [219], pp. 223—233. *State Papers*, vol. xliii. pp. [28—34.]

commanders, or in certain civil officers, either expressly, or by inevitable implication from the nature and extent of their general trust. Such documents are to be interpreted by the same rules of liberality and good faith with other acts of the sovereign power.<sup>30</sup>

Thus a license granted by the belligerent state to its own subjects, or to the subjects of its enemy, to carry on a trade interdicted by war, operates as a dispensation with the laws of war so far as its terms can be fairly construed to extend. The adverse belligerent party may justly consider such documents of protection as *per se* a ground of capture and confiscation; but the maritime tribunals of the state, under whose authority they are issued, are bound to consider them as lawful relaxations of the ordinary state of war. A license is an act proceeding from the sovereign authority of the state, which alone is competent to decide on all the considerations of political and commercial expediency, by which such an exception from the ordinary consequences of war must be controlled. Licenses, being high acts

§ 25.  
Licenses to  
trade with  
the enemy.

<sup>30</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 14. Vattel, Droit des Gens, liv. iii. ch. 17, §§ 265—277.

of sovereignty, are necessarily *stricti juris*, and must not be carried further than the intention of the authority which grants them may be supposed to extend. Not that they are to be construed with pedantic accuracy, or that every small deviation should be held to vitiate their fair effect. An excess in the quantity of goods permitted might not be considered as noxious to any extent, but a variation in their quality or substance might be more significant, because a liberty assumed of importing one species of goods, under a license to import another, might lead to very dangerous consequences. The limitations of time, persons, and places, specified in the license, are also material. The great principle in these cases is, that subjects are not to trade with the enemy, nor the enemy's subjects with the belligerent state, without the special permission of the government; and a material object of the control which the government exercises over such a trade is, that it may judge of the fitness of the persons, and under what restrictions of time and place such an exemption from the ordinary laws of war may be extended. Such are the general principles laid down by Sir *W. Scott* for the interpretation of these documents: but *Grotius* lays down the general

rule, that safe-conducts, of which these licenses are a species, are to be liberally construed; *laxa quam stricta interpretatio admit-tenda est*. And during the last war licenses were eventually interpreted with great liberality in the British courts of prize.<sup>31</sup>

It was made a question in some cases in those courts, how far these documents could protect against British capture, on account of the nature and extent of the authority of the persons by whom they were issued. The leading case on this subject is that of the *Hope*, an American ship laden with corn and flour, captured whilst proceeding from the United States to the ports of the Peninsula occupied by the British troops, and claimed as protected by an instrument granted by the British consul at Boston, accompanied by a certified copy of a letter from the admiral on the Halifax station. In pronouncing judgment in this case, Sir *W. Scott* observed, that the instrument of protection, in order to be effectual, must come from those who have a competent authority to grant such a

§ 26.  
Authority  
to grant  
licenses.

<sup>31</sup> Chitty's Law of Nations, ch. 7. Kent's Comment. on American Law, vol. i. p. 164, Note a. 2d Edit.

protection, but that the papers in question came from persons who were vested with no such authority. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority: if at any time delegated to persons in a subordinate station, it must be exercised either by those who have a special commission granted to them for the particular business, and who in legal language are called *mandatories*, or by persons in whom such a power is vested in virtue of any situation to which it may be considered incidental. It was quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. *Eæ rei non præponitur*, and, therefore, his acts in relation to it are not binding. Neither does the admiral, on any station, possess such authority. He has, indeed, power relative to the ships under his immediate command, and can restrain them from committing acts of hostility; but he cannot go beyond that—he cannot grant a safeguard of this kind beyond the limits of his own station. The protections, therefore, which had been set up did not result from any power incidental to the situation of the persons by whom they had been granted; and it was not pretended that

any such power was specially entrusted to them for the particular occasion. If the instruments which had been relied upon by the claimants were to be considered as the naked acts of those persons, then they were, in every point of view, totally invalid. But the question was, whether the British government had taken any steps to ratify these proceedings, and thus to convert them into valid acts of state; for persons not having full power may make what in law are termed *sponsiones*, or, in diplomatic language, treaties *sub spe rati*, to which a subsequent ratification may give validity: *rati habitio mandato æquiparatur*. The learned judge proceeded to show, that the British government had confirmed the acts of its officers by the order in council of the 26 October, 1813, and accordingly decreed restitution of the property. In the case of the *Reward*, before the lords of appeal, the principle of this judgment was substantially confirmed; but in that of the *Charles*, and other similar cases, where certificates or passports of the same kind, signed by Admiral Sawyer, and also by the Spanish minister in the United States, had been used for voyages from thence to the Spanish West Indies, the lords of appeal held that these documents, not

being included within the terms of the confirmatory order in council, did not afford protection. In the cases of the passports granted by the British minister in the United States, permitting American vessels to sail with provisions from thence to the island of St. Bartholomew's, but not confirmed by an order in council, the lords condemned in all the cases not expressly included within the terms of the order in council by which certain descriptions of licenses granted by the minister had been confirmed.<sup>22</sup>

§ 27.  
Ransom of  
captured  
property.

The contract made for the ransom of enemy's property taken at sea is generally carried into effect by a safe-conduct, granted by the captors, permitting the captured vessel and cargo to proceed to a designated port within a limited time. Unless prohibited by the law of the captor's own country, this document furnishes a complete legal protection against the cruizers of the same nation, or its allies, during the period and within the geographical limits prescribed by its terms. This protection results from the

<sup>22</sup> Dodson's Adm. Rep. vol. i. p. 226. The Hope. *Id.* Appendix (D). Stewart's Vice-Adm. Rep. p. 367.

general authority to capture which is delegated by the belligerent state to its commissioned cruizers, and which involves the power to ransom captured property when judged advantageous. If the ransomed vessel is lost by the perils of the sea before her arrival, the obligation to pay the sum stipulated for her ransom is not thereby extinguished. The captor guarantees the captured vessel against being interrupted in its course, or retaken by other cruizers of his nation, or its allies, but he does not insure against losses by the perils of the seas. Even where it is expressly agreed that the loss of the vessel by these perils shall discharge the captured from the payment of the ransom, this clause is restrained to the case of a total loss on the high seas, and is not extended to shipwreck or stranding, which might afford the master a temptation fraudulently to cast away his vessel, in order to save the most valuable part of the cargo, and avoid the payment of the ransom. Where the ransomed vessel, having exceeded the time or deviated from the course prescribed by the ransom-bill, is retaken, the debtors of the ransom are discharged from their obligation, which is merged in the prize, and the amount is deducted from the net

proceeds thereof, and paid to the first captor, whilst the residue is paid to the second captor. So if the captor, after having ransomed a vessel belonging to the enemy, is himself taken by the enemy, together with the ransom-bill, of which he is the bearer, this ransom-bill becomes a part of the capture made by the enemy; and the persons of the hostile nation, who were debtors of the ransom, are thereby discharged from their obligation. The death of the hostage taken for the faithful performance of the contract on the part of the captured does not discharge the contract; for the captor trusts to him as a collateral security only, and by losing it does not also lose his original security, unless there is an express agreement to that effect.<sup>33</sup>

Sir *William Scott* states, in the case of the *Hoop*, that as to ransoms, which are contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in the British courts of justice in his own proper person for the payment of the ransom, even before British subjects were prohibited by the statute 22 Geo. III. cap. 25, from ransoming

<sup>33</sup> Pothier, *Traité de Propriété*, Nos. 134—137. Valin, sur l'Ordonnance, liv. iii. tit. 9; des Prises, art. 19. *Traité des Prises*, ch. 11, Nos. 1—3.

enemy's property; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. But the effect of such a contract, like that of every other which may be lawfully entered between belligerents, is to suspend the character of enemy so far as respects the parties to the ransom-bill; and consequently the technical objection of the want of a *persona standi in judicio* cannot, on principle, prevent a suit being brought by the captor directly on the ransom-bill. And this appears to be the practice in the maritime courts of the European continent.<sup>34</sup>

<sup>34</sup> Robinson's Adm. Rep. vol. i. p. 201. The Hoop. See Lord Mansfield's judgment in the case of *Ricord v. Bettenham*, Burrow's Rep. p. 1734.

## CHAP. III.

## RIGHTS OF WAR AS TO NEUTRALS.

§ 1.  
Rights and  
duties of  
neutrality.

THE right of every independent nation to remain at peace, whilst other nations are engaged in war, is an incontestable attribute of sovereignty; but it is obviously impossible that neutral nations should be wholly unaffected by the existence of war between those with whom they continue to maintain the accustomed relations of friendship and commerce. The rights of neutrality bring with them correspondent duties. Among these duties is that of impartiality between the belligerent parties. The neutral is the common friend of both parties, and consequently is not at liberty to favour one party to the detriment of the other.<sup>1</sup>

<sup>1</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 103—110.

There is, however, one very important exception arising out of antecedent engagements, by which the neutral may be bound to one of the parties to the war. Thus the neutral may be bound by treaty, previous to the war, to furnish one of the belligerent parties with a limited succour in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally with their prizes. The fulfilment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy.<sup>2</sup>

§ 2.  
Neutrality modified by a limited alliance with one of the belligerent parties.

How far a neutrality thus limited may be tolerated by the opposite belligerent must depend more upon considerations of policy than of strict right. Thus where Denmark, in consequence of a previous treaty of defensive alliance, furnished limited succours in ships and troops to the Empress Catharine II. of Russia, in the war of 1788 against Sweden, the abstract right of the Danish court to remain neutral, except so far as regarded the stipulated succours, was scarcely contested by Sweden and the allied mediating powers. But

<sup>2</sup> Vide ante, pt. iii. ch. 2, § 13.

it is evident from the history of these transactions, that if the war had continued, the neutrality of Denmark would not have been tolerated by these powers, unless she had withheld from her ally the succours stipulated by the treaty of 1773, or Russia had consented to dispense with its fulfilment.<sup>3</sup>

§ 3.  
Qualified  
neutrality,  
arising out  
of ante-  
cedent  
treaty  
stipula-  
tions, ad-  
mitting  
the armed  
vessels and  
prizes of  
one belli-  
gerent  
into the  
neutral  
ports,  
whilst  
those of the  
other are  
excluded.

Another case of qualified neutrality arises out of treaty stipulations antecedent to the commencement of hostilities, by which the neutral may be bound to admit the vessels of war of one of the belligerent parties, with their prizes, into his ports, whilst those of the other may be entirely excluded, or only admitted under limitations and restrictions. Thus by the treaty of amity and commerce of 1778, between the United States and France, the latter secured to herself two special privileges in the American ports:—1. Admission for her privateers, with their prizes, to the exclusion of her enemies. 2. Admission for her public ships of war, in case of urgent necessity, to refresh, victual, repair, &c., but not exclusively of other nations at war with her: Under these

<sup>3</sup> Annual Register, vol. xxx. pp. 181, 182. State Papers, p. 292. Eggers, Leben von Bernstorff, 2 abtheil. pp. 118—195.

stipulations, the United States not being expressly bound to exclude the public ships of the enemies of France, granted an asylum to British vessels and those of other powers at war with her. Great Britain and Holland still complained of the exclusive privileges allowed to France in respect to her privateers and prizes, whilst France herself was not satisfied with the interpretation of the treaty by which the public ships of her enemies were admitted into the American ports. To the former, it was answered by the American government that they enjoyed a perfect equality, qualified only by the exclusive admission of the privateers and prizes of France, which was the effect of a treaty made long before, for valuable considerations, not with a view to circumstances such as had occurred in the war of the French Revolution, nor against any nation in particular, but against all in general, and which might therefore be observed without giving just offence to any.<sup>4</sup>

On the other hand, the minister of France asserted the right of arming and equipping vessels for war, and of enlisting men, within

<sup>4</sup> Mr. Jefferson's Letter to Mr. Hammond and Mr. Van Berckel, Sept. 9, 1793. Waite's State Papers, vol. i. pp. 169, 172.

the neutral territory of the United States. Examining this question under the law of nations and the general usage of mankind, the American government produced proofs from the most enlightened and approved writers on the subject, that a neutral nation must, in respect to the war, observe an exact impartiality towards the belligerent parties; that favours to the one, to the prejudice of the other, would import a fraudulent neutrality of which no nation would be the dupe; that no succour ought to be given to either, unless stipulated by treaty, in men, arms, or any thing else directly serving for 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 can levy men within the territory without its consent; that, finally, the treaty of 1778, making it unlawful for the enemies of France to arm in the United States, could not be construed affirmatively into a permission to the French to arm in those ports, the treaty being express as to the prohibition, but silent as to the permission.<sup>5</sup>

<sup>5</sup> Mr. Jefferson's Letter to Mr. G. Morris, Aug. 16, 1793. Waite's State Papers, vol. i. p. 140.

The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral state which is the common friend of both parties.<sup>6</sup>

§ 4.  
Hostilities  
within the  
territory of  
the neutral  
state.

This exemption extends to the passage of an army or fleet through the limits of the territorial jurisdiction, which can hardly be considered an innocent passage, such as one nation has a right to demand from another; and, even if it were such an innocent passage, is one of those *imperfect* rights, the exercise of which depends upon the consent of the proprietor, and which cannot be compelled against his will. It may be granted or withheld, at the discretion of the neutral state; but its being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to him, unless there be sufficient reasons for withholding it.<sup>7</sup>

§ 5.  
Passage  
through  
the neutral  
territory.

<sup>6</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. Martens, des Prises et Reprises, ch. 2, § 18.

<sup>7</sup> Vide ante, pt. ii. ch. 4. Rights of Property. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 119—131. Grotius,

The extent of the maritime territorial jurisdiction of every state bordering on the sea has already been described.\*

§ 6.  
Captures within the maritime territorial jurisdiction, or by vessels stationed within it, or hovering on the coasts.

Not only are all captures made by the belligerent cruizers within the limits of this jurisdiction, absolutely illegal and void, but captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbour of a neutral state, for the purpose of exercising the rights of war from this station, are also invalid. Thus where a British privateer stationed itself within the river Mississippi, in the neutral territory of the United States, for the purpose of exercising the rights of war from the river, by standing off and on, obtaining information at the Balize, and overhauling vessels in their course down the river, and made the capture in question within three English miles of the alluvial islands formed at its mouth, restitution of the captured vessel was decreed by Sir *W. Scott*. So also where a belligerent ship, lying within neutral territory, made a capture with her boats out of

de Jur. Bel. ac Pac. lib. ii. cap. 2, § 18. Sir *W. Scott*, Robinson's Adm. Rep. vol. iii. p. 353.

\* Vide ante, pt. ii. ch. 4. Rights of Property.

the neutral territory, the capture was held to be invalid; for though the hostile force employed was applied to the captured vessel lying out of the territory, yet no such use of a neutral territory for the purposes of war is to be permitted. This prohibition is not to be extended to *remote* uses, such as procuring provisions and refreshments, which the law of nations universally tolerates; but no *proximate* acts of war are in any manner to be allowed to originate on neutral ground.<sup>9</sup>

Although the immunity of the neutral territory from the exercise of any act of hostility is generally admitted, yet an exception to it has been attempted to be raised in the case of a hostile vessel met on the high seas and pursued; which it is said may, in the pursuit, be chased within the limits of a neutral territory. The only text writer of authority who has maintained this anomalous principle is *Bynkershoek*. He admits that he had never seen it mentioned in the writings of the publicists, or among any of the European nations, the Dutch only excepted; thus leaving the

§ 7.  
Vessels  
chased into  
the neutral  
territory,  
and there  
captured.

<sup>9</sup> The *Anna*, Nov. 1805. Robinson's Adm. Rep. vol. v. p. 373. The *Twee Gebroeders*, July, 1800. Vol. iii. p. 162.

inference open, that even if reasonable in itself, such a practice never rested upon authority, nor was sanctioned by general usage. The extreme caution, too, with which he guards this license to belligerents, can hardly be reconciled with the practical exercise of it; for how is an enemy to be pursued in a hostile manner within the jurisdiction of a friendly power, without imminent danger of injuring the subjects and property of the latter? *Dum fervet opus*—in the heat and animation excited against the flying foe, there is too much reason to presume that little regard will be paid to the consequences that may ensue to the neutral. There is, then, no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. “When the fact is established,” says Sir *W. Scott*, “it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy.”<sup>10</sup>

§ 8. Though it is the duty of the captor's country to make restitution of the property thus  
Claim on  
the ground

<sup>10</sup> Robinson's Adm. Rep. vol. v. p. 15. The *Vrow Anna Catharina*.

captured within the territorial jurisdiction of the neutral state, yet it is a technical rule of the prize court to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory has been thus violated. This rule is founded upon the principle that the neutral state alone has been injured by the capture, and that the hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture.<sup>11</sup>

of violation of neutral territory must be sanctioned by the neutral state.

Where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the right as well as the duty of the neutral state, where the property thus taken comes into its possession, to restore it to the original owners. This restitution is generally made through the agency of the courts of admiralty and maritime jurisdiction. Traces of the exercise of such a jurisdiction are found at a very early period in the writings of Sir Leoline Jenkins, who was judge of the English high court of admiralty in the reigns of Charles II. and James II. In a letter to the king in

§ 9. Restitution by the neutral state of property captured within its jurisdiction, or otherwise in violation of its neutrality.

Captures within the places called the King's Chambers.

<sup>11</sup> Robinson's Adm. Rep. vol. iii. Note. Case of the Etrusco.

council, dated Oct. 11, 1675, relating to a French privateer seized at Harwich with her prize, (a Hamburg vessel bound to London,) Sir Leoline states several questions arising in the case, among which was, "Whether this "Hamburger, being taken within one of your "Majesty's chambers, and being bound for "one of your ports, ought not to be set free "by your Majesty's authority, notwithstanding "he were, if taken upon the high seas out of "those chambers, a lawful prize. I do humbly conceive he ought to be set free, upon a full and clear proof that he was within one of the king's chambers at the time of the seizure, which he in his first memorial sets forth to have been eight leagues at sea over against Harwich. King James (of blessed memory) his direction, by proclamation; March 2, 1604, being that all officers and subjects, by sea and land, shall rescue and succour all merchants and others, as shall fall within the danger of such as shall await the coasts, in so near places to the hinderance of trade outward and homeward; and all foreign ships, when they are within the king's chambers, being understood to be within the places intended in those directions, 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, and of the ancient  
 “ reputation of those places. But this being  
 “ a point not lately settled by any determina-  
 “ tion, (that I know of, in case where the  
 “ king’s chambers precisely, and under that  
 “ name, came in question,) is of that import-  
 “ ance as to deserve your Majesty’s declara-  
 “ tion and assertion of that right of the crown  
 “ by an act of state in council, your Majesty’s  
 “ coasts being now so much infested with  
 “ foreign men of war, that there will be  
 “ frequent use of such a decision.”<sup>12</sup>

Whatever doubts there may be as to the  
 extent of the territorial jurisdiction thus as-  
 serted as entitled to the neutral immunity,  
 there can be none as to the sense enter-  
 tained by this eminent civilian as to the  
 right and the duty of the neutral sovereign  
 to make restitution where his territory is  
 violated.

When the maritime war commenced in Extent of  
 Europe in 1793, the American government, the neutral  
 which had determined to remain neutral, found jurisdiction  
 it necessary to define the extent of the line along the  
coasts and  
within the  
bays and  
rivers.

<sup>12</sup> Life and Works of Sir L. Jenkins, vol. ii. p. 727.

of territorial protection claimed by the United States on their coasts, for the purpose of giving effect to their neutral rights and duties. It was stated on this occasion that governments and writers on public law had been much divided in opinion as to the distance from the sea coast within which a neutral nation might reasonably claim a right to prohibit the exercise of hostilities. The character of the coast of the United States, remarkable in considerable parts of it for admitting no vessels of size to pass near the shore, it was thought would entitle them in reason to as broad a margin of protected navigation as any nation whatever. The government, however, did not propose, at that time, and without amicable communications with the foreign powers interested in that navigation, to fix on the distance to which they might ultimately insist on the right of protection. President *Washington* gave instructions to the executive officers to consider it as restrained, for the present, to the distance of one sea league, or three geographical miles, from the sea-shores. This distance, it was supposed, could admit of no opposition, being recognised by treaties between the United States, and some of the powers with whom they were connected in commercial

intercourse, and not being more extensive than was claimed by any of them on their own coasts. As to the bays and rivers, they had always been considered as portions of the territory, both under the laws of the former colonial government and of the present union, and their immunity from belligerent operations was sanctioned by the general law and usage of nations. The 25th article of the treaty of 1794, between Great Britain and the United States, stipulated that “neither of the said parties shall permit the ships or goods belonging to the citizens or subjects of the other, to be taken within cannon shot of the coast, nor in any of the bays, ports, or rivers of their territories, by ships of war, or others, having commissions from any prince, republic, or state whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated, shall use his utmost endeavours to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.” Previously to this treaty with Great Britain the United States were bound by treaties with three of the belligerent nations, (France, Prussia, and Holland,) to protect and defend,

“ by all the means in their power;” the vessels and effects of those nations in their ports or waters, or on the seas near their shores, and to recover and restore the same to the right owner when taken from them. But they were not bound to make compensation if *all the means in their power* were used, and failed in their effect. Though they had, when the war commenced, no similar treaty with Great Britain, it was the President’s opinion that they should apply to that nation the same rule which, under this article, was to govern the others above-mentioned; and even extend it to captures made on the high seas, and brought into the American ports, if made by vessels which had been armed within them. In the constitutional arrangement of the different authorities of the American federal Union, doubts were at first entertained whether it belonged to the executive government, or the judiciary department, to perform the duty of inquiring into captures made within the neutral territory, or by armed vessels originally equipped, or the force of which had been augmented within the same, and of making restitution to the injured party. But it has been long since settled that this duty appropriately belongs to the federal tribunals acting as

courts of admiralty and maritime jurisdiction.<sup>15</sup>

It has been judicially determined that this peculiar jurisdiction to inquire into the validity of captures made in violation of the neutral immunity will be exercised only for the purpose of restoring the specific property, when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries. And it seems to be doubtful whether this jurisdiction will be exercised where the property has been once carried *infra præsidia* of the captor's country, and there regularly condemned in a competent court of prize. However this may be in cases where the property has come into the hands of a *bond fide* purchaser, without notice of the unlawfulness of the capture, it has been determined that the neutral court of admiralty will restore it to the original owner, where it is found in the hands of the

§ 10.  
Limitations of the neutral jurisdiction to restore in cases of illegal capture.

<sup>15</sup> Mr. Jefferson's Letter to M. Genet, Nov. 8, 1793. Waite's State Papers, vol. vi. p. 195. Opinion of the Attorney-General on the capture of the British ship Grange, May 14, 1793. Ibid. vol. i. p. 75. Mr. Jefferson's Letter to Mr. Hammond, Sept. 5, 1723. Waite's State Papers, vol. i. p. 165. Wheaton's Reports, vol. iv. p. 65, Note a.

captor himself claiming under the sentence of condemnation. But the illegal equipment will not affect the validity of a capture, made after the cruize, to which the outfit had been applied, is actually terminated.<sup>14</sup>

§ 11.  
Right of  
asylum in  
neutral  
ports de-  
pendent on  
the consent  
of the neu-  
tral state.

An opinion is expressed by some text writers that belligerent cruisers not only are entitled to seek an asylum and hospitality in neutral ports, but have a right to bring in and sell their prizes within those ports. But there seems to be nothing in the established principles of public law which can prevent the neutral state from withholding the exercise of this privilege impartially from all the belligerent powers, or even from granting it to one of them, and refusing it to others, where stipulated by treaties existing previous to the war. The usage of nations, as testified in their marine ordinances, sufficiently shows that this is a rightful exercise of the sovereign authority, which every state possesses, to regulate the police of its own sea-ports, and to preserve the public peace within its own territory. But the

<sup>14</sup> Wheaton's Rep. vol. v. p. 385. The *Amistad de Rues*, vol. viii. p. 108 ; vol. ix. p. 658 ; vol. vii. p. 519. The *Santissima Trinidad*.

absence of a positive prohibition implies a permission to enter the neutral ports for these purposes.<sup>15</sup>

*Vattel* states that the impartiality, which a neutral nation ought to observe between the belligerent parties, consists of two points. 1. To give no assistance where there is no previous stipulation to give it; nor voluntarily to furnish troops, arms, ammunition, or any thing of direct use in war. "I do not say to give assistance equally, but to give no assistance; for it would be absurd that a state should assist at the same time two enemies. And besides, it would be impossible to do it with equality: the same things, the like number of troops, the like quantity of arms, of munitions, &c. furnished under different circumstances, are no longer equivalent successours." 2. In whatever does not relate to the war, the neutral must not refuse to one of the parties, merely because he is at war with the other, what she grants to that other.<sup>16</sup>

<sup>15</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 15. *Vattel*, liv. iii. ch. 7, § 132. Valin, Comm. sur l'Ordonn. de la Marine, tom. ii. p. 272.

<sup>16</sup> Droit des Gens, liv. iii. ch. 7, § 104.

§ 13.  
Arming  
and equip-  
ping ves-  
sels, and  
enlisting  
men within  
the neutral  
territory,  
by either  
bellige-  
rent,  
unlawful.

These principles were appealed to by the American government, when its neutrality was attempted to be violated on the commencement of the European war in 1793, by arming and equipping vessels, and enlisting men within the ports of the United States by the respective belligerent powers to cruize against each other. It was stated that if the neutral power might not, consistently with its neutrality, furnish men to either party for their aid in war, as little could either enrol them in the neutral territory. The authority both of *Wolffius* and *Vattel* was appealed to in order to show that the levying of troops is an exclusive prerogative of sovereignty, which no foreign power can lawfully exercise within the territory of another state without its express permission. The testimony of these and other writers on the law and usage of nations was sufficient to show that the United States, in prohibiting all the belligerent powers from equipping, arming, and manning vessels of war in their ports, had exercised a right and a duty with justice and moderation. By their treaties with several of the belligerent powers, which formed part of the law of the land, they had established a state of peace with them. But without appealing to treaties, they were at peace with them all

by the law of nature ; for, by the natural law, man is at peace with man, till some aggression is committed, which, by the same law, authorizes one to destroy another, as his enemy. For the citizens of the United States, then, to commit murders and depredations on the members of other nations, or to combine to do it, appeared to the American government as much against the laws of the land as to murder or rob, or combine to murder or rob, their own citizens ; and as much to require punishment, if done within their limits, where they had a territorial jurisdiction, or on the high seas, where they had a personal jurisdiction, that is to say, one which reached their own citizens only ; this being an appropriate part of each nation, on an element where each has a common jurisdiction.<sup>17</sup>

The same principles were afterwards con- § 14.  
 signed to the forms of a law of congress passed Prohi-  
 in 1794, and revised and re-enacted in 1818, bition en-  
 by which it is declared to be a misdemeanour forced by  
 for any person, within the jurisdiction of the municipal  
 United States, to augment the force of any statutes.

<sup>17</sup> Mr. Jefferson's Letter to M. Genet, June 17, 1793.  
 American State Papers, vol. i. p. 155.

armed vessel belonging to one foreign power at war with another power, with whom they are at peace; or to prepare any military expedition against the territories of any foreign nation with whom they are at peace; or to hire or enlist troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel, to cruize or commit hostilities in foreign service, against a nation at peace with them; and the vessel, in this latter case, is made subject to forfeiture. The president is also authorized to employ force to compel any foreign vessel to depart, which, by the law of nations or treaties, ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by the law.<sup>18</sup>

Foreign  
Enlistment  
Act.

The example of America was soon followed by Great Britain, in the act of parliament 59 Geo. III. ch. 69, entitled, "An Act to prevent the Enlisting or Engagement of His Majesty's Subjects to serve in Foreign Service, and the Fitting Out or Equipping in His Majesty's Dominions Vessels for Warlike Purposes, without His Majesty's License."

<sup>18</sup> Kent's Comm. on American Law, vol. i. p. 123. 2d Ed.

The previous statutes, 9 and 29 Geo. II., enacted for the purpose of preventing the formation of Jacobite armies in France and Spain, annexed capital punishment as for a felony to the offence of entering the service of a foreign state. The 59 Geo. III. ch. 69, commonly called the Foreign Enlistment Act, provided a less severe punishment, and also supplied a defect in the former law, by introducing after the words "king, prince, state, or potentate," the words "colony or district assuming the powers of a government," in order to reach the case of those who entered the service of unacknowledged as well as of acknowledged states. The act also provided for preventing and punishing the offence of fitting out armed vessels, or supplying them with warlike stores, upon which the former law had been entirely silent.

In the debates which took place in parliament upon the enactment of the last-mentioned act in 1819, and on the motion for its repeal in 1823, it was not denied by Sir *J. Mackintosh* and other members who opposed the bill, that the sovereign power of every state might interfere to prevent its subjects from engaging in the wars of other states, by which its own peace might be endangered, or

its political and commercial interests affected. It was, however, insisted that the principles of neutrality only required the British legislature to maintain the laws in being, but could not command it to change any law, and least of all to alter the existing laws for the evident advantage of one of the belligerent parties. Those who assisted insurgent states, however meritorious the cause in which they were engaged, were in a much worse situation than those who assisted recognised governments, as they could not lawfully be reclaimed as prisoners of war, and might, as engaged in what was called rebellion, be treated as rebels. The proposed new law would go to alter the relative risks, and operate as a law of favour to one of the belligerent parties. To this argument it was replied by Mr. *Canning*, that when peace was concluded between Great Britain and Spain in 1814, an article was introduced into the treaty by which the former power stipulated not to furnish any succours to what were then denominated the revolted colonies of Spain. In process of time, as those colonies became more powerful, a question arose of a very difficult nature, to be decided on a due consideration of their *de jure* relation to Spain on the one hand, and their *de facto*

independence on the other. The law of nations afforded no precise rule as to the course which, under circumstances so peculiar as the transition of colonies from their allegiance to the parent state, ought to be pursued by foreign powers. It was difficult to know how far the statute law or the common law was applicable to colonies so situated. It became necessary, therefore, in the act of 1819, to treat the colonies as actually independent of Spain; and to prohibit mutually, and with respect to both, the aid which had been hitherto prohibited with respect to one only. It was in order to give full and impartial effect to the provisions of the treaty with Spain, which prohibited the exportation of arms and ammunition to the colonies, but did not prohibit their exportation to Spain, that the act of parliament declared that the prohibition should be mutual. When, however, from the tide of events flowing from the proceedings of the congress of Verona, war became probable between France and Spain, it became necessary to review these relations. It was obvious that if war actually broke out, the British government must either extend to France the prohibition which already existed with respect to Spain, or remove from Spain

the prohibition to which she was then subject, provided they meant to place the two countries on an equal footing. So far as the exportation of arms and ammunition was concerned, it was in the power of the crown to remove any inequality between the belligerent parties, simply by an order in council. Such an order was consequently issued, and the prohibition of exporting arms and ammunition to Spain was removed. By this measure, the British government offered a guarantee of their *bond fide* neutrality. The mere appearance of neutrality might have been preserved by the extension of the prohibition to France, instead of the removal of the prohibition from Spain; but it would have been a prohibition of words only, and not at all in fact, for the immediate vicinity of the Belgic ports to France would have rendered the prohibition of direct exportation to France totally nugatory. The repeal of the act of 1819 would have, not the same, but a correspondent effect to that which would have been produced by an order in council prohibiting the exportation of arms and ammunition to France. It would be a repeal in words only as respects France, but in fact respecting Spain; and would occasion an inequality of

operation in favour of Spain, inconsistent with an impartial neutrality. The example of the American government was referred to, as vindicating the justice and policy of preventing the subjects of a neutral country from enlisting in the service of any belligerent power, and of prohibiting the equipment in its ports of armaments in aid of such power. Such was the conduct of that government under the presidency of Washington, and the secretaryship of Jefferson; and such was more recently the conduct of the American legislature in revising their neutrality statutes in 1818, when the congress extended the provisions of the act of 1794 to the case of such unacknowledged states as the South American colonies of Spain, which had not been provided for in the original law.<sup>19</sup>

The unlawfulness of belligerent captures made within the territorial jurisdiction of a neutral state is incontestably established on principle, usage, and authority. Does this immunity of the neutral territory from the exercise of acts of hostility within its limits

§ 15.  
Immunity of the neutral territory, how far it extends to neutral vessels on the high seas.

<sup>19</sup> Annual Register, vol. lxi. p. 71. Canning's Speeches, vol. iv. p. 150; vol. v. p. 34.

extend to the vessels of the nation on the high seas, and without the jurisdiction of any other state ?

We have already seen that both the public and private vessels of every independent nation on the high seas, and without the territorial limits of any other state, are subject to the municipal jurisdiction of the state to which they belong.<sup>20</sup> This jurisdiction is exclusive only so far as respects offences against the municipal laws of the state to which the vessel belongs. It excludes the exercise of the jurisdiction of every other state under its municipal laws, but it does not exclude the exercise of the jurisdiction of other nations as to crimes under international law, such as piracy and other offences, which all nations have an equal right to judge and to punish. Does it, then, exclude the exercise of the belligerent right of capturing enemy's property ?

This right of capture is confessedly such a right as may be exercised within the territory of the belligerent state, within the enemy's territory, or in a place belonging to no one: in short, in any place except the territory of a

<sup>20</sup> Vide ante, pt. ii. ch. 2, § 11.

neutral state. Is the vessel of a neutral nation on the high seas such a place ?

A distinction has been here taken between the public and the private vessels of a nation. In respect to its *public* vessels, it is universally admitted that neither the right of visitation and search, of capture, nor any other belligerent right, can be exercised on board such a vessel on the high seas. A public vessel, belonging to an independent sovereign, is exempt from every species of visitation and search, even within the territorial jurisdiction of another state : *à fortiori*, must it be exempt from the exercise of belligerent rights on the ocean, which belongs exclusively to no one nation ?<sup>21</sup>

In respect to *private* vessels, it has been said, the case is different. They form no part of the neutral territory, and when within the territory of another state are not exempt from the local jurisdiction. That portion of the ocean which is temporarily occupied by them forms no part of the neutral territory ; nor does the vessel itself, which is a movable thing, the property of private individuals, form any part of the territory of that power to

<sup>21</sup> Vide ante, pt. ii. ch. 2, § 11.

whose subjects it belongs. The jurisdiction which that power may lawfully exercise over the vessel on the high seas is a jurisdiction over the persons and property of its citizens: it is not a territorial jurisdiction. Being upon the ocean, it is a place where no particular nation has jurisdiction, and where, consequently, all nations may equally exercise their international rights.<sup>22</sup>

§ 16.  
Usage of  
nations  
subjecting  
enemy's  
goods in  
neutral  
vessels to  
capture.

Whatever may be the true original abstract principle of natural law on this subject, it is undeniable that the constant usage and practice of belligerent nations, from the earliest times, have subjected enemy's goods in neutral vessels to capture and condemnation as prize of war. This constant and universal usage has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations.<sup>23</sup>

<sup>22</sup> Rutherford's *Inst.* vol. ii. b. ii. ch. 9, § 19. *Asuni*, *Dritto Maritime*, pt. ii. ch. 3, art. 2. *Letter of American Envoys at Paris to M. de Talleyrand*, Jan. 17, 1798. *Waite's American State Papers*, vol. iv. p. 34.

<sup>23</sup> *Consolato del Mare*, cap. 273. *Albericus Gentilis*, *Hisp. Advoc.* lib. i. cap. 27. *Grotius*, *de Jur. Bel. ac Pac.* lib. iii. cap. 6, §§ 6, 26; cap. 1, § 5, Note 6. *Bynkershoek*, *Quæst. Jur. Pub.* lib. i. cap. 14. *Vattel*, *Droit des Gens*, liv. iii. ch. 7, § 115. *Heineccius*, *de Nav. ob. vect.*

The regulations and practice of certain maritime nations, at different periods, have not only considered the goods of an enemy laden in the ships of a friend liable to capture, but have doomed to confiscation the neutral vessel on board of which these goods were laden. This practice has been sought to be justified upon a supposed analogy with that provision of the Roman law which involved the vehicle of prohibited commodities in the confiscation pronounced against the prohibited goods themselves.<sup>24</sup>

§ 17. Neutral vessels laden with enemy goods subject to confiscation by the ordinances of some states.

Thus by the marine ordinance of Louis XIV, of 1681, all vessels laden with enemy's goods are declared lawful prize of war. The contrary rule had been adopted by the preceding prize ordinances of France, and was again revived by the règlement of 1744, by which it was declared that "in case there should be found on board of neutral vessels, of whatever nation, goods or effects belonging to his Majesty's enemies, the goods or effects shall be good prize, and the vessels shall be restored." *Valin*, in his commentary upon

§ 17. Neutral vessels laden with enemy goods subject to confiscation by the ordinances of some states.

cap. 2, § 9. Loccenius, de Jure Marit. lib. ii. cap. 4, § 12.

Azuni, de Diritto Marit. pt. ii. ch. 3, art. 1, 2.

<sup>24</sup> Barbeyrac, Note to Grotius, lib. iii. cap. 6, § 6, Note 1.

the ordinance, admits that the more rigid rule, which continued to prevail in the French prize tribunals from 1681 to 1744, was peculiar to the jurisprudence of France and Spain; but that the usage of other nations was only to confiscate the goods of the enemy.<sup>25</sup>

§ 18. Goods of a friend on board the ships of an enemy, Although by the general usage of nations, independently of treaty stipulations, the goods of an enemy found on board the ships of a friend are liable to capture and condemnation, yet the converse rule, which subjects to confiscation the goods of a friend on board the vessels of an enemy, is manifestly contrary to reason and justice. It may, indeed, afford, as *Grotius* has stated, a presumption that the goods are enemy's property; but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call *presumptiones juris et de jure*, and which are conclusive upon the party.

liable to confiscation by the prize code of some nations. But however unreasonable and unjust this maxim may be, it has been incorporated into the prize code of certain nations, and enforced by them at different periods. Thus by the

<sup>25</sup> Valin, Comm. liv. iii. tit. 9. Des Prises, art. 7.

French ordinances of 1538, 1543, and 1584, the goods of a friend laden on board the ships of an enemy are declared good and lawful prize. The contrary was provided by the subsequent declaration of 1650; but by the marine ordinance of Louis XIV. of 1681, the former rule was again established. *Valin* and *Pothier* are able to find no better argument in support of this rule, than that those who lade their goods on board an enemy's vessels thereby favour the commerce of the enemy, and by this act are considered in law as submitting themselves to abide the fate of the vessel; and *Valin* asks, "How can it be that the goods of friends and allies found in an enemy's ship should not be liable to confiscation, whilst even those of subjects are liable to it?" To which *Pothier* himself furnishes the proper answer: that in respect to goods, the property of the king's subjects, in lading them on board an enemy's vessels, they contravene the law which interdicts to them all commercial intercourse with the enemy, and deserve to lose their goods for this violation of the law.<sup>26</sup>

<sup>26</sup> *Valin*, Comm. liv. iii. tit. 9. Des Prises, art. 7.  
*Pothier*, Traité de Propriété, No. 96.

The fallacy of the argument by which this rule is attempted to be supported consists in assuming, what requires to be proved, that by the act of lading his goods on board an enemy's vessel the neutral submits himself to abide the fate of the vessel; for it cannot be pretended that the goods are subjected to capture and confiscation *ex re*, since their character of neutral property exempts them from this liability. Nor can it be shown that they are thus liable *ex delicto*, unless it be first proved that the act of lading them on board is an offence against the law of nations. It is therefore with reason that *Bynkershoek* concludes that this rule, where merely established by the prize ordinances of a belligerent power cannot be defended on sound principles. Where, indeed, it is made by special compact the equivalent for the converse maxim, that *free ships make free goods*, this relaxation of belligerent pretensions may be fairly coupled with a correspondent concession by the neutral, that *enemy ships should make enemy goods*. These two maxims have been, in fact, commonly thus coupled in the various treaties on this subject, with a view to simplify the judicial inquiries into the proprietary interest of the ship and cargo, by

resolving them into the mere question of the national character of the ship.

The two maxims are not, however, inseparable. The primitive law, independently of international compact, rests on the simple principle that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The right to capture an enemy's property has no limit but that of the *place* where the goods are found, which, if neutral, will protect them from capture. We have already seen that a neutral vessel on the high seas is not such a place. The exemption of neutral property from capture has no other exceptions than those arising from the carrying of contraband, breach of blockade, and other analogous cases, where the conduct of the neutral gives to the belligerent a right to treat his property as enemy's property. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. States have changed this simple and natural principle of the law of nations, by mutual compact, in whole or in part, according as they believed it to be for their interest; but

§ 19.  
The two maxims, of free ships free goods, and enemy ships enemy goods, not necessarily connected.

the one maxim, that *free ships make free goods*, does not necessarily imply the converse proposition, that *enemy ships make enemy goods*. The stipulation that neutral bottoms shall make neutral goods, is a concession made by the belligerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property found in the vessel of an enemy to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the preexisting law of nations; but neither reason nor usage render the two concessions so indissoluble that the one cannot exist without the other.

It was upon these grounds that the Supreme Court of the United States determined that the treaty of 1795, between them and Spain, which stipulated that free ships should make free goods, did not necessarily imply the converse proposition, that enemy ships should make enemy goods, the treaty being silent as to the latter; and that, consequently, the goods of a Spanish subject found on board the vessel of an enemy of the United States were not liable to confiscation as prize of war.

And although it was alleged that the prize law of Spain would subject the property of American citizens to condemnation when found on board the vessels of her enemy, the court refused to condemn Spanish property found on board a vessel of their enemy upon the principle of reciprocity; because the American government had not manifested its will to retaliate upon Spain; and until this will was manifested by some legislative act, the court was bound by the general law of nations constituting a part of the law of the land.<sup>27</sup>

The conventional law in respect to the rule § 20. now in question has fluctuated, at different Conventional law periods, according to the fluctuating policy as to free ships free goods. and interests of the different maritime states of Europe. It has been much more flexible than the consuetudinary law; but there is a great preponderance of modern treaties in favour of the maxim, *free ships free goods*, sometimes, but not always, connected with the correlative maxim, *enemy ships enemy goods*; so that it may be said that, for two centuries past, there has been a constant tendency to establish by compact the principle

<sup>27</sup> Cranch's Rep. vol. ix. p. 388. The Nereide.

that the neutrality of the ship should exempt the cargo, even if enemy's property, from capture and confiscation as prize of war. Among the earliest examples of such a stipulation is that contained in the capitulation granted by the Ottoman Porte, in 1604, to Henry IV. of France, which has been since followed in all the conventions between the different nations of Christendom and the Mohammedan powers, such as Turkey and the Barbary States. Under these treaties, the flag and pass are made conclusive of the national character both as to ship and cargo.<sup>28</sup>

It became, at an early period, an object of interest with Holland, a great commercial and navigating country, whose permanent policy was essentially pacific, to obtain a relaxation of the severe rules which had been previously observed in maritime warfare. The States-General of the United Provinces having complained of the provisions in the French ordinance of Henry II. 1538, a treaty of commerce was concluded between France and the Republic in 1646, by which the operation of the ordinance, so far as respected the capture

<sup>28</sup> Flassan, *Histoire de la Diplomatie Française*, tom. ii. p. 226. Azuni, *Diris Marit.* pt. ii. ch. 3, art. 1, § 8.

and confiscation of neutral vessels for carrying enemy's property, was suspended ; but it was found impossible to obtain any relaxation as to the liability to capture of enemy's property in neutral vessels. The Dutch negotiator in Paris, in his correspondence with the grand pensionary De Witt, states that he had obtained the " repeal of the pretended French law, *que robe d'ennemi confisque celle d'ami* ; " so that if, for the future, there should be " found in a free Dutch vessel effects belonging to the enemies of France, these effects alone will be confiscable, and the ship with the other goods will be restored ; for it is impossible to obtain the twenty-fourth article of my Instructions, where it is said that the freedom of the ship ought to free the cargo, even if belonging to an enemy." This latter concession the United Provinces obtained from France by the treaty of alliance of 1662, and the commercial treaty signed at the same time with the peace at Nimiguen in 1678, confirmed by the treaty of Ryswick in 1697. The rule of *free ships free goods* was coupled, in these treaties, with its correlative maxim, *enemy ships enemy goods*. The same concession was obtained by Holland from England, in 1668 and 1674, as the price of an

alliance between the two countries against the ambitious designs of Louis XIV. These treaties gave rise, in the war which commenced in 1756 between France and Great Britain, to a very remarkable controversy between the British and Dutch governments, in which it was contended on the one side that Great Britain had violated the rights of neutral commerce, and on the other that the States-General had not fulfilled the guarantee which constituted the equivalent for the concession made to the neutral flag in derogation of the preexisting law of nations."

The principle that the character of the vessel should determine that of the cargo was adopted by the treaties of Utrecht of 1713, subsequently confirmed by those of 1721 and

" Dumont, *Corps Diplomatique*, tom. vi. pt. i. p. 342. Flassan, *Histoire de la Diplomatie Française*, tom. iii. p. 451. A pamphlet was published on the occasion of this controversy between the British and Dutch governments, by the elder Lord Liverpool, (then Mr. Jenkinson,) entitled, "A Discourse on the Conduct of Great Britain in respect to Neutral Nations during the present War," which contains a very full and instructive discussion of the question of neutral navigation, both as resting on the primitive law of nations and on treaties. London, 8vo. 1757. 2d Ed. 1794; 3d Ed. 1801.

1739, between Great Britain and Spain, by the treaty of Aix-la-Chapelle in 1748, and of Paris in 1763, between Great Britain, France, and Spain.

Such was the state of the consuetudinary <sup>Armed</sup> and conventional law prevailing among the <sup>neutrality</sup> different maritime powers of Christian Europe, <sup>of 1780.</sup> and between them and that set of nations who profess the Mohammedan religion, when the declaration of independence by the British North American colonies gave rise to a maritime war between France and Great Britain. With a view to conciliate those powers which remained neutral in this war, the cabinet of Versailles issued, on the 26th of July, 1778, an ordinance or instruction to the French cruizers, prohibiting the capture of neutral vessels, even when bound to or from enemy ports, unless laden in whole or in part with contraband articles destined for the enemy's use; reserving the right to revoke this concession, unless the enemy should adopt a reciprocal measure within six months. The British government, far from adopting any such measure, issued in March, 1780, an order in council suspending the special stipulations respecting neutral commerce and navigation contained in the treaty of alliance of 1674,



between Great Britain and the United Provinces, upon the alleged ground that the States-General had refused to fulfil the reciprocal conditions of the treaty. Immediately after this order in council, the Empress Catharine II. of Russia communicated to the different belligerent and neutral powers the famous declaration of neutrality, the principles of which were acceded to by France, Spain, and the United States of America, as belligerents, and by Denmark, Sweden, Prussia, Holland, the Emperor of Germany, Portugal, and Naples, as neutral powers. By this declaration, which afterwards became the basis of the armed neutrality of the Baltic powers, the rule that free ships make free goods was adopted, without the previously associated maxim that enemy ships should make enemy goods. The court of London answered this declaration by appealing to the "principles generally acknowledged as the law of nations, being the only law between powers where no treaties subsist;" and to the "tenor of its different engagements with other powers, where those engagements had altered the primitive law by mutual stipulations, according to the will and convenience of the contracting parties." Circumstances rendered it convenient for the

British government to dissemble its resentment towards Russia and the other northern powers, and the war was terminated without any formal adjustment of this dispute between Great Britain and the other members of the armed neutrality.<sup>30</sup>

By the treaties of peace concluded at Versailles in 1783, between Great Britain, France, and Spain, the treaties of Utrecht were once more revived and confirmed. This confirmation was again reiterated in the commercial treaty of 1786, between France and Great Britain, by which the two kindred maxims were once more associated. In the negotiations at Lisle in 1797, it was proposed by the British plenipotentiary, Lord Malmesbury, to renew all the former treaties between the two countries confirmatory of those of Utrecht. This proposition was objected to by the French ministers, for several reasons foreign to the present subject; to which Lord Malmesbury replied that these treaties were become the law of nations, and that infinite confusion would result from their not being renewed. It is

<sup>30</sup> Flassan, *Diplomatie Française*, tom. vii. pp. 183, 273. *Annual Register*, vol. xxiii. p. 205. *State Papers*, pp. 345—356; vol. xxiv. p. 300. *State Papers*.

probable, however, that his Lordship meant to refer to the territorial arrangements rather than to the commercial stipulations contained in these treaties. Be this as it may, the fact is, that they were not renewed, either by the treaty of Amiens in 1802, or by that of Paris in 1814.

During the protracted wars of the French revolution all the belligerent powers began by discarding in practice, not only the principles of the armed neutrality, but even the generally received maxims of international law by which the rights of neutral commerce in time of war had been previously regulated. "Russia," says Von Martens, "made common cause with Great Britain and with Prussia, to induce Denmark and Sweden to renounce all intercourse with France, and especially to prohibit their carrying goods to the country. The incompatibility of this pretension with the principles established by Russia in 1780, was veiled by the pretext that in a war like that against revolutionary France, the rights of neutrality did not come in question." France, on her part, revived the severity of her ancient prize code, by decreeing, not only the capture and condemnation of the goods of her enemies found on board neutral vessels,

but even of the vessels themselves laden with goods of British growth, produce, and manufacture. But in the further progress of the war, the principles which had formed the basis of the armed neutrality of the northern powers in 1780, were revived by a new maritime confederacy between Russia, Denmark, and Sweden, formed in 1800, to which Prussia acceded. This league was soon dissolved by the naval power of Great Britain and the death of the Emperor Paul; and the principle now in question was expressly relinquished by Russia by the convention signed at St. Petersburg in 1801, between that power and the British government, and subsequently acceded to by Denmark and Sweden. In 1807, in consequence of the stipulations contained in the treaty of Tilsit between Russia and France, a declaration was issued by the Russian court, in which the principles of the armed neutrality were proclaimed anew, and the convention of 1801 was annulled by the Emperor Alexander. In 1812, a treaty of alliance against France was signed by Great Britain and Russia; but no convention respecting the freedom of neutral commerce and navigation has been since concluded between these two powers.

Without entering into the abstract question,

The international law of Europe adopted by America, and modified by treaty.

how far the ancient international law, by which the intercourse of the maritime states of Europe has been so long regulated, is binding upon the new communities which have sprung up in the western hemisphere, it may be sufficient to observe that it was certainly considered by the United States as obligatory upon them during the war of their revolution. During that war, the American courts of prize acted upon the generally received principles of European public law, that enemy's property in neutral vessels was liable to, whilst neutral property in an enemy's vessels was exempt from, confiscation; until Congress issued an ordinance recognising the maxims of the armed neutrality of 1780, upon condition that they should be reciprocally acknowledged by the other belligerent powers. In the instructions given by Congress in 1784 to their ministers appointed to treat with the different European courts, the same principles were proposed as the basis of negotiation by which the independence of the United States was to be recognised. During the wars of the French revolution, the United States being neutral, admitted that the immunity of their flag did not extend to cover enemy's property, as a principle founded in the customary law and

established usage of nations, though they sought every opportunity of substituting for it the opposite maxim of *free ships free goods*, by conventional arrangements with such nations as were disposed to adopt that amendment of the law. In the course of the correspondence which took place between the minister of the French republic and the government of the United States, the latter affirmed that it could not be doubted that, by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. It was true, that several nations, desirous of avoiding the inconvenience of having their vessels stopped at sea, overhauled, carried into port, and detained, under pretence of having enemy's goods on board, had, in many instances, introduced, by special treaties, the principle, that enemy ships should make enemy goods, and friendly ships friendly goods; a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss: but this was altogether the effect of particular treaty, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as have so

agreed to control it. England had generally determined to adhere to the rigorous principle, having in no instance, so far as was recollected, agreed to the modification of letting the property of the goods follow that of the vessel, except in the single one of her treaties with France. The United States had adopted this modification in their treaties with France, with the United Netherlands, and with Prussia; and, therefore, as to those powers, American vessels covered the goods of their enemies, and the United States lost their goods when in the vessels of the enemies of those powers. With Great Britain, Spain, Portugal, and Austria, the United States had then no treaties; and therefore had nothing to oppose them in acting according to the general law of nations, that enemy goods are lawful prize though found in the ships of a friend. Nor was it perceived that France could, on the whole, suffer, for though she lost her goods in American vessels, when found therein by England, Spain, Portugal, or Austria; yet she gained American goods when found in the vessels of England, Spain, Portugal, Austria, the United Netherlands, or Prussia: and as the Americans had more goods afloat in the vessels of those six nations, than France had afloat in their vessels, France was the gainer, and they

the losers, by the principle of the treaty between the two countries. Indeed the United States were losers in every direction of that principle; for when it worked in their favour, it was to save the goods of their friends; when it worked against them, it was to lose their own, and they would continue to lose whilst it was only partially established. When they should have established it with all nations, they would be in a condition neither to gain nor lose, but would be less exposed to vexatious searches at sea. To this condition the United States were endeavouring to advance; but as it depended on the will of other nations, they could only obtain it when others should be ready to concur.<sup>31</sup>

By the treaty of 1794 between the United States and Great Britain, article 17, it was stipulated that vessels, captured on suspicion of having on board enemy's property or contraband of war, should be carried to the nearest port for adjudication, and that part of the cargo only which consisted of enemy's

<sup>31</sup> Mr. Jefferson's Letter to M. Genet, July 24, 1793. Waite's State Papers, vol. i. p. 134. See also President Jefferson's Letter to Mr. R. R. Livingston, American Minister at Paris, Sept. 9, 1801. Jefferson's Memoirs, vol. iii. p. 489.

property, or contraband for the enemy's use, made prize, and the vessel be at liberty to proceed with the remainder of her cargo. In the treaty of 1778, between France and the United States, the rule of *free ships free goods* had been stipulated; and, as we have already seen, France complained that her goods were taken out of American vessels without resistance by the United States, who, it was alleged, had abandoned, by their treaty with Great Britain, their antecedent engagements to France, recognising the principles of the armed neutrality.

To these complaints, it was answered by the American government that when the treaty of 1778 was concluded, the armed neutrality had not been formed, and consequently the state of things on which that treaty operated was regulated by the pre-existing law of nations, independently of the principles of the armed neutrality. By that law, free ships did not make free goods, nor enemy ships enemy goods. The stipulation therefore in the treaty of 1778 formed an exception to a general rule which retained its obligation in all cases where not changed by compact. Had the treaty of 1794 between the United States and Great Britain not been formed, or had it

entirely omitted any stipulation on this subject, the belligerent right would still have existed. The treaty did not concede a new right, but only mitigated the practical exercise of a right already acknowledged to exist. The desire of establishing universally the principle, that neutral ships should make neutral goods, was felt by no nation more strongly than by the United States. It was an object which they kept in view, and would pursue by such means as their judgment might dictate. But the wish to establish a principle was essentially different from an assumption that it is already established. However solicitous America might be to pursue all proper means tending to obtain the concession of this principle by any or all of the maritime powers of Europe, she had never conceived the idea of obtaining that consent by force. The United States would only arm to defend their own rights: neither their policy nor their interests permitted them to arm in order to compel a surrender of the rights of others.<sup>33</sup>

<sup>33</sup> Letter of the American Envoys at Paris, Messrs. Marshall, Pinkney, and Geary, to M. de Talleyrand, Jan. 17, 1798. Waite's State Papers, vol. iv. pp. 38—47.

The principle of *free ships free goods*, had been stipulated by the treaty of 1785, between the United States and Prussia. On the expiration of this convention in 1799, a new treaty was negotiated, which contains the following article:—“ Experience having proved  
“ that the principle adopted in the 12th  
“ article of the treaty of 1785, according to  
“ which free ships make free goods, has not  
“ been sufficiently respected during the two  
“ last wars, and especially in that which still  
“ continues, the two contracting parties propose, after the return of a general peace, to  
“ agree, either separately between themselves,  
“ or jointly with other powers alike interested,  
“ to concert with the great maritime powers  
“ of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and the safety of neutral  
“ navigation and commerce in future wars.  
“ And if in the interval either of the contracting parties should be engaged in a war,  
“ to which the other should remain neutral,  
“ the ships of war and privateers of the belligerent power shall conduct themselves towards the vessels of the neutral power, as  
“ favourably as the course of the war then  
“ existing may permit, observing the principles

“and rules of the law of nations as generally acknowledged.”

During the war which commenced between the United States and Great Britain in 1812, the prize courts of the former uniformly enforced the generally acknowledged rule of international law, that enemy's goods in neutral vessels are liable to capture and confiscation, except as to such powers with whom the American government had stipulated by subsisting treaties the contrary rule, that free ships should make free goods.

In their recent negotiations with the newly established republics of South America, the United States proposed the establishment of the principle of *free ships free goods*, as between all the powers of the North and South American continents. It was declared that the rule of public law,—that the property of an enemy is liable to capture in the vessels of a friend,—has no foundation in natural right, and, though it be the established usage of nations, rests entirely on the abuse of force. No neutral nation, it was said, was bound to submit to the usage; and though the neutral may have yielded at one time to the practice, it did not follow that the right to vindicate by force the security of

though he includes timber and naval stores among those articles which are particularly useful for the purposes of war, and always liable to capture as contraband; and considers provisions as such only under certain circumstances, "when there are hopes of reducing the enemy by famine." *Bynkershoek* strenuously contends against admitting into the list of contraband articles those things which are of promiscuous use in peace and in war. He considers the limitation assigned by Grotius to the right of intercepting them, confining it to the case of necessity, and under the obligation of restitution or indemnification, as insufficient to justify the exercise of the right itself. He concludes that the materials out of which contraband articles may be formed are not themselves contraband; because if all the materials may be prohibited, out of which something may be fabricated that is fit for war, the catalogue of contraband goods will be almost interminable, since there is hardly any kind of material out of which something, at least, fit for war may not be fabricated. The interdiction of so many articles would amount to a total interdiction of commerce, and might as well be so expressed. He qualifies this general position by stating that it

The general freedom of neutral commerce with the respective belligerent powers is subject to certain exceptions. Among these is the trade with the enemy in certain articles called contraband of war. The almost unanimous authority of elementary writers, of prize ordinances, and of treaties, agrees to enumerate among these all warlike instruments, or materials by their own nature fit to be used in war. Beyond these, there is some difficulty in reconciling the conflicting authorities derived from the opinions of publicists, the fluctuating usage among nations, and the text of various conventions designed to give to that usage the fixed form of positive law. *Grotius*, in considering this subject, makes a distinction between those things which are useful only for the purposes of war, those which are not so, and those which are susceptible of indiscriminate use in war and in peace. The *first*, he agrees with all other text writers in prohibiting neutrals from carrying to the enemy, as well as in permitting the *second* to be so carried; the *third* class, such as money, provisions, ships, and naval stores, he sometimes prohibits, and at others permits, according to the existing circumstances of the war. *Vattel* makes somewhat of a similar distinction,

§ 21.  
Contra-  
band of  
war.

though he includes timber and naval stores among those articles which are particularly useful for the purposes of war, and always liable to capture as contraband; and considers provisions as such only under certain circumstances, "when there are hopes of reducing the enemy by famine." *Bynkershoek* strenuously contends against admitting into the list of contraband articles those things which are of promiscuous use in peace and in war. He considers the limitation assigned by Grotius to the right of intercepting them, confining it to the case of necessity, and under the obligation of restitution or indemnification, as insufficient to justify the exercise of the right itself. He concludes that the materials out of which contraband articles may be formed are not themselves contraband; because if all the materials may be prohibited, out of which something may be fabricated that is fit for war, the catalogue of contraband goods will be almost interminable, since there is hardly any kind of material out of which something, at least, fit for war may not be fabricated. The interdiction of so many articles would amount to a total interdiction of commerce, and might as well be so expressed. He qualifies this general position by stating that it

may sometimes happen that materials for building ships are prohibited, "if the enemy is in great need of them, and cannot well carry on the war without them." On this ground he justifies the edict of the States-General of 1657 against the Portuguese, and that of 1652 against the English, as exceptions to the general rule that materials for ship-building are not contraband. He also states that "provisions are often excepted" from the general freedom of neutral commerce "when the enemies are besieged by our friends, or are *otherwise* pressed by famine."<sup>34</sup>

*Valin* and *Pothier* both concur in declaring that provisions (*munitions de bouche*) are not contraband by the prize law of France, or the common law of nations, unless in the single case where they are destined to a besieged or blockaded place.<sup>35</sup>

As to naval stores, Sir *W. Scott*, laying down the doctrine of their being liable to seizure as contraband in their own nature, when going to the enemy's use, under the

Naval stores, how far contraband.

<sup>34</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 1, § 5. Rutherford's Inst. b. ii. ch. 9, § 19. Vattel, liv. iii. ch. 7, § 112. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9, 10.

<sup>35</sup> Valin, Comm. sur l'Ordonn. liv. iii. tit. 9; des Prises, art. 11. Pothier, de Propriété, No. 104.

modern law of nations, observes that formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making the treaty between England and Sweden in 1661, or at least at the time of making the treaty which is the basis of it, that of 1656. And *Valin*, in his commentary upon the marine ordinance of Louis XIV., by which only munitions of war were declared to be contraband, says: "In the war of 1706, pitch and tar were comprehended in the list of contraband, because the enemy treated them as such, except when found on board Swedish ships, these articles being of the growth and produce of their country. In the treaty of commerce concluded with the king of Denmark, by France, the 23d of August, 1742, pitch and tar were also declared contraband, together with resin, sail-cloth, hemp and cordage, masts, and ship timber. Thus, as to this matter, there is no fault to be found with the conduct of the English, except where it contravenes particular treaties; for in law these things are now contraband, and have been so since the beginning of the present century, which was not the case formerly, as it appears by ancient

“ treaties, and particularly that of St. Germain, concluded with England in 1677; the fourth article of which expressly provides, that the trade in all these articles shall remain free, as well as in every thing necessary to human nourishment, with the exception of places besieged or blockaded.”<sup>36</sup>

By the treaty of navigation and commerce of Utrecht, between Great Britain and France, renewed and confirmed by the treaty of Aix-la-Chapelle in 1748, by the treaty of Paris in 1763, by that of Versailles in 1783, and by the commercial treaty between France and Great Britain of 1786, the list of contraband is strictly confined to munitions of war; and naval stores, provisions, and all other goods which have not been worked into the form of any instrument or furniture for warlike use, by land or by sea, are expressly excluded from this list. The subject of the contraband character of naval stores continued a vexed question, between Great Britain and the Baltic powers, throughout the whole of the eighteenth century. Various relaxations in favour of the extreme belligerent pretension on this

<sup>36</sup> Vain, *Comm. sur l'Ordonn. liv. iii. tit. 9; des Prises, art. 11.*

subject had been conceded in favour of the commerce in articles the peculiar growth and production of these states, either by permitting them to be freely carried to the enemy's ports, or by mitigating the original penalty of confiscation, on their seizure, to the milder right of preventing the goods being carried to the enemy, and applying them to the use of the belligerent, on making a pecuniary compensation to the neutral owner. This controversy was at last terminated by the convention between Great Britain and Russia, concluded in 1801, to which Denmark and Sweden subsequently acceded. By the third article of this treaty, which is literally copied from the treaties of armed neutrality of 1780 and 1800, the list of contraband is confined to munitions of war, excluding naval stores, without "prejudice to the particular stipulations of one or the other crown with other powers, by which objects of similar kind should be reserved, provided or permitted."

The object of this convention is declared in its preamble to be the settlement of the differences between the contracting parties, which had grown out of the armed neutrality by "an invariable determination of their principles upon the rights of neutrality in their appli-

" cation to their respective monarchies;" which object was accomplished by the northern powers yielding the rule of *free ships free goods*, whilst Great Britain conceded the points asserted by them as to contraband, blockades, and the coasting and colonial trade.<sup>37</sup>

The doctrine of the British prize courts as to provisions and naval stores becoming contraband, independently of special treaty stipulations, is laid down very fully by Sir *W. Scott*, in the case of the *Jonge Margaretha*. He there states that the catalogue of contraband had varied very much, and sometimes in such a manner as to make it difficult to assign the reason of the variations, owing to particular circumstances, the history of which had not accompanied the history of the decisions.

Provisions  
and naval  
stores,  
when con-  
traband.

\* See a pamphlet entitled, "Substance of the Speech delivered by Lord Grenville in the House of Lords, Nov. 13, 1801," in which his lordship reasoned to show that the convention abandoned the maritime rights, previously asserted by Great Britain against the armed neutrality; that it not only formed a new conventional law between the contracting parties, but contained a recognition of universal and preexisting rights which could not justly be refused by them to other states. For the very lame and unsuccessful replies made by the able speakers who entered the lists against him, see Annual Register for 1802, ch. 4.

“ In 1673, when many unwarrantable rules  
“ were laid down by public authority respect-  
“ ing contraband, it was expressly asserted by  
“ a person of great knowledge and experience  
“ in the English admiralty, that by its practice,  
“ *corn, wine, and oil*, were liable to be deemed  
“ contraband. In much later times, many  
“ sorts of provisions, such as butter, salted  
“ fish, and rice, has been condemned as  
“ contraband. The modern established rule  
“ was, that generally they are not contraband,  
“ but may become so under circumstances  
“ arising out of the peculiar situation of the  
“ war, or the condition of the parties engaged  
“ in it. Among the causes which tend to  
“ prevent provisions from being treated as  
“ contraband, one is that they are of the  
“ growth of the country which exports them.  
“ Another circumstance to which some indul-  
“ gence, by the practice of nations is shown,  
“ is when the articles are in their native and  
“ unmanufactured state. Thus iron is treated  
“ with indulgence, though anchors and other  
“ instruments fabricated out of it are directly  
“ contraband. Hemp is more favourably con-  
“ sidered than cordage; and wheat is not  
“ considered so noxious a commodity as any  
“ of the final preparations of it for human

“ use. But the most important distinction is,  
“ whether the articles are destined for the  
“ ordinary uses of life or for military use. The  
“ nature and quality of the port to which the  
“ articles were going, is a test of the matter  
“ of fact on which the distinction is to be  
“ applied. If the port is a general commercial  
“ port, it shall be understood that the articles  
“ were going for civil use, although occasion-  
“ ally a frigate or other ships of war may be  
“ constructed in that port. On the contrary,  
“ if the great predominant character of a port  
“ be that of a port of naval equipment, it shall  
“ be intended that the articles were going for  
“ military use, although merchant ships resort  
“ to the same place, and although it is possible  
“ that the articles might have been applied to  
“ civil consumption ; for it being impossible to  
“ ascertain the final application of an article  
“ *incipitis usus*, it is not an injurious rule  
“ which deduces both ways the final use from  
“ the immediate destination ; and the pre-  
“ sumption of a hostile use, founded on its  
“ destination to a military port, is very much  
“ inflamed, if at the time when the articles  
“ were going, a considerable armament was  
“ notoriously preparing, to which a supply of

“ those articles would be eminently use-  
“ ful.”<sup>38</sup>

Articles of  
promis-  
cuous use  
becoming  
contraband  
when des-  
tined to a  
port of  
naval  
equipment.

The distinction, under which articles of pro-  
miscuous use are considered as contraband,  
when destined to a port of naval equipment,  
appears to have been subsequently abandoned  
by Sir *W. Scott*. In the case of the *Charlotte*,  
he states that “ the character of the port is  
“ immaterial, since naval stores, if they are to  
“ be considered as contraband, are so, without  
“ reference to the nature of the port, and  
“ equally, whether bound to a mercantile port  
“ only, or to a port of naval military equip-  
“ ment. The consequences of the supply may  
“ be nearly the same in either case. If sent  
“ to a mercantile port, they may then be ap-  
“ plied to immediate use in the equipment of  
“ privateers, or they may be conveyed from  
“ the mercantile to the naval port, and there  
“ become subservient to every purpose to  
“ which they could have been applied if going  
“ directly to a port of naval equipment.”<sup>39</sup>

Provisions  
becoming  
contraband  
under cer-  
tain cir-  
cumstances  
of the war.

The doctrine of the English court of ad-  
miralty, as to provisions becoming contra-  
band, under certain circumstances of war, was

<sup>38</sup> Robinson's Adm. Rep. vol. i. p. 192.

<sup>39</sup> Ibid. vol. v. p. 305.

adopted by the British government in the instructions given to their cruizers on the 8th June, 1793, directing them to stop all vessels, laden wholly or in part with corn, flour, or meal, bound to any port in France, and to send them into a British port to be purchased by government, or to be released on condition that the master should give security to dispose of his cargo in the ports of some country in amity with his Britannic Majesty. This order was justified upon the ground, that by the modern law of nations, all provisions are to be considered contraband, and as such, liable to confiscation, wherever the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to terms. The actual situation of France, (it was said,) was notoriously such as to lead to the employing this mode of distressing her by the joint operations of the different powers engaged in the war; and the reasoning which the text writers apply to all cases of this sort, was more applicable to the present case, in which the distress resulted from the unusual mode of war adopted by the enemy himself, in having armed almost the whole labouring class of the French nation, for the purpose of commencing and supporting

hostilities against almost all European governments; but this reasoning was most of all applicable to a trade, which was in a great measure carried on by the then actual rulers of France, and was no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war and were then carrying it on against Great Britain.<sup>40</sup>

This reasoning was resisted by the neutral powers, Sweden, Denmark, and especially the United States. The American government insisted that when two nations go to war, other nations, who choose to remain at peace, retain their natural right to pursue their agriculture, manufacture, and other ordinary vocations; to carry the produce of their industry for exchange to all countries, belligerent or neutral, as usual; to go and come freely without injury or molestation; in short, that the war among others should be, for neutral nations, as if it did not exist. The only restriction to this general freedom of commerce, which had been submitted to by nations at peace, was that of not furnishing to either

<sup>40</sup> Mr. Hammond's Letter to Mr. Jefferson, 12th Sept. 1793.

party implements merely of war, nor any thing whatever to a place blockaded by its enemy. These implements of war had been so often enumerated in treaties under the name of contraband as to leave little question about them at that day. It was sufficient to say that corn, flour, and meal, were not of the class of contraband, and consequently remained articles of free commerce. The state of war then existing between Great Britain and France furnished no legitimate right to either of these belligerent powers to interrupt the agriculture of the United States, or the peaceable exchange of their produce with all nations. If any nation whatever had the right to shut against their produce all the ports of the earth except her own, and those of her friends, she might shut these also, and thus prevent altogether the export of that produce.<sup>41</sup>

In the treaty subsequently concluded between Great Britain and the United States on the 19th November, 1794, it was stipulated, (article 18,) that under the denomination of contraband should be comprised all arms and implements serving for the purposes of war,

<sup>41</sup> Mr. Jefferson's Letter to Mr. T. Pinkney, 7th Sept. 1793.

“ and also timber for ship-building, tar or rosin,  
 “ copper in sheets, sails, hemp, and cordage,  
 “ and generally whatever may serve directly  
 “ to the equipment of vessels, unwrought iron  
 “ and fir planks only excepted.” The article  
 then goes on to provide that “ whereas *the*  
 “ *difficulty of agreeing on the precise cases, in*  
 “ *which alone provisions and other articles, not*  
 “ *generally contraband, may be regarded as*  
 “ *such*, renders it expedient to provide against  
 “ the inconveniences and misunderstandings  
 “ which might thence arise ; it is further  
 “ agreed, that whenever any such articles, so  
 “ becoming contraband according to the ex-  
 “ isting law of nations, shall for that reason  
 “ be seized, the same shall not be confiscated ;  
 “ but the owners thereof shall be speedily and  
 “ completely indemnified ; and the captors, or  
 “ in their default, the government under whose  
 “ authority they act, shall pay to the masters  
 “ or owners of such vessels the full value of  
 “ all such articles, with a reasonable mercantile  
 “ profit thereon, together with the freight,  
 “ and also the demurrage incident to such  
 “ detention.”

British  
 provision  
 order of  
 April,  
 1795.

The instructions of June, 1793, had been  
 revoked previous to the signature of this  
 treaty ; but before its ratification the British

government issued, in April, 1795, an order in council instructing its cruizers to stop and detain all vessels laden wholly or in part with corn, flour, meal, and other articles of provisions, and bound to any port in France, and to send them to such ports as might be most convenient, in order that such corn, &c. might be purchased on behalf of government.

This last order was subsequently revoked, and the question of its legality became the subject of discussion before the mixt commission constituted under the treaty to decide upon the claims of American citizens by reason of irregular or illegal captures and condemnations of their vessels and other property, under the authority of the British government. The order in council was justified upon two grounds:—

1. That it was made when there was a prospect of reducing the enemy to terms by famine, and that in such a state of things, provisions bound to the ports of the enemy became so far contraband, as to justify Great Britain in seizing them upon the terms of paying the invoice price, with a reasonable mercantile profit thereon, together with freight and demurrage.
2. That the order was justified by *necessity*,

the British nation being at that time threatened with a scarcity of the articles directed to be seized.

The first of these positions was rested not only upon the general law of nations, but upon the above quoted article of the treaty between Great Britain and America.

The evidence adduced of this supposed law of nations was principally the following loose passage of *Vattel*: “Commodities particularly  
“ useful in war, and the carrying of which to  
“ an enemy is prohibited, are called contra-  
“ band goods. Such are arms, ammunition,  
“ timber for ship-building, every kind of naval  
“ stores, horses, and even provisions, in certain  
“ junctures, when we have hopes of reducing  
“ the enemy by famine.”<sup>42</sup>

In answer to this authority, it was stated that it might be sufficient to say that it was, at best, equivocal and indefinite, as it did not designate what the junctures are in which it might be held that “there are hopes of reducing the enemy by famine;” that it was entirely consistent with it, to affirm, that these hopes must be built upon an obvious and palpable chance of effecting the enemy’s reduction

<sup>42</sup> *Droit des Gens*, liv. iii. ch. 7, § 112.

by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist except in certain defined cases, such as the actual siege, blockade, or investment of particular places. This answer would be rendered still more satisfactory by comparing the above quoted passage with the more precise opinions of other respectable writers on international law, by which might be discovered that which Vattel does not profess to explain—the combination of circumstances to which his principle is applicable or is intended to be applied.

But there was no necessity for relying wholly on this answer, since Vattel would himself furnish a pretty accurate commentary on the vague text which he had given. The only instance put by this writer which came within the range of his general principle, was that which he, as well as Grotius, had taken from Plutarch. “Demetrius,” as *Grotius* expressed it, “held Attica by the sword. He had taken “the town of Rhamnus, *designing a famine* “*in Athens*, and had almost accomplished his “design, when a vessel laden with provisions “attempted to relieve the city.” *Vattel* speaks of this as of a case in which provisions were contraband, (section 17,) and although he did

not make use of this example for the declared purpose of rendering more specific the passage above cited, yet as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband farther than that example would warrant.

It was also to be observed, that in sect. 113, he states expressly that all contraband goods, (including, of course, those becoming so by reason of the junctures of which he had been speaking at the end of sect. 112,) are to be confiscated. But nobody pretended that Great Britain could rightfully have *confiscated* the cargoes taken under the order of 1795; and yet if the seizures made under that order fell within the opinion expressed by Vattel, the confiscation of the cargoes seized would have been justifiable. It had long been settled that all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature, or become so by existing circumstances; and even in early times, when this rule was not so well established, we find that those nations who sought an exemption from forfeiture, never claimed it upon grounds peculiar to any description of contraband, but upon general reasons embracing all cases of

contraband whatsoever. As it was admitted, then, that the cargoes in question were not subject to forfeiture as contraband, it was manifest that the juncture which gave birth to the order in council could not have been such a one as Vattel had in view ; or, in other words, that the cargoes were not become contraband at all within the true meaning of his principle, or within any principle known to the general law of nations.

The authority of Grotius was also adduced as countenancing this position.

*Grotius* divides commodities into three classes, the first of which he declares to be plainly contraband ; the second plainly not so ; and as to the third, he says : “ In tertio illo genere usus ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipient, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat.” This “ causa alia ” is afterwards explained by an example, “ ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabitur.”

This opinion of Grotius as to the third class of goods did not appear to proceed at all upon

the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent. He does not consider the right of seizure as a means of effecting the reduction of the enemy, but as the indispensable means of our own defence. He does not state the seizure upon any supposed illegal conduct in the neutral, in attempting to carry articles of the third class, (among which provisions are included,) *not bound to a port besieged or blockaded*, to be lawful, when made with the mere view of annoying or reducing the enemy, but solely when made with a view to our own preservation or defence, under the pressure of that imperious and unequivocal necessity, which breaks down the distinctions of property, and, upon certain conditions, revives the original right of using things as if they were in common.

This necessity he explains at large in his second book, (cap. ii. sec. 6,) and in the above recited passage he refers expressly to that explanation. In sections 7, 8, and 9, he lays down the conditions annexed to this right of necessity: as, 1. It shall not be exercised until all other possible means have been used; 2. Nor if the right owner is under a like

necessity; and, 3. Restitution shall be made as soon as practicable.

In his third book, (cap. xvii. sec. 1,) recapitulating what he had before said on this subject, Grotius further explains this doctrine of necessity, and most explicitly confirms the construction placed upon the above-cited texts. And *Rutherford*, in commenting on Grotius, (lib. iii. cap. 1, sec. 5,) also explains what he there says of the right of seizing provisions upon the ground of necessity, and supposes his meaning to be that the seizure would not be justifiable in that view, "unless the exigency of affairs is such that we cannot possibly do without them."<sup>43</sup>

*Bynkershoek* also confines the right of seizing goods, not generally contraband of war, (and provisions among the rest,) to the above-mentioned cases.<sup>44</sup>

It appeared, then, that so far as the authority of text writers could influence the question, the order in council of 1795 could not be rested upon any just notion of contraband; nor could it, in that view, be justified by the reason of the thing or the approved usage of nations.

<sup>43</sup> *Rutherford's Inst.* vol. ii. b. ii. ch. 9, § 19.

<sup>44</sup> *Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.*

If the mere hope, however apparently well founded, of annoying or reducing an enemy by intercepting the commerce of neutrals in articles of provision, (which in themselves are no more contraband than ordinary merchandize,) to ports not besieged or blockaded, would authorize that interruption, it would follow that a belligerent might at any time prevent, without a siege or blockade, all trade whatsoever with its enemy; since there is at all times reason to believe that a nation, having little or no shipping of its own, might be so materially distressed by preventing all other nations from trading with it, that such prevention might be a powerful instrument in bringing it to terms. The principle is so wide in its nature that it is, in this respect, incapable of any boundary. There is no solid distinction, in this view of the principle, between provisions and a thousand other articles. Men must be clothed as well as fed; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. A nation, in proportion as it can be debarred its accustomed commercial intercourse with other states, must be enfeebled and impoverished; and if it is allowable to a belligerent to violate the free-

dom of neutral commerce in respect to any one article not contraband *in se*, upon the expectation of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing its reaching his ports, why not upon the same expectation of annoyance cut off, as far as possible by captures, all communication with the enemy, and thus strike at once effectually at his power and resources ?

As to the 18th article of the treaty of 1794, between the United States and Great Britain, it manifestly intended to leave the question where it found it; the two contracting parties, not being able to agree upon a definition of the cases in which provisions and other articles not generally contraband might be regarded as such, (the American government insisting on confining it to articles destined to a place actually besieged, blockaded, or invested, whilst the British government maintained that it ought to be extended to all cases where there is an expectation of reducing the enemy by famine,) concurred in stipulating that "whenever any such articles, so becoming "contraband, *according to the existing law of nations*, shall for that reason be seized, the "same shall not be confiscated," but the

owners should be completely indemnified in the manner provided for in the article. When the law of nations existing at the time the case arises pronounces the articles contraband, they may for that reason be seized; when otherwise, they may not be seized. Each party was thus left as free as the other to decide whether the law of nations, in the given case, pronounced them contraband or not, and neither was obliged to be governed by the opinion of the other. If one party, on a false pretext of being authorized by the law of nations, made a seizure, the other was at full liberty to contest it, to appeal to that law, and, if he thought fit, to resort to reprisals and war.

As to the second ground upon which the order in council, was justified, *necessity*, Great Britain being, as alleged, at the time of issuing it, threatened with a scarcity of those articles directed to be seized, it was answered that it would not be denied that extreme necessity might justify such a measure. It was only important to ascertain whether that necessity then existed, and upon what terms the right it communicated might be carried into exercise.

Grotius and the other text writers on the subject concurred in stating that the necessity must be real and pressing, and that even then it does not confer a right of appropriating the goods of others until all other practicable means of relief have been tried and found inadequate. It was not to be doubted that there were other practicable means of averting the calamity apprehended by Great Britain. The offer of an advantageous market in the different ports of the kingdom was an obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into a profitable commerce; they will send their cargoes where interest invites; and if this inducement is held out to them in time, it will always produce the effect intended. But so long as Great Britain offered less for the necessaries of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy, and pass by her own? Could it be said, that under the mere apprehension (not under the actual experience) of scarcity, she was authorised to have recourse to the forcible means of seizing provisions belonging to neutrals, without attempting

those means of supply which were consistent with the rights of others, and which were not incompatible with the exigency? After this order had been issued and carried into execution, the British government did what it should have done before: it offered a bounty upon the importation of the articles of which it was in want. The consequence was that neutrals came with these articles, until at length the market was found to be overstocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the order of 1795.

Upon these grounds, a full indemnification was allowed by the commissioners, under the seventh article of the treaty of 1794, to the owners of the vessels and cargoes seized under the orders in council, as well for the loss of a market as for the other consequences of their detention.<sup>45</sup>

§ 22.  
Transportation of military persons and despatches in the enemy's service.

Of the same nature with the carrying of contraband goods is the transportation of military persons or despatches in the service of the enemy.

<sup>45</sup> Proceedings of the Board of Commissioners under the seventh article of the treaty of 1794. MS. Opinion of Mr. W. Pinkney, case of the Neptune.

A neutral vessel which is used as a transport for the enemy's forces is subject to confiscation if captured by the opposite belligerent. Nor will the fact of her having been impressed by violence into the enemy's service exempt her. The master cannot be permitted to aver that he was an involuntary agent. Were an act of force exercised by one belligerent power on a neutral ship or person to be considered a justification for an act contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands must seek redress from the government which has imposed the restraint upon him.<sup>46</sup> As to the number of military persons necessary to subject the vessel to confiscation, it is difficult to define, since fewer persons of high quality and character may be of much more importance than a much greater number of persons of lower condition. To carry a veteran general, under some circumstances, might be a much more

<sup>46</sup> Robinson's Adm. Rep. vol. iv. p. 256. The Carolina.

noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and therefore the belligerent has a stronger right to prevent and punish it; nor is it material, in the judgment of the prize court, whether the master be ignorant of the character of the service on which he is engaged. It is deemed sufficient if there has been an injury arising to the belligerent from the employment in which the vessel is found. If imposition be practised, it operates as force; and if redress is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible in the greater number of cases to prove the privity of the immediate offender.<sup>47</sup>

The fraudulently carrying the despatches of the enemy will also subject the neutral vessel, in which they are transported, to capture and confiscation. The consequences of such a service are indefinite, infinitely beyond the

<sup>47</sup> Robinson's Adm. Rep. vol. vi. p. 430. The *Orozembo*.

effect of any contraband that can be conveyed:  
“ The carrying of two or three cargoes of  
“ military stores,” says Sir *W. Scott*, “ is  
“ necessarily an assistance of a limited nature ;  
“ but in the transmission of despatches may  
“ be conveyed the entire plan of a campaign,  
“ that may defeat all the plans of the other  
“ belligerent in that quarter of the world. It  
“ is true, as it has been said, that *one ball*  
“ might take off a Charles the XIIth, and  
“ might produce the most disastrous effects in  
“ a campaign ; but that is a consequence so  
“ remote and accidental, that in the contem-  
“ plation of human events it is a sort of  
“ evanescent quantity of which no account is  
“ taken ; and the practice has been, accord-  
“ ingly, that it is in considerable quantities  
“ only that the offence of contraband is  
“ contemplated. The case of despatches is  
“ very different : it is impossible to limit a  
“ letter to so small a size as not to be  
“ capable of producing the most important  
“ consequences. It is a service, therefore,  
“ which, in whatever degree it exists, can  
“ only be considered in one character—as  
“ an act of the most hostile nature. The  
“ offence of fraudulently carrying despatches  
“ in the service of the enemy being, then,

“ greater than that of carrying contraband  
“ under any circumstances, it becomes abso-  
“ lutely necessary, as well as just, to resort  
“ to some other penalty than that inflicted in  
“ cases of contraband. The confiscation of  
“ the noxious article, which constitutes the  
“ penalty in contraband, where the vessel  
“ and cargo do not belong to the same per-  
“ son, would be ridiculous when applied to  
“ *despatches*. There would be *no* freight  
“ dependent on their transportation, and there-  
“ fore this penalty could not, in the nature of  
“ things, be applied. The vehicle in which  
“ they are carried must, therefore, be confis-  
“ cated.”<sup>48</sup>

But carrying the despatches of an ambassa-  
dor or other public minister of the enemy,  
resident in a neutral country, is an exception  
to the reasoning on which the above general  
rule is founded. “ They are despatches from  
“ persons who are, in a peculiar manner, the  
“ favourite object of the protection of the law  
“ of nations, residing in the neutral country for  
“ the purpose of preserving the relations of  
“ amity between that state and their own go-  
“ vernment. On this ground, a very material

<sup>48</sup> Robinson's Adm. Rep. vol. vi. p. 440. *The Atalanta*.

“ distinction arises, with respect to the right  
“ of furnishing the conveyance. The neutral  
“ country has a right to preserve its relations  
“ with the enemy, and you are not at liberty  
“ to conclude that any communication between  
“ them can partake, in any degree, of the  
“ nature of hostility against you. The limits  
“ assigned to the operations of war against  
“ ambassadors, by writers on public law, are,  
“ that the belligerent may exercise his right of  
“ war against them, wherever the character of  
“ hostility exists : he may stop the ambassador  
“ of his enemy on his passage ; but when he  
“ has arrived in the neutral country, and taken  
“ on himself the functions of his office, and  
“ has been admitted in his representative cha-  
“ racter, he becomes a sort of *middle man*,  
“ entitled to peculiar privileges, as set apart  
“ for the preservation of the relations of amity  
“ and peace, in maintaining which all nations  
“ are, in some degree, interested. If it be  
“ argued that he retains his national character  
“ unmixed, and that even his residence is con-  
“ sidered as a residence in his own country ;  
“ it is answered, that this is a fiction of law, in-  
“ vented for his further protection only, and as  
“ such a fiction, it is not to be extended beyond  
“ the reasoning on which it depends. It was

“ intended as a privilege ; and cannot be urged  
“ to his disadvantage. Could it be said that  
“ he would, on that principle, be subject to  
“ any of the rights of war in the neutral terri-  
“ tory ? Certainly not : he is there for the  
“ purpose of carrying on the relations of peace  
“ and amity, for the interests of his own  
“ country primarily, but, at the same time,  
“ for the furtherance and protection of the in-  
“ terest which the neutral country also has in  
“ the continuance of those relations. It is to  
“ be considered also with regard to this ques-  
“ tion, what may be due to the convenience  
“ of the neutral state ; for its interest may re-  
“ quire that the intercourse of correspondence  
“ with the enemy’s country should not be  
“ altogether interdicted. It might be thought  
“ to amount almost to a declaration, that an  
“ ambassador from the enemy shall not reside  
“ in the neutral state, if he is declared to be  
“ debarred from the only means of communi-  
“ cating with his own. For to what useful  
“ purpose can he reside there, without the  
“ opportunity of such a communication ? It  
“ is too much to say that all the business of  
“ the two states shall be transacted by the  
“ minister of the neutral state resident in the  
“ enemy’s country. The practice of nations

“ has allowed to neutral states the privilege  
 “ of receiving ministers from the belligerent  
 “ powers, and of an immediate negotiation  
 “ with them.”<sup>49</sup>

In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated, and the carrier-master is refused his freight, to which he is entitled upon innocent articles which are condemned as enemy's property. But where the ship and the innocent articles of the cargo belong to the owner of the contraband, they are all involved in the same penalty. And even where the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circumstances of false papers and false destination, will work a confiscation of the ship as well as the cargo. The same effect has likewise been held to be produced by the carriage of contraband articles in a ship, the owner of which is bound by the express obligation of the treaties subsisting between his own country and the capturing country, to

§ 23.  
 Penalty for  
 the carry-  
 ing of con-  
 traband.

<sup>49</sup> Sir W. Scott, Robinson's Adm. Rep. vol. vi. p. 461. The Caroline.

refrain from carrying such articles to the enemy. In such a case, it is said that the ship throws off her neutral character, and is liable to be treated at once as an enemy's vessel, and as a violator of the solemn compacts of the country to which she belongs.<sup>50</sup>

The general rule as to contraband articles, as laid down by Sir *W. Scott*, is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. "Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not

<sup>50</sup> Robinson's Adm. Rep. vol. i. p. 91. The Ringende Jacob. P. 244. The Sarah Christina. P. 288. The Mercurius. Vol. iii. p. 217. The Franklin. Vol. iv. p. 69. The Edward. Vol. vi. p. 125. The Ranger. Vol. iii. p. 205. The Neutralitet.

As to how far the shipowner is liable for the act of the master in cases of contraband, see Wheaton's Rep. vol. ii. Appendix, Note I. pp. 37, 38.

“ now generally held to attach.”<sup>51</sup> But the same learned judge applied a different rule in other cases of contraband, carried from Europe to the East Indies, with false papers and false destination, intended to conceal the real object of the expedition, where the return cargo, the proceeds of the outward cargo taken on the return voyage, was held liable to condemnation.<sup>52</sup>

Although the general policy of the American government, in its diplomatic negotiations, has aimed to limit the catalogue of contraband by confining it strictly to munitions of war, excluding all articles of promiscuous use, a remarkable case occurred during the late war between Great Britain and the United States, in which the supreme court of the latter appears to have been disposed to adopt all the

<sup>51</sup> Robinson's Adm. Rep. vol. iii. p. 168. The *Ionina*.

<sup>52</sup> Ibid. vol. ii. p. 343. The *Rosalie* and *Betty*. Vol. iii. p. 122. The *Nancy*. The soundness of these last decisions may be well questioned ; for in order to sustain the penalty, there must be, on principle, a *delictum* at the moment of seizure. To subject the property to confiscation whilst the offence no longer continues, would be to extend it indefinitely, not only to the return voyage, but to all future cargoes of the vessel, which would thus never be purified from the contagion communicated by the contraband articles.

principles of Sir W. Scott as to provisions becoming contraband under certain circumstances. But as that was not the case of a cargo of *neutral* property, supposed to be liable to capture and confiscation as contraband of war, but of a cargo of *enemy's* property going for the supply of the enemy's naval and military forces, and clearly liable to condemnation, the question was, whether the neutral master was entitled to his freight as in other cases of the transportation of innocent articles of enemy's property; and it was not essential to the determination of the case to consider under what circumstances articles *anticipitis usus* might become contraband. Upon the actual question before the court, it seems there would have been no difference of opinion among the American judges in the case of an ordinary war; all of them concurring in the principle, that a neutral, carrying supplies for the enemy's naval or military forces, does, under the mildest interpretation of international law, expose himself to the loss of freight. But the case was that of a Swedish vessel, captured by an American cruiser, in the act of carrying a cargo of British property, consisting of barley and oats, for the supply of the allied armies in the Spanish peninsula, the United States being

at war with Great Britain, but at peace with Sweden and the other powers allied against France. Under these circumstances a majority of the judges were of the opinion that the voyage was illegal, and that the neutral carrier was not entitled to his freight on the cargo condemned as enemy's property.

It was stated in the judgment of the court, that it had been solemnly adjudged in the British prize courts, that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employment, or the carrying of despatches, are acts of hostility which subject the property to confiscation. In these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the enemy state, and to assist in warding off the pressure of the war, or in favouring its offensive projects. Now these cases could not be distinguished, in principle, from that before the court. Here was a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to

be exported at all. It was vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy indirectly to operate with more vigour and promptitude against them, and increase his disposable force. But it was not the effect of the particular transaction which the law regards: it was the general tendency of such transactions to assist the military operations of the enemy, and to tempt deviations from strict neutrality. The destination to a neutral port could not vary the application of this rule. It was only doing that indirectly, which was directly prohibited. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army, while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might lawfully supply a British fleet stationed on the American coast? An attempt had been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the

latter. But the court held, that whatever might be the right of the Swedish sovereign, acting under his own authority, if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It was perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits were conferred upon the enemy of the United States, who thereby acquired a greater disposable force to bring into action against them. In the *Friendship*, (6 Rob. 420,) Sir *W. Scott*, speaking on this subject, declared that “it signifies nothing, whether the men so conveyed are to be put into action on an immediate expedition or not. The mere shifting of drafts in detachments, and *the conveyance of stores* from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant whether this or that case may be connected with the *immediate active* service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action; but still the general importance of having troops conveyed to places

“ where it is convenient that they should be  
“ collected, either for present or future use, is  
“ what constitutes the object and employment  
“ of transport vessels.” It was obvious that  
the learned judge did not deem it material to  
what places the stores might be destined ; and  
it must be equally immaterial, what is the  
immediate occupation of the enemy’s force.  
That force was always hostile to America, be  
it where it might. To-day it might act against  
France, to-morrow against the former country ;  
and the better its commissary department was  
supplied, the more life and activity was com-  
municated to all its motions. It was not  
therefore material whether there was another  
distinct war, in which the enemy of the United  
States was engaged, or not. It was sufficient,  
that his armies were every where their enemies ;  
and every assistance offered to them must,  
directly or indirectly, operate to their injury.

The court was therefore of opinion that the  
voyage, in which the vessel was engaged, was  
illicit, and inconsistent with the duties of neu-  
trality, and that it was a very lenient adminis-  
tration of justice to confine the penalty to a  
mere denial of freight.<sup>53</sup>

<sup>53</sup> Wheaton’s Rep. vol. i. p. 382. The Commercen.

It had been contended in argument in the above case that the exportation of grain from Ireland being generally prohibited, a neutral could not lawfully engage in that trade during war, upon the principle of what has been called the "Rule of the War of 1756," in its application to the colonial and coasting trade of an enemy not generally open in time of peace. The court deemed it unnecessary to consider the principles on which that rule is rested by the British prize courts, not regarding them as applicable to the case in judgment. But the legality of the rule itself has always been contested by the American government, and it appears in its origin to have been founded upon very different principles from those which have more recently been urged in its defence. During the war of 1756, the French government, finding the trade with their colonies almost entirely cut off by the maritime superiority of Great Britain, relaxed their monopoly of that trade, and allowed the Dutch, then neutral, to carry on the commerce between the mother country and her colonies, under special licenses or passes, granted for this particular purpose, excluding, at the same time, all other neutrals from the same trade. Many Dutch vessels so employed were

§ 24.  
Rule of the  
war of  
1756.

captured by the British cruizers, and, together with their cargoes, were condemned by the prize courts, upon the principle that by such employment, they were, in effect, incorporated into the French navigation, having adopted the commerce and character of the enemy, and identified themselves with his interests and purposes. They were, in the judgment of these courts, to be considered like transports in the enemy's service, and hence liable to capture and condemnation, upon the same principle with property condemned for carrying military persons or despatches. In these cases, the property is considered, *pro hac vice*, as enemy's property, as so completely identified with his interests as to acquire a hostile character. So, where a neutral is engaged in a trade, which is exclusively confined to the subjects of any country, in peace and in war, and is interdicted to all others, and cannot at any time be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national, that it must follow the hostile situation of the country.<sup>54</sup> There

<sup>54</sup> Robinson's Adm. Rep. vol. ii. p. 52. The Princessa. Vol. iv. p. 118. The Anna Catharina. P. 121. The Rendsborg. Vol. v. p. 150. The Vrow Anna Catharina. Wheaton's Rep. vol. ii. Appendix, p. 29.

is all the difference between this principle and the more modern doctrine, which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the opposite belligerent, protecting their property from capture in a particular trade, which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has never been deemed to have such an effect. The Rule of the War of 1756 was originally founded upon the former principle: it was suffered to lay dormant during the war of the American revolution: and when revived at the commencement of the war against France in 1793, was applied, with various relaxations and modifications, to the prohibition of all neutral traffic with the colonies and upon the coasts of the enemy. The principle of the rule was frequently vindicated by Sir *W. Scott*, in his masterly judgments in the High Court of Admiralty, and in the writings of other British publicists of great learning and ability. But the conclusiveness of their reasonings was ably contested by different American and other foreign writers, and failed to procure the

acquiescence of neutral powers in this prohibition of their trade with the enemy's colonies. The question continued a fruitful source of contention between Great Britain and those powers until they became her allies or enemies at the close of the war ; but its practical importance will probably be hereafter much diminished by the revolution which has since taken place in the colonial system of Europe.<sup>55</sup>

§ 25.  
Breach of  
blockade.

Another exception to the general freedom of neutral commerce in time of war is to be found in the trade to ports or places besieged or blockaded by one of the belligerent powers.

The more ancient text writers all require that the siege or blockade should actually exist, and be carried on by an adequate force, and not merely declared by proclamation, in order to render commercial intercourse with the port or place unlawful on the part of neutrals. Thus *Grotius* forbids the carrying any thing to besieged or blockaded places, "if it might impede the execution of the belligerent's lawful designs, and if the carriers might have known of the siege or blockade ; as in the case of a town actually invested or

<sup>55</sup> Wheaton's Rep. vol. i. Appendix, Note iii.

“ a port closely blockaded, and when a surrender or peace is already expected to take place.”<sup>56</sup> And *Bynkershoek*, in commenting upon this passage, holds it to be “ unlawful to carry any thing, whether contraband or not, to a place thus circumstanced, since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. If, therefore, it should be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise the siege or blockade, which would be doing him an injury, and therefore unjust. And because it cannot be known what articles the besieged may want, the law forbids, in general terms, carrying *any thing* to them; otherwise disputes and altercations would arise to which there would be no end.”<sup>57</sup>

<sup>56</sup> “ *Si juris mei executionem rerum subvectio impedieret, idque scire potuerit qui advexit, ut si OPPIDUM OBSESSUM TENEBAM, si PORTUS CLAUSOS, et jam deditio aut pax expectabitur,*” &c. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 1, sec. 5, Note 3.

<sup>57</sup> *Bynkershoek*, Quæst. Jur. Pub. lib. i. cap. 11. Duponceau's Transl. p. 82.

*Bynkershoek* appears to have mistaken the true sense of the above-cited passage from Grotius, in supposing that the latter meant to require, as a necessary ingredient in a strict blockade, that there should be an expectation of peace or of a surrender, when in fact he merely mentions that as an example by way of putting the strongest possible case. But that he concurred with Grotius in requiring a strict and actual siege or blockade, where a town is actually invested with troops, or a port closely blockaded by ships of war, (*oppidum obsessum, portus clausos,*) is evident from his subsequent remarks in the same chapter upon the decrees of the States-General against those who should carry any thing to the Spanish camp, the same not being then actually besieged. He holds the decrees to be perfectly justifiable, so far as they prohibited the carrying of contraband of war to the enemy's camp, "but as to other things, whether they were or "were not lawfully prohibited, depends entirely "upon the circumstance of the place being "besieged or not." So also, in commenting upon the decree of the States-General of the 26th June 1630, declaring the ports of Flanders in a state of blockade, he states that this

decree was for some time not carried into execution by the actual presence of a sufficient naval force, during which period certain neutral vessels trading to those ports were captured by the Dutch cruizers; and that part of their cargoes only which consisted of contraband articles was condemned, whilst the residue was released with the vessels. "It has been asked," says he, "by what law the contraband goods were condemned under those circumstances, and there are those who deny the legality of their condemnation. It is evident, however, that whilst those coasts were guarded in a lax or remiss manner, the law of blockade, by which all neutral goods going to or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war, by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation."

To constitute a violation of blockade, says Sir *W. Scott*, "three things must be proved: 1st, the existence of an actual blockade; 2dly, the knowledge of the party supposed to have offended; and, 3dly, some act of violation, either by going in or coming out

What things must be proved to constitute a violation of blockade.

“ with a cargo laden after the commencement  
“ of blockade.”<sup>58</sup>

Actual  
presence  
of the  
blockading  
force.

1. The definition of a lawful maritime blockade requiring the actual presence of a sufficient force, stationed at the entrance of the port, sufficiently near to prevent communication, as given by the text writers, is confirmed by the authority of numerous modern treaties, and especially by the convention of 1801 between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law which had given rise to the armed neutrality of 1780 and of 1801.<sup>59</sup>

The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the legal operation of the blockade. The law considers an

<sup>58</sup> Robinson's Adm. Rep. vol. i. p. 92. The *Betsey*.

<sup>59</sup> The 3d art. sect. 4, of this convention, declares, “ That in order to determine what characterizes a blockaded port, that denomination is given only where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering.”

attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade.<sup>60</sup>

2. As a proclamation, or general public notification, is not of itself sufficient to constitute a legal blockade, so neither can a knowledge of the existence of such a blockade be imputed to the party *merely* in consequence of such a proclamation or notification. Not only must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated.<sup>61</sup> As, on the one hand, a declaration of blockade which is not supported by the fact cannot be deemed legally to exist, so on the other hand, the fact, duly notified to the party on the spot, is of itself sufficient to affect him with a knowledge of it; for public notifications between governments can be meant only for the information of individuals; but if the individual is personally informed, that purpose is still better obtained than by a public declaration.<sup>62</sup> Where the vessel sails from a country lying sufficiently near to the blockaded port to have constant information of the state of the

<sup>60</sup> Robinson's Adm. Rep. vol. i. p. 154. The Columbia.

<sup>61</sup> Ibid. p. 93. The Betsey.

<sup>62</sup> Ibid. p. 83. The Mercurdus.

blockade, whether it is continued or is relaxed, no special notice is necessary; for the public declaration in this case implies notice to the party after sufficient time has elapsed to receive the declaration at the port whence the vessel sails.<sup>63</sup> But where the country lies at such a distance that the inhabitants cannot have this constant information, they may lawfully send their vessels conjecturally, upon the expectation of finding the blockade broken up, after it has existed for a considerable time. In this case, the party has a right to make a fair inquiry whether the blockade be determined or not, and consequently cannot be involved in the penalties affixed to a violation of it, unless, upon such inquiry, he receives notice of the existence of the blockade.<sup>64</sup>

“ There are,” says Sir *W. Scott*, “ two sorts  
“ of blockade: one by the *simple fact* only,  
“ the other by a notification accompanied with  
“ the fact. In the former case, when the fact  
“ ceases otherwise than by accident or the  
“ shifting of the wind, there is immediately an  
“ end of the blockade; but where the fact is  
“ accompanied by a public notification from

<sup>63</sup> Robinson's Adm. Rep. vol. ii. p. 131. The *Jonge Petronella*. P. 298. The *Calypso*.

<sup>64</sup> Ibid. vol. i. p. 332. The *Betsey*.

“ the government of a belligerent country to  
“ neutral governments, I apprehend, *primâ*  
“ *facie*, the blockade must be supposed to  
“ exist till it has been publicly repealed. It  
“ is the duty, undoubtedly, of a belligerent  
“ country which has made the notification of  
“ blockade, to notify in the same way, and  
“ immediately, the discontinuance of it: to  
“ suffer the fact to cease, and to apply the  
“ notification again, at a distant time, would  
“ be a fraud on neutral nations, and a conduct  
“ which we are not to suppose that any  
“ country would pursue. I do not say that a  
“ blockade of this sort may not in any case  
“ expire *de facto*; but I say such a conduct is  
“ not hastily to be presumed against any  
“ nation; and therefore, till such a case is  
“ clearly made out, I shall hold that a block-  
“ ade by notification is, *primâ facie*, to be  
“ presumed to continue till the notification  
“ is revoked.”<sup>65</sup> And in another case, he  
says: “The effect of a notification to any  
“ foreign government would clearly be to in-  
“ clude all the individuals of that nation;  
“ it would be nugatory if individuals were  
“ allowed to plead their ignorance of it;

<sup>65</sup> Robinson's Adm. Rep. vol. i. p. 171. The *Neptunus*.

“ it is the duty of foreign governments to  
“ communicate the information to their sub-  
“ jects, whose interests they are bound to  
“ protect. I shall hold, therefore, - that a  
“ neutral master can never be heard to aver  
“ against a notification of blockade that he is  
“ ignorant of it. If he is really ignorant of it,  
“ it may be a subject of representation to his  
“ own government, and may raise a claim of  
“ compensation from them, but it can be no  
“ plea in the court of a belligerent. In the  
“ case of a blockade *de facto* only, it may be  
“ otherwise; but this is a case of a blockade  
“ by notification. Another distinction between  
“ a notified blockade and a blockade existing  
“ *de facto* only, is, that in the former the act  
“ of sailing for a blockaded place is sufficient  
“ to constitute the offence. It is to be pre-  
“ sumed that the notification will be formally  
“ revoked, and that due notice will be given  
“ of it; till that is done, the port is to be  
“ considered as closed up; and from the  
“ moment of quitting port to sail on such a  
“ destination, the offence of violating the  
“ blockade is complete, and the property  
“ engaged in it subject to confiscation. It  
“ may be different in a blockade existing *de*  
“ *facto* only: there no presumption arises as

“ to the continuance, and the ignorance of  
“ the party may be admitted as an excuse for  
“ sailing on a doubtful and provisional des-  
“ tination.”<sup>66</sup>

A more definite rule as to the notification of an existing blockade has been frequently provided by conventional stipulations between different maritime powers. Thus by the 18th article of the treaty of 1794, between Great Britain and the United States, it was declared—  
“ That whereas it frequently happens that  
“ vessels sail for a port or place belonging to  
“ an enemy, without knowing that the same  
“ is either besieged, blockaded, or invested, it  
“ is agreed that every vessel so circumstanced  
“ may be turned away from such port or  
“ place; but she shall not be detained, nor  
“ her cargo, if not contraband, be confiscated,  
“ unless, after notice, she shall again attempt  
“ to enter; but she shall be permitted to go  
“ to any other port or place she may think  
“ proper.” This stipulation, which is equivalent to that contained in previous treaties between Great Britain and the Baltic powers, having been disregarded by the naval authorities and prize courts in the West Indies, the

<sup>66</sup> Robinson's Adm. Rep. vol. ii. p. 112. *The Neptunus*, Hempel.

attention of the British government was called to the subject by an official communication from the American government. In consequence of this communication, instructions were sent out in the year 1804, by the Board of Admiralty, to the naval commanders and judges of the vice-admiralty courts, not to consider any blockade of the French West-India islands as existing, unless in respect to particular ports which were actually invested; and then not to capture vessels bound to such ports, unless they should previously have been warned not to enter them. The stipulation in the treaty intended to be enforced by these instructions seems to be a correct exposition of the law of nations, and is admitted by the contracting parties to be a correct exposition of that law, or to constitute a rule between themselves in place of it. Neither the law of nations nor the treaty admits of the condemnation of a neutral vessel for the mere intention to enter a blockaded port, unconnected with any fact. In the above cited cases, the fact of sailing was coupled with the intention, and the condemnation was thus founded upon a supposed actual breach of the blockade. Sailing for a blockaded port, knowing it to be blockaded, was there construed into an

attempt to enter that port, and was therefore adjudged a breach of blockade from the departure of the vessel. But the fact of clearing out for a blockaded port is, in itself, innocent, unless it be accompanied with a knowledge of the blockade. The right to treat the vessel as an enemy is declared by *Vattel*, (liv. iii. sect. 177,) to be founded on the *attempt* to enter; and certainly this attempt must be made by a person knowing the fact. The import of the treaty, and of the instructions issued in pursuance of the treaty, is that a vessel cannot be placed in the situation of one having a notice of the blockade, until she is warned off. They gave her a right to inquire of the blockading squadron if she had not previously received this warning from one capable of giving it, and consequently dispensed with her making that inquiry elsewhere. A neutral vessel might thus lawfully sail for a blockaded port, knowing it to be blockaded; and being found sailing towards such port would not constitute an attempt to break the blockade, unless she should be actually warned off.<sup>67</sup>

<sup>67</sup> Cranch's Rep. vol. iv. p. 185. *Fitzsimmons v. the Newport Insurance Company*. Mr. Merry's Letter to Mr. Secretary Madison, 12th April, 1804. Wheaton's Rep. vol. iii. Appendix, p. 11.

Where an enemy's port was declared in a state of blockade by notification, and at the same time when the notification was issued, news arrived that the blockading squadron had been driven off by the superior force of the enemy, the blockade was held by the prize court to be null and defective from the beginning, in the main circumstance that is essentially necessary to give it legal operation; and that it would be unjust to hold neutral vessels to the observance of a notification, accompanied by a circumstance that defeated its effect. This case was, therefore, considered as independent of the presumption arising from notification in other instances; the notification being defeated, it must have been shown that the actual blockade was again resumed, and the vessel would have been entitled to a warning, if any such blockade had existed when she arrived off the port. The mere act of sailing for the port, under the dubious state of the actual blockade at the time, was deemed insufficient to fix upon the vessel the penalty for breaking the blockade.<sup>68</sup>

In the above case, a question was raised

<sup>68</sup> Robinson's Adm. Rep. vol. vi. p. 65. The Triheten.

whether the notification which had issued was not still operative; but the court was of opinion that it could not be so considered, and that a neutral power was not obliged, under such circumstances, to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force. But in a subsequent case, where it was suggested that the blockading squadron had actually returned to its former station off the port, in order to renew the blockade, a question arose whether there had been that notoriety of the fact, arising from the operation of time or other circumstances, which must be taken to have brought the existence of the blockade to the knowledge of the parties. Among other modes of resolving this question, a prevailing consideration would have been the length of time, in proportion to the distance of the country from which the vessel sailed. But as nothing more came out in evidence than that the squadron came off the port on a certain day, it was held that this would not restore a blockade which had been thus effectually raised, but that it must be renewed again, by notification, before foreign nations could be affected with an obligation to observe it. The

squadron might return off the port with different intentions. It might arrive there as a fleet of observation merely, or for the purpose of only a qualified blockade. On the other hand, the commander might attempt to connect the two blockades together; but this is what could not be done; and in order to revive the former blockade, the same form of communication must have been observed *de novo* that is necessary to establish an original blockade.<sup>69</sup>

Some act  
of viola-  
tion.

3. Besides the knowledge of the party, some act of violation is essential to a breach of blockade, as either going in or coming out of the port with a cargo laden after the commencement of the blockade.<sup>70</sup>

Thus by the edict of the States-General of Holland of 1630, relative to the blockade of the ports of Flanders, it was ordered that the vessels and goods of neutrals which should be found going in or coming out of the said ports, or so near thereto as to show beyond a doubt that they were endeavouring to run into them; or which from the documents on board should appear bound to the said ports, although

<sup>69</sup> Robinson's Adm. Rep. vol. vi. p. 112. The *Hoffnung*.

<sup>70</sup> Ibid. vol. i. p. 93. The *Betsey*.

they should be found at a distance from them, should be confiscated, unless they should, voluntarily, before coming in sight of or being chased by the Dutch ships of war, change their intention, while the thing was yet undone, and alter their course. *Bynkershoek*, in commenting upon this part of the decree, defends the reasonableness of the provision which affects vessels *found so near to the blockaded ports as to show beyond a doubt that they were endeavouring to run into them*, upon the ground of legal presumption, with the exception of extreme and well-proved necessity only. Still more reasonable is the infliction of the penalty of confiscation, where the intention is expressly avowed by the papers found on board. The third article of the same edict also subjected to confiscation such vessels and their cargoes as should come out of the said ports, not having been forced into them by stress of weather, although they should be captured at a distance from them, unless they had, after leaving the enemy's port, performed their voyage to a port of their own country, or to some other neutral or free port, in which case they should be exempt from condemnation ; but if, in coming out of

the said ports of Flanders, they should be pursued by the Dutch ships of war, and chased into another port, such as their own, or that of their destination, and found on the high seas coming out of *such port*, in that case they might be captured and condemned. Bynkershoek considers this provision as distinguishing the case of a vessel having broken the blockade, and afterwards terminated her voyage by proceeding voluntarily to her destined port, and that of a vessel chased and compelled to take refuge; which latter might still be captured after leaving the port in which she had taken refuge. And in conformity with these principles is the more modern law and practice.<sup>71</sup>

With respect to violating a blockade by coming out with a cargo, the time of shipment is very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose in any way to assist the

<sup>71</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 11. Robinson's Adm. Rep. vol. ii. p. 128. The *Welvaart van Pillaw*. Vol. iii. p. 147. The *Juffrow Maria Schroeder*.

exportation of the property of the enemy.<sup>72</sup> A neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade; if she afterwards take on board a cargo, it is a violation of the blockade. But where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade.<sup>73</sup> So where goods were sent into the blockaded port before the commencement of the blockade, but re-shipped by order of the neutral proprietor as found unsaleable, during the blockade, they were held entitled to restitution. For the same rule which permits neutrals to withdraw their vessels from a blockaded port, extends also, with equal justice, to merchandize sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietor.<sup>74</sup>

After the commencement of a blockade, a neutral is no longer at liberty to make any pur-

<sup>72</sup> Robinson's Adm. Rep. vol. i. p. 93. The *Betsy*.

<sup>73</sup> Ibid. vol. i. p. 150. The *Vrouw Judith*.

<sup>74</sup> Ibid. vol. iv. p. 89. The *Potsdam*. Wheaton's Rep. vol. iii. p. 183. *Olivera v. Union Insurance Company*.

chase in that port. Thus where a ship which had been purchased by a neutral of the enemy in a blockaded port, and sailed on a voyage to the neutral country, had been driven by stress of weather into a belligerent port, where she was seized, she was held liable to condemnation under the general rule. That the vessel had been purchased out of the proceeds of the cargo of another vessel, was considered as an unavailing circumstance on a question of blockade. If the ship has been purchased in a blockaded port, *that* alone is the illegal act, and it is perfectly immaterial out of what funds the purchase was effected. Another distinction taken in argument was, that the vessel had terminated her voyage, and therefore that the penalty would no longer attach. But this was also overruled, because the port into which she had been driven was not represented as forming any part of her original destination. It was therefore impossible to consider this accident as any discontinuance of the voyage, or as a defeasance of the penalty which had been incurred.

A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the

interior canal navigation or land carriage of the country. A blockade may be of different descriptions. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The legal blockade can extend no further than the actual blockade can be applied. If the place be not invested on the land side, its interior communications with other ports cannot be cut off. If the blockade be rendered imperfect by this rule of construction, it must be ascribed to its physical inadequacy by which the extent of its legal pretensions is unavoidably limited.<sup>75</sup> But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, with the ship under charter-party proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. This case is very different from the preceding, because there the communication had been by inland navigation, which was in no manner, and in no part of it, subject to the blockade.<sup>76</sup>

<sup>75</sup> Edwards's Adm. Rep. p. 32. *The Comet*.

<sup>76</sup> Robinson's Adm. Rep. vol. iii. p. 297. Vol. iv. p. 65. *The Stert*.

The offence incurred by a breach of blockade generally remains during the voyage ; but the offence never travels on with the vessel further than to the end of the return voyage, although if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent cruizers to vindicate the violated law. But where the blockade has been raised between the time of sailing and the capture, the penalty does not attach ; because the blockade being gone, the necessity of applying the penalty to prevent future transgression no longer exists. When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events done away.<sup>77</sup>

§ 26.  
Right of  
visitation  
and search.

The right of visitation and search of neutral vessels at sea is a belligerent right essential to the exercise of the right of capturing enemy's

<sup>77</sup> Robinson's Adm. Rep. vol. ii. p. 128. The *Welvaart van Pillaw*. Vol. vi. p. 387. The *Lisette*. As to how far the act of the master binds the ship owner in cases of breach of blockade, see the cases collected in Wheaton's Reports, vol. ii. Appendix, pp. 36—40.

property, contraband of war, and vessels committing a breach of blockade. Even if the right of capturing enemy's property be ever so strictly limited, and the rule of *free ships free goods* be adopted, the right of visitation and search is essential in order to determine whether the ships themselves are neutral and documented as such according to the law of nations and treaties; for, as *Bynkershoek* observes, "it is lawful to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral." Indeed it seems that the practice of maritime captures could not exist without it. Accordingly the text writers generally concur in recognising the existence of this right.<sup>78</sup>

The international law on this subject is ably summed up by Sir *W. Scott* in the case of the *Maria*, where the exercise of the right was attempted to be resisted by the interposition

<sup>78</sup> *Bynkershoek*, Quæst. Jur. Pub. lib. i. cap. 14. *Vattel*, Droit des Gens, liv. iii. ch. 7, § 114. *Martens*, Précis, &c. liv. viii. ch. 7, §§ 317, 321. *Galliani*, dei Doveri de Principi Neutrali, &c. p. 458. *Lampredi*, Del Commercio de Popoli Neutrali, &c. p. 185. *Kluber*, Droit des Gens Moderne de l'Europe, § 293.

of a convoy of Swedish ships of war. In delivering the judgment of the High Court of Admiralty in that memorable case, this learned civilian lays down the three following principles of law :—

1. That the right of visiting and searching merchant-ships on the high seas, whatever be the ships, the cargoes, or the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. “ I say, be the ships, the cargoes, and the destination what they may, because till they are visited and searched, it does not appear what the ships, or the destination are ; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the right of maritime capture ; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice ; for practice

“ is uniform and universal upon the subject.  
“ The many European treaties which refer to  
“ this right, refer to it as preexisting, and  
“ merely regulate the exercise of it. All  
“ writers upon the law of nations unanimously  
“ acknowledge it, without the exception even  
“ of *Hubner* himself, the great champion of  
“ neutral privileges.”

2. That the authority of the neutral sovereign being forcibly interposed cannot legally vary the rights of a lawfully commissioned belligerent cruiser. “ Two sovereigns may  
“ unquestionably agree, if they think fit, as in  
“ some late instances they have agreed, by  
“ special covenant, that the presence of one of  
“ their armed ships along with their merchant-  
“ ships shall be mutually understood to imply  
“ that nothing is to be found in that convoy  
“ of merchant-ships inconsistent with amity or  
“ neutrality; and if they consent to accept  
“ this pledge, no third party has a right to  
“ quarrel with it, any more than any other  
“ pledge which they may agree mutually to  
“ accept. But surely no sovereign can legally  
“ compel the acceptance of such a security by  
“ mere force. The only security known to  
“ the law of nations upon this subject, inde-  
“ pendently of all special covenant, is the right

“ of personal visitation and search, to be exercised by those who have the interest in making it.”

3. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. “ For the proof of this I need only refer to *Vattel*, one of the most correct and certainly not the least indulgent of modern professors of public law. In book iii. c. 7, sect. 114, he expresses himself thus:— ‘ On ne peut empêcher le transport des effets de contrebande, si l’on ne visite pas les vaisseaux neutres. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite. Aujourd’hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise.’ *Vattel* is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting a fact—the fact that such is the existing practice of modern Europe. Conformably to this principle we find in the celebrated French ordinance of 1681, now in force, article 12, ‘ That every vessel shall be good prize in case of resistance and combat;’

“ and *Valin*, in his smaller Commentary,  
“ p. 81, says expressly, that although the ex-  
“ pression is in the conjunctive, yet that the  
“ *resistance alone is sufficient*. He refers to the  
“ Spanish ordinance, 1718, evidently copied  
“ from it, in which it is expressed in the dis-  
“ junctive, ‘ in case of resistance *or* combat.’  
“ And recent instances are at hand and within  
“ view, in which it appears that Spain con-  
“ tinues to act upon this principle. The first  
“ time it occurs to my notice on the inquiries  
“ I have been able to make in the institutes of  
“ our own country respecting matters of this  
“ nature, except what occurs in the Black  
“ Book of the Admiralty, is in the order of  
“ council, 1664, art. 12, which directs, ‘ That  
“ when any ship, met withal by the royal navy  
“ or other ship commissioned, shall fight or  
“ make resistance, the said ship and goods shall  
“ be adjudged lawful prize.’ A similar article  
“ occurs in the proclamation of 1672. I am  
“ therefore warranted in saying that it was the  
“ rule and the undisputed rule of the British ad-  
“ miralty. I will not say that that rule may not  
“ have been broken in upon in some instances  
“ by considerations of comity or of policy, by  
“ which it may be fit that the administration  
“ of this species of law should be tempered

“ in the hands of those tribunals which have  
“ a right to entertain and apply them ; for no  
“ man can deny that a state may recede from  
“ its extreme rights, and that its supreme  
“ councils are authorised to determine in what  
“ cases it may be fit to do so, the particular  
“ captor having in no case any other right and  
“ title than what the state itself would possess  
“ under the same facts of capture. But I  
“ stand with confidence upon all principles  
“ of reason,—upon the distinct authority of  
“ Vattel,—upon the institutes of other great  
“ maritime countries, as well as those of our  
“ own country, when I venture to lay it down  
“ that, by the law of nations, as now under-  
“ stood, a deliberate and continued resistance  
“ to search, on the part of a neutral vessel, to  
“ a lawful cruizer, is followed by the legal  
“ consequence of confiscation.”<sup>70</sup>

The judgment of condemnation pronounced in this case was followed by the treaty of armed neutrality entered into by the Baltic powers in 1800, which league was dissolved by the death of the Emperor Paul, and the points in controversy between those powers and Great Britain were finally adjusted by the

<sup>70</sup> Robinson's Adm. Rep. vol. i. p. 340. The Maria.

convention of 5th June, 1801. By the 4th article of this convention, the right of search as to merchant vessels sailing under neutral convoy was modified, by limiting it to public ships of war of the belligerent party, excluding private armed vessels. Subject to this modification, the pretension of resisting by means of convoy the exercise of the belligerent right of search, was surrendered by Russia and the other northern powers, and various regulations provided to prevent the abuse of that right to the injury of neutral commerce. As has already been observed, the object of this treaty is expressly declared by the contracting parties in its preamble to be the settlement of the differences which had grown out of the armed neutrality by "an invariable determination of their principles upon the rights of neutrality in their application to their respective monarchies." The 8th article also provides that "the principles and measures adopted by the present act shall be alike applicable to all the maritime wars in which one of the two powers may be engaged whilst the other remains neutral. These stipulations shall consequently be regarded as permanent, and shall serve as a constant rule for the

“contracting parties in matters of commerce  
“and navigation.”<sup>80</sup>

§ 27.  
Forcible  
resistance  
by an  
enemy  
master.

In the case of the *Maria*, the resistance of the convoying ship was held to be a resistance of the whole fleet of merchant vessels under convoy, and subjected the whole to confiscation. This was a case of neutral property condemned for an attempted resistance by a neutral armed vessel to the exercise of the right of visitation and search by a lawfully commissioned belligerent cruiser. But the forcible resistance by an enemy master will not, in general, affect neutral property laden on board an enemy's merchant vessel; for an attempt on his part to rescue his vessel from the possession of the captor is nothing more than the hostile act of a hostile person, who has a perfect right to make such an attempt.

<sup>80</sup> The question arising out of the case of the Swedish convoy gave rise to several instructive polemic essays. The judgment of Sir W. Scott was attacked by Professor J. F. W. Schlegel, of Copenhagen, in a Treatise on the Visitation of Neutral Ships under Convoy, transl. London, 1801; and vindicated by Dr. Croke in “Remarks on M. Schlegel's Work,” 1801. See also “Letters of Sulpicius on the Northern Confederacy,” London, 1801. “Substance of the Speech of Lord Grenville in the House of Lords, Nov. 13, 1801.” London, 1802.

“ If a *neutral* master,” says Sir *W. Scott*,  
 “ attempts a rescue, or to withdraw himself  
 “ from search, he violates a duty which is  
 “ imposed upon him by the law of nations, to  
 “ submit to search, and to come in for inquiry  
 “ as to the property of the ship or cargo ; and  
 “ if he violates this obligation by a recurrence  
 “ to force, the consequence will undoubtedly  
 “ reach the property of his owner ; and it  
 “ would, I think, extend also to the whole  
 “ property entrusted to his care, and thus  
 “ fraudulently attempted to be withdrawn from  
 “ the operation of the rights of war. With an  
 “ *enemy* master, the case is very different : no  
 “ duty is violated by such an act on his part—  
 “ *lupum auribus teneo*, and if he can withdraw  
 “ himself, he has a right so to do.”<sup>81</sup>

The question how far a neutral merchant  
 has a right to lade his goods on board an  
 armed enemy vessel, and how far his property  
 is involved in the consequences of resistance  
 by the enemy master, was agitated both in the  
 British and American prize courts during the  
 last war between Great Britain and the United  
 States. In a case adjudged by the supreme

§ 28.  
 Right of a  
 neutral to  
 carry his  
 goods in  
 an armed  
 enemy  
 vessel.

<sup>81</sup> Robinson's Adm. Rep. vol. v. p. 232. *The Catharina Elizabeth*.

court of the United States in 1815, it was determined that a neutral had a right to charter and lade his goods on board a belligerent armed merchant ship, without forfeiting his neutral character, unless he actually concurred and participated in the enemy master's resistance to capture.<sup>82</sup> Contemporaneously with this decision of the American court, Sir *W. Scott* held directly the contrary doctrine, and decreed salvage for the recapture of neutral Portuguese property previously taken by an American cruizer from on board an armed British vessel, upon the ground that the American prize courts might justly have condemned the property.<sup>83</sup> In reviewing its former decision, in a subsequent case adjudged in 1818, the American court confirmed it, and, alluding to the decision in the English high court of admiralty, stated, that if a similar case should again occur in that court, and the decisions of the American court should in the mean time have reached that learned judge, he would be called upon to acknowledge that the danger of condemnation in the United States courts was not as great as he had

<sup>82</sup> Cranch's Rep. vol. ix. p. 388. *The Nereide*.

<sup>83</sup> Dodson's Adm. Rep. vol. i. p. 443. *The Fanny*.

imagined. In determining the last-mentioned case, the American court distinguished it both from those where neutral vessels were condemned for the unneutral act of the convoying vessel, and those where neutral vessels had been condemned for placing themselves under enemy's convoy. With regard to the first class of cases, it was well known that they originated in the capture of the Swedish convoy at the time when Great Britain had resolved to throw down the glove to all the world, on the contested principles of the northern maritime confederacy. But, independently of this, there were several considerations which presented an obvious distinction between both classes of cases and that under consideration. A convoy was an association for a hostile object. In undertaking it, a state spreads over the merchant vessels an immunity from search which belongs only to a national ship; and by joining a convoy, every individual vessel puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine. If, then, the association be voluntary, the neutral, in suffering the fate of the entire convoy, has only to regret his own folly in wedding his fortune to theirs; or if involved in the resistance

of the convoying ship, he shares the fate to which the leader of his own choice is liable in case of capture.<sup>44</sup>

§ 29.  
Neutral  
vessels  
under  
enemy's  
convoy,  
liable to  
capture?

The Danish government issued, in 1810, an ordinance relating to captures, which declared to be good and lawful prize "such vessels as, " notwithstanding their flag is considered " neutral, as well with regard to Great Britain " as the powers at war with the same nation, " still, either in the Atlantic or Baltic, have " made use of English convoy." Under this ordinance, many American neutral vessels were captured, and, with their cargoes, condemned in the Danish prize courts for offending against its provisions. In the course of the discussions which subsequently took place between the American and Danish governments respecting the legality of these condemnations, the principles upon which the ordinance was grounded were questioned by the United States government as inconsistent with the established rules of international law. It was insisted that the prize ordinances of Denmark, or of any other particular state, could not make or alter the general law of

<sup>44</sup> Wheaton's Rep. vol. iii. p. 409. The Atalanta.

nations, nor introduce a new rule binding on neutral powers. The right of the Danish monarch to legislate for his own subjects and his own tribunals, was incontestable; but before his edicts could operate upon foreigners carrying on their commerce upon the seas, which are the common property of all nations, it must be shown that they were conformable to the law by which all are bound. It was, however, unnecessary to suppose, that in issuing these instructions to its cruisers, the Danish government intended to do any thing more than merely to lay down rules of decision for its own tribunals, conformable to what that government understood to be just principles of public law. But the observation became important when it was considered that the law of nations nowhere existed in a written code accessible to all, and to whose authority all deferred; and that the present question regarded the application of a principle (to say the least) of doubtful authority, to the confiscation of neutral property for a supposed offence committed, not by the owner, but by his agent the master, without the knowledge or orders of the owner, under a belligerent edict, retrospective in its operation, because unknown to those whom it was to affect.

The principle laid down in the ordinance, as interpreted by the Danish tribunals, was that the fact of having navigated under enemy's convoy is, *per se*, a justifiable cause, not of capture merely, but of condemnation in the courts of the other belligerent; and *that*, without inquiring into the proofs of proprietary interest, or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects. A belligerent pretension so harsh, apparently so new, and so important in its consequences, before it could be assented to by neutral states, must be rigorously demonstrated by the authority of the writers on public law, or shown to be countenanced by the usage of nations. Not one of the numerous expounders of that law even mentioned it; no belligerent nation had ever before acted upon it; and still less could it be asserted that any neutral nation had ever acquiesced in it. Great Britain, indeed, had contended that a neutral state had no right to resist the exercise of the belligerent claim of visitation and search by means of convoys *consisting of its own ships of war*. But the records even of the *British* courts of admiralty might be searched in vain

for a precedent to support the principle maintained by Denmark, that the mere fact of having sailed under belligerent convoy is, in all cases and under all circumstances, conclusive cause of condemnation.

The American vessels in question were engaged in their accustomed lawful trade, between Russia and the United States; they were unarmed, and made no resistance to the Danish cruizers; they were captured on the return voyage, after having passed up the Baltic and been subjected to examination by the Danish cruizers and authorities, and were condemned under an edict which was unknown, and consequently, as to them, did not exist when they sailed from Cronstadt, and which, unless it could be strictly shown to be consistent with the preexisting law of nations, must be considered as an unauthorized measure of retrospective legislation. To visit upon neutral merchants and mariners extremely penal consequences from an act, which they had reason to believe to be innocent at the time, and which is not pretended to be forbidden by a single treaty or writer upon public law, by the general usage of nations, or even by the practice of any one belligerent, or the acquiescence of any one neutral state, must require

something more than a mere resort to the supposed analogy of other acknowledged principles of international law, but from which it would be vain to attempt to deduce that now in question as a corollary.

Being found in company with an enemy's convoy might, indeed, furnish a *presumption* that the captured vessel and cargo belonged to the enemy, in the same manner as goods taken in an enemy's vessel are presumed to be enemy's property until the contrary is proved; but this presumption is not of that class of presumptions called *presumptiones juris et de jure*, which are held to be conclusive upon the party, and which he is not at liberty to controvert. It is a slight presumption only, which will readily yield to countervailing proof. One of the proofs which, in the opinion of the American negotiator, ought to have been admitted by the prize tribunal to countervail this presumption, would have been evidence that the vessel had been compelled to join the convoy; or that she had joined it, not to protect herself from examination by Danish cruizers, but against others, whose notorious conduct and avowed principles rendered it certain that captures by them would inevitably be followed by con-

demnation. It followed, then, that the simple fact of having navigated under British convoy could be considered as a ground of suspicion only, warranting the captors in sending in the captured vessel for further examination, but not constituting in itself a conclusive ground of confiscation.

Indeed it was not perceived how it could be so considered, upon the mere ground of its interfering with the exercise of the belligerent pretension of visitation and search, by a state which, when neutral, had asserted the right of protecting its private commerce against belligerent visitation and search by armed convoys of its own public ships.

Nor could the consistency of the Danish government, in this respect, be vindicated, by assuming a distinction between the doctrine maintained by Denmark, when neutral, against Great Britain, from that which she sought, as a belligerent, to enforce against America. Why was it that navigating under the convoy of a *neutral* ship of war was deemed a conclusive cause of condemnation? It was because it tended to impede and defeat the belligerent right of search—to render every attempt to exercise this lawful right a contest of violence—to disturb the peace of the world, and to

withdraw from the proper forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction.

The mere circumstance of sailing in company with a *belligerent* convoy had no such effect ; being an *enemy*, the belligerent had a *right to resist*. The masters of the vessels under his convoy could not be involved in the consequences of that resistance, because they were neutral, and had not actually participated in the resistance. They could no more be involved in the consequences of a resistance by the belligerent, which is his own lawful act, than is the neutral shipper of goods on board a belligerent vessel for the resistance of the master of that vessel, or the owner of neutral goods found in a belligerent fortress for the consequences of its resistance.

The right of capture in war extends only to things actually belonging to the enemy, or such as are considered as constructively belonging to him, because taken in a trade prohibited by the laws of war, such as contraband, property taken in breach of blockade, and other analogous cases ; but the property now in question was neither constructively nor actually the property of the enemy of Denmark. It was not pretended that it was

actually his property, and it could not be shown to have been constructively his. If, indeed, these American vessels had been armed; if they had thus contributed to augment the force of the belligerent convoy; or if they had actually participated in battle with the Danish cruisers,—they would justly have fallen by the fate of war, and the voice of the American government would never have been raised in their favour. But they were, in fact, unarmed merchantmen; and far from increasing the force of the British convoying squadron, their junction tended to weaken it by expanding the sphere of its protecting duty; and instead of participating in the enemy's resistance, in fact there was no battle and no resistance, and the merchant vessels fell a defenceless prey to the assailants.

The illegality of the act on the part of the neutral masters, for which the property of their owners had been confiscated, must then be sought for in a higher source, and must be referred back to the circumstance of *their joining the convoy*. But why should this circumstance be considered illegal any more than the fact of a neutral taking shelter in a belligerent port, or under the guns of a belligerent fortress which is subsequently invested and

taken? The neutral cannot, indeed, seek to escape from visitation and search by *unlawful* means, either of force or fraud; but if, by the use of any lawful and innocent means, he may escape, what is to hinder his resorting to such means for the purpose of avoiding a proceeding so vexatious? The belligerent cruisers and prize courts had not always been so moderate and just as to render it desirable for the neutral voluntarily to seek for an opportunity of being examined and judged by them. Upon the supposition, indeed, that justice was administered promptly, impartially, and purely in the prize tribunals of Denmark, the American ship masters could have had no motive to avoid an examination by Danish cruisers, since their proofs of property were clear, their voyages lawful, and they were not conscious of being exposed to the slightest hazard of condemnation in these tribunals. Indeed some of these vessels had been examined on their voyage up the Baltic, and acquitted by the Danish courts of admiralty. Why, then, should a guilty motive be imputed to them, when their conduct could be more naturally explained by an innocent one? Surely, in the multiplied ravages to which neutral commerce was then exposed on every sea, from the

sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of these parties might be sufficiently accounted for, without resorting to the supposition that they meant to resist or even to evade the exercise of the belligerent rights of Denmark.

Even admitting, then, that the neutral American had no right to put himself under convoy in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right to defend himself against his *enemy*, as France had shown herself to be, by her conduct and the avowed principles upon which she had declared open war against all neutral trade. Denmark had a right to capture the commerce of her enemy, and for that purpose to search and examine vessels under the neutral flag, whilst America had an equal right to protect her commerce against French capture by all the means allowed by the ordinary laws of war between enemies. The exercise of this perfect right could not legally be affected by the circumstance of the war existing between Denmark and England, or by the alliance between Denmark and France. America and England were at peace. The alliance

between Denmark and France was against England, not against America; and the Danish government, which had refused to adopt the decrees of Berlin and Milan as the rule of its conduct towards neutrals, could not surely consider it culpable on the part of the American ship masters to have defended themselves against the operation of these decrees by every means in their power. If the use of any of these means conflicted in any degree with the belligerent rights of Denmark, that was an incidental consequence, which could not be avoided by the parties without sacrificing their incontestable right of self-defence.

But it might perhaps be said, that as resistance to the right of search is, by the law and usage of nations, a substantive ground of condemnation *in the case of the master of a single ship*, still more must it be so, where *many vessels are associated* for the purpose of defeating the exercise of the same right.

In order to render the two cases stated perfectly analogous, there must have been an actual resistance on the part of the vessels in question, or at least on the part of the enemy's fleet, having them at the time under its protection, so as to connect them inseparably with

the acts of the enemy. Here was no *actual* resistance on the part of either, but only a *constructive* resistance on the part of the neutral vessels, implied from the fact of their having joined the enemy's convoy. This however was, at most, a *mere intention to resist*, never carried into effect, which had never been considered, in the case of a single ship, as involving the penalty of confiscation. But the resistance of the master of a single ship, which is supposed to be analogous to the case of convoy, must refer to a *neutral* master, whose resistance would, by the established law of nations, involve both ship and cargo in the penalty of confiscation. The same principle would not, however, apply to the case of an *enemy-master*, who has an incontestable right to resist his enemy, and whose resistance could not affect the *neutral owner of the cargo*, unless he was on board, and actually participated in the resistance. Such was, in a similar case, the judgment of Sir W. Scott. So also the right of a neutral to transport his goods on board even of an *armed* belligerent vessel was solemnly affirmed by the decision of the highest judicial tribunal in the United States during the late war with Great Britain, after a most elaborate discussion, in which all the principles

and analogies of public law bearing upon the question were thoroughly examined and considered.

The American negotiator then confidently relied upon the position assumed by him—that the entire silence of all the authoritative writers on public law, as to any such exception to the general freedom of neutral navigation, laid down by them in such broad and comprehensive terms, and of every treaty made for the special purpose of defining and regulating the rights of neutral commerce and navigation, constituted of itself a strong negative authority to show that no such exception exists, especially as that freedom is expressly extended to every case which has the slightest resemblance to that in question. It could not be denied that the goods of a friend, found in an enemy's fortress, are exempt from confiscation as prize of war; that a neutral may lawfully carry his goods in an armed belligerent ship; that the neutral shipper of goods on board an enemy's vessel, (armed or unarmed,) is not responsible for the consequences of resistance by the enemy-master. How then could the neutral owner, both of ship and cargo, be responsible for the acts of the belligerent convoy, under the protection of which

his property had been placed, not by his own immediate act, but by that of the master proceeding without the knowledge or instructions of the owner ?

Such would certainly be the view of the question, even applying to it the largest measure of belligerent rights ever assumed by any maritime state. But when examined by the milder interpretations of public law, which the Danish government, in common with the other northern powers of Europe, had hitherto patronized, it would be found still more clear of doubt. If, as Denmark had always insisted, a neutral might lawfully arm himself against all the belligerents; if he might place himself under the convoying force of his own country, so as to defy the exercise of belligerent force to compel him to submit to visitation and search on the high seas; the conduct of the neutral Americans who were driven to take shelter under the floating fortresses of the enemy of Denmark, not for the purpose of resisting the exercise of her belligerent rights, but to protect themselves against the lawless violence of those, whose avowed purpose rendered it certain, that, notwithstanding this neutrality, capture would inevitably be followed by condemnation, would find

its complete vindication in the principles which the publicists and statesmen of that country had maintained in the face of the world. Had the American commerce in the Baltic been placed under the protection of the public ships of war of the United States, as it was admitted it might have been, the belligerent rights of Denmark would have been just as much infringed as they were by what actually happened. In that case, the Danish cruizers must, upon Danish principles, have been satisfied with the assurance of the commander of the American convoying squadron, as to the neutrality of the ships and cargoes sailing under his protection. But that assurance could only have been founded upon their being accompanied with the ordinary documents found on board of American vessels, and issued by the American government upon the representations and proofs furnished by the interested parties. If these might be false and fraudulent in the one case, so might they be in the other, and the Danish government would be equally deprived of all means of examining their authenticity in both. In the one, it would be deprived of those means by its own voluntary acquiescence in the statement of the commander of the convoying

squadron, and in the other by the presence of a superior enemy's force, preventing the Danish cruizers from exercising their right of search; This was put for the sake of illustration, upon the supposition that the vessels under convoy had escaped from capture; for upon that supposition only could any *actual* injury have been sustained by Denmark as a belligerent power. Here they were captured without any hostile conflict, and the question was, whether they were liable to confiscation for having navigated under the enemy's convoy, notwithstanding the neutrality of the property and the lawfulness of their voyage in other respects.

Even supposing then that it was the intention of the American ship-masters in sailing with the British convoy, to escape from Danish as well as French cruizers, that intention had failed of its effect; and it might be asked what belligerent right of Denmark had been practically injured by such an abortive attempt? If any, it must be the right of visitation and search. But that right is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right

growing out of the greater right of capturing enemy's property, or contraband of war, and to be used, as means to an end, to enforce the exercise of that right. Here the actual exercise of the right was never in fact opposed, and no injury had accrued to the belligerent power. But it would perhaps be said, that it might have been opposed and actually defeated, had it not been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic Sea might thus have been effectually protected from Danish capture. And it might be asked in reply, what injury would have resulted to the belligerent rights of Denmark from that circumstance? If the property were neutral, and the voyage lawful, what injury would result from the vessels escaping from examination? On the other hand, if the property were enemy's property, its escape must be attributed to the superior force of the enemy, which, though a *loss*, could not be an *injury* of which Denmark would have a lawful right to complain. Unless it could be shown that a neutral vessel navigating the seas is bound to *volunteer to be searched* by the belligerent

cruizers, and that she had no right to avoid search by any means whatever, it was apparent that she might avoid it by any means not unlawful. Violent resistance to search, rescue after seizure, fraudulent spoliation or concealment of papers, are all avowedly unlawful means, which, unless extenuated by circumstances, may justly be visited with the penalty of confiscation. Those who alleged that sailing under belligerent convoy was also attended with the same consequences, must show it, by appealing to the oracles of public law, to the text of treaties, to some decision of an international tribunal, or to the general practice and understanding of nations.

The negotiation finally resulted in the signature of a treaty in 1830, between the United States and Denmark, by which the latter power stipulated to indemnify the American claimants generally for the seizure of their property by the payment of a fixed sum *en bloc*, leaving it to the American government to apportion it by commissioners appointed by itself, and authorized to determine "according to the principles of justice, equity, and the law of nations," with a declaration that

the convention, having no other object than to terminate all the claims, " can never " hereafter be invoked, by one party or the " other, as a precedent or rule for the " future."<sup>85</sup>

<sup>85</sup> Martens, *Nouveau Recueil*, tom. viii. p. 350.

## CHAP. IV.

## TREATY OF PEACE.

THE power of concluding peace, like that of declaring war, depends upon the municipal constitution of the state. These authorities are generally associated. In unlimited monarchies, both reside in the sovereign; and even in limited or constitutional monarchies, each may be vested in the crown. Such is the British constitution, at least in form; but it is well known, that in its practical administration the real power of making war actually resides in the parliament, without whose approbation it cannot be carried on, and which body has consequently the power of compelling the crown to make peace, by withholding the supplies necessary to prosecute hostilities. The American constitution vests the power of declaring war in the two houses of congress, with the assent of the president. By the

§ 1.  
Power of making peace dependent on the municipal constitution.

forms of the constitution, the president has the exclusive power of making treaties of peace, which, when ratified with the advice and consent of the senate, become the supreme law of the land, and have the effect of repealing the declaration of war and all other laws of congress, and of the several states which stand in the way of their stipulations. But the congress may at any time compel the president to make peace, by refusing the means of carrying on war. In France the king has, by the express terms of the constitutional charter, power to declare war, to make treaties of peace, of alliance, and of commerce; but the real power of making both peace and war resides in the chambers, which have the authority of granting or refusing the means of prosecuting hostilities.

§ 2.  
Power of  
making  
treaties  
of peace  
limited in  
its extent.

The power of making treaties of peace, like that of making other treaties with foreign states, is, or may be, limited in its extent by the national constitution. We have already seen that a general authority to make treaties of peace necessarily implies a power to stipulate the conditions of peace; and among these may properly be involved the cession of the public territory and other property, as well as

of private property included in the eminent domain. If, then, there be no limitation expressed in the fundamental laws of the state, or necessarily implied from the distribution of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary for the national safety or policy.<sup>1</sup>

The duty of making compensation to individuals, whose private property is thus sacrificed to the general welfare, is inculcated by publicists as correlative to the sovereign right of alienating those things which are included in the eminent domain; but this duty must have its limits. No government can be supposed to be able, consistently with the welfare of the whole community, to assume the burthen of losses produced by conquest, or the violent dismemberment of the state. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the state to control, it does not impose any obligation upon the government to indemnify

<sup>1</sup> Vide ante, pt. iii. ch. 2, Rights of Negotiation and Treaties, § 6.

those who may suffer a loss of property by the cession.<sup>2</sup>

The fundamental laws of most free governments limit the treaty-making power in respect to the dismemberment of the state, either by an express prohibition or by necessary implication from the nature of the constitution. Thus, even under the constitution of the old French monarchy, the States-General of the kingdom declared that Francis I. had no power to dismember the kingdom, as was attempted by the treaty of Madrid concluded by that monarch; and that not merely upon the ground that he was a prisoner, but that the assent of the nation represented in the States-General was essential to the validity of the treaty. The cession of the province of Burgundy was therefore annulled, as contrary to the fundamental laws of the kingdom; and the provincial states of that duchy, according to Mezeray, declared that "never having been  
" other than subjects of the crown of France,  
" they would die in that allegiance; and if  
" abandoned by the king, they would take up

<sup>2</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; liv. iv. ch. 2, § 12. Kent's Comment. on American Law, vol. i. p. 179. 2d Ed.

“ arms, and maintain by force their independence, rather than pass under a foreign dominion.” But when the ancient feudal constitution of France was gradually abolished by the disuse of the States-General, and the absolute monarchy became firmly established under Richelieu and Louis XIV., the authority of ceding portions of the public territory as the price of peace passed into the hands of the king, in whom all the other powers of government were concentrated. The different constitutions established in France subsequently to the revolution of 1789, limited this authority in the hands of the executive in various degrees. The provision in the constitution of 1795, by which the recently conquered countries on the left bank of the Rhine were annexed to the French territory, became an insuperable obstacle to the conclusion of peace in the conferences at Lisle. By the constitutional charter of 1830 the king is invested with the power of making peace, without any limitation of this authority other than that which is implied in the general distribution of the constitutional powers of the government. Still it is believed that, according to the general understanding of French publicists, the assent of the chambers, clothed with the forms of a legislative

act, is considered essential to the ultimate validity of a treaty ceding any portion of the national territory. The extent and limits of the territory being defined by the municipal laws, the treaty-making power is not considered sufficient to repeal those laws.

In Great Britain, the treaty-making power, as a branch of the regal prerogative, has in theory no limits; but it is practically limited by the general controlling authority of parliament, whose approbation is necessary to carry into effect a treaty by which the existing territorial arrangements of the empire are altered.

In confederated governments, the extent of the treaty-making power in this respect must depend upon the nature of the confederation. If the union consists of a system of confederated states, each retaining its own sovereignty complete and unimpaired, it is evident that the federal head, even if invested with the general power of making treaties of peace for the confederacy, cannot lawfully alienate the whole or any portion of the territory of any member of the union, without the express assent of that member. Such was the theory of the ancient Germanic constitution; the dismemberment of its territory was contrary

to the fundamental laws and maxims of the empire; and such is believed to be the actual constitution of the present Germanic confederation. This theory of its public law has often been compelled to yield in practice to imperious necessity, such as that which forced the cession to France of the territories belonging to the states of the empire on the left bank of the Rhine, by the treaty of Luneville in 1800. Even in the case of a supreme federal government or composite state, like that of the United States of America, it may perhaps be doubted how far the mere general treaty-making power vested in the federal head necessarily carries with it that of alienating the territory of any member of the union without its consent.

The effect of a treaty of peace is to put an end to the war, and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties, and to bury in oblivion the original causes of the war. It forbids the revival of the same war by resuming hostilities for the original cause which first kindled it, or for whatever may have occurred in the course of it. But the reciprocal stipulation of

§ 3.  
Effects of  
a treaty of  
peace.

perpetual peace and amity between the parties does not imply that they are never again to make war against each other for any cause whatever. The peace relates to the war which it terminates: and is perpetual, in the sense that the war cannot be revived for the same cause. This will not, however, preclude the right to claim and resist, if the grievances which originally kindled the war be repeated,—for that would furnish a new injury and a new cause of war equally just with the former. If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows, that all previous complaints and injury, arising under such claim, are thrown into oblivion, by the *amnesty*, necessarily implied, if not expressed: but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition, it remains open for future discussion. And even a specific arrangement of a matter in dispute, if it be special and limited, has reference only to that particular mode of asserting the claim, and does not preclude the party from any subsequent pretensions to the same thing on other grounds. Hence the utility in practice of requiring a general renunciation of all

pretensions to the thing in controversy, which has the effect of precluding for ever the assertion of the claim in any mode.<sup>3</sup>

The treaty of peace does not extinguish claims founded upon debts contracted or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war. Hence debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated in the mean time in the rigorous exercise of the strict rights of war, contrary to the milder practice of recent times. There are even cases where debts contracted, or injuries committed, between the respective subjects of the belligerent nations during the war, may become the ground of a valid claim, as in the case of ransom-bills, and of contracts made by prisoners of war for subsistence, or in the course of trade carried on under a license. In all these cases the remedy may be asserted subsequently to the peace.<sup>4</sup>

<sup>3</sup> Vattel, *Droit des Gens*, liv. iv. ch. 2, §§ 19—21.

<sup>4</sup> Kent's *Comment.* vol. i. p. 169. 2d Ed.

§ 4.  
*Uti perit-  
 detis the  
 basis of  
 every  
 treaty of  
 peace un-  
 less the  
 contrary be  
 expressed.*

The treaty of peace leaves every thing in the state in which it found it, unless there be some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance of the war, the conqueror in possession has only an usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operation, or express provisions, extinguishes his title for ever.<sup>5</sup>

The restoration of the conquered territory to its original sovereign by the treaty of peace carries with it the restoration of all persons and things, which have been temporarily under the enemy's dominion, to their original state. This general rule is applied without exception to real property or immovables. The title acquired in war to this species of property, until confirmed by a treaty of peace, confers a mere temporary right of possession.

<sup>5</sup> Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 4, 5. Vattel, Droit des Gens, liv. iii. ch. 13, §§ 197, 198. Martens, Précis du Droit des Gens, liv. iii. ch. 4, § 282. Klüber, Droit des Gens Moderne de l'Europe, §§ 254—259. . . .

The proprietary right cannot be transferred by the conqueror to a third party, so as to entitle him to claim against the former owner on the restoration of the territory to the original sovereign. If, on the other hand, the conquered territory is ceded by the treaty of peace to the conqueror, such an intermediate transfer is thereby confirmed, and the title of the purchaser becomes valid and complete. In respect to personal property, or movables, a different rule is applied. The title of the enemy to things of this description is considered complete against the original owner after twenty-four hours' possession, in respect to booty on land. The same rule was formerly considered applicable to captures at sea: but the more modern usage of maritime nations requires a formal sentence of condemnation as prize of war in order to preclude the right of the original owner to restitution on payment of salvage. But since the *jus postliminii* does not, strictly speaking, operate after the peace, if the treaty of peace contains no express stipulation respecting captured property, it remains in the condition in which the treaty finds it, and is thus tacitly ceded to the actual possessor. The *jus postliminii* is a right which belongs

TREATY OF PEACE.

exclusively to a state of war; and therefore a transfer to a neutral, before the peace, even without a judicial sentence of condemnation, is valid, if there has been no recovery or recapture before the peace. The intervention of peace covers all defects of title, and vests a lawful possession in the neutral, in the same manner as it quiets the title of the hostile captor himself.<sup>6</sup>

§ 5.  
From what  
time the  
treaty of  
peace com-  
mences its  
operation.

A treaty of peace binds the contracting parties from the time of its signature. Hostilities are to cease between them from that time, unless some other period be provided in the treaty itself. But the treaty binds the subjects of the belligerent nations only from the time it is notified to them. Any intermediate acts of hostility committed by them, before it was known, cannot be punished as criminal acts, though it is the duty of the state to make restitution of the property seized subsequently to the conclusion of the treaty: and, in order to avoid disputes respecting the consequences of such acts, it is usual to provide in the treaty itself the periods at which hostilities are to cease in different places. *Grotius*

<sup>6</sup> Vattel, liv. iii. ch. 14, §§ 209, 212, 216. Robinson's Adm. Rep. vol. vi. p. 45. The Parissima Conception. P.138. The Sophia.

intimates an opinion that individuals are not responsible, even *civiliter*, for hostilities thus continued after the conclusion of peace, so long as they are ignorant of the fact, although it is the duty of the state to make restitution wherever the property has not been actually lost or destroyed. But the better opinion seems to be that wherever a capture takes place at sea, after the signature of the treaty of peace, mere ignorance of the fact will not protect the captor from civil responsibility in damages; and that, if he acted in good faith, his own government must protect him and save him harmless. When a place or country is exempted from hostility by articles of peace, it is the duty of the state to give its subjects timely notice of the fact; and it is bound in justice to indemnify its officers and subjects, who act in ignorance of the fact. In such a case it is the actual wrong-doer who is made responsible to the injured party, and not the superior commanding officer of the fleet, unless he be on the spot, and actually participating in the transaction. Nor will damages be decreed by the prize court, even against the actual wrong-doer, after the lapse of a great length of time.<sup>7</sup>

When the treaty of peace contains an express stipulation that hostilities are to cease in

<sup>7</sup> Robinson's Adm. Rep. vol. i. p. 121. The Mentor.

a given place at a certain time, and a capture is made previous to the expiration of the period limited, but with a knowledge of the peace on the part of the captor, the capture is still invalid : for since constructive knowledge of the peace, after the periods limited in the different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect. It may, however, be questionable whether any thing short of an official notification from his own government would be sufficient in such a case to affect the captor with the legal consequences of actual knowledge. And where a capture was made by an American cruizer of a British vessel, before the period fixed for the cessation of hostilities by the treaty of Ghent in 1814, and in ignorance of the fact, —but the prize had not been carried *infra præsidia* and condemned, and while at sea was recaptured by a British ship of war after the period fixed for the cessation of hostilities, but without knowledge of the peace, —it was judicially determined that the possession of the vessel by the American cruizer was a lawful possession, and that the British recaptor could not after the peace lawfully use force to devert this lawful possession. The restoration of peace put an end from the time limited to all force ; and then the general

principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place. The *uti possidetis* is the basis of every treaty of peace, unless the contrary be expressly stipulated. Peace gives a final and perfect title to captures without condemnation, and as it forbids all force, it destroys all hope of recovery as much as if the captured vessel was carried *infra præsidia* and judicially condemned.<sup>8</sup>

Things stipulated to be restored by the treaty are to be restored in the condition in which they were first taken, unless there be an express provision to the contrary; but this does not refer to alterations which have been the natural effect of time, or of the operations of war. A fortress or town is to be restored as it was when taken, so far as it still remains in that condition when the peace is concluded. There is no obligation to repair, as well as restore a dismantled fortress, or a ravaged territory. The peace extinguishes all claim for damages done in war, or arising from the operations of war. Things are to be

§6.  
In what  
condition  
things  
taken are  
to be  
restored.

<sup>8</sup> Valin, *Traité des Prises*, ch. iv. §§ 4, 5. Emérigon, *Traité d'Assurance*, ch. 12, § 19. Merlin, *Répertoire de Jurisprudence*, tom. ix. tit. *Prise Maritime*, § 5. Kent's *Comment.* vol. i. p. 173.

restored in the condition in which the peace found them; and to dismantle a fortification or waste a country after the conclusion of peace, and previously to the surrender, would be an act of perfidy. If the conqueror has repaired the fortifications, and re-established the place in the state it was in before the siege, he is bound to restore it in the same condition. But if he has constructed new works, he may demolish them: and, in general, in order to avoid disputes, it is advisable to stipulate in the treaty precisely in what condition the places occupied by the enemy are to be restored.<sup>9</sup>

§ 7.  
Breach  
of the  
treaty.

The violation of any one article of the treaty is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other. A violation of any single article abrogates the whole treaty, if the injured party elects so to consider it. This may, however, be prevented by an express stipulation, that if one article be broken, the others shall nevertheless continue in full force. If the treaty is violated by one of the contracting parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its articles, it becomes not absolutely void, but voidable at

<sup>9</sup> Vattel, *Droit des Gens*, liv. iv. ch. 3, § 31.

the election of the injured party. If he prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction.<sup>10</sup>

Treaties of peace are to be interpreted by the same rules with other treaties. Disputes respecting their meaning or alleged infraction may be adjusted by amicable negotiation between the contracting parties, by the mediation of friendly powers, or by reference to the arbitration of some one power selected by the parties. This latter office has recently been assumed, in several instances, by the five great powers of Europe, with the view of preventing the disturbance of the general peace by a partial infraction of the territorial arrangements stipulated by the treaties of Vienna, in consequence of the internal revolutions which have taken place in some of the states constituted by those treaties. Such are the protocols of the conference of London, by which a suspension of hostilities between Holland and Belgium has been enforced, and terms of separation between the two countries proposed, which, when accepted by both, are to

§ 8.  
Disputes  
respecting  
its breach,  
how ad-  
justed.

<sup>10</sup> Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 15; lib. iii. cap. 19, § 14. Vattel, liv. iv. ch. 4, §§ 47, 48, 54.

form the basis of a permanent peace. The objections to this species of interference, and the difficulty of reconciling it with the independence of the smaller powers, are obvious; but it is clearly distinguishable from that general right of superintendence over the internal affairs of other states, asserted by the powers who were the original parties to the Holy Alliance, for the purpose of preventing changes in their municipal constitutions not proceeding from the voluntary concession of the reigning sovereign, or supposed in their consequences, immediate or remote, to threaten the social order of Europe. The proceedings of the conference treat the revolution, by which the union between Holland and Belgium established by the congress of Vienna, had been dissolved, as an irrevocable event, and confirm the independence, neutrality, and state of territorial possession of Belgium, upon the conditions contained in the treaty of the 15th November, 1831, between the five powers and that kingdom, subject to such modifications as may ultimately be the result of direct negotiations between the North Netherlands and Belgium.

THE END.